



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.

KNOCK OUT HOMES INCORPORATED,

Respondent.

OSHRC Docket No. 21-0281

REMAND ORDER

Before: ATTWOOD, Chairman and LAIHOW, Commissioner.

BY THE COMMISSION:

On September 16, 2021, Chief Administrative Law Judge Covette Rooney entered a default judgment against Knock Out Homes Incorporated and dismissed its notice of contest for failing to file an answer. The judge's decision became a final order of the Commission on November 1, 2021. Two weeks later, Respondent, appearing pro se, filed a letter with the Commission, which we construe as a request for relief from a final order under Federal Rule of Civil Procedure 60(b)(1).¹ 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.

¹ Federal Rule of Civil Procedure 60(b)(1) provides, "[o]n motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect[.]" Fed. R. Civ. P. 60(b)(1); *see also* 29 U.S.C. § 661(g) (applying Federal Rules of Civil Procedure to Commission proceedings where other rules have not been adopted).

BACKGROUND

On February 18, 2021, the Occupational Safety and Health Administration issued Respondent three citations—a five-item serious citation, a one-item willful citation, and a one-item other-than-serious citation—with a total proposed penalty of \$41,349. On March 15, 2021, Respondent’s representative, Kevin Long, filed a Notice of Contest challenging all three citations. After the case was docketed with the Commission, Laura A. O’Reilly entered an appearance for the Secretary and on March 29, 2021, filed a timely complaint.

Respondent did not file an answer, and on May 12, 2021, the judge issued an Order to Show Cause giving the company 14 days to file an explanation for its failure.² *See* 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). That same day, Megan J. McGinnis filed an Entry of Additional Appearance on behalf of the Secretary.³ Respondent did not file an answer or otherwise respond to the judge’s show cause order. On August 3, 2021, McGinnis filed a motion for the Secretary seeking a default judgment against Respondent, who again did not respond, and the judge effectively granted that motion in her default order.

On November 16, 2021, the Commission received a letter in the mail from Long that was directed “To Osha” and titled “Late Notice of Contest.” In the letter, Long explains that Respondent has no employees and avers that he is “not trying to avoid” the matter but has “not been able to access the Osha Portal.” Long asserts that he has “multiple emails from Laura O’Reilly trying to help [him] get into the portal to no success.” He further states that he has “been trying to do everything in [his] power to get help with this matter,” including having “an Osha employee try to help [him] access the portal and it still didn’t work.”

DISCUSSION

In considering requests for relief under FRCP 60(b)(1), the Commission applies the framework set out in *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P’ship*, 507 U.S. 380, 395 (1993):

[T]he determination is at bottom an equitable one, taking account of all relevant circumstances surrounding the party’s omission. These include . . . the danger of

² The return receipt for the judge’s show cause order shows that it was delivered to an agent for the company on May 17, 2021, but it is unclear from the receipt who signed for the mailing.

³ We note that the record does not contain a withdrawal of appearance from Laura O’Reilly.

prejudice to the [opposing party], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith.

Northwest Conduit Corp., 18 BNA OSHC 1948, 1951 (No. 97-0851, 1999). In addition, to prevail on such a motion for relief, the moving party must allege a meritorious defense. *Id.* at 1951.

Here, the claims made in Respondent's letter suggest that it may mistakenly believe the Commission and OSHA are one and the same. *See Arch-Tech Constr.*, No. 19-1922, 2020 WL 5880240, at *1 (OSHRC Sept. 25, 2020) (noting pro se litigant's confusion about whom to contact regarding Commission proceedings); *see also A A Plumbing, Inc.*, 20 BNA OSHC 2203, 2204 (No. 04-1299, 2005); *Action Grp., Inc.*, 14 BNA OSHC 1934, 1935 (No. 88-2058, 1990) (citations omitted). Indeed, although mailed to the Commission, the company's "Late Notice of Contest" letter was directed "To Osha" and more than once seems to incorrectly refer to the Commission's electronic filing system (EFS) as the "Osha portal." In addition, we note that the inspection number listed in Respondent's letter appears to relate to a different set of contested citations previously docketed in the Commission's EFS several years ago—if Respondent had attempted to file its letter as a notice of contest using information associated with that prior case, an error message would be generated by the EFS. *See Occupational Safety and Health Review Commission, Electronic Case Filing – Policy and Procedure Guide (2019)* https://www.oshrc.gov/assets/1/6/Commission_E-File_System_Guide_-_FINAL_2-21.PDF. Finally, it is not clear from the record what filings Respondent has received in this matter given that the return receipt for the judge's show cause order does not show who signed for it on the company's behalf and the Secretary's motion for default judgment does not indicate whether counsel conferred with Respondent prior to filing it, as required by Commission Rule 40(d), 29 C.F.R. § 2200.40(d). *See A A Plumbing*, 20 BNA OSHC at 2204 (noting the Secretary's failure to confer with a pro se litigant when setting aside the judge's default order).

Under these circumstances, we set aside the judge's order and remand this case to the judge to consider whether Respondent is entitled to relief under FRCP 60(b)(1). Specifically, the judge should provide Respondent with an opportunity to present evidence supporting its claim that it attempted in good faith to participate in the Commission's proceedings and put forth a meritorious defense. *See Elan Lawn & Landscape Serv., Inc.*, 22 BNA OSHC 1337, 1338 (No. 08-0700, 2008) (remanding case to judge to consider evidence to determine whether FRCP 60(b) relief may be

granted); *Architectural Glass & Metal Co.*, 19 BNA OSHC 1546, 1548 (No. 00-0389, 2001) (same).

SO ORDERED.

/s/
Cynthia L. Attwood
Chairman

/s/
Amanda Wood Laihow
Commissioner

Dated: December 29, 2021



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KNOCK OUT HOMES INCORPORATED,

Respondent.

OSHRC DOCKET NO. 21-0281

ORDER OF DEFAULT FOR FAILURE TO FILE AN ANSWER

On February 18, 2021, following an inspection of a worksite, the United States Occupational Safety and Health Administration (“OSHA”) issued three Citations and Notifications of Penalty (“Citations”) to Knock Out Homes Incorporated (“Respondent”) for alleged violations of the Occupational Safety and Health Act. The Citations, which resulted from OSHA inspection number 1498015, consisted of: a five-item citation alleging serious violations of 29 C.F.R. §§ 1926.25(a), 1926.302(b)(6), 1926.403(b)(1) & (b)(2), 1926.416(e)(1), and 1926.1053(b)(13); a second one-item citation alleging a “willful-serious” violation of 29 C.F.R. § 1926.501(b)(13); and a third one-item citation alleging an other-than-serious violation of 29 C.F.R. § 1926.503(b)(1). The Citations proposed a total penalty of \$41,349.

The Citations were mailed to Respondent at 408 Franklin Avenue, Troy, Illinois. On March 15, 2021, Mr. Kevin Rodger Long, whose relationship to Respondent is not clear from the instant record, filed a Notice of Contest with OSHA challenging the Citations on behalf of Respondent. The Secretary does not argue that the Notice of Contest was untimely.

After receiving the Notice of Contest, the Commission mailed a Notice of Docketing and Instructions to Employer (“Notice of Docketing”) to Respondent’s office in Troy, Illinois. The Notice of Docketing included a guide to the Commission’s procedures and a postcard that was to be returned to the Commission to verify Respondent had complied with the employee posting requirements of Commission Rule 7 for the Citations and Notice of Contest. *See* 29 C.F.R. § 2200.7. To date, this postcard has not been returned to the Commission.

The Secretary filed his Complaint on March 29, 2021. The Certificate of Service for the Complaint indicates it was filed in the Commission’s e-filing system and was served on Mr. Long by email. Respondent was required to respond to the Complaint within 21 days of service. 29 C.F.R. § 2200.34(b)(1). To date, Respondent has not filed an Answer or otherwise responded to the Complaint.

On May 12, 2021, the undersigned issued an Order to Show Cause Why Notice of Contest Should Not Be Dismissed (“Show Cause Order”) for failure to file an Answer. The Show Cause Order directed Respondent to show cause, on or before May 26, 2021, as to why it should not be declared in default for not filing an Answer to the Complaint. The Show Cause Order explained that if there was no response, all of the alleged violations set out in the Citations would be affirmed and the proposed penalties would be assessed without a hearing. The Show Cause Order was served on Respondent electronically through the Commission’s e-filing system. Additionally, two copies of the Show Cause Order were mailed to Respondent’s office in Troy, Illinois, one by First-Class Mail and one by Certified Mail with return receipt requested. The return receipt for the copy of the Show Cause Order served via Certified Mail was returned to the Commission on May 26, 2021,

and indicates it was served on an agent of Respondent on May 17, 2021.¹ The copy of the Show Cause Order sent by First-Class Mail was not returned to the Commission's office and is therefore presumed to have been delivered by the Postal Service. *See In re Nimz Transp., Inc.*, 505 F.2d 177, 179 (7th Cir. 1974); *Lavelle Constr.*, 19 BNA OSHC 1149, 1151 n.4 (No. 99-1921, 2000) (view of Chairman Rogers).

On August 3, 2021, the Secretary filed a Motion for Default Judgment. The Secretary's motion notes that the period set forth in the Show Cause Order has passed without Respondent having filed an Answer. The Secretary therefore seeks dismissal of the Notice of Contest and requests that the penalty amounts set forth in the Citations be affirmed. The Certificate of Service for the Secretary's motion indicates it was served on Respondent electronically through the Commission's e-filing system as well as by First-Class Mail to Respondent's office in Troy, Illinois. Respondent filed no response to the Secretary's Motion for Default Judgment.

The Commission expects a business to maintain "orderly procedures for handling important documents." *Louisiana-Pacific Corp.*, 13 BNA OSHC 2020, 2021 (No. 86-1266, 1989) (citations omitted). A Commission judge has very broad discretion in imposing sanctions for noncompliance with the judge's orders or the Commission's Rules of Procedure. *See Sealtite Corp.*, 15 BNA OSHC 1130, 1134 (No. 88-1431, 1991). However, the Commission has long held that dismissal is too harsh a sanction for failure to comply with certain prehearing orders unless the record shows contumacious conduct by the noncomplying party, prejudice to the opposing party, or a pattern of disregard for Commission proceedings. *See Architectural Glass & Metal Co.*, 19 BNA OSHC 1546, 1547 (No. 00-0389, 2001).

¹ The signature block of the return receipt reads as follows: "229404 C19".

The undersigned finds the conduct of Respondent to be contumacious and demonstrative of a pattern of disregard for these proceedings. Over two months have passed since the deadline of the Show Cause Order and yet no response or Answer has been filed, despite Respondent having been served the Show Cause Order by three different methods. Neither has Respondent filed any response to the Secretary's Motion for Default Judgment, which was served on Respondent by both e-mail and First-Class Mail. Indeed, no one has filed anything with regard to this matter on behalf of Respondent since March 15, 2021, when Respondent filed its Notice of Contest. The undersigned therefore finds that this matter has been abandoned. *Cf. Sealtite Corp.*, 15 BNA 1130 (88-1431, 1991) (contumacious conduct established where party engaged in a "consistent pattern" of failure to respond to judge's orders).

For these reasons, Respondent is found to be in DEFAULT, its Notice of Contest is DISMISSED, and the Citations issued to Respondent on February 18, 2021, as a result of OSHA inspection number 1498015 are AFFIRMED in their entirety and \$41,349 in penalties are ASSESSED.

SO ORDERED.²

/s/Covette Rooney
Covette Rooney
Chief Judge, OSHRC

Dated: September 27, 2021
Washington, D.C.

² As this Order of Default grants all the relief sought in the Secretary's Motion for Default Judgment, it accordingly resolves the Secretary's motion.