



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.

ARTEMIO GONZALEZ EXTERIORS,

Respondent.

OSHRC Docket No. 12-0846

ORDER OF DEFAULT

On September 19, 2012, the undersigned issued an Order to Show Cause (“Order”) to Respondent. The Order directed Respondent to show cause on or before October 1, 2012, as to why it should not be declared in default for not filing an answer to the complaint within the time permitted by the Commission’s Rules of Procedure. Respondent was advised that failure to comply with the Order would result in all of the alleged violations set out in the OSHA citation being affirmed and the proposed penalties being assessed without a hearing.

The Order was sent to Respondent, at its address of record, by first class certified mail, return receipt requested. On October 26, 2012, the certified mailing was returned to the Commission with a label on it stating “UNCLAIMED” and “UNABLE TO FORWARD.”

There is no evidence in the record that Respondent has not received any of the Commission's previous mailings in this matter. Further, in the absence of evidence to the contrary, it is reasonable to presume that the Postal Service officials have properly discharged their duties. *See Powell v. Commissioner*, 958 F.2d 53, 54 (4th Cir. 1992). Thus, it is reasonable to conclude here that Respondent either did not pick up the certified mailing from the Post Office or that it has moved and left no forwarding address. Commission Rule 6, 29 C.F.R. § 2200.6, requires that a change of address "be communicated promptly in writing to the Judge." A party who fails to do so "shall be deemed to have waived his right to notice and service under these rules."

Commission Rule 101(a), 29 C.F.R. § 2200.101(a), provides in relevant part that:

Sanctions. When any party has failed to plead or otherwise proceed as provided by these rules or as required by the ... Judge, he may be declared to be in default ... on the initiative of the ... Judge, after having been afforded an opportunity to show cause why he should not be declared to be in default....Thereafter, the ... Judge, in [her] discretion, may enter a decision against the defaulting party....

A judge has very broad discretion in imposing sanctions for noncompliance with the Commission's Rules of Procedure or the judge's orders. *See Sealtite Corp.*, 15 BNA OSHC 1130, 1134 (No. 88-1431, 1991). The Commission, however, has long held that dismissal is too harsh a sanction for failure to comply with certain prehearing orders unless the record shows contumacious conduct by the noncomplying party, prejudice to the opposing party, or a pattern of disregard for Commission proceedings. *See Architectural Glass & Metal Co.*, 19 BNA OSHC 1546, 1547 (No. 00-389, 2001). I find Respondent's conduct here to be contumacious in that, as set out above, it either failed to pick up the certified mailing from the Post Office or it failed provide my office with a change of address as required by Commission Rule 6. I also find that Respondent's

conduct has caused prejudice to the Secretary by impeding her ability to proceed in this matter. For these reasons, Respondent is found to be in DEFAULT, its notice of contest is DISMISSED, and the OSHA citation issued to Respondent on January 19, 2012, Inspection Number 108500, is AFFIRMED in its entirety.

SO ORDERED.

/s/
Covette Rooney
Chief Judge

Dated: Dec 12, 2012
Washington, D.C.