



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.

OSHRC Docket No. 08-0474

WR EXTERIOR DESIGN CONSTRUCTION,
INC.,

Respondent,

APPEARANCES:

Diane C. Sherman, Attorney; Patricia M. Rodenhausen, Regional Solicitor; Gregory F. Jacob, Solicitor; U.S. Department of Labor, Washington, DC
For the Complainant

Wladyslaw Rudzinski; Bridgewater, NJ
For the Respondent

REMAND ORDER

In an order dated September 15, 2008, Chief Administrative Law Judge Irving Sommer granted the Secretary's motion to dismiss WR Exterior Design Construction's ("WR's") notice of contest ("NOC") for its failure to file a timely answer. In his order, the judge affirmed the citations and assessed the total proposed penalty of \$19,600. For the reasons that follow, we set aside the dismissal order and remand this case to the judge.

Background

Following the issuance of the citations in this case, WR, appearing *pro se*, timely filed a NOC and, on April 28, 2008, the Secretary timely filed a complaint. Under Commission Rule 34(b)(1), 29 C.F.R. § 2200.34(b)(1), WR was required to file an answer by May 21. Having received no answer from WR, the judge *sua sponte* issued an order on May 27 directing WR to show cause, on or before June 6, why its NOC should not be dismissed. The envelope

containing the show cause order—sent via certified mail to WR—was returned to the Commission on June 13 unopened and without signature.

On August 29, the Secretary filed a motion to dismiss the NOC based on WR’s failure to file an answer and respond to the show cause order. In her motion, the Secretary did not state whether “any other party opposes or does not oppose the motion” as required by Commission Rule 40(a), 29 C.F.R. § 2200.40(a). The judge granted the Secretary’s motion on September 15, and on October 24, WR’s owner filed a petition seeking review of the judge’s order. In the petition, WR’s owner explains that he has a “limited command of the English language.”

Discussion

The Commission has consistently 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.” *AA Plumbing, Inc.*, 20 BNA OSHC 2203, 2204, 2005 CCH OSHD ¶ 32,795, p. 52,446 (No. 04-1299, 2005) (quoted case omitted). Here, the record indicates that WR never received the judge’s show cause order. *See, e.g., Rakich Masonry*, 21 BNA OSHC 1928, 1928-29 (No. 06-1159, 2007) (remanding for further development of the record because, *inter alia*, envelope containing show cause order was returned unopened and without signature); *Samuel Filisko*, 20 BNA OSHC 2204, 2205-06, 2005 CCH OSHD ¶ 32,855, pp. 52,962-63 (No. 04-1465, 2005) (same). Additionally, in filing her motion to dismiss, the Secretary failed to comply with Commission Rule 40(a). As we have recently explained, one function of this rule is “to ensure that a party in jeopardy of being defaulted is warned of that possibility by the moving party,” and the rule’s application is particularly important where, as here, the employer is appearing *pro se*. *Elan Lawn & Landscape Serv., Inc.*, 22 BNA OSHC 1337, 1339 (No. 08-0700, 2008). Moreover, based on the representation in his petition, it appears WR’s owner may have had some difficulty understanding the filings and orders in this case, possibly because of a lack of comprehension of the English language. Finally, the Secretary does not claim that she was prejudiced by WR’s failure to file a timely answer.

Under these circumstances, we conclude the record presently lacks sufficient evidence to support the sanction of dismissal. *See Samuel Filisko*, 20 BNA OSHC at 2206, 2005 CCH OSHD at p. 52,963 (“[L]ate 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.”). Accordingly, we set aside the judge’s order and remand this case to allow WR an opportunity to explain why its failure to file an answer and respond to the show cause order should be excused. *See* Commission Rule 101(b), 29 C.F.R. § 2200.101(b) (sanction may be set aside for reasons deemed sufficient by the Commission or Judge). On remand, the judge should also evaluate whether WR’s owner requires the services of a qualified interpreter to effectively communicate with the Commission throughout the proceedings. *See Oscar Renda Contracting, Inc.*, 17 BNA OSHC 1883, 1887, 1995-97 CCH OSHD ¶ 31,225, p. 43,779 (No. 93-1886, 1997) (“[F]ailure to provide those invited to appear before us with the basic means to be effectively understood, particularly on their explicit request, demeans both the witness and the forum and undermines the credibility, much less the civility, of the adjudicative process.”).

SO ORDERED.

_____/s/_____
Horace A. Thompson III
Chairman

Dated: November 4, 2008

_____/s/_____
Thomasina V. Rogers
Commissioner