United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR,

Complainant,

v.

STEVEN S. MOALEMI, M.D., P.C., d/b/a, EMPIRE PHYSICAL MEDICINE AND PAIN MANAGEMENT

Respondent.

OSHRC Docket No. 19-0142

APPEARANCES:

Jessica L. Cole, Attorney; Heather R. Phillips, Counsel for Appellate Litigation; Charles F. James, Counsel for Appellate Litigation; Edmund C. Baird, Associate Solicitor of Labor for Occupational Safety and Health; Kate O'Scannlain, Solicitor of Labor; U.S. Department of Labor, Washington, DC
For the Complainant

Steven S. Moalemi, M.D., New York, NY
For the Respondent, Pro Se

REMAND ORDER

Before: SULLIVAN, Chairman; ATTWOOD and LAIHOW, Commissioners.

BY THE COMMISSION:

On January 2, 2019, the Occupational Safety and Health Administration issued a citation to Steven S. Moalemi, M.D., P.C., alleging three serious violations of OSHA standards and proposing a total penalty of $7,392. On August 27, 2019, Administrative Law Judge William S. Coleman issued an Order of Dismissal declaring the Respondent, appearing pro se, to be in default, dismissing his Notice of Contest, and affirming the citation and total proposed penalty. For the reasons discussed below, we set aside the judge's order and remand for further proceedings consistent with this opinion.

The judge based his dismissal order on Respondent's failure to appear for four mandatory prehearing telephone conferences and to respond to an order to show cause why he should not be declared in default.[1] *See* 29 C.F.R. § 2200.101(a) ("When any party has failed to plead or otherwise proceed as provided by these rules or as required by the Commission or the Judge, the party may be declared to be in default . . . after having been afforded an opportunity to show cause why the party should not be declared to be in default," and "the Commission or the Judge, in their discretion, may enter a decision against the defaulting party . . . ."). Neither the Secretary nor the Respondent appeared for the first two telephone conferences, scheduled by the judge for April 11, 2019 and May 2, 2019.[2] On a third telephone conference scheduled for May 28, 2019, the Secretary appeared, but Respondent did not. The next day, the judge issued an order directing Respondent to show cause by June 18, 2019, why the citation items and proposed penalties should not be affirmed due to his failure to follow Commission Rules and participate in the proceedings. In the show-cause order, the judge also scheduled a fourth telephone conference for June 27, 2019. This order was sent to Respondent in two mailings—one by first-class mail and one by certified mail with return receipt requested. The return receipt card was returned with a signature (which is illegible) indicating the order had been delivered on June 3, 2019. After Respondent failed to respond to the show-cause order and failed to appear for the fourth telephone conference, the judge issued the dismissal order, which was docketed with the Commission on August 28, 2019.

[1] This case was assigned to Simplified Proceedings. *See* 29 C.F.R. Pt. 2200, subpt. M.

[2] The judge noted in his scheduling order for the May 2 telephone conference that the Secretary had informed him that the parties were "exploring potential settlement." After both parties failed to participate in the May 2 conference (following their failure to participate in the previous conference scheduled for April 11), the judge admonished them in his third scheduling order: "*The parties are reminded that even though they may be engaged in settlement discussions, the participation of all parties in noticed telephone conferences is MANDATORY*." (italics and capitalization in original.) We further remind the Secretary that it is his burden to prosecute his case and his participation in any mandatory conference scheduled by a Commission judge is particularly important in a Simplified Proceedings case (where there are no pleadings) involving a pro se employer. *See* 29 C.F.R. § 2200.207 (regarding the use of pre-hearing conferences in Simplified Proceedings).

In a letter received by the Commission on September 23, 2019, Respondent states that he "would like to petition for the . . . case to be re-opened," claiming that he received the judge's decision but "did not receive the order to show cause." Respondent also asserts that he had "worked out an agreement with . . . OSHA" and "was under the impression that what we had agreed to was final." Respondent requests that the Commission "[p]lease allow [the parties] to continue with what we had agreed to."

Upon review of the case record in light of Respondent's claim that he did not receive the show-cause order, there appears to be a zip code discrepancy in Respondent's mailing address. The letterhead on Respondent's letter to the Commission shows a zip code of 10036, which is also the zip code listed for the "Inspection Site" on the citation. Respondent's mailing address on the citation, however, shows 10033 as the zip code, which is the zip code the judge used to send Respondent the three telephone conference scheduling orders as well as the order to show cause.[3] Although we do not fault the judge for using the address the Secretary provided in the citation, given Respondent's claim that he did not receive the show-cause order and the address discrepancy, it is unclear whether Respondent received any of the judge's orders. Therefore, the present record is insufficient to establish that dismissal was warranted. *See Waterford Aluminum Co.*, 23 BNA OSHC 1438, 1439 (No. 10-1163, 2011) (remanding where "the record [is] insufficient to establish contumacy where it is unclear whether the judge's show cause order was ever received by [the pro se employer]"). In addition, it is evident from the record that the parties had engaged in settlement negotiations and according to Respondent's letter, reached an agreement that Respondent is willing to finalize. *See McQueary Indus., Inc.*, 22 BNA OSHC 1809, 1810 (No. 08-1932, 2009) (remanding where the respondent "provided a reason for its failure to respond to the show-cause order and has expressed its desire to settle the case"); *see also* 29 C.F.R. § 2200.100(a) ("Settlement is permitted and encouraged by the Commission at any stage of the proceedings.").

[3] The record shows that the judge's dismissal order—the only order Respondent claims to have received—was sent to both parties "via email on August 27, 2019." As for the citation, it is not apparent from Respondent's notice of contest that it was received. In his email to OSHA, titled "Contest of penalties," Respondent states: "I am writing this email pursuant to our conversation today." The email does not reflect Respondent's mailing address. We note that according to the citation, all three alleged violations were corrected during the inspection.

Accordingly, we set aside the judge's decision and remand for further proceedings. *See* 29 C.F.R. § 2200.101(b) ("For reasons deemed sufficient by the Commission or the Judge and upon motion . . . expeditiously made, the Commission or the Judge may set aside a sanction imposed under paragraph (a) of this section.").

SO ORDERED.

/s/
James J. Sullivan, Jr.
Chairman

/s/
Cynthia L. Attwood
Commissioner

/s/
Amanda Wood Laihow
Commissioner

Dated: January 24, 2020

United States of America

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1120 20th Street, N.W., Ninth Floor

Washington, DC 20036-3419

SECRETARY OF LABOR, Complainant, v. STEVEN S. MOALEMI, M.D., P.C., d/b/a Empire Physical Medicine and Pain Management, Respondent.	IN SIMPLIFIED PROCEEDINGS PER 29 C.F.R. § 2200.203 OSHRC DOCKET No. 19-0142

ORDER OF DISMISSAL

Pursuant to Commission Rule 101(a), 29 C.F.R. § 2200.101(a), the Respondent, Steven S. Moalemi, M.D., P.C., d/b/a Empire Physical Medicine and Pain Management, is declared to be in default and its notice of contest is dismissed, as described below.

Background

On or around November 14, 2018, an official from the Manhattan, New York, area office of the Occupational Safety and Health Administration (OSHA) conducted an inspection of a worksite of the Respondent at 7 West 45th Street, Ninth Floor, New York, New York 10033 (OSHA Inspection No. 1360484). As a result of that inspection, on January 2, 2019, OSHA issued a three-item serious Citation and Notification of Penalty (Citation) alleging that on or about November 14, 2018, the Respondent had violated several standards codified at 29 C.F.R. Part 1910 and proposing penalties totaling of $7,392. The Citation indicates that all three alleged violative conditions were corrected during the inspection.

The Respondent received the Citation and then, by an email from by Dr. Steven Moalemi sent to the OSHA area office, submitted a written notice of intention to contest, in which he stated that "I am contesting the penalties" for the inspection.[4] OSHA then duly forwarded the notice of contest to the Occupational Safety and Health Review Commission (Commission). *See* 29 C.F.R. §§ 1903.17(a) & 2200.33. On February 4, 2019, the Commission's Executive Secretary issued a "Notice of Docketing and Instructions to the Employer." On March 7, 2019, the Commission's Chief Judge designated the matter to be resolved under the Commission's rules for Simplified Proceedings, 29 C.F.R. Part 2200, Subpart M, and assigned the matter to the undersigned Commission Judge for disposition.

On March 13, 2019, the undersigned issued a notice and scheduling order that included notice of a prehearing telephone conference to be conducted on April 11, 2019. Neither the Respondent nor the Secretary called in for that telephone conference, so another telephone conference was scheduled for May 2, 2019. Neither party called in for that telephone conference either, so the undersigned scheduled another telephone conference for May 28, 2019. An attorney for the Secretary called in for that telephone conference, but the Respondent did not call in for that telephone conference.

On May 29, 2019, the undersigned issued an order to show cause to the Respondent directing the Respondent to file a written response to show cause no later than June 18, 2019, showing why the Respondent should not be declared in default and why the citations and proposed penalties should not be affirmed due to the Respondent's failure to proceed as provided by the Commission's rules of procedure. The order to show cause also scheduled a telephone conference for June 27, 2019, to address

[4] In the email, Dr. Moalemi also promised to send to the area office copies of his tax returns for the years 2015, 2016, and 2017 as well as bank statements from the last twelve months. The record before the Commission does not indicate whether these materials were provided to the Area Office, which would have been done apparently in an effort to negotiate down with the Area Office the amount of the proposed penalties.

the Respondent's anticipated response to the order to show cause. The order to show cause closed with the following admonition in distinctive typeface as follows:

> **Compliance.** THE RESPONDENT'S FAILURE TO RESPOND TO THIS ORDER OR FAILURE TO PARTICIPATE IN THE TELEPHONE CONFERENCE ON JUNE 27, 2019, WILL LIKELY RESULT IN THE ALLEGED VIOLATIONS BEING AFFIRMED AND THE PROPOSED PENALTIES OF $7392 BEING ASSESSED AGAINST THE RESPONDENT WITHOUT A TRIAL.

The order to show cause was sent to the Respondent in two separate mailings—one by certified mail, return receipt requested, and the other by regular first-class mail. The certified mailing was delivered to the Respondent on June 3, 2019, as reflected by a signature on the return receipt card for the mailing bearing that date. The mailing that was sent by regular first-class mail was not returned un-delivered.

The Respondent did not file a written response to the order to show cause, and no one representing the Respondent called in for the telephone conference on June 27, 2019.

Discussion

Commission Rule 101(a), codified at 29 C.F.R. § 2200.101(a), provides in part as follows:

> *Sanctions.* When any party has failed to plead or otherwise proceed as provided by these rules or as required by the . . . Judge, the party may be declared to be in default . . . on the initiative of the . . . Judge, after having been afforded an opportunity to show cause why the party should not be declared to be in default . . . . Thereafter, the . . . Judge, in [his] discretion, may enter a decision against the defaulting party . . . .

The Commission "follows the policy in law that favors deciding cases on their merits." *DHL Express, Inc.*, 21 BNA OSHC 2179, 2180 (No. 07-0478, 2007). Rule 101(a) nevertheless permits the harsh sanction of dismissal of a notice of contest where a party has displayed a "pattern of disregard" of Commission proceedings. *Philadelphia Constr. Equip., Inc.*, 16 BNA OSHC 1128, 1131 (No. 92-899, 1993); *Architectural Glass & Metal Co.*, 19 BNA OSHC 1546, 1547 (No. 00-0389, 2001); *see also* Commission Rule

101(b), 29 C.F.R. § 2200.101(b) (a default sanction may be set aside "[f]or reasons deemed sufficient by the Commission or Judge and upon motion expeditiously made").

The Respondent's failure to participate in four consecutive telephone conferences and to file a response to the order to show cause as described above displays a pattern of disregard of Commission proceedings that warrants an order of default. The Respondent has been provided multiple opportunities to participate in necessary Commission proceedings that are preliminary to the conduct of an evidentiary hearing that the Respondent had sought by virtue of contesting the proposed penalties, and the Respondent has not participated in any. The most recent Order to Show Cause made it abundantly clear that if the Respondent continued to fail to participate by failing to file a response to the order and failing to participate in the telephone conference on June 27, 2019, that the undersigned would likely issue an order of default that would have the effect of affirming the original penalties as proposed.

The Respondent has not participated in Commission proceedings and has not responded to the orders of the undersigned. It is impossible to move this case forward to hearing in view of the Respondent's continuing failure to participate as directed. There is no reasonable basis to conclude that if a hearing were to be scheduled that the Respondent would participate in any future prehearing proceedings or would appear at a hearing to defend the matter. *Cf.* Commission Rule 64(a), 29 C.F.R. § 2200.64(a) (providing that "[t]he failure of a party to appear at a hearing may result in a decision against that party"). The only reasonable conclusion to be drawn from the Respondent's continuing failure to participate is that the Respondent has willfully defaulted and abandoned its case before the Commission.

The Respondent's failure to participate is prejudicial to the administration of justice and to the Secretary's enforcement responsibilities under the OSH Act. The Commission cannot countenance the prejudicial effects of the Respondent's continuing failure to participate. Dismissal of the Respondent's

notice of contest is the necessary and appropriate remedy to cure the prejudicial impact of the Respondent's failure to participate.

ORDER

For these reasons, the Respondent is determined to be in DEFAULT, its notice of contest is DISMISSED. The Citation issued to the Respondent on January 2, 2019 as a result of Inspection Number 1360484 and alleging certain violations of standards set forth in 29 C.F.R. Part 1910 with proposed penalties totaling $7,392 is AFFIRMED in its entirety.

SO ORDERED.

/s/_____

WILLIAM S. COLEMAN

Administrative Law Judge

DATED: August 27, 2019