



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.

GENERATIONAL BUILDINGS, LLC,

Respondent.

OSHRC Docket No. 21-0447

REMAND ORDER

Before: ATTWOOD, Chairman and LAIHOW, Commissioner.

BY THE COMMISSION:

On October 13, 2021, Administrative Law Judge Patrick B. Augustine issued an order of dismissal based on the failure of Generational Buildings, LLC, appearing pro se, to register with the Commission's Electronic Filing System (EFS) and respond to an Order to Show Cause. For the reasons that follow, we set aside the judge's decision and remand this case for further proceedings in a manner consistent with this order.

BACKGROUND

Following an inspection on January 8, 2021, the Occupational Safety and Health Administration issued Generational Buildings a four-item serious citation with a proposed penalty of \$21,844. Both parties filed timely pleadings: the Secretary filed the complaint on July 6, 2021, and Respondent filed the answer on July 20, 2021. The case was assigned to the judge on August 17, 2021. The Notice of Assignment issued to the parties includes a document titled "Important Notice" that informs them of the requirement to comply with Commission Rule 8(c), 29 C.F.R. § 2200.8(c), which mandates that all documents be filed electronically using the Commission's EFS. A self-represented party, however, "may submit a written statement to the Judge requesting

an exemption from the mandatory e-filing requirement on the grounds that it would place an undue burden on them to comply with the requirement.” Commission Rule 8(c)(2), 29 C.F.R. § 2200.8(c)(2).

Sometime between August 17 (the date of assignment) and August 25, 2021 (the issuance date of the Order to Show Cause), the judge’s Legal Assistant twice called Generational Buildings’ office to remind the company of the need to register with and use the Commission’s EFS to file all documents, and to offer any assistance in doing so. The first time, the Legal Assistant left a message on the company’s business number, and the second time, the Legal Assistant spoke with an unnamed person who said that they would pass the message on. Generational Buildings did not respond to either of these messages, nor did it register with the EFS.

On August 25, 2021, eight days after the Notice of Assignment was issued, the judge issued an Order to Show Cause giving the company 14 days to file an explanation as to why it had failed to register with the EFS or seek an exemption based on undue hardship, and, if not seeking an exemption, to register or risk dismissal in favor of the Secretary. *See* Commission Rule 101(a); 29 C.F.R. § 2200.101(a) (judge may declare party in default for failing to plead or otherwise proceed as required after giving party opportunity to show cause). After Generational Buildings failed to respond to the show cause order, the judge issued the order dismissing the company’s notice of contest and affirming the citation. Generational Buildings, now represented by counsel, has timely filed a petition with the Commission seeking review of the judge’s decision.

DISCUSSION

“Whether dismissal is appropriate in any situation depends on whether a party’s behavior demonstrates contumacy, whether the other party suffered prejudice, and whether other aggravating circumstances were present.” *Caterpillar, Inc.*, 17 BNA OSHC 1507, 1509 (No. 94-347, 1996) (citations omitted). Here, the judge found that the company’s “repeated failures to engage in the litigation process illustrate a pattern of disregard for the Commission’s proceedings as well as contumacious conduct.” Specifically, the judge stated that Generational Buildings was “given multiple opportunities and plenty of time to comply with Commission Rules of Procedure and this Court’s Notice and Order, and the Court has yet to receive any communication or contact from Respondent.” Noting that the case had been pending for “nearly three months,” the judge found that the delay caused by the company’s failure to register with the EFS was attributable to Generational Buildings alone since it was self-represented.

We find that dismissal is too harsh of a sanction under the circumstances of this case. *Architectural Glass & Metal Co.*, 19 BNA OSHC 1546, 1547 (No. 00-0389, 2001) (“Although a judge has very broad discretion in imposing sanctions for noncompliance with Commission Rules of Procedure or his own orders, the judge must not impose a sanction that is too harsh under the circumstances of the case.”) The record shows that the judge gave this pro se Respondent only eight days after the Notice of Assignment was issued to either register with the EFS or seek an exemption before issuing an Order to Show Cause threatening dismissal.¹ While the judge’s office did make two attempts in the span of a week to contact Generational Builders about the EFS requirement, it is unclear whether the company—which, according to its notice of contest, consists of three employees—ever received those messages or otherwise understood the need to immediately register with the EFS. It would have been reasonable for the judge to provide the company, as a small employer, with more than a few days to respond to the Legal Assistant’s phone calls. Indeed, the Commission has consistently made “allowances for pro se employers who have failed, through ignorance of our rules and of legal procedures, to comply with its procedural requirements.” *Sealtite Corp.*, 15 BNA OSHC 1130, 1133 (No. 88-1431, 1991) (citations omitted). Here, rather than move to issue a show cause order, the judge could have issued an interim order highlighting the registration requirement and explaining that as a self-represented party, the company could request an exemption due to hardship.

We also find that the shortcomings identified by the judge in support of his dismissal do not support a finding of contumacy or a pattern of disregard for Commission proceedings, particularly where Generational Builders was in fact participating in the case, as evidenced by its timely filed answer. *Compare Jessica Hicks*, 25 BNA OSHC 2227, 2228 (No. 16-0757, 2016) (dismissal too harsh when judge’s finding of contumacy rested solely on pro se respondent’s single failure to respond to show cause order); *Tom Reed Contracting*, 25 BNA OSHC 1649, 1650 (No. 14-1659, 2015) (default set aside and conduct found not contumacious when pro se respondent failed to file answer and respond to second show cause order but responded to first show cause

¹ Of note, the certified mail receipt sent with the Order to Show Cause was signed on September 2, 2021, which means it took eight days for Generational Buildings to receive that order after its issuance. If mail in the company’s region operates at a consistent pace, it seems entirely possible that Generational Buildings had just barely received the Notice of Assignment at the time the judge issued the Order to Show Cause.

order with request for rescheduling due to serious medical condition); *Heave Ho Crane Co.*, 24 BNA OSHC 2058, 2060-61 (No. 14-0250, 2014) (default set aside and conduct found not contumacious when pro se respondent failed to file required position statement and confer with Secretary but explained that response to show cause order was not in affidavit form as stipulated because of internet issues) *with Phila. Constr. Equip., Inc.*, 16 BNA OSHC 1128, 1130-31 (No. 92-899, 1993) (finding a pattern of disregard where pro se respondent consistently did not respond until it received orders threatening dismissal or default, failed to appear for a hearing, and appeared late at a reinstatement hearing); *Sealtite Corp.*, 15 BNA OSHC at 1134 (finding pro se respondent in default after lengthy pattern of noncompliance with Commission rules and the judge's orders). In addition, we note that the Secretary has not claimed any prejudice by the company's failure to register with the EFS or respond to the judge's show cause order.

Under these circumstances, we set aside the judge's decision and remand the case for further proceedings.² *See* Commission Rule 101(b); 29 C.F.R. § 2200.101(b) (motion to set aside sanctions).

SO ORDERED.

/s/ _____
Cynthia L. Attwood
Chairman

/s/ _____
Amanda Wood Laihow
Commissioner

Dated: December 2, 2021

² Now that Generational Buildings is represented by counsel, it can no longer seek an exemption from the EFS based on hardship and must register to file all documents using the system. Commission Rule 8(c); 29 C.F.R. § 2200.8(c).



OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

721 19th Street, Room 407
Denver, Colorado 80202-2517

SECRETARY OF LABOR,
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v.

GENERATIONAL BUILDINGS, LLC

Respondent.

OSHRC DOCKET NO. 21-0447

Attorneys and Parties:

Boyce N. Richardson, Esq., Office of the Solicitor, U.S. Department of Labor, Kansas City, MO
For Complainant

Melvin Troyer, Self-Represented Litigant, Jamesport, MO
For Respondent

JUDGE: First Judge Patrick B. Augustine, United States Administrative Law Judge

DECISION AND ORDER OF DISMISSAL PURSUANT TO 29 C.F.R. § 2200.101

Procedural History

This proceeding is before the Occupational Safety and Health Review Commission (Commission) pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* (Act). The Occupational Safety and Health Administration (OSHA) conducted an inspection of a Generational Buildings, LLC (Respondent) worksite at 3823 N. Cobbler Rd., Independence, MO on January 8, 2021. As a result of the inspection, OSHA issued a Citation and Notification of Penalty (Citation) to Respondent alleging four serious violations of the Act with a proposed penalty of \$21,844.00. The Citation was issued on March 9, 2021. Respondent timely filed a notice of contest (Notice of Contest).

This case was designated to proceed under conventional proceedings of the Commission. The Complaint was filed on July 6, 2021. On July 7, 2021, Respondent filed a communication which the Court deems to be an Answer. On August 17, 2021, Chief Judge Covette Rooney assigned this matter to the Court by entering a *Notice of Assignment of Review Commission Judge* (Assignment Notice). Attached to the Assignment Notice was documentation titled as an Important Notice in which Respondent was informed of the requirement to comply with Commission Rule 8(c), 29 C.F.R. § 2200.8(c).¹ Commission Rule 8(c)² requires all parties to register with the Commission's Electronic Filing System (EFS) and to file all pleadings and documents through the EFS. The Rule also has a provision notifying self-represented litigants (such as Respondent in this case) that it may seek an exemption from complying with the EFS requirements by filing a written statement, supported by facts, explaining that complying with the EFS requirements would place an undue burden upon it. Commission Rule 8(c)(2) sets forth the procedures for filing the request for exemption based on undue burden.

Upon the Court receiving this case, the Court's Legal Assistant twice called Respondent's office to remind Respondent of the need to register with and use the Commission's EFS to file all documents and to offer any assistance in registering. The Legal Assistant once left a message on the business number of Respondent. On a second occasion, the Legal Assistant spoke with a woman who answered the telephone who indicated she would take a message and pass it on. No messages were received from Respondent from the telephone outreach.

¹ The Commission's EFS is not a new creature to the Commission or courts. The implementation of the EFS follows from the evaluation of implemented electronic filing systems in federal courts and other federal adjudicatory agencies. Much thought was given to the needs of attorneys and self-represented litigants in creating a workable EFS for the Commission.

² Commission Rule 8(c), which requires all parties to register with the Commission's EFS, became effective on June 10, 2019. Rules of Procedure, 84 Fed. Reg. 14554 (April 10, 2019). Technical Amendments, 85 Fed. Reg. 65220 (October 15, 2020) (to be codified at 29 C.F.R. pt. 2200).

On August 25, 2021, the Court entered an *Order to Show Cause* in which Respondent was placed on notice that its Notice of Contest could be dismissed, and the Citation affirmed. The Court specifically laid out in the *Order to Show Cause* that unless Respondent registered with the EFS or filed a written statement seeking an exemption based on undue hardship that its failure to take one of the above actions could result in the Court dismissing its Notice of Contest and affirming the Citation.

The *Order to Show Cause* was sent certified United States mail, return receipt requested, as required under Commission Rules. Commission Rule 7(o)(2), 29 C.F.R. § 2200.7(o)(2). The *Order to Show Cause* was signed for and received by a representative of Respondent on September 2, 2021. As of the date of this Decision and Order, Respondent has not: (i) responded to the *Order to Show Cause*; (ii) registered with the Commission's EFS; or (iii) filed a written statement with the Court seeking an exemption based on undue hardship.

Jurisdiction

The Commission has jurisdiction over this action pursuant to section 10(c) of the Act due to the filing of a *Notice of Contest* by Respondent. 29 U.S.C. § 659(c).

Controlling Case Law

The Commission has held that “[w]here it is highly probable that a case will be appealed to a particular circuit, the Commission generally has applied the precedent of that circuit in deciding the case— even though it may differ from the Commission's precedent.” *Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2067 (No. 96-1719, 2000). The Court applies the precedent of the Eighth Circuit where it differs from the Commission in deciding this case.

Although the Commission recognizes the difficulties a self-represented litigant may face when participating in the Commission's proceedings, the Commission still requires the self-

represented litigant to follow the rules and exercise reasonable diligence in the legal proceedings in which it is taking part. *Sealtite Corp.*, 15 BNA OSHC 1130 (No. 88-1431, 1991). An unrepresented employer must “exercise reasonable diligence in the legal proceedings” and “must follow the rules and file responses to a judge's orders, or suffer the consequences, which can include dismissal of the notice of contest.” *Wentzel d/b/a N.E.E.T. Builders*, 16 BNA OSHC 1475, 1476 (No. 92-2696, 1993) (citations omitted).

Discussion

Commission Rule 101(a) provides:

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 on the initiative of the Commission or the Judge, after having been afforded an opportunity to show cause why he should not be declared in default Thereafter, the Commission or Judge, in their discretion, may enter a decision against the defaulting party

This is a case of first impression since no Commission case law exists on the question of whether the failure of a Respondent to register in the EFS after Court orders to do so may result in dismissal of Respondent’s Notice of Contest and an affirmance of the Citation. Also, as noted above, Respondent has been provided an opportunity to show cause why it should not be held in default and failed to respond to the Court’s Assignment Notice entered on August 17, 2021, and the Court’s *Order to Show Cause* issued on August 25, 2021.

Federal Court’s Holdings on Failure to Register

While no Commission case law exists on the question presented, federal courts have ruled on this issue. Federal courts, who have addressed the issue, have done so under Federal Rule of Civil Procedure 41(b) (“Rule 41(b)”).

Dial v. Mix, No. 3-19CV-1864 N-BK, 2019 WL 6702656 (N.D. Tex, Oct. 30, 2019) presented largely the same facts before that court as in this case. The federal district court advised

Dial, a pro-se litigant, of the Court's requirement to register and use the court's electronic filing system (CM/ECF) and she failed to do so. The federal court extended the deadline for registering and in that order advised that Dial's failure to comply may result in the dismissal of the case for want of prosecution under Rule 41(b). Dial never complied and the court dismissed the case.

The *Dial* Court stated as follows:

Rule 41(b) of the Federal Rules of Civil Procedure allows a court to dismiss an action *sua sponte* for failure to prosecute or for failure to comply with the federal rules or any court order. *Larson v. Scott*, 157 F.3d 1030, 1031 (5th Cir. 1998). "This authority flows from the court's inherent power to control its docket and prevent undue delay in the disposition of pending cases." *Boudwin v. Graystone Ins. Co., Ltd.*, 756 F.2d 399, 401 (5th Cir. 1985)(citing *Link v. Wabash R.R. Co.*, 370 U.S. 626 (1962)).

Generally, such dismissal is without prejudice. However, when, as here, a Rule 41(b) dismissal is tantamount to a dismissal with prejudice the court is required to apply a higher standard of review. *Berry v. CIGNA/RSI-CIGNA*, 975 F.2d 1188, 1191 (5th Cir. 1992). In that instance, a court may dismiss for want of prosecution only when there is a clear record of delay or contumacious conduct. In applying this higher standard, the court must find "at least one of three aggravating factors: (1) delay caused by a party himself and not his attorney; (2) actual prejudice to the other party; or (3) delay caused by intentional conduct." *Id. see also Nottingham v. Warden Bill Clements Unit*, 837 F.3d 438, 441 (5th Cir. 2016)(same).

The *Dial* Court found the requisites were met and dismissed the case. The court noted the case had been pending for nearly three months, and despite the issuance of two orders, Dial had failed to comply with the court's directive to register for electronic filing or demonstrate cause as to why she should be excused from the registration requirement. In addition, Dial had failed to comply with a show cause order issued by that court and failed to keep the court informed of her current address. The court stated these actions were attributable to Ms. Dial alone. The court concluded, considering the foregoing conduct of Ms. Dial, no lesser sanction will prompt diligent prosecution of the case. Indeed, the court noted, the case cannot proceed further absent Dial's registration for electronic filing. *See also McKeller v. LVNV Funding, LLC.*, No. 3:20-CV-3065-

M-BK ,2021 WL 3625078 (D. Tex. July 7, 2021)(failure to file an amended complaint and register to use the electronic filing system resulted in dismissal); *Harris v. Comm'r of Social Security*, No. CIV-S-09-2336 GGH, 2009 WL 5206035 (E.D. Cal., Dec. 21, 2009)(failure to register and use electronic filing system resulted in sanctions).

Commission Rule 101 and Failure to Register

The Court notes similarities between Federal Rule of Civil Procedure 41(b) and Commission Rule 101. Both permit sanctions for failure to follow a rule or an order of the court. Both have provisions for show cause procedures. Both require an evaluation of factors and affirm a dismissal of an action upon the of finding of contumacious conduct, prejudice or a pattern of disregarding rules and orders. *See* Fed. R. Civ. P. 41(b) and Commission Rule 101, 29 C.F.R. § 2200.101. Therefore, the Court finds Commission Rule 101, closely tracking Federal Rule of Civil Procedure 41(b), is written in broad enough terms that it provides the remedy for a party's failure to comply with Commission Rule 8(c) which requires parties to register with and use the Commission's EFS.

According to the Commission, “[D]ismissal is too harsh a sanction for failure to comply with certain pre-hearing orders unless the record shows contumacious conduct by the noncomplying party, prejudice to the opposing party, or a pattern of disregard for Commission proceedings.” *Amsco, Inc.*, No. 02-0220, 2003 WL 25548066, (O.S.H.R.C., Feb.12, 2003) 19 BNA OSHC 2189, 2191 (No. 02-0220, 2003). *See also Sealtite Corp.*, 15 BNA OSHC 1130 (No. 88-1431, 1991) (contumacious conduct established where party engaged in a “consistent pattern” of failure to respond to judge's orders).

The term “contumacious conduct” has not been defined in the Act or Commission Rules. According to the Merriam-Webster Dictionary, “contumacious” is conduct which is “stubbornly

disobedient: rebellious.”³ Commission precedent makes it clear that an undefined term’s meaning can be determined by consulting a contemporaneous dictionary. *See, e.g., Fla. Gas Contractors, Inc.*, No 14-0948, 2019 WL 995716, at *3 (O.S.H.R.C., Feb. 21, 2019)(determining term’s meaning by first turning to dictionary in absence of a definition in standard); *see also Crawford v. Metro. Gov’t of Nashville & Davidson Cty.*, 555 U. S. 271, 276 (2009) (undefined term “carries its ordinary meaning”). In conclusion, the trial judge has great discretion in determining the facts to the ordinary meaning to determine whether the conduct engaged into by a party is contumacious.” *Fox v. Vice*, 563 U.S. 826 (2011) (recognizing trial courts have wide discretion in fact finding).

Therefore, applying ordinary meaning to the term “contumacious conduct,” default judgments may be appropriate when a party fails to comply with an order under 29 C.F.R. § 2200.101(a) (default appropriate when a party fails to proceed as provided by the Commission Rules or as required by a judge). *See also St. Lawrence Food Corp.*, 21 BNA OSHC 1467, 1472 (Nos. 04-1734 & 04-1735, 2006) (failing to comply with Commission Rules and orders to delay proceedings has been determined to be contumacious conduct.)

Findings

As stated previously, Commission Rule 101 is broad enough in its language and is the appropriate vehicle to address sanctions for parties who do not register in the EFS or seek an exemption due to undue hardship.

The Court finds Respondent’s repeated failures to engage in the litigation process illustrate a pattern of disregard for the Commission’s proceedings as well as contumacious conduct.

³ The link between *contumacious* and the law goes back to Latin. The Latin adjective *contumax* means “rebellious,” or, in specific cases, “showing contempt of court.” *Contumacious* is related to *contumely*, meaning “harsh language or treatment arising from, haughtiness and contempt.” *See* “Contumacious.” Merriam-Webster.com Dictionary, Merriam-Webster, <https://www.merriam-webster.com/dictionary/contumacious>.

Respondent has been given multiple opportunities and plenty of time to comply with Commission Rules of Procedure and this Court's Notice and Order, and the Court has yet to receive any communication or contact from Respondent. The Court finds the delays in this case are wholly attributable to Respondent, including Respondent's failure to respond to the Assignment Notice and the *Order to Show Cause* which were sent to the address that it specifically provided, and which were not returned as undelivered.

The Court has a need to manage its docket and to do so in a timely manner which promotes public policy. This case has been pending before the Court for nearly three months, and despite telephone calls from the Court to assist Respondent in registering, the issuance of an Assignment Notice and an *Order to Show Cause*, Respondent has failed to comply with Commission Rule 8(c) and the Court's *Order to Show Cause* to register and use the EFS or demonstrate cause why the registration would cause an undue hardship. Because Respondent is representing itself the failure to comply, and the delay caused by such failure is attributable to Respondent alone. *Berry*, 975 F.2d at 1191.

Considering the above conduct of Respondent which is intentional, and the reasons stated below, no lesser sanction will prompt diligent prosecution of this case by Respondent. Indeed, as previously stated, the case cannot proceed further absent Respondent's EFS registration. Given the time the Court has provided Respondent to register in the EFS or seek an exemption with no fruitful activity or response, the Court finds that any further delay will result in actual prejudice to Complainant.

The Court has gone beyond the traditional parameters established by the Commission in past Rule 101 holdings by evaluating: (i) the facts of this matter; (ii) the ramifications to public policy and docket management; (iii) the prejudice of further delay; (iv) the inability for this case

to proceed forward absent compliance with Commission Rule 8(c); (v) where the fault lays; and (vi) the intentional nature of Respondent's actions. *Berry v. CIGNA/RSI-CIGNA*, 975 F.2d 1188, 1191 (5th Cir. 1992). *See also Nottingham v. Warden Bill Clements Unit*, 837 F.3d 438, 441 (5th Cir. 2016) For the reasons stated, the Court finds Respondent's pattern of disregard for the Commission's proceedings and its failure to comply with its Order and Assignment Notice issued by the Court constitutes contumacious conduct warranting the sanction of dismissal of Respondent's *Notice of Contest*.

Alternatively, the Court finds the Court has conveyed due notice to Respondent of its procedural rights and provided ample warning that its failure to comply with Court orders may result in the dismissal of its Notice of Contest. At every instance, Respondent has failed to take advantage of the opportunity to advise the Court that it has not abandoned its case before the Court. Every indication before the Court is that Respondent has walked away from its contest. Under these circumstances, the Court sees no worthwhile purpose in allowing this case to proceed to a hearing when there is no basis to believe that Respondent will fulfill its pre-hearing obligations or appear at the hearing. *See Twin Pines Constr. Inc./Teles Constr.*, 24 BNA OSHC 1500, 1504 (No. 12-1328, 2012) (No worthwhile purpose in proceeding to a hearing where a party has abandoned the case). The Court finds that Respondent relinquished its case with the intent to abandon. 1 C.J.S. Abandonment § 13 (2013). *See also* Fed. R. Civ. P. 41(b).

Accordingly, under the circumstances contained herein, the Court should exercise its sound discretion to DISMISS Respondent's Notice of Contest even if limitations may prevent further adjudication of Respondent's claims or defenses. *See Nottingham*, 837 F.3d at 441 (finding no abuse of discretion when district court applied higher standard of review and dismissed *pro se* action due to intentional noncompliance with court orders). The violations and penalties alleged

in the Citation and Notification of Penalty are AFFIRMED in its entirety and penalties ASSESSED.

ORDER

Based on the foregoing, it is ORDERED that:

1. Citation 1, Item 1, issued as a Serious Citation and the corresponding penalty of \$5,461.00, are hereby AFFIRMED as final orders of the Commission pursuant to section 10(a) of the Act.
2. Citation 1, Item 2, issued as a Serious Citation and the corresponding penalty of \$5,461.00, are hereby AFFIRMED as final orders of the Commission pursuant to section 10(a) of the Act.
3. Citation 1, Item 3, issued as a Serious Citation and the corresponding penalty of \$5,461.00, are hereby AFFIRMED as final orders of the Commission pursuant to section 10(a) of the Act.
4. Citation 1, Item 4, issued as a Serious Citation and the corresponding penalty of \$5,461.00, are hereby AFFIRMED as final orders of the Commission pursuant to section 10(a) of the Act.

SO ORDERED.

Date: October 26, 2021

Denver, Colorado

/s/ Patrick B. Augustine

Patrick B. Augustine
First Judge, OSHRC