



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.

BILODEAU HOMES,

Respondent.

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OSHRC DOCKET No. 05-0231

DIRECTION FOR REVIEW AND REMAND ORDER

In a decision and order dated August 11, 2005, Administrative Law Judge William C. Cregar granted the Secretary's Motion to Dismiss Notice of Contest based on the failure of Bilodeau Homes (Bilodeau) to file a timely answer to the Secretary's complaint. The judge affirmed a serious citation alleging three violations of standards under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678, and assessed the total proposed penalty of \$3,000. For the reasons that follow, we direct this case for review, set aside Judge Cregar's order, and remand the case to the judge.

Procedural Background

The Secretary issued Bilodeau the citation and notification of penalty on January 12, 2005. Bilodeau, appearing pro se, filed a timely notice of contest on February 4, 2005, and the Secretary filed her complaint on February 23, 2005. On March 8, 2005, before the 20-

day period for filing an answer had passed, the case was designated for E-Z Trial by the Chief Administrative Law Judge and all pleading requirements were suspended.¹ *See* Commission Rule 200(b)(1), 29 C.F.R. § 2200.200(b)(1) (complaints and answers not required in EZ-Trial proceedings).

On April 15, 2005, the Secretary filed an unopposed Motion to Discontinue E-Z Trial based on the fact that “discussions between counsel for the Secretary and the respondent have revealed that there are factual disputes which will require discovery . . .” On April 26, 2005, the judge granted the unopposed motion stating that, “under the particular circumstances of this case, the E-Z Trial procedures would be inappropriate” and “the case shall continue under conventional rules.” *See* Rule 204, 29 C.F.R. § 2200.204 (provisions governing discontinuance of E-Z Trial).

On June 28, 2005, the Secretary filed her Motion to Dismiss Notice of Contest. In her motion, the Secretary stated that she had contacted Bilodeau’s president on June 7, 2005, and informed him that, “an answer to the Complaint needed to be filed.” The Secretary also stated that the parties had agreed Bilodeau would file an answer by June 21, 2005, but that no answer had yet been filed; a letter from the Secretary to Bilodeau’s president documenting their conversation was also attached to the motion. The Secretary failed to state, however, that she had consulted with Bilodeau prior to filing her motion as required by Rule 40 (a), 29 C.F.R. § 2200.40(a) (“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 Cregar granted the Secretary’s motion and his decision was docketed with the Commission on August 16, 2005.

¹ In the recent amendment to the Commission’s procedural rules, the name “E-Z Trial” was replaced with “Simplified Proceedings.” *See* 70 Fed. Reg. 22785, 22792 (May 3, 2005) (effective date of August 1, 2005). As the relevant events in this case, with the exception of the judge’s decision and order, occurred before this change became effective, we will refer to the procedure as E-Z Trial.

On September 6, 2005, Bilodeau filed a petition for discretionary review seeking the Commission's "understanding that Respondent is Pro Se and is trying to comply with the rules and regulations of OSHA." In the petition, Bilodeau's president disputes that "any firm date was set for [an] answer to [the] complaint" when he spoke to the Secretary's counsel. He also claims that the Secretary's counsel was "advised that [Bilodeau's] response had already been filed with the Complainant and should stand as a response to said complaint."

Discussion

Rule 101(a), 29 C.F.R. §2200.101(a),² 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 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 101(b), 29 C.F.R. §2200.101(b),³ a default sanction may be set aside "for reasons deemed sufficient by the

² This rule, formerly Commission Rule 41(a), 29 C.F.R. § 2200.41(a), states:

§2200.101 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.

³ This rule, formerly Commission Rule 41(b), 29 C.F.R. § 2200.41(b), states:

Commission or Judge.”

In *AA Plumbing, Inc.*, Docket No. 04-1299 (February 2, 2005), we noted that a 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 a case. *AA Plumbing*, slip opinion at 3-4 (citing *Samuel Filisko d/b/a/ Associated Contractors Group*, Docket No. 04-1465 (January 21, 2005)). Here, the Secretary made no claims of contumacious conduct on the part of Bilodeau in her motion to dismiss and the judge made no such findings in his decision. The Secretary also made no claims of prejudice as a result of Bilodeau’s failure to file a timely answer. In fact, the reasons for Bilodeau’s failure to file remain unknown and the company’s petition suggests that it intended its notice of contest to “stand as a response to said complaint.”

The Secretary also failed to comply with Rule 40(a) when she did not consult with Bilodeau prior to filing her motion to dismiss. *See AA Plumbing*, slip opinion at 4 (Commission set aside default for pro se employer’s failure to file timely answer based in part on Secretary’s failure to follow Rule 40(a) in filing of motion for default). While the Secretary did contact Bilodeau’s president three weeks prior to filing her motion in order to discuss the company’s failure to file an answer, it is not clear whether she informed him that she intended to file a motion to dismiss if the answer was not filed by their alleged agreed-upon date and that if the motion were granted, the alleged violations would be affirmed and the proposed penalties assessed. In any event, the Secretary’s motion did not contain a statement as to whether or not Bilodeau opposed it, and was therefore violative of Rule 40(a).

Finally, we note that the Commission has long recognized that, generally speaking, employers appearing pro se are “often confused by legal terminology and may not be fully

§2200.101 Failure to obey rules. . . . (b) *Motion to set aside sanctions.* For reasons deemed sufficient by the Commission or Judge and upon motion

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. In this regard, cases, such as this one, that involve pro se employers, few citation items, and less than \$20,000 in proposed penalties, are typically assigned to the Commission’s E-Z Trial docket, thereby allowing all pleading requirements to be suspended, discovery to be eliminated, and a hearing to proceed under less formal rules. *See* Subpart M of the Commission’s Rules, 29 C.F.R. §§ 2200.200-211.

Here, we question whether the current case’s initial assignment to the E-Z Trial docket, then subsequent removal, created confusion for this pro se employer, particularly where the judge’s order discontinuing E-Z Trial stated only that “conventional rules” would now apply and made no mention of the specific circumstances surrounding this case. Indeed, for the matter to proceed at that point, Bilodeau was required to file an answer to the Secretary’s previously filed complaint and do so by a date neither specified by the judge nor easily determined by consulting the Commission’s “conventional rules,” which would not have addressed the unique posture of the case at that time. *See* Rule 34(b), 29 C.F.R. § 2200.34(b) (“Within 20 days after service of the complaint, the party against whom the complaint was issued shall file an answer with the Commission.”).

Under these circumstances, we find that Bilodeau should be given an opportunity to explain to the judge the reasons for its failure to file a timely answer. Accordingly, we direct this case for review, set aside the judge’s order, and remand this case for further proceedings in a manner consistent with this order.

SO ORDERED.

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

_____/s/_____
W. Scott Railton
Chairman

_____/s/_____
Thomasina V. Rogers
Commissioner

Dated: _September 9, 2005

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR,
Complainant,
v.
BILODEAU HOMES,
Respondent.

DOCKET NO. 05-0231

APPEARANCES:

Merle D. Hyman
U.S. Department of Labor
Boston, Massachusetts
For the Complainant.

Michael J. Bilodeau, President
Bilodeau Homes
Sudbury, Massachusetts
For the Respondent, *pro se*.

BEFORE: William C. Cregar
Administrative Law Judge

DECISION AND ORDER

This matter is before the Occupational Safety and Health Review Commission (“the Commission”) pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (“the Act”). On June 28, 2005, Complainant filed and served upon Respondent a Motion to Dismiss Notice of Contest (“Motion”). The Motion requests that the Notice of Contest be dismissed and that the penalties be affirmed. To date, Respondent has failed to respond to the Motion. Finding good cause, I grant the Motion.

Statement of Facts

I adopt the following allegations, as set forth in the Secretary’s Complaint, dated February 23, 2005, as having been established:

1. Respondent, is, and at all times hereinafter mentioned was, a corporation with an office and place of business located at 111 Boston Post Road, Ste. 211, Sudbury, Massachusetts, and is engaged in the operation of a custom home building business.

2. During the course of business activities the Respondent and employees are engaged in receiving, handling and otherwise working on and with goods and materials that are moving or have

moved across state lines in interstate commerce. By virtue of activities, as aforesaid, the Respondent is an employer engaged in a business affecting commerce within the meaning of section 3(5) of the Act.

3. As a result of an inspection of Respondent's workplace located at 24 Polonoket Avenue, Sudbury, Massachusetts, by an authorized representative of the Complainant between October 29, 2004-January 4, 2005, Respondent, an employer within the meaning of the Act, was issued: Serious Citation No. 1 (three itemized violations), dated January 12, 2005.

4. The citation identifies the specific standard or general duty clause violations alleged, describes said violations, specifies the abatement date proposed for said violations, and sets forth the penalties for said violations.

5. At or about the time of the inspection herein Respondent violated each of the standards set out in the citation in the manner described therein.

6. The violations alleged in the citation constitute serious violations within the meaning of sections 17(b) and 17(k) of the Act in that there was substantial probability that death or serious bodily harm could result from the conditions that existed and the Respondent knew, or with the exercise of reasonable diligence should have known, of the presence of the violations.

7. The citation sets forth the penalties proposed for the violations alleged therein. Considering the gravity of the violations, the size of Respondent's business, Respondent's history of previous violations and good faith, as required under section 17(j) of the Act, said penalties are appropriate.

8. The abatement date set forth in the citation represents the earliest practicable time within which the Respondent could reasonably be expected to abate the violations.

9. On January 12, 2005, a Notification of Proposed Penalty was mailed to the Respondent.

10. On February 4, 2005, the Respondent filed with a representative of the Secretary of Labor a notification of intent to contest the aforesaid citation and proposed penalties.

I further adopt the following allegations, as set forth in the Motion:

11. This case was assigned to E-Z trial status. On April 26, 2005, this court issued an order discontinuing E-Z trial and stating that "the case shall continue under conventional rules." When no answer to the Complaint was forthcoming, on June 7, 2005, Complainant's counsel contacted

Respondent, who is *pro se*, and advised him that an answer to the complaint needed to be filed. The parties agreed that the answer would be filed no later than June 21, 2005. To date, neither Complainant nor this tribunal has received an answer to the complaint.

Discussion

Section 2200.41(a) of Title 29 of the Code of Federal Regulations states:

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.

There is no requirement that a judge issue a show cause order before granting a party's motion for a default judgment. *See Schipper Constr., Inc.*, 18 BNA OSHC 1865, n.3 (No. 99-0253, 1999). The Secretary's Motion is accordingly GRANTED, and the Citation and Notification of Penalty is AFFIRMED in all respects.

ORDER

Based upon the foregoing, it is hereby ORDERED that:

1. Serious Citation 1, Item 1, alleging a violation of 29 C.F.R. 1926.21(b)(2), is affirmed, and a penalty of \$750.00 is assessed.
2. Serious Citation 1, Item 2, alleging a violation of 29 C.F.R. 1926.651(i)(2), is affirmed, and a penalty of \$750.00 is assessed.
3. Serious Citation 1, Item 3, alleging a violation of 29 C.F.R. 1926.651(k)(1), is affirmed, and a penalty of \$1500.00 is assessed.

/s/

WILLIAM C. CREGAR
Judge, OSHRC

Dated: August 11, 2005
Washington, D.C.