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. PERMABOND CONSTRUCTION, INC., Respondent.	OSHRC Docket No. 12-0993

APPEARANCES:

Madeline T. Le, Attorney; James E. Culp, Regional Solicitor; M. Patricia Smith, Solicitor of Labor; U.S. Department of Labor, Washington, DC and Dallas, TX
For the Complainant

Darrel Kirtley, Vice President; Permabond Construction, Inc., Houston, TX
For the Respondent

REMAND ORDER

Before: ROGERS, Chairman; ATTWOOD, Commissioner.

BY THE COMMISSION:

At issue before the Commission is Administrative Law Judge Brian A. Duncan's Decision and Order affirming a single-item citation issued to Permabond Construction, Inc. ("Permabond") and assessing the total proposed penalty of $4,900. For the following reasons, we remand this case to the judge for further proceedings consistent with this opinion.

On October 30, 2012, the judge issued an Order to Show Cause in which he gave Permabond, appearing *pro se*, fifteen days to show why it should not be held in default for (1) failing to appear for an October 22, 2012 conference call and (2) failing to file a timely notice of contest. *See* Occupational Safety and Health Act of 1970 ("the Act"), 29 U.S.C. § 659(a) (requiring employer to notify the Secretary of its intent to contest a citation within 15 working days after receiving a Citation and Notification of Penalty from the Occupational Safety and

Health Administration). The show cause order was sent to Permabond 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 Permabond received the order on November 2, 2012.

On November 30, 2012, the judge sent the parties a Notice of Decision indicating that the attached copy of his decision affirming the citation would be submitted to the Commission on December 14, 2012, and if not directed for review, would become a final Commission order thirty days after docketing with the Commission. *See* Commission Rule 90(b)(1), (2), 29 C.F.R. § 2200.90(b)(1), (2). In his decision, the judge concluded that Permabond's repeated failure to timely participate in the proceedings constituted contumacious conduct justifying the sanction of default. *See* Commission Rule 101(a), 29 C.F.R. § 2200.101(a) (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 . . . .").

On December 7, 2012, seven days after the judge sent his decision to the parties, Permabond faxed a letter to the Commission's Denver Regional Office, dated December 4, 2012, ("December 4 letter") and addressed to the judge.[1] In the letter, Permabond's vice president, Darrel Kirtley, explains that he missed the scheduled conference call due to illness and asks the judge for "another conference date." Approximately one week later, the judge submitted his decision to the Commission's Executive Secretary, who docketed it on December 17, 2012, which became "the date that the Judge's [decision was] made for purposes of section 12(j) of the Act, 29 U.S.C. § 661(j)." Commission Rule 90(b)(2), 29 C.F.R. § 2200.90(b)(2).

On January 3, 2013, the Secretary forwarded to the judge a copy of a letter from Permabond dated November 2, 2012 ("November 2 letter"). In her cover letter to the judge, the Secretary states that Permabond's letter is being forwarded "to the court in the event that Permabond itself failed to do so." The November 2 letter begins with the salutation "To whom it may Concern," and in it Kirtley explains that he missed the scheduled conference call because he wrote down the wrong date and asks "for the mercy of the courts to allow Permabond Construction another chance."

Under Commission Rule 90(b)(3), 29 C.F.R. § 2200.90(b)(3), a judge has the authority to correct errors in his decision and/or relieve a party from default or grant reinstatement, as

[1] Judge Duncan is assigned to the Denver Regional Office.

follows:

> *Correction of errors; Relief from default.* Until the Judge's report has been directed for review or, in the absence of a direction for review, until the decision has become a final order, the Judge may correct clerical errors and errors arising through oversight or inadvertence . . . . Until the Judge's report has been docketed by the Executive Secretary, the Judge may relieve a party of default or grant reinstatement under §§ 2200.101(b), 2200.52(f) or 2200.64(b).

Here, the record shows that Permabond's December 4 letter was faxed to the judge before his decision was transmitted to the Executive Secretary on December 14, and docketed on December 17, 2012. But the judge stated in his decision that "[a]s of this date, Respondent has never contacted the Court regarding its failure to appear on the conference call, nor filed any response to the *Order to Show Cause*." Given this statement, it is unclear whether the judge ever reviewed the December 4 letter, which provided an explanation for Kirtley's failure to attend the conference call, before sending his decision to the Executive Secretary for docketing.

With respect to the November 2 letter, the record suggests that Permabond may not have filed a copy of it with the judge. It is possible, however, that Kirtley, as the company's *pro se* representative, intended for the letter to serve as Permabond's response to the show cause order, but he mistakenly sent it to the Secretary instead of the judge. Indeed, the letter was dated the same day Permabond received the show cause order and provided another, albeit different, explanation for Kirtley's failure to attend the conference call. *See Schipper Constr., Inc.*, 18 BNA OSHC 2000, 2002, 1999 CCH OSHD ¶ 31,885, p. 47,134 (No. 99-0253, 1999) (accepting answer to complaint that employer, appearing *pro se*, erroneously mailed to Secretary instead of judge).

Under these circumstances, we find it appropriate to remand this case to the judge to allow him an opportunity to review both of Permabond's letters and determine whether any further action is appropriate.

SO ORDERED.

/s/
Thomasina V. Rogers
Chairman

/s/
Cynthia L. Attwood
Commissioner

Dated: February 11, 2013

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

Secretary of Labor, Complainant, v. Permabond Construction, Inc., Respondent,	OSHRC DOCKET NO. 12-0993

Before: Administrative Law Judge Brian A. Duncan

DECISION AND ORDER

Procedural History

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to Section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §651 *et seq*. ("the Act"). The Occupational Safety and Health Administration ("OSHA") conducted an inspection of Respondent's worksite in Katy, Texas on November 14, 2011. As a result of the inspection, OSHA issued a *Citation and Notification of Penalty* to Respondent alleging one serious violation of the Act with an associated penalty of $4,900.00. Respondent contested the citation item.[2]

On October 2, 2012, the Court issued an *Order* which required the parties to appear by telephone for a conference call on October 22, 2012. Complainant's counsel appeared by telephone for the conference call. Respondent failed to appear.

[2] Respondent's *Notice of Contest* was not filed until April 26, 2012. Complainant filed *Complainant's Opposition to Relief Under Rule 60(b)* seeking to vacate the *Notice of Contest* as impermissibly late. That issue was still pending when this case was re-assigned to the undersigned for adjudication.

On October 30, 2012, the Court issued an *Order to Show Cause* to Respondent, pursuant to Commission Rules 67 and 101, requiring Respondent to: (1) explain its failure to appear on the October 22nd conference call; and (2) explain its reasons for filing the *Notice of Contest* on April 26, 2012 for citations issued on December 6, 2011. The *Order to Show Cause* warned that "[f]ailure to respond to this *Order to Show Cause*, and/or failure to establish good cause, if any, may result in the issuance of default judgment against Respondent dismissing its *Notice of Contest* and affirming the citations proposed in this case pursuant to Commission Rules 67 and 101." As of this date, Respondent has never contacted the Court regarding its failure to appear on the conference call, nor filed any response to the *Order to Show Cause*.

Commission Rule 101(a) provides "[w]hen 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 the Judge, after having been afforded an opportunity to show cause why he should not be declared in default ... [t]hereafter, the Commission or Judge, in their discretion, may enter a decision against the defaulting party ..." The Court finds that Respondent has either abandoned its contest in this case or demonstrated a pattern of disregard for the procedural requirements and authority of the Commission by: (1) failing to appear for the October 22, 2012 conference call; (2) failing to file its *Notice of Contest* pursuant to the fifteen working day limitation contained in Section 10(a) of the Act, 29 U.S.C. §659(a); and (3) failing to respond to the Court's October 30, 2012 *Order to Show Cause.* Respondent's repeated failure to timely participate in this proceeding constitutes contumacious conduct justifying sanctions. *Philadelphia Construction Equipment, Inc*., 16 BNA OSHC 1128, 1993 CCH OSHD ¶30,051 (No. 92-0899, 1993); *Sealtite Corporation*, 15 BNA OSHC 1130, 1991 CCH OSHD ¶29,398 (No. 88-1431, 1991). Accordingly, Respondent's

Notice of Contest is hereby VACATED and the violation alleged in the *Citation and Notification of Penalty* is AFFIRMED.

SO ORDERED.

/s/

Date: December 14, 2012
Denver, Colorado

Judge Brian A. Duncan
U.S. Occupational Safety and Health Review Commission