



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.

OSHRC Docket No. 16-0757

JESSICA HICKS dba LOGS TO LUMBER AND
BEYOND,

Respondent.

APPEARANCES:

Karen E. Mock, Senior Trial Attorney; Rolesia Butler Dancy, Counsel; Stanley E. Keen, Regional Solicitor; M. Patricia Smith, Solicitor; U.S. Department of Labor, Washington, DC and Atlanta, GA

For the Complainant

Jessica Hicks, Logs to Lumber and Beyond, Ocilla, GA

For the Respondent

DECISION

Before: ATTWOOD, Chairman; and MACDOUGALL, Commissioner.

BY THE COMMISSION:

On July 25, 2016, Administrative Law Judge John B. Gatto issued a default judgment against Respondent. On August 8, 2016, the parties filed a Stipulation and Joint Motion seeking approval of their signed settlement agreement. For the reasons that follow, we set aside the default judgment and approve the settlement agreement.

BACKGROUND

On April 8, 2016, the Occupational Safety and Health Administration issued Respondent two citations alleging a serious violation and several other-than-serious violations with a total proposed penalty of \$1,360. Respondent, appearing pro se, filed a timely notice of contest, and

on June 3, 2016, the Secretary notified the judge that the parties had settled the matter.¹ That same day, the judge issued an order vacating a scheduling order he had previously issued and directed the parties to file their settlement agreement with him no later than 30 days from the date of his order. The judge also directed Respondent to serve the order on certain employees and employee representatives, as well as post the order and submit proof of posting to the judge.² On June 15, 2016, the Secretary sent the judge a copy of the cover letter he sent to Respondent with a proposed settlement agreement. That same day, Respondent complied with the judge's posting requirement.³

Having received no settlement agreement from either party within the 30-day time frame specified in his June 3, 2016 order, the judge issued Respondent a show cause order on July 8, 2016. The July 8, 2016 order directed Respondent to show cause in writing as to the reason it should not be declared in default for failing to comply with the June 3, 2016 order, or in the alternative, to file a settlement agreement executed by both parties on or before July 22, 2016.⁴ Respondent received the show cause order on July 12, 2016, and it did not file a response with the judge. On July 25, 2016, the judge issued an order declaring Respondent in default, dismissing its notice of contest, and affirming the citations. On August 5, 2016, the default order was docketed with the Commission. Three days later, on August 8, 2016, the judge received the fully executed settlement agreement from the Secretary. The agreement, which amends the proposed penalty to \$816, was signed by Respondent's representative on July 27, 2016, and by the Secretary two days later on July 29, 2016.

DISCUSSION

Commission Rule 101(a) permits the sanction of default where a party fails to proceed as required by the Commission's rules, by the Commission, or a judge. 29 C.F.R. § 2200.101(a). Whether dismissal is appropriate depends on whether a party's behavior demonstrates

¹ The parties were not required to file pleadings since this case was assigned to Simplified Proceedings. *See* 29 C.F.R. § 2200.200(b) (pleadings generally not required under Simplified Proceedings).

² The judge directed Respondent to comply with the service and posting requirement no later than the first working day after receipt of his order and to submit proof of posting no later than the first working day following the posting.

³ Respondent submitted proof of posting to the judge on June 24, 2016.

⁴ As required by Commission Rule 101(b), the judge sent the show cause order by certified mail, return receipt requested. 29 C.F.R. § 2200.101(b).

contumacy, whether the other party has suffered prejudice, and whether other aggravating circumstances are present. *See, e.g., Tom Reed Contracting*, 25 BNA OSHC 1649, 1650 (No. 14-1659, 2015). Dismissal of a citation 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) (*AGM*); *compare Philadelphia Constr. Equip. Inc.*, 16 BNA OSHC 1128, 1130-31 (No. 92-899, 1993).

Here, the judge concluded that Respondent's conduct was contumacious based solely on its failure to respond to his show cause order, as no other basis was identified in his default order.⁵ A one-time failure, however, does not establish contumacy, let alone a "pattern of disregard."⁶ *AGM*, 19 BNA OSHC at 1547; *AA Plumbing Inc.*, 20 BNA OSHC 2203, 2204 (No. 04-1299, 2005) (failure to file timely answer does not alone warrant dismissal); *Samuel Filisko*, 20 BNA OSHC 2204, 2206 (No. 04-1465, 2005) (same). In any event, Respondent filed a timely notice of contest and participated in settlement negotiations with the Secretary, as is evident from the cover letter the Secretary sent to the judge and from the signed settlement agreement itself. Respondent also complied with the judge's June 3, 2016 order by submitting proof of posting.⁷ Finally, while it is true that Respondent did not file the settlement agreement within the time ordered by the judge, neither did the Secretary. The judge's June 3, 2016 order directed the parties, not just Respondent, to file the agreement; yet, the show cause order was directed solely

⁵ We note that the judge issued his default order three days after the response to his show cause order was due—the precise time frame the Commission's rules allow for the mailing of a response. *See* 29 C.F.R. § 2200.4(b) (where service of a document is made by mail, a separate period of 3 days shall be allowed).

⁶ Not only does the judge's default order fail to support a finding of contumacious conduct on the part of Respondent, but it also fails to provide important details and supporting reasons for his conclusion as required by the Administrative Procedure Act. 5 U.S.C. § 557(c).

⁷ The posting of a citation is required under section 9(b) of the Occupational Safety and Health Act, and the service and posting of a settlement agreement is required by Commission Rule 100(c). *See* 29 U.S.C. § 658(a) (requiring citation be prominently posted at or near the place the violation occurred); 29 C.F.R. § 2200.100(c) (requiring proof of service be filed with a settlement agreement, showing both service and posting). No statutory or procedural requirement exists for the posting of a judge's order directing the parties to file a settlement agreement.

to Respondent and the default judgment penalized only Respondent.⁸ In these circumstances, we find the default sanction unwarranted.

Accordingly, we set aside the judge's order and approve the settlement agreement filed by the parties. *See* 29 C.F.R. §2200.101(b) (sanction may be set aside for sufficient reasons); 29 C.F.R. § 2200.100(c) (approval of settlement agreement).

SO ORDERED.

/s/
Cynthia L. Attwood
Chairman

/s/
Heather L. MacDougall
Commissioner

Dated: September 29, 2016

⁸ It is unclear why the judge, when faced with what appears to have been the parties' inability to finalize their attempts at settlement within the 30-day time frame, did not simply return the case to his active docket and issue the parties a new scheduling order.



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THOMAS E. PEREZ, Secretary of Labor,
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Docket No. 16-0757

DEFAULT ORDER

The Court entered an *Order Vacating Scheduling Order and Directing Filing of Settlement Agreement and Final Consent Order*, which required the parties no later than **30 days** from the date of that Order to file with the Court an executed settlement agreement. On July 8, 2016, the Court entered a *Show Cause Order* directing Respondent Jessica Hicks d/b/a Logs To Lumber And Beyond to show cause in writing on or before July 22, 2016, by filing with the Court a statement as to the reason(s) Respondent should not be declared to be in default for failing to comply with the Court's Order, or in the alternative, within the same period, filing with the Court an executed Stipulation and Joint Motion signed by both parties. Ms. Hicks received the *Show Cause Order*, as evidence by the signed return receipt she signed for on July 12, 2016. After having been afforded an opportunity to show cause why it should not be declared to be in default, Respondent failed to respond to the Show Cause Order.

The Court's *Show Cause Order* notified Respondent that "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 Judge, after having been afforded an opportunity to show cause why he should not be declared to be in default, or on the motion of a party. Thereafter, the Commission or Judge, in their discretion,

may enter a decision against the defaulting party or strike any pleading or document not filed in accordance with these rules.” 29 CFR § 2200.101(a).

A judge has very broad discretion in imposing sanctions for noncompliance with the Commission’s Rules of Procedure or the judge’s orders. *See Sealtite Corp.*, 15 BNA OSHC 1130, 1134 (No. 88-1431, 1991). The Commission, however, 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. 00-389, 2001). The Court finds Respondent’s conduct here to be contumacious. Accordingly,

IT IS HEREBY ORDERED THAT Respondent is declared to be in **DEFAULT**, its notice of contest is **DISMISSED**, and the OSHA citation issued to Respondent on April 8, 2016, Inspection Number 1103922 is **AFFIRMED** in its entirety.

SO ORDERED THIS 25th day of July, 2016.

/s/
JOHN B. GATTO, Judge