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. NEUPAUER MASONRY, INC., Respondent.	OSHRC Docket No. 12-1336

APPEARANCES:

Barbara A. Goldberg, Attorney; Janet M. Graney, Acting Regional Solicitor; M. Patricia Smith, Solicitor of Labor; U.S. Department of Labor, Washington, DC and Chicago, IL
For the Complainant

Andjelko Galic, Attorney; Chicago, IL
For the Respondent

REMAND ORDER

Before: ROGERS, Chairman and ATTWOOD, Commissioner.

BY THE COMMISSION:

At issue before the Commission is an Order of Default issued by Chief Administrative Law Judge Covette Rooney dismissing the notice of contest filed by Neupauer Masonry, Inc. ("Neupauer"), affirming the three citations issued to Neupauer, and assessing the total proposed penalty of $43,560. For the following reasons, we remand this case for further proceedings consistent with this opinion.

On September 19, 2012, the judge issued an Order to Show Cause, in which she gave Neupauer—appearing *pro se* at the time—until October 1, 2012, to show why it should not be held in default for failing to file a timely answer to the Secretary's complaint. *See* Commission Rule 34(b)(1), 29 C.F.R. § 2200.34(b)(1) (answer shall be filed within 20 days after service of complaint). The judge sent the show cause order to Neupauer via certified mail, return receipt

requested, as required by Commission Rule 101(d), 29 C.F.R. § 2200.101(d). The return receipt shows that the order was received by Neupauer on September 25, 2012.

On December 12, 2012, the judge dismissed Neupauer's notice of contest based on its failure to respond to the show cause order or otherwise communicate with her office citing Commission Rule 101(a), 29 C.F.R. § 2200.101(a), which provides that a party "may be declared to be in default . . . after having been afforded an opportunity to show cause why he should not be declared to be in default . . . ." She found that Neupauer's failure to respond constituted contumacious conduct which prejudiced the Secretary by impeding her ability to proceed in the matter.

In its petition for review, Neupauer—now represented by counsel—claims that it had previously hired an individual named Julio Vargas to provide the company with legal advice and representation in this matter.[1] According to Neupauer, it forwarded the judge's show cause order to Vargas, who assured the company that an appropriate response would be timely filed. Neupauer argues that "[b]ut for the fact that [it] became a victim of the unauthorized practice of law [by Vargas, it] would have answered the underlying complaint and would have participated in this litigation contesting these very serious charges."[2] The company's petition also includes a verification signed by its counsel asserting that Vargas is not an attorney and is not licensed in Illinois.

Parties are generally bound by the actions of their hired representatives. *Byrd Produce Co.*, 16 BNA OSHC 1268, 1269, 1993-1995 CCH OSHD ¶ 30,139, p. 41,447 (No. 91-0823, 1993) (consolidated). But the claims alleged by Neupauer in its petition raise serious issues that the judge did not have before her when determining whether default was appropriate. Indeed, it is not clear from the current record when Vargas was hired or whether he contributed to Neupauer's failure to file a timely answer and respond to the judge's show cause order. And while the judge found Neupauer's conduct contumacious, the company now claims that its behavior was due to its reliance on a representative who misrepresented his qualifications.

[1] The case file contains no entry of appearance for Vargas.

[2] Neupauer does not specify in its petition whether Vargas misrepresented himself as a licensed attorney, or whether Neupauer was unaware that Commission Rules allow for non-attorney representation and thus assumed Vargas was an attorney when he agreed to represent it in this matter. *See* Commission Rule 20(a), 29 C.F.R. § 2200.20(a) (any party or intervenor may appear in person, through an attorney, or through another representative who is not an attorney).

Under these circumstances, we find it appropriate to remand this case to the judge to allow her an opportunity to fully consider Neupauer's claims and take any further action as appropriate including, if necessary, reconsideration of her default decision.

SO ORDERED.

/s/
Thomasina V. Rogers
Chairman

/s/
Cynthia L. Attwood
Commissioner

Dated: January 24, 2013

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SECRETARY OF LABOR,

Complainant,

v.

NAUPAUER MASONRY, INC.

Respondent.

OSHRC Docket No. 12-1336

ORDER OF DEFAULT

On September 19, 2012**,** the undersigned issued an Order to Show Cause ("Order") to Respondent. The Order directed Respondent to show cause on or before October 1, 2012**,** as to why it should not be declared in default for not filing an answer to the complaint within the time permitted by the Commission's Rules of Procedure. Respondent was advised that failure to respond to the Order would result in all of the alleged violations set out in the OSHA citation being affirmed and the proposed penalties being assessed without a hearing.

The Order was sent to Respondent, at its address of record, by first class certified mail, return receipt requested. The green receipt card which accompanied the certified mailing was returned to the Commission showing the signature "Neupauer" on it and dated September 25, 2012. It is clear, therefore, that Respondent received the Order. Despite this fact, Respondent has not responded to the Order and has not otherwise communicated with my office.

Commission Rule 101(a), 29 C.F.R. § 2200.101(a), provides in relevant part that:

> *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 … on the initiative of the … Judge, after having been afforded an opportunity to show cause why he should not be declared to be in default….Thereafter, the … Judge, in [her] discretion, may enter a decision against the defaulting party….

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). I find Respondent's conduct here to be contumacious in that, as set out above, it clearly received and signed for the mailing and yet failed to respond to the Order or otherwise communicate with my office. I further find that Respondent's conduct has caused prejudice to the Secretary by impeding her ability to proceed in this matter. For these reasons, Respondent is found to be in DEFAULT, its notice of contest is DISMISSED, and the OSHA citation issued to Respondent on October 3, 2011**,** Inspection Number 92350, is AFFIRMED in its entirety.

SO ORDERED.

_/s/ Covette Rooney_____
Covette Rooney
Chief Judge

Dated: December 12, 2012
Washington, D.C.