UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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WASHINGTON, DC 20006-1246

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SECRETARY OF LABOR,

Complainant,

v.

PHILADELPHIA CONSTRUCTION EQUIPMENT, INC.,

Respondent.

OSHRC Docket No. 92-899

DECISION

Before: FOULKE, Chairman; WISEMAN and MONTOYA, Commissioners.

BY THE COMMISSION:

The Occupational Safety and Health Administration issued two citations to Philadelphia Construction Equipment, Inc. ("PCE") alleging willful and serious violations of a number of construction safety standards. PCE contested the citations and was notified of the hearing set for 10:00 a.m. on October 22, 1992, as scheduled by a Review Commission Administrative Law Judge. PCE did not appear at the appointed time. Under Rule 64(a) of the Commission's Rules of Procedure ("Commission's Rules"), 29 C.F.R. § 2200.64(a), "[t]he failure of a party to appear at a hearing may result in a decision against that party." The judge granted the Secretary's motion to find PCE in default pursuant to Rule 41(a) of the Commission's Rules, 29 C.F.R. § 2200.41(a),[1] affirmed the citations, and assessed the penalty proposed by the Secretary of $16,650.

[1]Rule 41(a) provides:

> *Sanctions.* 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 . . . on the motion of a party.

PCE filed a petition seeking Commission review and reinstatement under Rule 64(c) of the Commission's Rules, 29 C.F.R. § 2200.64(c).[2] The Commission directed the case for review and, due to the lack of a factual record, remanded it to the judge to conduct further proceedings to allow PCE to offer proof of good cause to excuse its failure to appear.

On remand, the judge conducted a hearing on the issue of reinstatement on January 6, 1993 ("the reinstatement hearing"), at which James Carroll, PCE's Secretary, appearing *pro se* and arriving late, testified concerning the events of October 22. Based on the record, the judge concluded in his decision that PCE did not show good cause that would excuse its failure to appear at the scheduled October 22 hearing. Describing PCE's overall conduct as "a consistent pattern of disregard for the pending proceedings," he found PCE to be in default. PCE took issue with the decision in its second petition for review, in which it was represented by counsel for the first time. The petition was granted.

Having deemed it unnecessary to request briefs in this case, we consider the following issues based on the record to be (1) whether the judge erred in finding that PCE failed to prove good cause that would excuse its failure to appear at the scheduled time for the hearing on October 22, and (2) whether the judge abused his discretion in finding PCE in default.

I. *Whether the Judge Erred in Finding that PCE Failed to Prove Good Cause for Excusing Its Failure to Appear at the Scheduled Hearing*

PCE contends that the judge erred in denying it reinstatement because Carroll had a good reason for being late. According to Carroll, he had to pick up a PCE foreman who was a witness described by PCE as "important to our case." PCE also asserts that Carroll was only "about seven minutes late," as he testified. PCE also asserts that Carroll never had the opportunity to inform the judge of his presence.

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[2]Rule 64(c) provides in pertinent part:

> *Rescheduling hearing.* The Commission or the Judge, upon a showing of good cause, may excuse such failure to appear.

We note that in our direction for review and remand order, we ordered (pursuant to Rule 107 of the Commission's Rules, 29 C.F.R. § 2200.107) a waiver of Rule 64(b) of the Commission's Rules, 29 C.F.R. § 2200.64(b), which requires that requests for reinstatement must ordinarily be made within five days after the scheduled hearing date.

The record shows that, by the time Carroll arrived at the courtroom, the judge was conducting a hearing in another case. Carroll was alone because, according to his testimony, the witness that he had picked up "was down parking the vehicle." The record establishes that after Carroll entered the courtroom John Strawn, counsel for the Secretary, informed Carroll that his case had already been called and a default order had been entered, mentioning that Carroll might be able to talk to the judge at the end of the hearing in progress. According to Carroll, he stayed in the hearing room approximately 45 minutes until the other hearing was completed, at which time the judge arose and walked into his chambers. Carroll testified that he assumed that the judge would ask if there were any questions before leaving the bench, and when the judge did not do this, Carroll did not want to cause a disruption in the courtroom to get his attention. Carroll testified that, "not being familiar with the function of the Court," he waited for the judge to return to the bench, and when he did not, Carroll left.

In his decision on remand, the judge concluded that PCE failed to prove good cause to excuse its failure to appear at 10:00 a.m. on October 22 for the scheduled hearing because the only witness, Carroll, was not credible. The judge found Carroll's testimony that he was late because he had to pick up a witness who had a flat tire to be an "incredulous" statement in light of the failure of this allegedly important witness to ever appear in the courtroom on October 22, and the proposed penalty in excess of $15,000.

The judge noted that, while Carroll testified that he arrived about seven minutes late, the transcript of the hearing on PCE's case shows that it concluded at 10:08 a.m., and the hearing on the next case commenced at 10:10 a.m. The judge found that the transcript was consistent with the recollection of the Secretary's counsel Strawn, who stated informally at the reinstatement hearing that Carroll arrived about 30 minutes late for the October 22 hearing. The judge further noted that Carroll's statement that he stayed approximately 45 minutes until the other hearing was over was inconsistent with the transcript of the hearing in the next case showing that it lasted almost two hours. The judge also found that Carroll's failure to appear on time or inform the judge of his late appearance was inconsistent with what he termed "the reasonably anticipated behavior of people dealing with business matters of similar import."

Based on our *de novo* review of the record, we conclude that the judge did not err in finding that PCE failed to prove good cause for excusing its failure to appear at the hearing on October 22. A party's responsibility to appear at the scheduled time for the hearing is basic to the orderly, efficient operation of Commission proceedings, and that responsibility will not be waived except for good cause.[3] The judge heard Carroll's testimony about why he was late and observed his demeanor, and the judge found his testimony not credible for the reasons he gave in his decision. PCE presented no corroborating evidence, such as testimony by the foreman who was allegedly picked up by Carroll.

Regarding Carroll's alleged lack of opportunity to inform the judge based on his unfamiliarity with Commission proceedings, we note that the Commission has stated that lay persons choosing to manage legal matters on their own will be held to a standard of reasonable diligence. *Keefe Earth Boring Co.*, 14 BNA OSHC 2187, 2192, 1991 CCH OSHD ¶ 29, 277, p. 39,270 (No. 88-2521, 1991). We conclude that the judge did not err in finding Carroll's conduct, as described in his testimony, inconsistent with what a reasonably diligent employer faced with a penalty over $15,000 would have done under the circumstances.[4] It would seem that, after the next hearing concluded, a reasonably diligent representative of a party would have taken some steps to get the judge's attention.

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[3]The Commission has found good cause for reinstatement in certain circumstances, such as in *Simpson Roofing Co.*, 5 BNA OSHC 1836, 1837, 1977-78 CCH OSHD ¶ 22,147, pp. 26,671-72 (No. 76-1841, 1977) (evidence established numerous unsuccessful attempts to contact judge, as well as communication with OSHA, about client injured evening before hearing); *Herriott Printing Co.*, 2 BNA OSHC 1702, 1703, 1974-75 CCH OSHD ¶ 19,466 p. 23,235 (No. 10615, 1975) (parties agreed failure to appear due to severe weather and unavoidable). *But see Richard Rothbard, Inc.*, 8 BNA OSHC 1408, 1410, 1980 CCH OSHD ¶ 24,482, p. 29,901 (No. 79-2283, 1980) (no good cause found where untimely, inadequate reinstatement request).

[4]We recognize that an employer appearing *pro se* may not be familiar with court proceedings and may be intimidated by courtrooms and judges. However, that cannot excuse the failure of PCE, through its representative Carroll, to be on time or to give notice of its belated appearance to the judge or court reporter, without a showing that it was deliberately thwarted in its efforts by the Secretary or the judge. *Cf. Keppel's, Inc.*, 7 BNA OSHC 1442, 1443-44, 1979 CCH OSHD ¶ 23,622, pp. 28,637-38 (No. 77-3020, 1979) (while subjective feeling of intimidation may have been responsible for late filing of written notice of contest, it was not precipitated by improper actions by the Secretary). However, a *pro se* employer's lack of legal knowledge has been considered a contributing factor in finding good cause for reinstatement. *See National Roofing Corp.*, 9 BNA OSHC 1249, 1250, 1981 CCH OSHD ¶ 25,164, p. 31,067 (No. 79-1158, 1981).

Having concluded that the judge did not err in finding that PCE failed to prove good cause to excuse its failure to appear at the scheduled time for the October 22 hearing, remaining for consideration is whether the judge abused his discretion by the default order.

II. *Whether the Judge Abused His Discretion in Finding PCE in Default*

The judge determined that default was the appropriate sanction against PCE in light of the "pattern of disregard for the pending proceedings" that PCE showed over the course of the proceedings in this case. He found the most compelling component of this pattern to be Carroll's failure to appear for the reinstatement hearing on time, for which tardiness Carroll testified that he had "no excuse, again, but the parking situation." The judge also noted that, earlier in the proceedings, PCE did not certify that the citation was posted or file an answer to the complaint *until* it was sent orders threatening dismissal or default. In addition, the judge mentioned that PCE failed to respond to the Secretary's discovery requests or motion to compel discovery, and it failed to file a prehearing statement in response to the judge's prehearing exchange order. The judge concluded that PCE's failure to be on time for the hearing twice, its failure, until threatened with dismissal, to certify the posting of the citation and file an answer, and its failure to respond to the discovery requests and the prehearing order are actions that "go beyond a lack of familiarity with legal procedures." He therefore found PCE to be in default.

PCE, through its counsel, argues in its second petition that the default order denied it due process, essentially contending that the sanction was excessive for its failure to appear. PCE does not deny the occurrence of any of the instances of its conduct upon which the judge relied in finding a pattern of disregard for Commission proceedings.

Rule 41(a) specifically mentions that default is a possible sanction if a party fails to proceed as provided by Commission Rules of Procedure or as required by the judge. See *supra* note 1. A judge has very broad discretion in imposing sanctions for noncompliance with Commission Rules of Procedure or the judge's orders. *E.g., Sealtite Corp.*, 15 BNA OSHC 1130, 1134, 1991 CCH OSHD ¶ 29,398, p. 39,583 (No. 88-1431, 1991). In determining whether a sanction imposed by a judge is too harsh, the test is whether the judge abused his or her discretion. *Id.* at 1134, 1991 CCH OSHD at p. 39,582. A judge

could be found to have abused his or her discretion if the decision to impose the sanction is unreasonable, arbitrary, or erroneous. *Id.* at 1134 n.7, 1991 CCH OSHD at pp. 39,582-83 n.7. While a default order is a considerable sanction, Review Commission judges unfortunately have only a limited number of sanctions available to them.

We determine that the judge did not abuse his discretion in issuing a default order in light of the "pattern of disregard" for Commission proceedings.[5] PCE does not deny any elements in this pattern of disregard, rather it makes a general claim that it will be denied due process if it is prevented from presenting its case on the merits. However, we note that PCE *has* received due process because it was afforded an opportunity to present its case on October 22, and an opportunity to prove good cause for reinstatement.

We emphasize that our review of this case is limited to whether the judge abused his broad discretion in holding PCE in default based on the entire circumstances of the case. We recognize that, because the Commission's Rules generally treat *pro se* employers the same as parties represented by counsel, it is often difficult for judges to conduct proceedings involving *pro se* employers. However, to hold a *pro se* employer in default for failure to appear at the scheduled time may not be appropriate without evidence that there was a pattern of disregard generally in the case. Nevertheless, because there was such a pattern in this case, we conclude that the judge did not abuse his discretion.

III. *Order*

We find that the judge did not err in concluding that PCE has not proven good cause for excusing its failure to appear at the October 22 hearing. In light of the cumulative effect of PCE's disregard for Commission procedures and the limited sanctions available, we conclude that the judge did not abuse his discretion in granting the Secretary's motion to hold PCE in default. We therefore consider the allegations in the complaint to be undisputed, and we affirm the two citations, as clarified by the complaint, for violations of

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[5]Under Rule 41(b) of the Commission's Rules of Procedure, 29 C.F.R. § 2200.41(b), the Commission may set aside a sanction imposed under Rule 41(a) if presented with "sufficient" reasons. Ordinarily, the Commission would require a party seeking relief under this rule to make a formal motion supported by sworn affidavits or other evidence showing sufficient reason for setting aside a sanction. *E.g., Penrod's Palace*, 14 BNA OSHC 1974, 1976, 1991 CCH OSHD ¶ 29,210, p. 39,094 (No. 88-1078, 1991).

the standards as set forth below and assess these penalties totalling $16,650 as proposed by the Secretary and found appropriate by the judge:

Citation No. 1, Serious Violations		
Item 1a--	violation of 29 C.F.R. § 1926.59(e)(1)---	$450 for
Item 1b--	violation of 29 C.F.R. § 1926.59(h)------	1a & 1b;
Item 2---	violation of 29 C.F.R. § 1926.651(c)(2)--	$750;
Item 3---	violation of 29 C.F.R. § 1926.651(h)(1)--	$450;
Item 4---	violation of 29 C.F.R. § 1926.651(i)(3)--	$1500;
Item 5---	violation of 29 C.F.R. § 1926.651(j)(2)--	$1500;
Item 6---	violation of 29 C.F.R. § 1926.651(k)(1)--	$1500.
Citation No. 2, Willful Violation		
Item 1---	violation of 29 C.F.R. § 1926.652(a)(1)--	$10,500.

It is so ordered.

Edwin G. Foulke, Jr.
Chairman

Donald G. Wiseman
Commissioner

Velma Montoya
Commissioner

Dated: April 22, 1993

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SECRETARY OF LABOR, Complainant, v. PHILADELPHIA CONSTRUCTION EQUIPMENT, INC., Respondent.	:	Docket No. 92-0899

NOTICE OF COMMISSION DECISION

The attached decision by the Occupational Safety and Health Review Commission was issued on April 22, 1993. **ANY PERSON ADVERSELY AFFECTED OR AGGRIEVED WHO WISHES TO OBTAIN REVIEW OF THIS DECISION MUST FILE A NOTICE OF APPEAL WITH THE APPROPRIATE FEDERAL COURT OF APPEALS WITHIN 60 DAYS OF THE DATE OF THIS DECISION.** See Section 11 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 660.

FOR THE COMMISSION

Ray H. Darling, Jr.

April 22, 1993
Date

Ray H. Darling, Jr.
Executive Secretary

Docket No. 92-0899

NOTICE IS GIVEN TO THE FOLLOWING:

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Michael H. Schoenfeld
Administrative Law Judge
Occupational Safety and Health
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SECRETARY OF LABOR Complainant, v. PHILADELPHIA CONSTRUCTION EQ. INC. Respondent.	OSHRC DOCKET NO. 92-0899

NOTICE OF DOCKETING OF ADMINISTRATIVE LAW JUDGE'S DECISION

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on February 18, 1993. The decision of the Judge will become a final order of the Commission on March 22, 1993 unless a Commission member directs review of the decision on or before that date. ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW. Any such petition should be received by the Executive Secretary on or before March 10, 1993 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary
Occupational Safety and Health
Review Commission
1825 K St. N.W., Room 401
Washington, D.C. 20006-1246

Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
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200 Constitution Avenue, N.W.
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If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 634-7950.

FOR THE COMMISSION

Ray H. Darling, Jr.

Date: February 18, 1993

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 92-0899

NOTICE IS GIVEN TO THE FOLLOWING:

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SECRETARY OF LABOR, Complainant, v. PHILADELPHIA CONSTRUCTION EQUIPMENT, INC., Respondent.	:	Docket No. 92-0899

Appearances:

John M. Strawn, Esquire
Office of the Solicitor
U.S. Department of Labor
For Complainant

James Carroll
Secretary
For Respondent

Before: Administrative Law Judge Michael H. Schoenfeld

DECISION AND ORDER ON REMAND

On December 18, 1992, the Commission remanded this case to this Administrative Law Judge "with instructions that further proceedings be scheduled to allow the respondent to offer proof of good cause to excuse its failure to appear [at a hearing on October 22, 1992]." Testimony pursuant to the remand order was taken in Philadelphia, Pennsylvania on January 6, 1993.[1]

[1] Although not specifically directed to do so, it is implicit in the Direction for Review and Remand Order issued by the Commission on December 18, 1992, that the Commission anticipated that the administrative law judge would reach some findings and conclusions on the basis of the further proceedings.

First, factual assertions offered by Respondent's representative are found not to be credible because they are; 1) in some instances, inconsistent with documented facts; and 2) in other instances they are inconsistent with the reasonably anticipated behavior of people dealing with business matters of similar import.

Secondly, even if taken as true, the factual circumstances described by Respondent's representative do not constitute good cause for failure to appear.

Thirdly, Respondent, throughout this matter has established a pattern of failing to comply with Commission Rules and Orders which amounts to behavior which is contumacious and disdainful of the Commission and its proceedings.

As to inconsistencies with documented facts, Respondent's Petition for Discretionary Review[2] and its representative claim that its representative arrived "seven minutes" late (TR 8). Not only is this inconsistent with the recollection of the Secretary's attorney, who places his arrival at about 30 minutes late (TR 5), but it is inconsistent with the transcript of the hearing, as well as the transcript of the hearing which followed. According to the court reporter's watch, the hearing in Respondent's matter did not finish until 10:08 a.m. (TR 4). A short recess was taken and the following matter, *W. Kramer Associates*, No. 92-1391, commenced at 10:10 a.m., according to the transcript of those proceedings. Although there is only a several minute difference between the times shown in the official transcripts and the claims of Respondent's representative, they must be viewed in light of other inconsistencies. Respondent's representative claims in the Petition for Review and in his testimony that on October 22, 1992, he did not leave the courtroom until after the hearing in *Kramer* was finished (Petition for Review; TR 8, line 16; TR 8 - 9, lines 25 & 1; TR 15, lines 14 - 16). He asserted that he stayed some 45 minutes (TR 15). The transcript shows, however, that the *Kramer* hearing lasted just short of two hours and did not adjourn until 12:00 noon.

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[2] While Respondent's petition contains a certificate of service, albeit unsigned, counsel for the Secretary indicated that he had not received a copy of it until the morning of the hearing on remand when one was supplied by the Administrative Law Judge. (TR 5, 12). Whether the Secretary would have filed a cross petition or statement in opposition to Respondent's Petition for Review is also somewhat speculative because the Commission issued its Direction for Review and Remand Order before the time allowed for such filings by the Secretary expired under Rule 91.

Respondent's representative, who testified that he was aware that penalties in this case were over $10,000 and that he took the matter seriously, nonetheless made no effort to contact the Judge or court reporter in the courtroom on October 22, 1992. Nor, other than his desire not to disrupt anything or lack of awareness of court proceedings, could he offer any explanation as to why he failed to do so even though the Secretary's attorney suggested that he do so (TR 5, 8).

Respondent's representative claimed he was late in October 1992 because a witness he was to pick up had a flat tire (TR 9). Although described as "important to our case" (PDR), this witness somehow never made it to the courtroom in October 1992 (TR 10). I find this to be an incredulous statement from a person who was supposedly attending an important hearing in which over $15,000 in penalties was to be at stake.

Arriving late with "no excuse, again, but the parking," (TR 9) to the January 1993 hearing on remand might, by itself, constitute, behavior showing disdain for the processes of the Commission. In addition, Respondent had to be threatened with dismissal before it certified that it had posted the citation as required. Further, Respondent did not file an answer of any kind to the Secretary's complaint until faced with a show cause order, again threatening dismissal. Respondent has also failed to respond in any way to discovery requests or a motion to compel discovery. Moreover, Respondent did not file a required pre-hearing statement. These actions go beyond a lack of familiarity with legal procedures. They constitute a consistent pattern of disregard for the pending proceedings. It is not too legalistic a standard to expect a *pro se* party to at least respond in some manner to the several documents it received. In contrast, Respondent did reply to two threats of dismissal (Executive Secretary's Posting and Service Order (April 9, 1992), Order to Show Why Notice of Contest Should Not Be Dismissed (June 5, 1992), as well as the Decision and Order affirming the citations (November 27, 1992). It is concluded that Respondent decided it could "pick and choose" which parts of the Commission proceedings in which to participate. That is contumacious conduct.

In sum, I conclude that Respondent has failed to demonstrate that good cause existed for his failure to appear at the October 22, 1992, hearing. Thus, Respondent is declared to be in default. 29 C.F.R. § 2200.41(a) (1991). Accordingly, the citations issued to Respondent on or about January 10, 1992, are AFFIRMED in their entirety. The civil penalties of $16,650 as proposed are assessed therefor.

MICHAEL H. SCHOENFELD
Judge, OSHRC

Dated: FEB 5 1993
Washington, D.C.