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| SECRETARY OF LABOR, | : | |
| | : | |
| Complainant, | : | |
| | : | |
| v. | : | OSHRC Docket No. 99-0189 |
| | : | |
| MERCHANT'S MASONRY, INC., | : | |
| | : | |
| Respondent. | : | |

ORDER AND REMAND

The Secretary has filed a Motion to Remand Matter for Settlement stating the parties agreed to settle this case and they are presently reducing the terms of the settlement to writing. The Secretary also states the parties have reached a settlement in *Secretary v. Merchant's Masonry, Inc.*, OSHRC Docket No. 99-2234, which is pending before Administrative Law Judge Nancy J. Spies, and requests that this case be remanded to Judge Spies so the parties may move to consolidate both cases for settlement purposes.

The Secretary's Motion is granted. This case is remanded to Judge Spies for further proceedings.

So ordered.

Date: July 27, 2000

/S/

Thomasina V. Rogers
Chairman

/S/

Gary L. Visscher
Commissioner

/S/

Stuart E. Weisberg
Commissioner

99-0189

NOTICE IS GIVEN TO THE FOLLOWING:

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| Respondent. | : | |

Appearances:

Richard M. Munoz, Esquire
Dallas, Texas
For the Secretary.

Steven E. Sanders, Esquire
Baton Rouge, Louisiana
For the Respondent.

Before: Chief Judge Irving Sommer

DECISION AND ORDER ON REMAND

This proceeding is before the Occupational Safety and Health Review Commission (“the Commission”) pursuant to section 10 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* (“the Act”). The Occupational Safety and Health Administration (“OSHA”) inspected a construction site of Respondent in Denham Springs, Louisiana, on December 12, 1998, resulting in the issuance of a citation that alleged a “repeat” violation and proposed a penalty of \$21,000.00. Respondent timely contested the citation. On January 25, 1999, OSHA sent Respondent a letter advising that it had forwarded the notice of contest to the Commission, and on February 1, 1999, the Commission issued its “Notice of Docketing and Instructions to Employer” letter to the parties. The Secretary filed her complaint on March 29, 1999, and, after Respondent did not file an answer, the undersigned on May 10, 1999, issued an order to show cause why the notice of contest should not be dismissed. Respondent filed no response to the order, and on June 15, 1999, the undersigned issued a decision and order dismissing the notice of contest.

On June 24, 1999, Respondent filed a petition for review, setting out the reasons for its failure to file an answer and respond to the orders. Specifically, Respondent stated that its secretary had gone on maternity leave and that the temporary secretary hired in the interim had put the complaint and orders in

the office of the company president instead of giving them to the office manager; as a result, the documents were overlooked until after the case had been dismissed. On September 24, 1999, the Commission remanded this matter and directed the undersigned to "take further evidence or follow whatever other procedure he deems appropriate to determine whether there is good cause to set aside his order of default and allow Merchant's to file its answer to the Secretary's complaint." A hearing in this regard was held on December 9, 1999.

The Testimony

Theresa Merchant, Respondent's office manager for three years, testified that the number of company employees ranged from 100 to 120 and that there were five other office workers, including her assistant, a secretary, an estimator, a project manager and a safety person; Keith Merchant, the president, was usually in the field.¹ Ms. Merchant said the procedure for mail was for the secretary to date-stamp it and give it to the appropriate person and that the previous secretary, Joleen Guillot, had been very competent and had known to not put anything in Mr. Merchant's office as he was rarely in; however, Guillot went on maternity leave around February 1, 1999, and Ms. Merchant believed that although she had told Jill Trahan, the temporary secretary, to give all the mail to her or her assistant so they could tell her who it went to, Trahan had mistakenly put the documents in this case in Mr. Merchant's office. Ms. Merchant noted that Mr. Merchant found the documents under some construction papers on his credenza in June of 1999, as he was cleaning out his office; she also noted that she had spot-checked Trahan's work and that it had seemed fine. (Tr. 6-35).

Ms. Merchant further testified that the company had been cited before and that she had signed settlement agreements in this regard. She said she had been aware of the subject citation and the notice of contest and that she and Mr. Merchant had discussed it and wondered when they would receive something. She also said that although she did not specifically remember reading it, she was confident that Guillot had given her C-1, a January 25, 1999 letter from OSHA stating that it had received the notice of contest and that the company would be hearing from the Commission. Ms. Merchant indicated this was the first time mail had been misplaced and that while she had never felt the need to check Mr. Merchant's desk and credenza before she did so now. (Tr. 12-21; 25-31).

Keith Merchant testified that his company had been in business since 1980, that he spent most of his time overseeing jobs, and that the time he was in his office could vary from once in two

¹Keith and Theresa Merchant are husband and wife. (Tr. 29).

weeks to two or three times in one week. He further testified that he had contested OSHA citations and gone through the hearing process before and that although he and his wife had been expecting to hear something in this case he had not known how long it would take. Merchant said he had been in his office a number of times from February 1 to the time he found the documents in June and that he was shocked when he discovered them and immediately called his attorney; however, he accepted responsibility in this matter, noting that he had been very busy and that he had seen some paperwork at one time that he could have confused with another citation his company had received. (Tr. 35-47).

Discussion

As set out in the remand order, Commission Rule 41(b) provides for the setting aside of a default order for “reasons deemed sufficient.” In similar cases, the inquiry has been whether the employer has demonstrated “good cause” or “excusable neglect” that justifies setting aside the default judgment. *See Choice Elec. Corp.*, 14 BNA 1899 (No. 88-1393, 1990); *Action Group, Inc.*, 14 BNA 1934 (No. 88-2058, 1990); and cases cited therein. The Commission has consistently held that an employer, even one appearing *pro se*, must exercise reasonable diligence and that mere carelessness or negligence does not constitute excusable neglect. *Keefe Earth Boring Co.*, 14 BNA 2187, 2192 (No. 88-2521, 1991). The Commission has also consistently held that a business must maintain orderly procedures for handling important documents and has denied relief where an employer’s document-handling procedures were to blame for an untimely filing. *E.K. Constr. Co.*, 15 BNA OSHC 1165, 1166 (No. 90-2460, 1991).

The record indicates that Theresa Merchant received and read C-1, OSHA’s January 25, 1999 letter advising that the company would be hearing from the Commission. The record also indicates that four and one-half months passed between the time Respondent received C-1 and my order of June 15, 1999, dismissing the notice of contest, and Keith and Theresa Merchant both testified that they had discussed this matter and were wondering when they would receive something. Finally, the record shows that during the period between C-1 and my order of June 15, 1999, the following documents were issued:

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| Commission’s Notice of Docketing | 2/1/99 |
| Secretary’s Motion for Extension of Time | 2/2/99 |
| Order Granting Secretary’s Motion | 2/16/99 |
| Secretary’s Complaint | 3/29/99 |
| Order to Show Cause | 5/10/99 |

Based on the record and the Commission precedent set out above, I conclude Respondent

has not met its burden of establishing good cause or excusable neglect. The company was on notice it would be receiving documents in this case, and, in the exercise of reasonable diligence, it should not have allowed over four months to pass without checking into this matter, particularly in light of its previous experience with OSHA citations. For example, Respondent could have contacted OSHA, which could have referred it to the Solicitor's Office or the Commission, or Theresa Merchant could simply have spoken with Jill Trahan, the temporary secretary, to ensure she was handling the mail properly.² However, Respondent took none of these steps, and Theresa Merchant specifically testified she did not talk to Trahan about the mail, although she did, as indicated above, spot-check some of her work. (Tr. 22; 25). Moreover, I note that there were five documents issued after C-1 and before my order of dismissal, as set out *supra*, all of which were evidently put in Keith Merchant's office contrary to Respondent's stated mail-handling procedure; this evidence persuades me that Theresa Merchant failed to properly monitor Trahan's work and that Respondent's mail-handling procedures were inadequate. Finally, Theresa Merchant indicated that Keith Merchant's desk and credenza were piled with paperwork and that he found the documents when he was cleaning out his office, and he himself indicated that he had been very busy and that he may well have seen the subject documents and confused them with another citation the company had received; Teresa Merchant also indicated that she now checks his office. (Tr. 11-12; 17-20; 26-27; 39; 43; 46).

In finding that Respondent has not met its burden of proving good cause or excusable neglect, I have considered the fact that the company was proceeding without an attorney during the relevant period. However, as noted above, Respondent has had previous experience in OSHA matters and, in any case, even a *pro se* employer must exercise reasonable diligence. I have also considered the fact that the proposed penalty is \$21,000.00 and Keith Merchant's testimony indicating that the imposition of this penalty would represent an extreme hardship for the company. Although I am sympathetic to Respondent's plight, I am constrained by the facts of this case and Commission precedent to conclude that there is not "good cause to set aside [my] order of default

²Respondent could also have called its attorney and asked him to check into this matter.

and allow Merchant's to file its answer to the Secretary's complaint." Accordingly, my previous order, which dismissed the notice of contest and affirmed the citation and penalty in all respects, is AFFIRMED.

So ORDERED.

/s/

Irving Sommer
Chief Judge

Date: 14 FEB 2000