

The end of the order stated, in capitalized, bold and underlined type:

FAILURE TO RESPOND TO THIS ORDER WILL RESULT IN ALL VIOLATIONS BEING AFFIRMED AND ALL PROPOSED PENALTIES BEING ASSESSED AGAINST RESPONDENT WITHOUT A HEARING.

The order was sent by certified mail and was signed for by Joe Manti on November 7. In a handwritten letter postmarked on November 11 and received by Chief Judge Sommer on November 16, Carolyn Manti wrote:

All equipment was in process of being dismantled & moved to other area of job site. Agent was aware of this. It was not improperly erected. By the time agent left equipment was moved and properly erected on different site. Agent was also aware of this.

This response was not served on the Secretary.

On December 17, the Secretary filed a motion to dismiss under Commission Rule 41(a),¹ 29 C.F.R. § 2200.41(a) or, in the alternative, for an order requiring a proper answer to the complaint. The Secretary argued that Manti failed to explain why it failed to file a timely answer and that its letter did not respond to each allegation in the complaint. Manti failed to respond to the motion. On January 7, 1993, Judge Richard Gordon, to whom the case had been assigned by Chief Judge Sommer, granted the Secretary's motion to dismiss Manti's notice of contest. Manti then filed a timely petition for discretionary review which raised substantive defenses to the citations and also stated that:

I have been in this family owned business for over 30 years. In that time there have been no serious accidents or a fatality. In sight [sic] of this I believe these fines & charges are unreasonable & unjust. I am trying to run

¹ Rule 41 provides:

§ 2200.41 Failure to obey rules.

(a) *Sanctions.* When any party has failed to plead or otherwise proceed as provided by these rules or as required by the Commission or Judge, he may be declared to be in default either:

(1) On the initiative of the Commission or Judge, after having been afforded an opportunity to show cause why he should not be declared to be in default; or

(2) On the motion of a party. Thereafter, the Commission or Judge, in their discretion, may enter a decision against the defaulting party or strike any pleading or document not filed in accordance with these rules.

(b) *Motion to set aside sanctions.* For reasons deemed sufficient by the Commission or Judge and upon motion expeditiously made, the Commission or Judge may set aside a sanction imposed under paragraph (a) of this rule.

a very small business to the best of my ability & keep my head above water at the same time. I have no money to hire and [sic] attorney, so I am pleading my own case. If an attorney is to be hired it will be one to file my bankruptcy proceedings as this will put me out of business. I do not have, nor ever have had, the amount of funds available to me that you are looking for.

This response was sent to the Department of Labor which forwarded it to the Commission.

II. Discussion

Under Commission Rule 41(b),² the Commission may set aside a dismissal for reasons it deems sufficient. As a result, the Commission has wide latitude and discretion in its review of sanctions imposed under Rule 41(a). *Choice Electric Corp.*, 14 BNA OSHC 1899, 1900, 1987-90 CCH OSHD ¶ 29,141, p. 38,941 (No. 88-1393, 1990).

In the usual case involving a dismissal for failure to file a timely answer, the employer not only failed to file an answer, but also did not respond to the judge's show cause order. *See e.g., Imageries*, 15 BNA OSHC 1545, 1992 CCH OSHD ¶ 29,639 (No. 90-378, 1992); *Choice Electric Corp.*; *Hickman*, 14 BNA OSHC 2193, 1991 CCH OSHD ¶ 29,278 (No. 90-1169, 1991); *Bywater Sales & Serv.*, 13 BNA OSHC 1268, 1986-87 CCH OSHD ¶ 27,896 (No. 86-1214, 1987). When reviewing these cases, the Commission's inquiry has been whether the employer can demonstrate sufficient reason to set aside the default. This has generally required remanding the case to the judge to afford the employer an opportunity to make that showing.³

² *See supra* note 1.

³ In *Imageries*, 15 BNA OSHC 1545, 1992 CCH OSHD ¶ 29,639 (No. 90-378, 1992), a case involving an employer appearing *pro se*, the Commission upheld the judge's dismissal after *Imageries* failed to respond to the Commission's briefing order. The Commission noted that

Pro se litigants are not exempt from following Commission rules and procedures that require all litigants to take *some* action or suffer a penalty. Virtually everyone is subject to laws and regulations that, when they are enforced, penalize those who choose not to respond. This is true of a parking ticket and a tax return, as well as a proceeding before this Commission or any state or federal court.

Id. at 1547, 1992 CCH OSHD at p. 40,131 (Emphasis in original).

Here, Manti responded to the show cause order. While the response did not “show cause” why the notice of contest should not be dismissed, it raised defenses to the citation and can be construed as an answer, especially under the Commission’s current Rule 34(b),⁴ 29 C.F.R. § 2200.34(b), which allows an employer to file as an answer a “short and plain statement denying those allegations in the complaint which the party intends to contest.” Manti apparently believed that this filing constituted a sufficient response to the judge’s show cause order.⁵

Employers appearing *pro se* are often confused by legal terminology and may not be fully cognizant of the legal technicalities of the judicial process. *Action Group, Inc.*, 14 BNA OSHC 1934, 1935, 1987-90 CCH OSHD ¶ 29,166, p. 39,018 (No. 88-2058, 1990). Because they cannot be expected to be as familiar with legal proceedings as a trained attorney, *pro se* employers are to be held to a standard of reasonable diligence. *Imageries*, 15 BNA OSHC at 1547, 1992 CCH OSHD at p. 40,131.

In our view, Manti’s response, while not technically complete, was sufficient to demonstrate that this *pro se* employer was proceeding with the requisite “reasonable diligence” sufficient to justify relief from the judge’s dismissal order. We will, therefore, reinstate Manti’s notice of contest, accept its response as an answer to the judge’s show cause order of November 5, 1992, and remand the matter to the judge for a hearing.

⁴ The Commission rules were amended on December 10, 1992, after the judge dismissed Manti’s notice of contest. 57 Fed. Reg. 41,676. The adoption of these new rules does not excuse an employer’s noncompliance with the rules then in effect. However, the Commission favors a decision based on the merits of the case rather than on a procedural flaw. *Better Baked Foods, Inc.*, 10 BNA OSHC 1382, 1383, 1982 CCH OSHD ¶ 25,873, p. 32,366 (No. 80-3689-A, 1982). That Manti’s answer would have satisfied current requirements shows that excusing its technical noncompliance with the rules then applicable would neither affect the integrity of the Commission’s procedures nor prejudice the Secretary’s ability to pursue the case.

⁵ In our view, a *pro se* employer could reasonably conclude that the proper response to a show cause order for failure to file an answer is to file the answer.

We also note that Manti raised specific defenses to the various violations for the first time in its petition for discretionary review. Under Commission Rule 34(b)(4),⁶ 29 C.F.R. § 2200.34(b)(4), affirmative defenses not raised in the answer may not be raised unless those defenses are otherwise asserted as soon as practicable. However, under Commission Rule 107,⁷ 29 C.F.R. § 2200.107, the Commission may, on its own motion, waive any rule where justice so requires. On remand, this case, for all practical purposes, will have not proceeded significantly beyond the complaint and answer stage. Since we find nothing in the record to indicate that the Secretary would be prejudiced by allowing Manti to pursue the defenses raised in its petition for discretionary review, and in view of the circumstances of this case, we find it appropriate to waive Commission Rule 34(b)(4) and allow Manti's petition for discretionary review to amend its answer of November 11, 1992.

The Commission is under an obligation to ensure that all parties to a controversy have a full, fair and equal opportunity to be heard. It also recognizes that those employers who are not trained in the law may require additional consideration of their circumstances. The Commission's rules, which have evolved over many years, are intended to enable its proceedings to progress smoothly and efficiently and assure fairness to all parties. Although the Commission's rules are not inflexible, there are limits to how liberally the Commission

⁶ Rule 34(b)(4) provides:

§ 2200.34 Employer contests.

.....

(b) *Answer.*

.....

(4) The failure to raise an affirmative defense in the answer may result in the party being prohibited from raising the defense at a later stage in the proceeding, unless the Judge finds that the party has asserted the defense as soon as practicable.

⁷ Rule 107 provides:

§ 2200.107 Special circumstances; waiver of rules.

In special circumstances not contemplated by the provisions of these rules and for good cause shown, the Commission or Judge may, upon application by any party or intervenor or on their own motion, after 3 working days notice to all parties and intervenors, waive any rule or make such orders as justice or the administration of the Act requires.

and its judges can interpret the rules to assist the *pro se* employer. See *Imageries*, 15 BNA OSHC at 1547, 1992 CCH OSHD at p. 40,131. Therefore, an employer that chooses to represent itself should be aware that a lack of familiarity with our procedures could jeopardize its ability to present its side of the case. For example, if Manti is to proceed, it should expect to both make and grant requests for information to prepare for the hearing. Manti must be ready to respond to various motions made by the Secretary, and engage in direct and cross-examination of witnesses at the hearing in sufficient detail to establish its defense. Therefore, we will forward to Manti a copy of the Commission's rules of procedure. We strongly urge Manti to become familiar with these rules.

Accordingly, the judge's order dismissing Manti's notice of contest is reversed and the matter is remanded to the Chief Administrative Law Judge for reassignment⁸ to a new judge with instructions to give Manti an opportunity to have a hearing in this matter.


Edwin G. Foulke, Jr.
Chairman


Velma Montoya
Commissioner

Dated: November 4, 1993

⁸ Judge Gordon is no longer with the Commission.



UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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Washington, DC 20036-3419

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Secretary of Labor,
Complainant,

v.

CAROLYN MANTI, d/b/a
MANTI HOMES,
Respondent.

Docket No. 92-2222

NOTICE OF COMMISSION DECISION AND REMAND ORDER

The attached Decision and Order of Remand by the Occupational Safety and Health Review Commission was issued on November 4, 1993. The case will be referred to the Office of the Chief Administrative Law Judge for further action.

FOR THE COMMISSION

Ray H. Darling, Jr.
Executive Secretary

November 4, 1993
Date

NOTICE IS GIVEN TO THE FOLLOWING:

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Carolyn Manti
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Administrative Law Judge
Occupational Safety and Health
Review Commission
Room 420
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SECRETARY OF LABOR
Complainant,
v.
MANTI HOMES
Respondent.

OSHRC DOCKET
NO. 92-2222

NOTICE OF DOCKETING
OF ADMINISTRATIVE LAW JUDGE'S DECISION

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on January 14, 1993. The decision of the Judge will become a final order of the Commission on February 16, 1993 unless a Commission member directs review of the decision on or before that date. **ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW.** Any such petition should be received by the Executive Secretary on or before February 3, 1993 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary
Occupational Safety and Health
Review Commission
1825 K St. N.W., Room 401
Washington, D.C. 20006-1246

Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Avenue, N.W.
Washington, D.C. 20210

If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 634-7950.

FOR THE COMMISSION

Ray H. Darling, Jr.
Executive Secretary.

Date: January 14, 1993

DOCKET NO. 92-2222

NOTICE IS GIVEN TO THE FOLLOWING:

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UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY & HEALTH REVIEW COMMISSION

LYNN MARTIN, Secretary of Labor, :
United States Department of Labor, :
Complainant, : OSHRC Docket
v. : NO. 92-2222
CAROLYN MANTI, d/b/a MANTI HOMES, :
Respondent. :

O R D E R

Complainant's Motion to Dismiss Respondent's Notice of Contest granted. Respondent's notice of contest is dismissed and the citations and proposed penalties are affirmed.

DATED: *January 7, 1993*
Boston, Massachusetts

SO ORDERED:


RICHARD W. GORDON
Judge, OSHRC