



United States of America  
**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**  
1120 20<sup>th</sup> Street, N.W., Ninth Floor  
Washington, DC 20036-3457

SECRETARY OF LABOR,

Complainant,

v.

ACTION CONCRETE CONSTRUCTION, INC.,

Respondent.

OSHRC Docket No. 09-0923

**APPEARANCES:**

Dane L. Steffenson, Attorney; Dana L. Ferguson, Acting Counsel; Stanley E. Keen, Regional Solicitor; Carol A. De Deo, Deputy Solicitor of Labor; U.S. Department of Labor, Washington, DC  
For the Complainant

G. Stephen Wiggins; Hubbard, Wiggins, McIlwain & Brakefield, P.C., Tuscaloosa, AL  
For the Respondent

**DIRECTION FOR REVIEW AND REMAND ORDER**

Before: ROGERS, Chairman; THOMPSON, Commissioner.

**BY THE COMMISSION:**

In a Decision and Order dated September 11, 2009, Chief Administrative Law Judge Irving Sommer granted the Secretary's motion to dismiss Action Concrete Construction's ("Action's") late-filed notice of contest ("NOC"). Stating that "[n]o response was entered by the Respondent," the judge affirmed the citation and assessed the proposed penalty of \$3,800. For the reasons that follow, we direct this case for review, set aside the judge's decision, and remand the case to the judge for reconsideration.

## Background

On April 8, 2009,<sup>1</sup> the Occupational Safety and Health Administration (“OSHA”) issued Action a citation alleging three serious violations under the Occupational Safety and Health Act of 1970 (“OSH Act”), 29 U.S.C. §§ 651-78. It is undisputed that Action received the citation on April 11 and, through its counsel, filed a NOC on May 20, thirteen days after expiration of the contest period. Section 10(a) of the OSH Act, 29 U.S.C. § 659(a) (employer has fifteen working days within which to notify the Secretary that he wishes to contest the citation or proposed assessment of penalty). Shortly thereafter, OSHA informed Action that the NOC was untimely. By letter to OSHA dated June 4, Action’s president explained that the late filing was due to her serious illness at the time she received the citation and the difficulty she had contacting her counsel, who had apparently relocated to a new address. Action’s counsel subsequently submitted several other letters, first to OSHA and finally, on June 19, to the Commission, requesting that the late NOC be accepted.

On August 14, the Secretary filed a motion to dismiss Action’s late-filed NOC. The Secretary’s motion failed to comply with Commission Rule 40(a) in that it does not indicate whether the Secretary made any effort to confer with Action prior to filing the motion and thus, does not state whether Action opposed the motion. *See* Commission 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.”). Additionally, the certificate of service attached to the motion reveals an error with respect to Action’s mailing address, and there is nothing in the case file from which to ascertain whether Action received the motion from the Secretary.<sup>2</sup>

Pursuant to the Commission’s procedural rules, Action had until August 31 to respond to the Secretary’s dismissal motion. Commission Rule 40(c), 29 C.F.R. § 2200.40(c). *See also* Commission Rule 4, 29 C.F.R. § 2200.4 (computation of time).

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<sup>1</sup> All dates discussed occurred in 2009.

<sup>2</sup> The NOC contains the following address for Action’s counsel: 808 Lurleen Wallace Blvd., North, P.O. Box 2427, Tuscaloosa, Alabama, 35403-2427. The Secretary erroneously addressed her motion to P.O. Box 2527 rather than P.O. Box 2427. The address was correct in all other respects.

On that day, the judge sent his Notice of Decision to the parties, which contained the same address error as the Secretary's motion. Action did not seek relief from the default during the period between the judge's transmittal of his decision to the parties, and his September 11 submission of the decision for docketing to the Executive Secretary. *See* Commission Rule 90(b)(3), 29 C.F.R. § 2200.90(b)(3) ("Until the Judge's report has been docketed by the Executive Secretary, the Judge may relieve a party of default or grant reinstatement . . .").<sup>3</sup> On September 21, Action filed a timely Petition for Discretionary Review ("PDR"), in which it reiterates its explanation for its late-filed NOC and requests relief under Federal Rule of Civil Procedure 60(b).<sup>4</sup>

### **Discussion**

Under Commission Rule 101(a), a party may be declared in default when it "has failed to plead or otherwise proceed as provided by [the Commission's] rules . . ." 29 C.F.R. § 2200.101(a). While Action "failed to . . . proceed" by failing to respond to the Secretary's dismissal motion, a number of circumstances suggest that relief from the default order may be warranted. *See* Commission Rule 101(b), 29 C.F.R. § 2200.101(b) (Commission or judge may set aside sanction imposed for failure to proceed under Commission rules).

First, the Secretary's failure to confer with Action prior to filing her dismissal motion deprived Action of the opportunity to have its position included therein. *E.g.*, *AA Plumbing, Inc.*, 20 BNA OSHC 2203, 2204, 2005 CCH OSHD ¶ 32,795, p. 52,447 (No. 04-1299, 2005) (remanding for reconsideration of default where Secretary failed to comply with Rule 40(a)); *Dore & Assocs. Contracting Inc.*, 19 BNA OSHC 1438, 1438 n.1, 2001 CCH OSHD ¶ 32,369, p. 49,698 n.1 (No. 01-0067, 2001) (same). The Secretary's failure to comply with this requirement is particularly troubling here, as the address error on the motion's certificate of service creates some uncertainty about whether Action ever received the motion. *Samuel Filisko*, 20 BNA OSHC 2204, 2206,

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<sup>3</sup> The Executive Secretary docketed the judge's decision on September 15, and the transmittal notice to Action contains the correct address for its counsel.

<sup>4</sup> Rule 60(b) provides, in relevant part:

On motion and just terms, the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect . . .

2005 CCH OSHD ¶ 32,855, p. 59,962 (No. 04-1465, 2005) (setting aside default order where it could not be determined whether employer received proper service due to misspelling of street name).

Second, the Secretary's motion makes no mention of the letter from Action's president or her detailed explanation for the delay in filing the company's NOC. Rather, the motion contains the following statement concerning Action's conduct:

The only statement as to why the [NOC] was late is Respondent's counsel's assertion that '[he] believes that [his] client's submission supports a favorable consideration.' . . . Accordingly, Respondent has provided no bases for a finding of excusable neglect and none is believed to exist.

On its face, therefore, the motion does not accurately reflect Action's position concerning the NOC and, as a result, we cannot be certain whether the judge took into account all of the information Action had provided before he ruled on the dismissal motion.

Finally, the judge's transmittal of the decision to the parties contained the same address error for Action's counsel as the Secretary's motion. Thus, we cannot be certain Action received notice of the judge's decision at that time. Absent proper notification, Action would have been deprived of the opportunity to seek relief from the default during the period prior to docketing with the Commission. *See* Commission Rule 90(b)(3), 29 C.F.R. § 2200.90(b)(3) ("Until the Judge's report has been docketed by the Executive Secretary, the Judge may relieve a party of default or grant reinstatement . . .").

Based on this record, it appears Action may have lacked notice of the two key events—the Secretary's dismissal motion and the judge's notice of decision—that resulted in the default after Action failed to respond. Under these circumstances, as well as the Secretary's omission in her dismissal motion of Action's detailed explanation for its delay in filing the NOC, Action may have been denied the opportunity to be fully heard. *See Oscar Renda Contracting, Inc.*, 17 BNA OSHC 1883, 1888, 1995-97 CCH OSHD ¶ 31,225, p. 43,780 (No. 93-1886, 1997) (noting that "quest for due process" includes "an evaluation of all the circumstances" and "[t]he individual's right to fairness must be respected") (citation omitted). Accordingly, we set aside the judge's decision and remand this case for reconsideration of whether default is warranted. *See* Commission Rule 101(b), 29 C.F.R. § 2200.101(b) (sanction may be set aside by Commission or judge for "reasons deemed sufficient").

With respect to Action's request for Rule 60(b) relief for its late-filed NOC, it asserts that it is a "small, family-owned business," and that its president was seriously ill at the time she received the OSHA citation. Action also states that it lost time attempting to locate its attorney by sending its initial request for assistance with the citation to a former address. *See Nw. Conduit Corp.*, 18 BNA OSHC 1948, 1951, 1999 CCH OSHD ¶ 31,949, p. 47,456 (No. 97-851, 1999) (excusing small employer's late-filed NOC where owner was solely responsible for handling OSHA matters and his temporary absence led to miscommunication with counsel). Thus, if the judge determines on remand that Action should be accorded relief from the default judgment, he should also provide Action an opportunity to substantiate its claim for Rule 60(b) relief.

SO ORDERED.

/s/  
Thomasina V. Rogers  
Chairman

Dated: October 9, 2009

/s/  
Horace A. Thompson III  
Commissioner

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DECISION AND ORDER

Motion by the Secretary to Dismiss Respondent's late Notice of Contest. No response was entered by the Respondent. Motion to Dismiss is GRANTED.

The Citation is AFFIRMED as issued.

/s/  
IRVING SOMMER  
Chief Judge

DATED: September 11, 2009  
Washington, D.C.