



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.

OSHRC DOCKET NO. 15-0518

CROCE BUILDERS INC.,

Respondent.

**ORDER OF DEFAULT**

This proceeding 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. Following an inspection of Respondent’s worksite in Cranford, New Jersey, the Occupational Safety and Health Administration (“OSHA”) issued a five-item serious citation, and a one-item other-than-serious citation, on February 27, 2015 to Croce Builders Inc. (“Respondent”), alleging violations of OSHA’s construction and reporting standards and proposing a total penalty of \$32,800. Respondent filed a timely notice of contest, sent by Frank B. Croce, Owner/Operator of Croce Builders Inc. The Commission docketed this case on March 31, 2015, and Mr. Croce returned the notice of docketing post card on April 9, 2015.

The Secretary filed the Complaint on May 29, 2015.<sup>1</sup> Respondent did not file an Answer as required under 29 C.F.R. § 2200.34(b). On August 14, 2015, the undersigned issued an Order to Show Cause Why Notice of Contest Should Not Be Dismissed (“Order I”) for failing to file an

<sup>1</sup> The Secretary had previously submitted a motion for an extension of time on April 14, 2015, and that motion was granted on April 28, 2015.

answer to the Secretary's Complaint. The Order I directed Respondent to show cause on or before August 28, 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 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 I was sent to Respondent, at its record address, by regular first-class mail and by certified mail with return receipt requested in accordance with 29 C.F.R. § 2200.101(d). The green receipt card which accompanied the certified mailing was returned to the Commission, signed as received by "G. Maldonado."<sup>2</sup> The first-class mailing was not returned.

On September 29, 2015, my office left a voice message for Mr. Croce asking him to return the call in regard to this proceeding. The next day, September 30, Mr. Croce returned the call. My office notified him that an Answer in response to the Secretary's Complaint had yet to be filed and that this case would result in a default judgment if he did not file the Answer. When asked whether he had received the Secretary's Complaint, he answered in the affirmative. He then stated that he would submit the Answer within the week. Mr. Croce then asked for the Commission's address, and my office referred him to the information already in the Secretary's Complaint. Mr. Croce was given two weeks to submit the Answer.

No Answer has been filed. On December 1, 2015, the undersigned issued another Order to Show Cause Why Notice of Contest Should Not Be Dismissed ("Order II") for failing to file an Answer to the Secretary's Complaint. The Order II directed Respondent to show cause on or before December 15, 2015, as to why it should not be declared in default for not filing an

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<sup>2</sup> The certified mailing tracking number 7012-1640-0002-4863-3346 confirms the delivery on August 27, 2015.

Answer to the Complaint within the time permitted by the Commission's Rules of Procedure. Respondent was advised that failure to respond to the Order II 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 certified mailing of the Order II was returned and marked: "Return to Sender; Unclaimed; Unable to Forward." The first-class mailing of the Order II, however, as was the first-class mailing of Order I, was not returned. It is therefore presumed that the Order II was delivered to Respondent. *Powell v. Commissioner*, 958 F.2d 53, 54 (4<sup>th</sup> Cir. 1992) (holding that, in the absence of evidence to the contrary, it is reasonable to presume that the United States Postal Service officials have properly discharged their duties). The Commission also expects employers to maintain orderly procedures for handling important documents. *Louisiana-Pacific Corp.*, 13 BNA OSHC 2020, 2021 (No. 86-1266, 1989) (holding that the Commission expects employers to maintain orderly procedures for handling important documents). Therefore, it is concluded that Respondent received the Order II. To date, Respondent has not responded to the Order II.

Rule 101(a) of the Commission's Rules of Procedure, 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....

29 C.F.R. § 2200.101(a). A judge has very broad discretion in imposing sanctions for noncompliance with the Commission's Rules of Procedure or the judge's orders. *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. *Architectural Glass & Metal Co.*, 19 BNA OSHC 1546, 1547 (No. 00-389, 2001).

Respondent has failed to comply with the Commission's rules by not filing an Answer. I find Respondent's conduct here to be contumacious in that Respondent has failed to respond to the Order II despite, as set out above, the warning contained inside the Order II as well as the September 30<sup>th</sup> telephone conversation with my office advising Respondent of the results of this case for failing to file an Answer. For these reasons, Respondent is found to be in DEFAULT, its notice of contest is DISMISSED, and the OSHA citation issued to Respondent on February 27, 2015, Inspection Number 994277 is AFFIRMED in its entirety.

SO ORDERED.

/s/Covette Rooney  
Covette Rooney  
Chief Judge

Dated: February 23, 2016  
Washington, D.C.