

complaint and certified that a copy of the complaint was sent “via certified mail, return-receipt requested” to “Samuel S. Filisko, A.C.G. 501 Morse Unit F, Schaumburg, IL 60193.”

The case file does not contain a copy of the return-receipt, but ACG admits receipt of the complaint in its untimely-filed answer.

On November 1, 2004, forty days after the complaint was filed, the judge issued a Order to Show Cause “why Respondent should not be declared to be in default and the citation(s) and penalties should not be affirmed due to its failure to file an answer.” The Certificate of Service attached to the order shows that a copy was sent by certified mail, return-receipt requested to ACG, with spelling errors in both the company president’s name and the company’s street address. The case file contains neither a signed return-receipt to establish that ACG received the Order to Show Cause nor a returned envelope to show whether delivery was attempted at the correct address. A United States Postal Service (USPS) “Track & Confirm” record available at the USPS website shows the following chronological details based on the certified mail tracking number of the item:

- ACCEPTANCE, November 01, 2004, 4:10 pm, WASHINGTON, DC 20036
- NOTICE LEFT, November 04, 2004, 11:01 am, SCHAUMBURG, IL 60193
- UNCLAIMED, November 20, 2004, 2:55 pm. SCHAUMBURG, IL
- UNCLAIMED, November 20, 2004, 3:08 pm, SCHAUMBURG, IL
- ARRIVAL AT UNIT, November 29, 2004, 11:00 am, WASHINGTON, DC 20037
- “Your item was delivered [sic] at 2:59 pm on November 29, 2004 in Washington, DC 20036”

On December 17, 2004, the judge issued a Notice of Decision to the parties, notifying them that he was dismissing ACG’s notice of contest and affirming the citation and proposed penalties on the grounds that ACG’s failure to file an answer or respond to his Order to Show Cause “demonstrate either that he has abandoned the case or treats the Rules of Procedure of

the Commission with disdain.” On December 27, 2004, the judge submitted his decision to the Commission’s Executive Secretary for docketing.¹

Also on December 27, 2004, the office of the Chief Administrative Law Judge stamped ACG’s untimely answer as received at 4:54 p.m. The answer was submitted on ACG’s company letterhead, dated December 10, 2004, and signed by ACG President Filisko. It states that it “is an answer to the complaint filed against Associated Contractors Group, Inc.” and it denies all charges. The case file does not contain a postmarked envelope in which the answer was sent. The Commission construes the untimely answer as a petition for discretionary review.

Discussion

Commission Rule 41(a), 29 C.F.R. § 2200.41(a), permits the sanction of default for failure to plead and for failure to proceed as required by a Commission judge.² The Commission has held a default sanction may be appropriate “where a party displays a ‘pattern of disregard’ for Commission proceedings.” *Architectural Glass & Metal Co.*, 19 BNA OSHC 1546, 1547, 2001 CCH OSHD ¶ 32,424, p. 49,975 (No. 00-0389, 2001) (*AGM*) (citing *Philadelphia Construction Equipment Inc.*, 16 BNA OSHC 1128, 1131, 1993-95 CCH OSHD ¶ 30,051, p. 41,295 (No. 92-899, 1993)). The Commission has also held that

¹ The Executive Secretary docketed the decision on December 29, 2004, and the notice of docketing states that it was sent to ACG with no spelling errors in the company president’s name or company street address.

² 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.

“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), a default sanction may be set aside “for reasons deemed sufficient by the Commission or Judge.”³

In this case, the Secretary has not claimed that ACG’s late filing of its answer or its failure to respond to the judge’s show cause order prejudiced her.⁴ Nor does ACG’s conduct on the record before us demonstrate contumacy or a pattern of disregard for Commission proceedings. Given the misspelling of the company’s street name on the Certificate of Service for the show cause order, as well as the lack of either the return-receipt or the envelope with the original show cause order, it cannot be determined whether ACG ever received proper service of the judge’s order. Without a response to the show cause order, it also cannot be determined whether the company has a reasonable basis for the untimely filing of its answer. Therefore, with only ACG’s failure to file a timely answer before him, and no indication on the record that ACG had received his show cause order, we see no basis for the judge’s conclusion that ACG either “has abandoned the case or treats the Rules of Procedure of the Commission with disdain.”

We further note that ACG has since filed its answer denying all charges, and thus has not abandoned this case. ACG 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

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

⁴ As of this date, the Secretary has not filed a response to ACG’s untimely filing.

process.” *Action Group, Inc.*, 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, ACG should be afforded an opportunity to explain the reasons for the late filing of its answer as required by Rule 41(a), since it is not clear from this record that such an opportunity was provided. Moreover, although ACG’s reasons for its late filing are not known, the late filing alone without evidence of prejudice, contumacious conduct and/or a pattern of disregard for Commission rules would not be a basis for dismissing this case. *See AGM*, 19 BNA OSHC at 1548, 2002 CCH OSHD at p. 49,976 (concurring opinion) (sanctions must be proportionate to the misconduct for which they were imposed). Accordingly, we set aside the judge’s dismissal 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: January 21, 2005

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

Secretary of Labor,
Complainant,
V.
SAMUEL FILISKO
Respondent.

OSHRC DOCKET NO. 04-1465

ORDER

On **11/01/04** the undersigned issued an **ORDER TO SHOW CAUSE** to the Respondent as to why his Notice of Contest should not be dismissed for failure to file an answer to the complaint as required by the Commission Rules of Procedure. The Respondent failed to reply to the ORDER. His actions demonstrate either that he has abandoned the case or treats the Rules of Procedure of the Commission with disdain. This cannot be countenanced as it seriously impedes the administration of justice.

Accordingly, the Notice of Contest filed by the Respondent is dismissed. The Secretary's citation(s) and proposed penalties are **AFFIRMED** in all respects.

IRVING SOMMER
Chief Judge

DATE: December 27, 2004
Washington, D.C.