



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.

GABRIEL LOPEZ ALVAREZ DBA
THREE AMIGOS,
Respondent.

OSHRC Docket No. 12-0710

APPEARANCES:

Janet M. Graney, Acting Regional Solicitor; U.S. Department of Labor, Chicago, IL
For the Complainant

Gabriel Lopez Alvarez, Chandler, AZ
For the Respondent

DIRECTION FOR REVIEW AND REMAND ORDER

Before: ROGERS, Chairman; and ATTWOOD, Commissioner.

BY THE COMMISSION:

On September 25, 2012, Chief Administrative Law Judge Covette Rooney issued an Order dismissing the notice of contest filed by Gabriel Lopez Alvarez dba Three Amigos and affirming two citations issued to Respondent with proposed penalties totaling \$21,120. Respondent, appearing *pro se*, filed with the Commission a letter dated October 9, 2012, that we have construed as a petition for discretionary review of the judge's decision. For the following reasons, we direct the case for review and remand for further proceedings consistent with this opinion.

On July 25, 2012, the judge issued a show cause order in which she gave Respondent until August 6 to show why it should not be held in default for failing to file an answer to the Secretary's complaint. The judge advised Respondent that failure to comply with the show

cause order would result in the dismissal of its notice of contest and an affirmance of the citations together with the proposed penalties. The show cause order was sent to Respondent at the Tennessee address then on record via certified mail, return receipt requested, but was returned on July 29 with the return receipt unsigned.¹ The front of the envelope was stamped “Return to Sender; Vacant; Unable to Forward.” The record shows that a previous order issued by the judge on May 23, 2012, and sent to Respondent at the Tennessee address was also returned and the envelope stamped “Return to Sender; Not Deliverable as Addressed; Unable to Forward.”²

In her Order dismissing the case, the judge noted that “[o]n 7/29/12 the [return receipt] green signature card was returned to the Commission with an indication that it was Vacant-unable to forward,” but found that “[i]t is clear, therefore, that Respondent received the Order.” The judge also found that “[t]here is no evidence in the record that Respondent has not received any of the previous Commission mailings in this matter.” Given the record before us, we find that both of these findings are contrary to the evidence. In addition, the judge did not address in her Order whether Respondent’s conduct was contumacious or if the Secretary was prejudiced by its noncompliance with the Commission’s rules. *See, e.g., Daniel Koury Constr. Inc.*, 20 BNA OSHC 2089, 2090 (No. 04-1300, 2004) (“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.’ ” (internal citations omitted)); *Rakich Masonry*, 21 BNA OSHC 1928, 1928-29 (No. 06-1159, 2007) (vacating judge’s dismissal and remanding for *pro se* employer to substantiate its assertion that incarceration hindered receipt of mail and caused its failure to file an answer or respond to show cause order).

¹ In its petition, Respondent, apparently for the first time, identifies its address as located in Chandler, Arizona. This is a different address from the one located in Knoxville, Tennessee, that was previously on record. *See* 29 C.F.R. § 2200.6 (party required to promptly communicate change of address in writing).

² We note that both of the judge’s orders were properly served in accordance with the Commission’s rules. *See* 29 C.F.R. § 2200.7(c) (service of an order may be accomplished by postage pre-paid first class mail at the last known address and is deemed effected upon mailing); 29 C.F.R. § 2200.101(d) (show cause orders shall be served upon the affected party by certified mail, return receipt requested); 29 C.F.R. § 2200.101 (failing to answer a show cause order that is served upon the affected party by certified mail, return receipt requested, may result in a dismissal sanction); *see also* 29 C.F.R. § 2200.6 (parties who fail to furnish a change of address shall be deemed to have waived their right to notice and service).

Accordingly, on remand, the judge should reconsider both findings regarding Respondent's receipt of her orders, reassess her decision to default Respondent, and take any further action as appropriate.

SO ORDERED.

/s/
Thomasina V. Rogers
Chairman

/s/
Cynthia L. Attwood
Commissioner

Dated: October 24, 2012



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**GABRIEL LOPEZ ALVAREZ DBA
THREE AMIGOS**

Respondent.

OSHRC DOCKET NO. 12-0710

ORDER

On **July 25, 2012**, the undersigned issued an Order to Show Cause and ordered Respondent to show cause on or before **August 6, 2012** why it had not answered the complaint filed in this matter within the time permitted under the Commission Rules of Procedure, and why it should not be declared in default. Respondent was advised that failure to comply with the Order would result in the dismissal of its notice of contest, the affirming of the citation(s), and the assessing of the proposed penalties without a hearing. The Order to Show Cause was sent by first class certified mail, return receipt requested. On **7/29/12** the green signature card which accompanied the certified letter was returned to the Commission with an indication that it was Vacant-unable to forward. It is concluded, therefore, that Respondent received the Order. Accordingly, Respondent has failed to respond to the Order. Respondent's actions demonstrate that it has either abandoned the case or treats the Commission's Rules of Procedure with disdain. This cannot be countenanced, as it seriously impedes the administration of justice.

Rule 101(a) of the Commission's Rules of Procedure, 29 C.F.R. § 2200.101(a), provides in pertinent part as follows:

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....

There is no evidence in the record that Respondent has not received any of the previous Commission's mailings in this matter. Further, in the absence of evidence to the contrary, it is reasonable to presume that the Postal Service officials have properly discharged their duties. *See Powell v. Commissioner*, 958 F.2d 53, 54 (4th Cir. 1992). A judge has very broad discretion in imposing sanctions for noncompliance with the Commission's Rules of Procedure or the judge's orders. *See Sealite Corp.*, 15 BNA OSHC 1130, 1134 (No. 88-1431, 1991). In view of the record before me, the undersigned finds that Respondent has been given proper notice of the proceedings in this matter and the opportunity to respond to the Order to Show Cause.

Accordingly, the notice of contest filed by Respondent is DISMISSED. The Secretary's citation(s) and proposed penalties are AFFIRMED in all respects.

/s/
COVETTE ROONEY
Chief Judge, OSHRC

DATE: September 25, 2012
Washington, D.C.