



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. 08-1932

MCQUEARY INDUSTRIES, INC.,

Respondent,

APPEARANCES:

Lindsay A. Wofford, Attorney; William E. Everhart, Regional Solicitor; Gregory F. Jacob, Solicitor; U.S. Department of Labor, Washington, DC
For the Complainant

Mike McQueary; Fort Worth, TX
For the Respondent

REMAND ORDER

Before: ROGERS, Chairman; THOMPSON, Commissioner.

BY THE COMMISSION:

In an order dated May 19, 2009, Chief Administrative Law Judge Irving Sommer dismissed a notice of contest (“NOC”), timely filed by McQueary Industries, Inc. (“McQueary”), due to the company’s failure to file an answer or respond to a show-cause order issued by the judge. In his dismissal order, the judge affirmed two citations alleging several serious and other-than-serious violations of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678, and assessed the total proposed penalty of \$8,400. For the reasons that follow, we set aside the dismissal order and remand this case to the judge.

Background

Following the issuance of the citations in this case, McQueary, appearing *pro se*, timely filed a NOC and, on January 5, 2009, the Secretary filed a complaint. McQueary was required to

file an answer by January 28. Commission Rule 34(b)(1), 29 C.F.R. § 2200.34(b)(1). In early February, after the time period for filing an answer had elapsed, the Secretary provided McQueary's owner with a draft settlement agreement and informed the judge of the proposed settlement. There is nothing in the record, however, to indicate whether the parties ever executed the draft agreement.

On April 1, the judge *sua sponte* issued an order directing McQueary to show cause, on or before April 10, why its NOC should not be dismissed for failure to file an answer. A certificate of receipt shows that, on April 6, a McQueary employee received the show-cause order. On May 19, noting that McQueary had failed to respond to the show-cause order, the judge entered a default judgment against McQueary and affirmed the citations. McQueary timely filed a petition seeking review of the judge's order.

In the petition, McQueary explains that, although the company received the show-cause order via certified mail, it was addressed to the owner rather than the individual who was responsible for "handling this issue" and further, that the individual responsible for handling this issue was on extended leave. McQueary also states its desire to "reinstate the payment arrangement" set forth in the draft settlement agreement. Attached to the petition is an unsigned copy of the settlement agreement, which would have reduced the total penalty for all alleged violations to \$4,200, and required twelve monthly payments of \$350, starting on April 15, 2009.

Discussion

We conclude the judge acted within his discretion by entering a default judgment against McQueary after more than one month passed without McQueary responding to the show-cause order. Commission Rule 101(a), 29 C.F.R. § 2200.101(a) (stating that a party failing to "proceed as provided by [Commission] rules or as required by the Commission or Judge . . . 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 . . ."). Through its petition, filed *pro se*, McQueary has now provided a reason for its failure to respond to the show-cause order and has expressed its desire to settle the case. Under these circumstances, we conclude the present record lacks sufficient evidence to support the sanction of dismissal. *Samuel Filisko*, 20 BNA OSHC 2204, 2206, 2005 CCH OSHD ¶ 32,855, p. 52,963 (No. 04-1465, 2005) ("[L]ate filing alone without evidence of prejudice, contumacious conduct

and/or a pattern of disregard for Commission rules would not be a basis for dismissing this case.”).

Accordingly, we set aside the default judgment and remand the case to the judge. Commission Rule 101(b), 29 C.F.R. § 2200.101(b) (sanction may be set aside “[f]or reasons deemed sufficient” by the Commission). On remand, if the judge finds that there is no evidence of contumacy, pattern of disregard, or prejudice to the Secretary, he should determine whether the parties are still willing to enter into a settlement agreement. *Id.* If settlement is desired, the judge should then provide the parties an opportunity to reach such an agreement. Commission Rule 100(a), 29 C.F.R. § 2200.100(a) (“Settlement is permitted and encouraged by the Commission at any stage of the proceedings.”).

SO ORDERED.

/s/ _____
Thomasina V. Rogers
Chairman

Dated: July 8, 2009

/s/ _____
Horace A. Thompson III
Commissioner

Secretary of Labor,

Complainant,

V.

McQueary Industries, Inc.

Respondent.

OSHRC Docket No. 08-1932

ORDER

On **4/1/09** the undersigned issued an **ORDER TO SHOW CAUSE** to the Respondent as to why his Notice of Contest should not be dismissed for failure to file an answer to the complaint as required by the Commission Rules of Procedure. The Respondent failed to reply to the ORDER. His actions demonstrate either that he has abandoned the case or treats the Rules of Procedure of the Commission with disdain. This cannot be countenanced as it seriously impedes the administration of justice.

Accordingly, the Notice of Contest filed by the Respondent is dismissed. The Secretary's citation(s) and proposed penalties are **AFFIRMED** in all respects.

/s/
Irving Sommer
Chief Judge

DATE: 29 May 2009