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SECRETARY OF LABOR,

Complainant,

v.

LAVELLE CONSTRUCTION

Respondent.

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OSHRC Docket No. 99-1921

**REMAND ORDER**

Before: ROGERS, Chairman; VISSCHER and WEISBERG, Commissioners.

BY THE COMMISSION:

Chief Administrative Law Judge Irving Sommer issued a default judgment against Respondent Lavelle Construction (“Lavelle”). At issue before the Commission is whether Lavelle, appearing *pro se*, has established a “sufficient” reason to set aside that sanction. For reasons that will be discussed below, we reverse the judge’s decision and remand this case for further proceedings.

Following an inspection of Lavelle’s worksite in Ashland, Massachusetts, the Occupational Safety and Health Administration issued two citations to Lavelle on September 13, 1999, alleging serious and repeat violations of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-78, and proposing penalties totaling \$7800. Lavelle filed a timely notice of contest.<sup>1</sup> On October 26, 1999, counsel for the Secretary served a complaint on Lavelle, along with a notice instructing Lavelle to file an answer within twenty days and warning Lavelle that failure to do so could result in judgment against it. *See* 29 C.F.R. §§ 2200.34(b), 2200.41(a).

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<sup>1</sup>Lavelle provided its mailing address with its notice of contest, and all documents issued or filed since receipt of the notice of contest have been sent to that address.

Lavelle did not file an answer within that time frame, and on December 3, 1999, Judge Sommer issued an order directing Lavelle “to show cause why its notice of contest should not be dismissed for failure to file an answer[.]” The certified mailing containing the show cause order was subsequently returned to the Commission unopened, with the return receipt still attached. It was marked “unclaimed” and had the following handwritten notations: “notifie [sic] 12/6/99, 12/15/99; ret [sic] 12/21/99.” On January 21, 2000, the judge issued an order dismissing Lavelle’s notice of contest and affirming the citations and proposed penalties. Lavelle then requested discretionary review. On review, when asked to explain its default, Lavelle timely responded to the effect that it had requested a hearing, apparently in response to the citation, but that it did not receive subsequent mailings despite “pick[ing] up everything that [it] receive[s].”

First, we note that the judge followed the Commission’s rules for assuring Lavelle due notice and an opportunity to respond. *See* 29 C.F.R. § 2200.41(a)(1) (a party may be declared in default “after having been afforded an opportunity to show cause why he should not be declared in default”); 29 C.F.R. § 2200.41(d) (show cause orders “shall be served upon the affected party by certified mail, return receipt requested”). Commission Rule of Procedure 41(b), however, permits the Commission to set aside sanctions for “reasons deemed sufficient.” 29 C.F.R. § 2200.41(b); *see Schipper Constr. Inc.*, 18 BNA OSHC 2000, 2001, 1999 CCH OSHD ¶ 31,885, p. 47,134 (No. 99-0253, 1999) (“Commission has wide latitude and discretion in its review of a default sanction”) (citing *Choice Electric Corp.*, 14 BNA OSHC 1899, 1900, 1987-90 CCH OSHD ¶ 29,141, p. 38,941 (No. 88-1393, 1990)). Generally, where a small, *pro se* employer has made factual claims that may have justified setting aside sanctions, the Commission, in its discretion, has remanded the case to the judge to afford the employer an opportunity to make such a showing on a full evidentiary record.<sup>2</sup> *See Action Group, Inc.*, 14 BNA OSHC 1934, 1935-36, 1987-90 CCH OSHD ¶

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<sup>2</sup>In proceedings on a motion for relief from sanctions, the sanctioned party bears the burden of proof. *See* 29 C.F.R. § 41(b); *Choice Electric Corp.*, 14 BNA OSHC 1899, 1900, 1987-90 CCH OSHD ¶ 29,141, pp. 38,941-42 (No. 88-1393, 1990) (citing *Wes Jones & Son*,

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29,166, pp. 39,018-19 (No. 88-2058, 1990); *Bywater Sales & Serv., Byco-MCS Div.*, 13 BNA OSHC 1268, 1269, 1986-87 CCH OSHD ¶ 27,896, p. 36,597 (No. 86-1214, 1987); *Right-Gard Corp.*, 1991-93 CCH OSHD ¶ 29,609, pp.40,085-86 (No. 91-1004, 1992).

In this case, while Lavelle's representations that it did not receive the complaint or certified mail notifications are not evidence, they do raise a factual issue as to whether Lavelle received documents informing it of its obligations to respond. Accordingly, we remand this case to the judge to hold a hearing to determine whether there is sufficient reason to set aside the dismissal order and allow Lavelle to file an answer to the Secretary's complaint.<sup>3</sup> If the judge determines that Lavelle's failures to respond should be excused, he

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<sup>2</sup>(...continued)

*Inc.*, 13 BNA OSHC 1277, 1279, 1986-87 CCH OSHD ¶ 27,924, p. 36,625 (No. 86-1095, 1987); *Bywater Sales & Serv.*, 13 BNA OSHC at 1269, 1986-87 CCH OSHD at p. 36,597).

<sup>3</sup>In response to his dissenting colleague's opinion that we should "simply remand this case for a resolution of the merits of the Secretary's citation against Lavelle" and suggestion that by not doing so the Commission is "put[ting] up unnecessary obstacles to getting to the merits of this case," Commissioner Weisberg observes that such a course of action would be a clear departure from the Commission's normal practice. He notes that in the Request for Explanation, dated May 3, 2000, the Commission asked Lavelle to explain: (1) why it did not file an answer, and (2) why it did not pick up the certified mail envelope containing the order to show cause from the post office. In his unsworn response, Lavelle explained:

Back when I James Lavelle got the first *complainant* [sic] I wrote a letter to have a hearing. From that time I did not get no notice for anything. The first response I got back was the notice of direction for review that I followed up on.

At best this raises two material issues of fact: (1) whether Lavelle received the Secretary's complaint and (2) whether Lavelle received notices from the Postal Service that it had certified mail for it (Lavelle's non-receipt of the judge's order to show cause is not at issue since the unopened envelope was returned by the Postal Service to the Commission). Commissioner Weisberg notes that his dissenting colleague would apparently resolve these issues of fact in Lavelle's favor based simply on the above unsworn explanation, without any factual record, without affording the Secretary the opportunity to present the testimony of Postal Service officials, and without permitting the judge to make any credibility determinations.

In October 1995, five years ago, the Commission implemented its E-Z Trial program to make it less burdensome for small businesses to challenge OSHA citations by providing a user-friendly forum to adjudicate non-complex health and safety cases more quickly and

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should set aside the dismissal order and schedule a hearing on the merits.<sup>4</sup>

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<sup>3</sup>(...continued)

economically. One impetus for the E-Z Trial program was that many small employers appearing *pro se* before the Commission did not get their day in court because of confusion regarding the legal processes involved or unnecessary obstacles in the path to resolving the case on the merits. In the past many notices of contest had been dismissed by judges because a small employer had failed to file an answer to the Secretary of Labor's complaint, or had not responded properly or promptly to the Secretary's request for discovery. The E-Z Trial process eliminated both the filing of a complaint by the Secretary and an answer by the employer. It favored mandatory disclosure of certain relevant information over the traditional discovery process. It also provided for a mandatory pre-hearing telephone conference with the judge early on to narrow disputed issues, agree upon facts, and attempt to settle the dispute.

The instant case contains proposed penalties totaling \$7,800 and does not involve complex issues of law or fact. However, this case was apparently not assigned to E-Z Trial because it includes an allegation of a repeat violation. Commissioner Weisberg believes that the Commission should re-examine its eligibility criteria for the E-Z Trial program and that cases should no longer be excluded solely because they involve an allegation of a repeat violation irrespective of the amount of the proposed penalty.

Finally, Commissioner Weisberg notes that the E-Z Trial program is currently being studied and evaluated by the Indiana Conflict Resolution Institute, School of Public and Environmental Affairs, Indiana University. He hopes that this study will encompass cases such as *Lavelle Construction*, and will consider and measure the appreciable impact on parties such as Lavelle, as well as the savings to the Commission in terms of time and resources, had this case been assigned to E-Z Trial. Had this case been eligible for E-Z Trial, it would have obviated the need to file an answer and would have provided for a prompt resolution of the merits of the Secretary's citation against Lavelle.

<sup>4</sup>Chairman Rogers notes that her dissenting colleague would remand this case for a hearing on the merits. As support for this result, her colleague points out that "the Commission has no way of knowing whether or not Lavelle's assertion that it did not receive the mailed complaint is correct, [and because] our own records show that the judge's order to show cause was returned undelivered to the Commission." However, Chairman Rogers emphasizes that the record indicates that the complaint was mailed to Lavelle at the address it provided and that the Postal Service attempted to deliver the show cause order to Lavelle at the same address. She agrees with her colleague that at this stage the Commission cannot confirm whether Lavelle in fact received the complaint or notifications about the certified mailing. However, in the absence of evidence to the contrary, it is reasonable to presume that the Postal Service officials properly discharged their duties. *See Powell v. Commissioner*, 958 F.2d 53, 54 (4th Cir. 1992). In this case, Lavelle has raised a material issue of fact by asserting that it did not receive these

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/s/ \_\_\_\_\_  
Thomasina V. Rogers  
Chairman

/s/ \_\_\_\_\_  
Stuart E. Weisberg  
Commissioner

Date: September 27, 2000

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<sup>4</sup>(...continued)  
documents. Accordingly, Chairman Rogers would give it the opportunity to present evidence supporting its assertion, which could provide a basis for a hearing on the merits.

VISSCHER, Commissioner, dissenting:

I would simply remand this case for a resolution of the merits of the Secretary's citation against Lavelle. I see no reason to prolong the proceedings by requiring both Lavelle and the Secretary (and any witnesses they may wish to call) to attend an additional hearing on Lavelle's assertions that it did not receive the mailed complaint and order to show cause.

The relevant facts are these. Lavelle timely filed a notice of contest to the citation. Thereafter the Secretary filed a complaint. Lavelle failed to file an answer. The judge issued an order to show cause as to why Lavelle's contest should not be dismissed. When Lavelle failed to respond to the order to show cause, the judge properly entered an order dismissing the notice of contest. Lavelle then timely petitioned the Commission for review of the judge's order. In response to the Commission's request for an explanation as to why the judge's order should be reversed, Lavelle indicated that it had received neither the Secretary's complaint nor the judge's order to show cause. While the Commission has no way of knowing whether or not Lavelle's assertion that it did not receive the mailed complaint is correct, our own records show that the judge's order to show cause was returned undelivered to the Commission.

It is unclear what evidence might be offered at a hearing that proves that Lavelle received the judge's order to show cause when in fact the unopened envelope and certified mail receipt in the Commission's files show that Lavelle did not receive it, or whether the majority believes that Lavelle's notice of contest might be dismissed even though Lavelle did not receive the order to show cause. Again, what is before us is simply whether Lavelle will have the opportunity to be heard on its notice of contest to the citation. The Commission ought not put up unnecessary obstacles to getting to the merits of this case.

/s/

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Gary L. Visscher  
Commissioner

Date: September 27, 2000

United States of America  
**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

Secretary of Labor,  
Complainant,  
V.  
LAVELLE CONSTRUCTION  
Respondent.

OSHRC DOCKET NO. 99-1921

**ORDER**

On **12/3/00** the undersigned issued an **ORDER TO SHOW CAUSE** to the Respondent as to why his Notice of Contest should not be dismissed for failure to file an answer to the complaint as required by the Commission Rules of Procedure. The Respondent failed to reply to the ORDER. His actions demonstrate either that he has abandoned the case or treats the Rules of Procedure of the Commission with disdain. This cannot be countenanced as it seriously impedes the administration of justice.

Accordingly, the Notice of Contest filed by the Respondent is dismissed. The Secretary's citation(s) and proposed penalties are **AFFIRMED** in all respects.

/s/

IRVING SOMMER  
Chief Judge

DATE: JAN 21 2000  
Washington, D.C.