



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.

TOM REED CONTRACTING,

Respondent.

OSHRC Docket No. 14-1659

APPEARANCES:

Jeffrey Rogoff, Regional Solicitor; U.S. Department of Labor, New York, NY
For the Complainant

Thomas P. Reed; Tom Reed Contracting, West Milford, NJ
For the Respondent

REMAND ORDER

Before: ATTWOOD, Acting Chairman and MACDOUGALL, Commissioner.

BY THE COMMISSION:

On August 24, 2015, Chief Administrative Law Judge Covette Rooney issued a default judgment against Tom Reed Contracting based on its failure to file an Answer and respond to two orders issued by the judge. For the reasons that follow, we set aside the judge's decision and remand this case for further proceedings in a manner consistent with this order.

BACKGROUND

Following an inspection, the Occupational Safety and Health Administration issued Respondent a one-item serious citation with a proposed penalty of \$2,800. Thomas P. Reed, Respondent's owner who is appearing pro se, timely filed a notice of contest. After the Secretary filed his Complaint¹ and the company failed to timely file an Answer, the judge issued Respondent a show cause order directing that a response be submitted by April 21, 2015. On April 20, 2015, the judge received a letter from Mr. Reed requesting "rescheduling" due to ongoing medical treatment for a serious health condition. A week later, the judge's office left Mr. Reed a voicemail message and sent him an email advising him that he needed to file an Answer. When Mr. Reed did not file an Answer, the judge issued the company an Order to File Answer on June 3, 2014, but received no response. On July 1, 2015, the judge issued the company a second show cause order. After the company failed to respond to this order, the judge entered a default decision, notice of which was sent on August 7, 2015. The decision was docketed on August 24, 2015, and Mr. Reed timely filed a petition with the Commission on September 8, 2015, seeking review of the judge's default decision.

DISCUSSION

"Whether dismissal is appropriate in any situation depends on whether a party's behavior demonstrates contumacy, whether the other party suffered prejudice, and whether other aggravating circumstances were present." *Caterpillar, Inc.*, 17 BNA OSHC 1507, 1509 (No. 94-347, 1996) (citations omitted). Here, the judge found that the company's conduct was "contumacious in that . . . the regular first class and certified mailings were received, yet the Respondent failed to respond to any of the three orders issued by the undersigned."²

However, while Respondent did not file an Answer, the company did respond to the first show cause order by asking for "rescheduling." Further, this request for "rescheduling," which

¹ The judge granted the Secretary's motion for an extension of time to file his Complaint to allow the parties additional time to explore settlement. The Secretary subsequently failed to timely file his Complaint and, on February 4, 2015, the judge issued the Secretary a show cause order. In response, the Secretary filed his Complaint together with an explanation that his pleading was late because "Respondent has refused to sign the Settlement Agreement, which represent[ed] the terms he previously agreed upon in order to resolve this matter without a need for litigation."

² We note that the judge erred in stating that Respondent failed to respond to "any of the three orders" she issued. As reflected earlier in the judge's decision, the company responded to the first show cause order, then failed to respond to the subsequent two orders.

could be construed as a request for additional time was both in writing and received in advance of the date on which the pleading was due to be filed. *See* 29 C.F.R. § 2200.5 (“Extension of time”). In his petition to the Commission, Mr. Reed asserts that because of his ongoing medical treatment, he has “not [been] able to respond in a timely manner.” This statement is consistent with his response to the judge’s first show cause order, in which he explained that he had been undergoing treatment “for the last two months and it was impossible to respond.”

Although Mr. Reed was silent from his April 20, 2015 response until his September 8, 2015 petition, we are mindful of his repeated assertions regarding his medical condition. In particular, we note that Mr. Reed’s request for rescheduling was not directly addressed by the judge. We also note that the Secretary has never claimed he was prejudiced by the company’s failure to timely file an Answer or respond to the judge’s orders. Under these circumstances, including the absence of more specific information regarding the timing and extent of Mr. Reed’s incapacitation during this period, we conclude that a sanction of dismissal may not be appropriate at this time and direct the judge to reconsider her decision dismissing the case. *See Larry McMurrin, dba Lar’s Plumbing, Inc.*, 25 BNA OSHC 1472, 1473 (No. 14-1806, 2015) (being mindful of owner’s serious medical condition in setting aside default decision); *Architectural Glass & Metal Co.*, 19 BNA OSHC 1546, 1547 (No. 00-0389, 2001) (“Although a judge has very broad discretion in imposing sanctions for noncompliance with Commission Rules of Procedure or his own orders, the judge must not impose a sanction that is too harsh under the circumstances of the case.”); *compare Phila. Constr. Equip., Inc.*, 16 BNA OSHC 1128, 1130-31 (No. 92-899, 1993) (finding a pattern of disregard where respondent consistently did not respond until it received orders threatening dismissal or default, failed to appear for a hearing, and appeared late at a reinstatement hearing); *Sealtite Corp.*, 15 BNA OSHC 1130, 1134 (No. 88-1431, 1991) (finding respondent in default because of long pattern of failure to comply with Commission rules and the judge’s orders).

Accordingly, we set aside the judge's decision and remand the case for further proceedings. *See* 29 C.F.R. § 2200.101(b) (motion to set aside sanctions). If the judge reinstates the case, we note that it may be appropriate to consider assigning this matter to Simplified Proceedings, thus obviating the need for this pro se Respondent to file an Answer. *See* 29 C.F.R. § 2200.200(b)(1) (complaints and answers not required under simplified proceedings); § 2200.202 (eligibility for simplified proceedings).

SO ORDERED.

/s/
Cynthia L. Attwood
Acting Chairman

/s/
Heather L. MacDougall
Commissioner

Dated: September 25, 2015



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ORDER OF DEFAULT

On October 10, 2014, the Occupational Safety and Health Administration (“OSHA”) issued a Citation and Notification of Penalty (“citation”) to Respondent for OSHA inspection number 990367. The citation alleged one violation of OSHA’s safety and health standards for a proposed penalty of \$2,800.00.¹ Respondent’s notice of contest was submitted by Thomas P. Reed and received by the Secretary on October 21, 2014. The Respondent’s notice of contest was docketed and the Commission’s Notice of Docketing was sent to the Respondent at its record address on November 4, 2014. The Notice of Docketing return card was not returned to the Commission.

On February 19, 2015, the Secretary filed the complaint in this matter. Respondent did not file an answer as required by Commission Rule 34(b), 29 C.F.R. § 2200.34(b). On April 7, 2015, the undersigned issued an Order to Show Cause Why Notice of Contest Should Not Be Dismissed (“First Order”) to Respondent because an answer had not been filed. The First Order directed Respondent to show cause on or before April 21, 2015, as to why it should not be declared in default for not filing an answer to the complaint within the time permitted by the

¹ The record shows that Thomas P. Reed received the citation on October 17, 2014.

Commission's Rules of Procedure. Respondent was advised that failure to respond to the First 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 First Order was sent to Respondent, at its record address, through the United States Postal Service (USPS) by regular first class mail and by certified mail² with return receipt requested. The USPS green return receipt card that accompanied the certified mailing was signed by "Thomas Reed" on April 17, 2015, and returned to my office. On April 20, 2015, the undersigned received a letter from Mr. Reed requesting a rescheduling. He stated he had been unable to respond earlier due to medical treatment.³

On June 3, 2015, the undersigned issued an Order To File Answer ("Second Order"). The Second Order directed Respondent to file an Answer to the Complaint on or before June 16, 2015. Respondent did not contact my office in response to the Second Order. The first class mailing was not returned by USPS and is deemed received by the Respondent.

On July 1, 2015, the undersigned issued an Order to Show Cause Why Notice of Contest Should Not Be Dismissed ("Third Order") to Respondent because an answer had not been filed. The Third Order directed Respondent to show cause on or before July 15, 2015, 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 respond to the Third 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 Third Order was sent to Respondent, at its record address, through the United States Postal Service (USPS) by regular first class mail and by certified mail⁴ with return receipt requested. The USPS green return receipt card, which accompanied the certified mailing, was returned to the Commission showing that "Thomas Reed" signed for the certified mailing on July

² The certified mailing tracking number was 7012-1640-0002-4863-2264. USPS tracking shows the mailing was delivered February 13, 2015.

³ On April 27, my office left a message by telephone advising the Respondent to submit an Answer.

⁴ The certified mailing tracking number was 7012-1640-0002-4863-3278.

8, 2015. The mailing by regular first class mail was not returned and is presumed delivered. It is concluded the Respondent received the Third Order. Despite this, Respondent has not responded to the Third Order and has not otherwise communicated with my office.⁵

Commission Rule 101(a), 29 C.F.R. § 2200.101(a), provides in pertinent 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 . . . 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 judge's orders or the Commission's Rules of Procedure. *See Sealtite Corp.*, 15 BNA OSHC 1130, 1134 (No. 88-1431, 1991). Nonetheless, the Commission 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. 00-0389, 2001). I find Respondent's conduct here to be contumacious in that, as set out above, the regular first class and certified mailings were received, yet the Respondent failed to respond to any of the three orders issued by the undersigned.

For these reasons, Respondent is found to be in DEFAULT, its notice of contest is DISMISSED, and the OSHA citation issued to Respondent on October 10, 2014, inspection number 990367, is AFFIRMED in its entirety and penalties ASSESSED.

SO ORDERED.

/s/ _____

Covette Rooney
Chief Judge

Dated: August 21, 2015
Washington, D.C.

⁵ The Commission expects a business to maintain "orderly procedures for handling important documents." *Louisiana-Pacific Corp.*, 13 BNA OSHC 2020, 2021 (No. 86-1266, 1989) (citations omitted).