

Respondent, appearing pro se, filed a timely notice of contest on August 2, 2004 and the Secretary filed her complaint on October 5, 2004. On November 29, 2004 after Respondent failed to file a timely answer to the complaint, the Secretary filed a Motion To Dismiss Respondent's Notice of Contest and For Default Judgment. In her motion, the Secretary failed to follow Commission Rule 40(a), 29 C.F.R. §2200.40(a), which states, in pertinent part that "Prior to filing a motion, the moving party shall confer or make reasonable efforts to confer with the other parties and shall state in the motion if any other party opposes or does not oppose the motion." Nonetheless, Judge Sommer granted the motion. On January 21, Respondent filed a letter with this Commission alleging that it never received the complaint and that it learned of the motion to dismiss only after it had been filed with the judge. This letter, which we interpret as a Petition for Discretionary Review, asks the Commission to reverse the default judgment.

Discussion

Commission Rule 41(a), 29 C.F.R. §2200.41(a)¹, permits the sanction of default for failure to plead or otherwise proceed as required by the Commission's rules or by the Commission or judge. The Commission has held that a default sanction may be appropriate "where a party displays a 'pattern of disregard' for Commission proceedings." *Architectural*

¹ Section 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.

Glass & Metal Co., 19 BNA OSHC 1546, 1547, 2001 CCH OSHD ¶32,424, p. 49,975 (No. 00-0389, 2001)(citing *Philadelphia Construction Equipment Inc.*, 16 BNA OSHC 1128, 1131, 1993-95 CCH OSHD ¶39,051, p. 41,295 (No. 92-899, 1993)). The Commission has also held that “dismissal of a citation is too harsh a sanction for failure to comply with certain prehearing orders unless the record shows contumacious conduct by the noncomplying party or prejudice to the opposing party.” *Id.*, and cases cited therein. Under Rule 41(b), 29 C.F.R. §2200.41(b)², a default sanction may be set aside “for reasons deemed sufficient by the Commission or Judge.”

In her Motion to Dismiss, the Secretary contended that Respondent either abandoned the case or exhibited “disdain” for Commission proceedings amounting to contumaciousness. The judge made no findings in response to these claims, and we find no evidence here that would support a default sanction. Respondent’s Petition for Discretionary Review demonstrates that it did not abandon the case. Finally, the Secretary does not claim that she was prejudiced by Respondent’s failure to file a timely answer.

A A Plumbing is a pro se employer, and the Commission has long recognized that, generally speaking, employers appearing pro se are “often confused by legal terminology and may not be fully cognizant of the legal technicalities of the judicial process.” *Action Group*, 14 BNA OSHC 1934, 1935, 1987-90 CCH OSHD ¶ 29,166, p. 39,018 (No. 88-2058, 1990), and cases cited therein. Under these circumstances, Respondent should be given an opportunity to explain to the judge the reasons for its failure to file a timely answer. We note that the late filing alone, without evidence of prejudice, contumacious conduct and/or a

² Section 2200.41(b) states:

§2200.41 Failure to obey rules. . . . (b) *Motion to set aside sanctions.* For reasons deemed sufficient by the Commission or Judge and upon motion

pattern of disregard for Commission rules, would not be a basis for dismissing this case. *Samuel Filisko d/b/a/ Associated Contractors Group*, Docket No. 04-1465 (January 21, 2005). This is especially true where, as here, the situation was exacerbated by the Secretary's own failure to follow the requirements of Commission Rule of Procedure 40(a), 29 C.F.R. §2200.40(a). Accordingly, we direct this case for review, set aside the judge's order and remand this case to him for further proceedings.

SO ORDERED.

/s/ _____
W. Scott Railton
Chairman

/s/ _____
James M. Stephens
Commissioner

/s/ _____
Thomasina V. Rogers
Commissioner

Dated: February 3, 2005

expeditiously made, the Commission or Judge may set aside a sanction imposed under paragraph (a) of this rule. See §2200.90(b)(3)

SECRETARY OF LABOR,

Complainant,

v.

A A PLUMBING, INC.,

Respondent.

Docket No. 04-1299

ORDER

Motion by the Secretary to Dismiss Respondent's Notice of Contest and for Default Judgement was issued on November 29, 2004. There was no response from the Respondent.

Motion granted. The Respondent's notice of contest is dismissed and the citations issued herein are AFFIRMED AS ISSUED.

IRVING SOMMER
Chief Judge

DATED: 30 Dec 2004
Washington, D.C.