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. DANIEL KOURY CONSTRUCTION, INC., Respondent.	OSHRC Docket No. 04-1300

DIRECTION FOR REVIEW AND REMAND ORDER

Daniel Koury Construction, Inc., (Daniel Koury) timely filed with the Commission a Petition for Discretionary Review of Administrative Law Judge G. Marvin Bober's default judgment against it, in which the judge affirmed a citation for a single alleged violation of a standard under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-78. The judge also imposed the proposed penalty of $600. For the following reasons, we hereby direct review of this case, vacate the default judgment, and remand the case to the judge, ordering him to reinstate the case for further proceedings on the merits of the citation allegations in a manner consistent with this opinion.

PROCEDURAL BACKGROUND

Following issuance of the citation on July 1, 2004, and timely-filed notice of contest, the parties and judge participated in two pre-trial telephone conferences in this case designated for the Commission's E-Z Trial simplified procedures, Commission Rules of Procedures, Subpart M, 29 C.F.R. § 2200.200 et seq. On October 25, 2004, the judge granted the Secretary's motion to amend the citation and, on October 27, 2004, he scheduled another pre-trial telephone conference to be held on November 16, 2004, at 9:15 am.

At an undetermined time on November 16, the judge issued an "Order to Show Cause" pursuant to Rule 41 of the Commission Rules of Procedure, 29 C.F.R § 2200.41, for Respondent's "fail[ure] in his responsibility to be available for the pre-trial telephone conference." The judge ordered that Respondent "shall no later than 5:00 p.m. EST on Thursday, November 18, 2004, provide in affidavit form a statement as to reason(s) the Respondent should not be declared to be in default and the Citation and Notification of Penalty issued July 1, 2004, should not be affirmed." The Certificate of Service stated that the Order "was mailed to the parties . . . by first class mail on November 16, 2004." Underneath that statement, the words "VIA FACSIMILE" are printed, but there is no Facsimile Transmission sheet or verification report, as there is in the file for a different document sent by facsimile. Also printed above the Respondent's Warwick, Rhode Island address on the Certificate of Service, are the words "FEDERAL EXPRESS." There is no verification in the file of Respondent's receipt via any means of the Order to Show Cause.

On Friday, November 19, 2004, the judge sent to the parties, via facsimile (with transmission sheet and verification report), a copy of his Decision and Order on Default Judgment, which he submitted to the Commission on November 29, 2004. In its Petition before us, Respondent explained that "on the day that we were supposed to have the conference call I had to go to a jobsite to meet with one of our customers. I act as the project manager, and these days it is very difficult to get any work, so when we do get work

we need to comply with the wishes of general contractors when the[y] order me to the jobsite . . . ."

DISCUSSION

Commission Rule 41 governs the imposition of sanctions providing, in relevant part, as follows.

> (a) *Sanctions*. When any party has failed to plead or otherwise proceed as provided by these rules or as required by the Judge, he may be declared to be in default either: (1) on the initiative of the Commission or Judge, after having been afforded an opportunity to show cause why he should not be declared to be in default; or (2) on the motion of a party.
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> . . .
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> (d) *Show cause orders.* All show cause orders issued by the Commission or Judge under paragraph (a) of this section shall be served upon the affected party by certified mail, return receipt requested.

Commission precedent recognizes the appropriateness of sanctions "to ensure compliance with prehearing procedures and to adjudicate cases fairly and efficiently," but prohibits imposition of "a sanction that is too harsh under the circumstances of the case." E.g., *Architectural Glass & Metal Co., Inc*., 19 BNA OSHC 1546, 1547, 2001 CCH OSHD ¶ 32,424, p. 49,975 (No. 00-0389, 2001), and cases there cited. Dismissal of a citation for noncompliance with prehearing orders is generally permissible only where "the record shows contumacious conduct by the noncomplying party or prejudice to the opposing party." *Id*., *citing Noranda Aluminum, Inc.*, 9 BNA OSHC 1187, 1189, 1981 CCH OSHD ¶ 25,086, p. 30,988 (No. 79-1059, 1980) (finding dismissal "too harsh a sanction for failure to comply with a discovery order"); *Circle T. Drilling Co.,* 8 BNA OSHC 1681, 1682, 1980 CCH OSHD ¶ 24,583, p. 30,155 (No. 79-2667, 1980).

The Commission's case law is consistent with that of reviewing courts, which "universally recognize the harshness of dismissal with prejudice and generally require that lesser sanctions first be considered." *Duquesne Light Co*., 8 BNA OSHC 1218, 1222, 1980 CCH OSHD ¶ 24,384, p. 29,719 (No. 78-5034, 1980). The First Circuit, in which this case arises, has recently emphasized that the "ultimate sanction of dismissal . . . for lack of

prosecution is appropriate only when plaintiff's misconduct is serious, repeated, contumacious, extreme, or otherwise inexcusable." *Bachier-Ortiz v. Colon-Mendoza*, 331 F.3d 193, 195 (1st Cir. 2003) (per curiam). *See also Crissman v. Raytheon Long Term Disability Plan*, 316 F.3d 36 (1st Cir. 2002) (reversing dismissal sanction for counsel's failure to appear at scheduling conference as unduly harsh where inconvenience to opposing party did not rise to the level of prejudice justifying dismissal).

We find that the judge's dismissal of the citation here was both procedurally and substantively flawed. As a procedural matter, the judge erred on two counts. First, he failed to comply with Commission Rules of Procedure, Rule 41(a)(1) by sending the Order to Show Cause by means other than certified mail, return receipt requested, and there is no indication in the file whether Respondent ever, in fact, received it. In addition, that Order mandated a response from a pro se party in affidavit form within two days. Rule 41(a) requires not just that a show cause order be sent; the party must be afforded an *opportunity* to show why default is not warranted. We find that the two-day response time provided in the judge's order for this pro se respondent was patently inadequate and unreasonable, and inconsistent with the intent of the E-Z Trial procedures applied in this case. In these circumstances, the judge effectively provided Daniel Koury Construction no opportunity to respond at all. *See Richard A. Pulaski Construction Co., Inc.*, 1995-97 CCH OSHD ¶ 30,811 (No. 94-1973, 1995) (reversing and remanding dismissal of notice of contest for failure to telephone judge for scheduled prehearing conference where employer not provided opportunity to show cause and reasons for missing phone call deemed sufficient).

Substantively, the judge made no finding that Respondent's failure to be present for a single telephone conference was contumacious and, on this record, we find that he could not. Thus, Respondent participated in two prior telephone conferences and, as stated in his Petition before the Commission, was urgently and unexpectedly called away at the scheduled time of the third. Although Respondent's failure to contact the judge at that time may have been thoughtless and inconvenient, we find that it falls far short of the type of "serious, repeated, contumacious, extreme, or otherwise inexcusable" conduct that would

warrant dismissal. Nor do we see any basis to establish that the Secretary suffered prejudice from this single missed telephone conference. *See Amsco Inc.,* 19 BNA OSHC 2189, 2191-92 (No. 02-0220, 2003) (vacating default sanction for counsel's failure to miss a single pre-hearing teleconference).

In these circumstances we conclude that the judge abused his discretion in dismissing the case. Accordingly, we hereby grant Respondent's Petition for Discretionary Review and vacate Judge Bober's November 29, 2004 Decision and Order on Default Judgment. We also order that the case be remanded to the judge for reinstatement and proceedings on the merits of the citation in a manner consistent with this opinion.

SO ORDERED

/s/_____
W. Scott Railton
Chairman

/s/_____
Thomasina V. Rogers
Commissioner

/s/_____
James M. Stephens
Commissioner

Dated: December 30, 2004

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DECISION AND ORDER ON DEFAULT JUDGEMENT

On October 27, 2004, an order notified all parties including the Respondent's representative, Daniel E. Koury, President, of a pre-trial telephone conference to be held on Tuesday, November 16, 2004 at 9:15 a.m. EST. Mr. Koury failed to notify the undersigned of its unavailability for the pre-trial telephone conference, and thus failed in its responsibility to this Court.

Thereafter, the undersigned on November 16, 2004, issued an order requiring the Respondent to provide in affidavit form a statement as to reason(s) the Respondent should not be declared to be in default and the Citation and Notification of Penalty issued July 1, 2004, should not be affirmed.

The Respondent did not file a reply.

DISCUSSION AND CONCLUSION

The Respondent has failed to comply with the Order To Show Cause and is declared to be in default.

IT IS ORDERED that Default Judgement is GRANTED.

IT IS FURTHER ORDERED that the Citation and Notification of Penalty issued July 1, 2004, is affirmed in its entirety.

Dated: NOV 29, 2004
Washington, D.C.

/s/
G. Marvin Bober
Administrative Law Judge