



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.

ARCH-TECH CONSTRUCTION,

Respondent.

OSHRC Docket No. 19-1922

REMAND ORDER

Before: SULLIVAN, Chairman; ATTWOOD and LAIHOW, Commissioners.

BY THE COMMISSION:

On July 1, 2020, Administrative Law Judge William S. Coleman issued an order finding Respondent in default, dismissing its notice of contest, and affirming the underlying two-item serious citation issued by the Occupational Safety and Health Administration. For the following reasons, we remand this case for the judge to reconsider his order in light of claims made by Respondent in its petition for discretionary review.

Specifically, Respondent's owner (appearing pro se) claims that he did not call in for several telephone conferences scheduled by the judge because of the ongoing COVID-19 pandemic and his belief after hearing the Governor of Massachusetts (where the OSHA Regional Solicitor's Office handling this matter is located) say on the news that all courts were closed. According to Respondent, he attempted to call in for a scheduled telephone conference on one occasion but did not receive a response and could not reach anyone to assist him. Additionally, he stated in his petition for discretionary review that he was under the belief that the citation would be withdrawn. He also claims that, after last speaking with the Secretary's counsel in the Regional Solicitor's Office by telephone on March 9, 2020, he then tried to reach him on seven occasions

between March 30 and May 13, 2020, and never received a response.¹ Due to his belief that the “courts” were closed and his repeated inability to reach anyone on the telephone, Respondent’s owner avers that the pandemic made it confusing and “very difficult to know what to do in these unknown and crazy times that nobody has ever been through or has past experiences with on how to handle” Finally, Respondent’s owner requests the opportunity to establish the company’s defense to the citation and claims that now that he knows the “court is open,” he will appear by telephone or in person as ordered.²

Based on the record before the judge at the time he issued his dismissal order, we find it was appropriate for him to impose the sanction of default for Respondent’s repeated failure to participate in Commission proceedings. *See* Commission Rule 101(a), 29 C.F.R. § 2200.101(a) (“When any party has failed to plead or otherwise proceed as provided by these rules or as required by the Commission or the Judge, the party may be declared to be in default either on the initiative of the Commission or the Judge, after having been afforded an opportunity to show cause why the party should not be declared to be in default, or on the motion of a party.”). It is well established, however, that the Commission “favors deciding cases on their merits,” and the circumstances alleged in Respondent’s petition for discretionary review—namely, those surrounding the ongoing COVID-19 pandemic, the owner’s apparent confusion as to who should be contacted to ascertain the status of the case, and the alleged failure of the Regional Solicitor’s office to respond to the Respondent’s telephone calls—warrant remanding to the judge for him to consider these proffered reasons for Respondent’s failure to participate in these proceedings.³ *See, e.g., DHL Express, Inc.,*

¹ Counsel for the Secretary told the judge during the April 28, 2020 telephone conference that he had last spoken with Respondent’s owner around mid-March and since that conversation, Secretary’s counsel had left voice messages for the owner but had not spoken with him.

² Respondent’s owner claims that his company is not the employer of the employee who is the subject of the fall protection citation, as his company does not have any employees. He also asserts that he attempted to prove to OSHA that the employee in question was employed by a subcontractor and that he had ensured that a personal fall arrest system was on the job and in use by the subcontractor.

³ Apparently adding to this confusion is Respondent’s claim that the Secretary’s counsel told the owner that if on March 26, 2020, the subcontractor involved in the case were found to be in violation of the cited fall protection provisions, the citation issued to Respondent would be withdrawn. Although the Secretary has prosecutorial discretion to cite more than one employer on a multi-employer worksite, *see Cuyahoga Valley Ry. Co. v. UTU*, 474 U.S. 3, 5-7 (1985), the owner’s apparent belief that Respondent’s citation could be withdrawn during this timeframe

21 BNA OSHC 2179, 2180 (No. 07-0478, 2007); *see* Commission Rule 101(b), 29 C.F.R. § 2200.101(b) (“For reasons deemed sufficient by the Commission or the Judge . . . , the Commission or the Judge may set aside a sanction imposed under paragraph (a) of this section.”).

Accordingly, we remand the case for the judge to reconsider his order in light of the claims raised in Respondent’s petition for discretionary review.⁴ In remanding this case for reconsideration, we emphasize the unprecedented circumstances surrounding the COVID-19 pandemic.

SO ORDERED.

/s/
James J. Sullivan, Jr.
Chairman

/s/
Cynthia L. Attwood
Commissioner

/s/
Amanda Wood Laihow
Commissioner

Dated: September 25, 2020

aligns with his claimed attempts to contact Secretary’s counsel numerous times from March 30 through May 13, 2020.

⁴ We pass no judgment on the veracity of Respondent’s allegations and leave it to the judge to determine whether dismissal remains an appropriate sanction. We also leave it to the judge to determine the best way to proceed—for instance, whether scheduling a telephone conference or remote hearing, or requesting written sworn affidavits from the parties concerning the claims in Respondent’s petition may be warranted.



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SECRETARY OF LABOR,

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v.

ARCH-TECH CONSTRUCTION,

Respondent.

OSHRC DOCKET No. 19-1922

ORDER OF DISMISSAL

Pursuant to Commission Rule 101(a), 29 C.F.R. § 2200.101(a), the Respondent, Arch-Tech Construction, is declared to be in default, and its notice of contest is dismissed, as described below.

Background

On or about October 3, 2019, an official from the Providence, Rhode Island, area office of the Occupational Safety and Health Administration (OSHA) commenced OSHA inspection number 1440641 at a worksite at 46 Curran Road, Cumberland, Rhode Island. As a result of that inspection, on October 30, 2019, OSHA issued a two-item serious citation that alleged violations of certain workplace safety standards codified in 29 C.F.R. Part 1926, and proposing penalties totaling \$7,956.

The citation was sent to the Respondent at 57B Rodman Street, Narragansett, Rhode Island 02882. By an email sent on November 25, 2019 from Mr. Eric Borelli to an

official at OSHA's area office in Providence, the Respondent contested the citation and proposed penalties. OSHA then duly forwarded the contested matter to the Occupational Safety and Health Review Commission (Commission). *See* 29 C.F.R. §§ 1903.17(a) and 2200.33. On December 11, 2019, the Commission's Executive Secretary issued a "Notice of Docketing and Instructions to the Employer" that assigned the matter Commission docket number 19-1922.

On January 2, 2020, the Commission's Chief Judge designated the matter to be resolved under the Commission's rules for Simplified Proceedings, 29 C.F.R. Part 2200, Subpart M, and assigned the matter to the undersigned Commission Judge for disposition.

On January 8, 2020, the undersigned issued a notice and scheduling order that included a notice of a prehearing telephone conference to be conducted on February 13, 2020. However, before that scheduled telephone conference, the Complainant filed and served a motion dated January 22, 2020 seeking discontinuance of simplified proceedings. The Respondent did not file a response to the motion pursuant to Commission Rule 204(b). 29 C.F.R. 2200.204(b). The Respondent also did not call in for the telephone conference on February 13, 2020. By order dated February 14, 2020, the Complainant's motion to discontinue simplified proceedings was granted and the matter was ordered to proceed as a conventional case.

The Complainant then timely filed and served his complaint dated March 6, 2020. The Respondent failed to file or serve its answer to the complaint within the 21-day period provided by Commission Rule 34(b). 29 C.F.R. § 2200.34(b). By notice and order dated April 7, 2020, the undersigned scheduled a hearing on the merits to commence on

November 5, 2020 in Providence, Rhode Island, and also provided notice of a telephone conference for April 28, 2020 at 10:30 a.m. EDT to address pre-hearing scheduling matters.

The Respondent did not call in for the April 28, 2020 telephone conference. The attorney for the Secretary reported that he had last spoken with Mr. Eric Borrelli of the Respondent around mid-March, and that since that conversation he had left voice messages for Mr. Borrelli but had not spoken with him.

The undersigned determined to extend the time for the Respondent to file and serve its answer or other appropriate responsive pleading or motion would to May 15, 2020, in view of the extraordinary national circumstances respecting the COVID-19 pandemic, and considering also that the Respondent was a self-represented party. An order providing notice of the extension was issued on April 29, 2020, and this order also scheduled a pre-hearing telephone conference to address pre-hearing scheduling matters for May 29, 2020, at 11:00 a.m. EDT. The order also contained the following admonition:

The Respondent should note that the failure of the Respondent to file a responsive pleading or appropriate motion, or to participate in the scheduled telephone conference, could provide grounds for determining the Respondent to be in default and to affirm the citation and proposed penalties of \$7956 arising out of OSHA inspection number 1440641 in their entirety without a hearing pursuant to Commission Rule 101, 29 C.F.R. § 2200.101.

The Respondent did not file an answer or responsive pleading by the May 15th extension (or at anytime thereafter) and did not call in for the telephone conference on May 29, 2020.

On June 1, 2020, the undersigned issued an order that was captioned “Order to Show Cause to Arch-Tech Construction Why the Notice of Contest Should Not Be Dismissed, and Notice of Telephone Conference on June 30, 2020” (Order to Show Cause). The Order to Show Cause directed the Respondent to file a written response to the Order to Show Cause no later than June 19, 2020, and in that response show cause “why the Respondent should not be declared to be in default and the citation and proposed penalties should not be affirmed due to the Respondent’s failure to proceed as provided by the Commission Rules of Procedure and participate as required.” The Order to Show Cause also scheduled another mandatory telephone conference for 10:30 a.m. EDT on June 30, 2020, for the purpose of addressing the Respondent’s anticipated response to the Order to Show Cause. The Order to Show Cause contained the following notice in the final numbered paragraph:

Compliance. The Respondent should take notice that if the Respondent fails to respond to this order, continues to fail to file its answer, or fails to participate in the telephone conference on June 30, 2020, the alleged violations arising out of inspection number 1440641 may be affirmed and the proposed penalties of \$7956 may be assessed against Respondent without a hearing under Commission Rule 101(a), 29 C.F.R. § 2200.101(a).

The Order to Show Cause was sent to the Respondent in two separate mailings—one by regular mail and the other by certified mail, return receipt requested. The regular mailing was not returned by the postal service undelivered and is thus presumed to have been delivered. *See Legille v. Dann*, 544 F.2d 1 (D.C. Cir. 1976) (noting that there is a rebuttable presumption that the postal service has delivered to the addressee a properly addressed, stamped and deposited mailing).

The Respondent did not file a response to the Order to Show Cause by the time specified in the order (June 19, 2020) or anytime thereafter. The Respondent did not call in for the telephone conference that was conducted as scheduled on June 30, 2020. The attorney for the Secretary called in for the Secretary and reported having had no subsequent contact with Mr. Borelli or anyone else representing the Respondent.

Discussion

Commission Rule 101(a), codified at 29 C.F.R. § 2200.101(a), provides in part as follows:

Sanctions. When any party has failed to plead or otherwise proceed as provided by these rules or as required by the . . . Judge, the party may be declared to be in default . . . on the initiative of . . . the Judge, after having been afforded an opportunity to show cause why the party should not be declared to be in default Subsequently, . . . the Judge, in [his] discretion, may enter a decision against the defaulting party

The Commission “follows the policy in law that favors deciding cases on their merits.” *DHL Express, Inc.*, 21 BNA OSHC 2179, 2180 (No. 07-0478, 2007). Rule 101(a) nevertheless permits the harsh sanction of dismissal of a notice of contest where a party has displayed a “pattern of disregard” of Commission proceedings. *Philadelphia Constr. Equip., Inc.*, 16 BNA OSHC 1128, 1131 (No. 92-899, 1993); *Architectural Glass & Metal Co.*, 19 BNA OSHC 1546, 1547 (No. 00-0389, 2001); *see also* Commission Rule 101(b), 29 C.F.R. § 2200.101(b) (a default sanction may be set aside “[f]or reasons deemed sufficient by the Commission or the Judge and upon motion . . . expeditiously made”).

The Respondent’s failure to call in for four consecutive telephone conferences, failure to file an answer or other appropriate pleading responsive to the complaint even

after being provided additional time to do so, and failure to respond to the Order to Show Cause, together reflect a pattern of disregard of Commission proceedings that warrants an order of default. The Order to Show Cause and the notice dated June 1, 2020 made it abundantly clear that if the Respondent continued to fail to participate, the undersigned would likely issue an order of default that would have the effect of affirming the citation in its entirety.

It is impossible to move this case forward to hearing in view of the Respondent's continuing failure to participate. There is no reasonable basis to conclude that if the hearing that is scheduled for November 5, 2020 were to be conducted that the Respondent would participate in any prehearing proceedings or would appear at a hearing to defend the matters. *Cf.* Commission Rule 64(a), 29 C.F.R. § 2200.64(a) (providing that "[t]he failure of a party to appear at a hearing may result in a decision against that party"). The only reasonable conclusions to be drawn from the Respondent's continuing failure to participate are that the Respondent has willfully defaulted and abandoned its case before the Commission, or that the Respondent is disdainful of the orders of the Commission, or both.

The Respondent's failure to participate is prejudicial to the administration of justice and to the Secretary's enforcement responsibilities under the OSH Act. The Commission cannot countenance the prejudicial effects of the Respondent's continuing failure to participate in the proceedings. Dismissal of the Respondent's notice of contest is the necessary and appropriate remedy to cure the prejudicial impact of the Respondent's persistent and continuing failures.

ORDER

For these reasons, the Respondent is determined to be in DEFAULT, and its notice of contest is DISMISSED. The two-item serious citation issued to the Respondent on October 30, 2019 in connection with Inspection Number 1440641 and the proposed penalties for each citation item are AFFIRMED in their entirety. The hearing that had been scheduled to commence on November 5, 2020 is cancelled.

SO ORDERED.

/s/ William S. Coleman

WILLIAM S. COLEMAN

Administrative Law Judge

DATED: July 13, 2020