

SECRETARY OF LABOR,
Complainant,
v.
AMSCO, INC.,
Respondent.

OSHRC Docket No. 02-0220

DECISION

Before: RAILTON, Chairman; ROGERS and STEPHENS, Commissioners.

BY THE COMMISSION:

On August 26, 2002, Administrative Law Judge G. Marvin Bober issued a Decision and Order declaring Amsco, Inc. (“Amsco”) to be in default and dismissing its notice of contest. The judge stated that dismissal was warranted under either Rule 41(a), 29 C.F.R.

§ 2200.41(a),¹ or Rule 64(a), 29 C.F.R. § 2200.64,² of the Commission's Rules of Procedure, because Amsco's attorney, Richard D. Wayne, failed to be available for a pre-hearing teleconference. For the following reasons, we vacate the judge's order, reinstate Amsco's notice of contest, and remand this case to the judge for further proceedings.

I. BACKGROUND

On August 8, 2002, the judge scheduled a pre-hearing teleconference by agreement with the parties for August 12, 2002, at 10:00 a.m. At the scheduled time, a Commission employee, on behalf of the judge, telephoned the office of Mr. Wayne. The receptionist at Mr. Wayne's law firm connected the call to his office voice mail, but the Commission employee did not leave a message. Instead, the Commission employee again telephoned Mr. Wayne's office and requested that the receptionist page Mr. Wayne. When the receptionist received no response to the page, she informed the Commission employee that Mr. Wayne was not in the building. The Commission employee then made a call to Mr. Wayne's cell phone and left a message instructing him to contact the Secretary's

¹29 C.F.R. § 2200.41(a) states:

§ 2200.41 Failure to obey rules.

(a) *Sanctions.* When any party has failed to plead or otherwise proceed as provided by these rules or as required by the Commission or Judge, he may be declared to be in default either: (1) On the initiative of the Commission or Judge, after having been afforded an opportunity to show cause why he should not be declared to be in default; or (2) On the motion of a party. Thereafter, the Commission or Judge, in their discretion, may enter a decision against the defaulting party or strike any pleading or document not filed in accordance with these rules.

²29 C.F.R. § 2200.64(a) states:

§ 2200.64 Failure to appear.

(a) *Attendance at hearing.* The failure of a party to appear at a hearing may result in a decision against that party.

representative, Kevin Sullivan, and then contact the judge to proceed with the teleconference. No further contact regarding this matter was made between the judge's office and Mr. Wayne's office on August 12, 2002.

On August 13, 2002, the judge issued an Order to Show Cause requiring Amsco to show why it should not be declared in default. Amsco immediately submitted a response stating that at the time of the scheduled teleconference, Mr. Wayne was working in a conference room at his law firm, and he was prepared to receive the call. However, because of staffing shortages at the firm on that date, he was not notified of the call. Amsco submitted copies of internal e-mails from Mr. Wayne's law firm indicating that Mr. Wayne's secretary had resigned on August 9, 2002, and that several other secretaries were absent on August 12, 2002.

On August 14, 2002, the judge issued a Notice of Decision in which he stated that he was not persuaded by Amsco's reasons for Mr. Wayne's failure to appear and found Mr. Wayne's conduct contumacious. Amsco immediately filed a Motion for Reconsideration, which reiterated the staffing problems at Mr. Wayne's law firm and provided additional supporting affidavits by Mr. Wayne and Loretta Connolly, the receptionist at the law firm. The Secretary submitted a memorandum opposing Amsco's Motion for Reconsideration, arguing that the staffing and communication problems at the law firm did not excuse Mr. Wayne's failure to make some effort to contact either the Secretary's representative or the Commission after the time for the scheduled conference had passed.

In denying Amsco's Motion for Reconsideration, the judge noted that Amsco offered no explanation as to why Mr. Wayne failed to respond to the message left on his cell phone by the Commission employee or why he failed to make any effort to contact the Commission regarding the status of the teleconference. As an additional reason for denying the motion, the judge stated that Mr. Wayne had previously failed to comply with orders issued by him on three previous occasions involving three other unrelated cases to which Amsco was not a party.

II. DISCUSSION

The issue on review is whether to set aside the judge's default sanction against Amsco and reinstate its Notice of Contest. Pursuant to Commission Rule 41(b), 29 C.F.R. § 2200.41(b),³ the Commission may set aside a sanction for reasons deemed sufficient. Amsco argues that the sanction should be set aside because dismissal by default was a disproportionately harsh sanction for unintentionally missing a single pre-hearing teleconference. We agree. The Commission has long held that dismissal is too harsh a sanction for failure to comply with certain pre-hearing orders unless the record shows contumacious conduct by the noncomplying party, prejudice to the opposing party, or a pattern of disregard for Commission proceedings. *See Architectural Glass & Metal Co.*, 19 BNA OSHC 1546, 1547, 2001 CCH OSHD ¶ 32,424, p. 49,975 (No. 00-389, 2001), and cases cited therein. *Cf. Crossman v. Raytheon*, 2002 U.S. App. LEXIS 27198 (1st Cir. Dec. 31, 2002) (failure to comply with one pre-hearing scheduling order "is not the type of action that alone should support the sanction of dismissal").

At the outset, we note that the Secretary has not alleged before the Commission any prejudice as a result of Mr. Wayne's conduct in this case. In addition, while we are disturbed by Mr. Wayne's actions, we find that his conduct does not rise to the level of contumacy. Mr. Wayne's failure to contact the judge's office once the scheduled time for the teleconference passed or to respond to the message left on his cell phone by the Commission employee raises serious questions about his regard for Commission procedures.⁴ These actions demonstrate a clear indifference on his part to the

³29 C.F.R. § 2200.41(b) provides:

§ 2200.41 Failure to obey rules.

....

(b) *Motion to set aside sanction.* For reasons deemed sufficient by the Commission or Judge and upon motion expeditiously made, the Commission or Judge may set aside a sanction imposed under paragraph (a) of this rule.

⁴For the first time in an affidavit submitted with Amsco's petition for discretionary review, Mr. Wayne claims that he may have left his cell phone in his suit jacket in his office or that the cell phone may not have audibly rung. However, this belated excuse does not directly address either his failure to respond to the cell phone message at any time on the day in question or his subsequent failure to proffer any explanation to the judge in response to the show cause order. We also note that later that same day, Mr. Wayne contacted the

commitment he made to both the judge and the Secretary regarding his participation in the scheduled teleconference. Though troubling, we believe that such neglect, without more, falls short of contumacious conduct warranting a default sanction. See *Choice Elec. Corp.*, 14 BNA OSHC 1899-1900, 1987-90 CCH OSHD ¶ 29,141 (88-1393, 1990) (Commission may set aside sanction pursuant to Rule 41(b) where party's conduct constitutes "excusable neglect"). See also *Pioneer Inv. Co. v. Brunswick Assocs. Ltd. Partnership*, 507 U.S. 380 (1990) (excusable neglect under Federal Rules of Civil Procedure 60(b)(1) encompasses situations where non-compliance is due to negligence, inadvertence, mistake or carelessness); *Johnson v. Dayton Elec. Mfg. Co.*, 140 F.3d 781 (8th Cir. 1998) (in determining whether to set aside default sanction, poor communication, carelessness, and "cavalier approach" does not constitute contumacious conduct). Cf. *Sealtite Corp.*, 15 BNA 1130, 1991-93 CCH OSHD ¶ 29,398 (88-1431, 1991) (contumacious conduct established where party engaged in a "consistent pattern" of failure to respond to judge's orders).

The judge's decision to sanction Amsco appears largely to stem from what he characterizes as a pattern of misconduct engaged in by its counsel, Mr. Wayne, in this and other cases. The judge's reasons, if correct, would appear to support disciplinary action against Mr. Wayne pursuant to Commission Rule 104, 29 C.F.R. § 2200.104.⁵ Thus, in tandem with this Decision, the

Commission's National Office, which serves both Judge Bober and another Commission judge before whom Mr. Wayne was appearing as counsel in an unrelated case, regarding a teleconference scheduled in the latter case. Yet he apparently made no inquiry at that time regarding the teleconference scheduled in this case.

⁵§ 2200.104 Standards of Conduct

....

(c) *Disciplinary action by the Commission.* If an attorney or other representative practicing before the Commission engages in unethical or unprofessional conduct or fails to comply with any rule or order of the Commission or its Judges, the Commission may, after reasonable notice and an opportunity to show cause to the contrary, and after hearing, if requested, take any appropriate disciplinary action, including suspension or disbarment from practice before the Commission.

(d) *Show cause orders.* All show cause orders issued by the Commission or Judge under paragraph (c) of this section shall be served upon the affected party by certified mail, return receipt requested.

Commission has issued an Order to Show Cause Why Disciplinary Action Should Not Be Taken against Mr. Wayne. Accordingly, in the current matter, we set aside the judge's decision imposing the sanction of dismissal of the notice of contest against Amsco and remand this case to the judge for further proceedings.⁶

So ORDERED.

/s/
W. Scott Railton
Chairman

/s/
Thomasina V. Rogers
Commissioner

/s/
James M. Stephens
Commissioner

Dated: February 12, 2003

⁶With respect to Amsco's request contained in its petition for discretionary review that the case be reassigned to another judge, the Commission finds no grounds for doing so.

SECRETARY OF LABOR,

Complainant,

v.

AMSCO, INCORPORATED,

Respondent.

Docket No. 02-0220

DECISION AND ORDER

It was agreed between counsel for the Complainant, counsel for the Respondent, and the undersigned to hold a pre-trial telephone conference on Monday, August 12, 2002 at 10:00 a.m. EDT. The Respondent's counsel without notifying the undersigned failed in his responsibility to be available for the pre-trial telephone conference.

On August 13, 2002, the undersigned issued an order directing Respondent's counsel, Richard D. Wayne, Esquire, to provide in affidavit form a statement as to reason(s) the Respondent should not be declared to be in default and the Citation and Notification of Penalty issued on January 7, 2002 should not be affirmed in its entirety.

On August 13, 2002, Respondent's counsel, Richard D. Wayne, Esquire, filed a reply stating that on Monday, August 12, 2002, he "left a note at his secretary's station, also on the 30th floor, that he could be reached in a conference room on the 29th floor or on his cell phone." He further states that "[a]lthough Respondent's counsel was at his firm and prepared to receive the telephone call, because his secretarial station was not manned, he failed to receive notice of the telephone conference and no message was left in Respondent's voice mail that a call had been placed."

DISCUSSION AND CONCLUSION

The pre-trial conference call was set on a date and time established by counsel for the Complainant and counsel for the Respondent in order to coincide with previously scheduled pre-trial conference call with another Judge. No request for an adjournment of the date or time of the pre-trial conference call was ever made.

At approximately 10:00 a.m. EDT on August 12, 2002, the Office of the Chief Judge initialed the pre-trial telephone call by telephoning the Respondent at his law firm. The person answering the telephone ("operator") directed the Commission employee to Mr. Wayne's office. As he was not in his office, the telephone went into his voice mail. No message was left. Instead the Commission employee again called the Respondent at his law firm. At this point the Commission employee directed the operator to page Mr. Wayne; however, the Commission employee was informed that Mr. Wayne had left the building. Immediately, thereafter, the Commission employee dialed Mr. Wayne's

cell phone number. As Mr. Wayne did not answer his cell phone, the Commission employee left him a message on his cell phone and directed him to call Complainant's counsel, Kevin Sullivan, Esquire and then call the undersigned in order for the telephone conference to go forward. Mr. Wayne never contacted the Commission on August 12, 2002 as instructed.

Moreover, Rule 41 of the Commission's Rules of Procedure, 29 C.F.R. 2200.41 provides that when any "party has failed or otherwise proceed as * * * required by the Judge, he [she] may be declared to be in default * * *: (1) on the initiative of the * * * Judge, after having been afforded an opportunity to show cause why he [she] should not be declared to be in default; * * *."

Rule 64 (a) of the Commission's Rules of Procedure, 29 C.F.R. 2200.64 (a) provides:

Attendance at hearing. The failure of a party to appear at a hearing may result in a decision against that party.

Pre-trial procedures aid in the early formulation of issues which benefit all parties and result in a more efficient use of Commission resources. The imposition of appropriate sanctions is important to ensure compliance with pre-trial procedures. *Duquesne Light Co.*, 8 BNA OSHC 1218, 1221 (No. 78-5303, 1980).

Mr. Wayne's reasons for his failure to appear are unpersuasive and his behavior is contumacious towards this Court.. Therefore, dismissal of the notice of contest is warranted under either Rule 41 or Rule 64 (a).

IT IS ORDERED that the Respondent shall be declared to be in default and the Citation and Notification of Penalty issued on January 7, 2002 shall be affirmed in its entirety.

Dated: August 26, 2002
Washington, D.C.

/s/
G. Marvin Bober
Administrative Law Judge