

In its petition for review, Merchant's, now represented by counsel,¹ averred that it had not intended to abandon its contest. It submitted an affidavit in which its office manager, Theresa D. Merchant, stated that its secretary went on maternity leave on or about February 1, 1999, and Merchant's hired a temporary replacement. The temporary secretary was instructed to bring all correspondence to Theresa Merchant for review and disposition in accordance with Merchant's usual custom and practice. According to the affidavit, it was not until June 21, after the judge had issued his dismissal order, that Theresa Merchant discovered that the temporary secretary had, contrary to instructions, misplaced the Secretary's complaint and the judge's orders in and among various construction documents in Keith Merchant's office instead of giving them to Theresa Merchant. In its petition of June 24, 1999, Merchant's reiterated its desire and intention to continue with these proceedings and requested an opportunity to answer the Secretary's complaint.

Commission Rule 41(b)² permits the Commission to set aside a default for reasons it deems "sufficient." As a result, the Commission has wide latitude and discretion in its review of a default sanction. *Choice Electric Corp.*, 14 BNA OSHC 1899, 1900, 1987-90 CCH OSHD ¶ 29,141, p. 38,941 (No. 88-1393, 1990). In a default case such as this one, the Commission's inquiry has been whether the employer would be able to demonstrate sufficient reason to set aside the default judgment. *Schipper Constr., Inc.*, No. 99-0253 (July 30, 1999); *Bywater Sales & Serv. Byco-MCS Div.*, 13 BNA OSHC 1268, 1986-87 CCH OSHD ¶ 27,896 (No. 86-1214, 1987). Generally speaking, where a small employer proceeding *pro se*, such as Merchant's, makes some factual claims before the Commission which might justify setting aside a sanction of dismissal, the Commission has in its

¹Merchant's asserts that it was not represented by counsel prior to the filing of its petition for review.

²Commission Rule 41(b), 29 C.F.R. § 2200.41(b), provides that, "[f]or reasons deemed sufficient by the Commission or Judge and upon motion expeditiously made, the Commission or Judge may set aside a sanction [of default]."

discretion remanded the case to the judge to afford the employer an opportunity to make that showing on a full evidentiary record. *Compare Action Group, Inc.*, 14 BNA OSHC 1934, 1987-90 CCH OSHD ¶ 29,166 (No. 88-2058, 1990) (remand for judge to determine whether employer could have reasonably believed that the case had been settled) *with Penrod's Palace*, 14 BNA OSHC 1974, 1977, 1991-93 CCH OSHD ¶ 29,210, p. 39,096 (No. 88-1078, 1991) (no remand where employer's claims, even if proven, would not justify relief).

In this case, Merchant's represents that it took measures to ensure that pleadings and other documents pertaining to this proceeding would reach the responsible company official during the time that its secretary, who normally routed mail within the company, was unavailable. However, we cannot on the face of its affidavit find that Merchant's efforts in this regard were adequate. Approximately two months elapsed between the filing of the Secretary's complaint and the return date of the judge's order. If Theresa Merchant had not received *any* correspondence during this period, it may be that Merchant's should have been on notice that its temporary secretary was not properly performing her assigned duties. However, we cannot make this determination on the present record.

Accordingly, we remand this case to the judge.³ We direct him 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.⁴

³Chairman Rogers agrees to the remand to allow for further consideration of this case. The Commission has consistently put the responsibility on an employer to maintain orderly procedures for handling important documents. *See E.K. Constr. Co.*, 15 BNA OSHC 1165, 1166, 1991 CCH OSHD ¶ 29,412, p. 39,637 (No. 90-2460, 1991) and cases cited therein. Nevertheless, so as not to further delay disposition of this case, she is willing to allow the judge on remand to consider whether to set aside his default order.

⁴In view of the basis for our disposition, we need not decide whether Merchant's could reasonably have assumed that its notice of contest was sufficient to serve as a general denial in answer to the Secretary's complaint.

(continued...)

This matter is remanded for further proceedings consistent with this decision.

/s/
Thomasina V. Rogers
Chairman

/s/
Gary L. Visscher
Commissioner

Dated: September 24, 1999

⁴(...continued)

Since we remand this matter, we also do not at this time rule on the Secretary's motion to file a brief or otherwise state a position before us. The judge on remand may afford the Secretary an opportunity to be heard through whatever means he considers appropriate.