



judge, ordering him to reinstate the case for further proceedings on the merits of the citation allegations in a manner consistent with this opinion.

### **PROCEDURAL BACKGROUND**

Following issuance of the citation on September 18, 2003, and timely-filed notice of contest, the parties participated in settlement discussions characterized in a June 3, 2004 letter from the Secretary to the judge as “hopeful of reaching settlement in the near future.” On July 6, 2004, the judge scheduled another of numerous pre-trial telephone conferences to be held on July 9, 2004, at 9:00 am.

On July 14, the judge issued an “Order to Show Cause” pursuant to Rule 41 of the Commission Rules of Procedure, 29 C.F.R § 2200.41, for Respondent’s “fail[ure] in his responsibility to be available for the pre-trial telephone conference.” The judge ordered that Respondent “shall no later than 5:00 p.m. EST on July 16, 2004, provide in affidavit form a statement as to reason(s) the Respondent should not be declared to be in default and the Citation and Notification of Penalty issued December 15, 2003 (sic), should not be affirmed.”<sup>1</sup> The Certificate of Service stated that the Order “was mailed to the parties . . . by first class mail on July 14, 2004.” Underneath that statement, the words “VIA FACSIMILE” are printed, but there is no facsimile transmission sheet or verification report in the file, as there is for a different document sent by facsimile. Also printed above the Respondent’s address on the Certificate of Service, are the words “FEDERAL EXPRESS.” There is no verification in the file of Respondent’s receipt via any means of the Order to Show Cause.

On July 27, 2004, the judge sent to the parties a Notice of Decision and copy of his Decision and Order on Default Judgment for SGS’ failure to respond to the show cause order. The notice stated that an aggrieved party may file a petition for discretionary review by the Commission: with the judge within ten days from the date of the notice, or thereafter with the Commission’s Executive Secretary within twenty days of the date of the Executive

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<sup>1</sup> As previously noted, the citation is dated September 18, 2003.

Secretary's notice of docketing. SGS timely requested such review by letter addressed to the judge dated August 2, 2004, and received by the Chief Administrative Law Judge's office on August 5, 2004. SGS manager John A. Calarco, appearing pro se, explained in the petition that he was "aware and available" for the July 9, 2004 telephone conference but that the phone call was mistakenly picked up by his recorder rather than being forwarded to his cell phone in the field. The judge submitted his Decision and Order on Default Judgment to the Commission's Executive Secretary on August 6, 2004, which became a final order of the Commission on September 9, 2004 pursuant to section 12(j), 29 U.S.C. §661(j), of the Act. This matter has only recently come to the Commission's attention.

## DISCUSSION

### A. The Petition for Discretionary Review

Federal Rules of Civil Procedure, Rule 60(a), provides for relief from a final judgment or order as follows:

Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders.

It is apparent here that SGS' timely-filed petition for review was inadvertently never considered by the Commission. SGS' petition was not timely circulated to the Commission, and the Commission's consequent failure to consider it constitutes an error arising from oversight that the Commission can remedy under Rule 60(a). *See Voegele Co., Inc.*, 7 BNA OSHC 1713, 1714 n.2, 1979 CCH OSHD ¶ 23,860, p. 28,938 n.2 (No. 76-2199, 1979) (finding case properly before Commission pursuant to Rule 60(a), where late direction for review resulted from reliance on erroneously stamped final order date), *aff'd*, 625 F.2d 1075 (3<sup>rd</sup> Cir. 1980); *In re American Precision Vibrator Co.*, 863 F.2d 428 (5th Cir. 1989) (finding court authorized, pursuant to Rule 60(a), to enter second order effectively vacating prior dismissal of appellant's bankruptcy petition, where first order was direct result of district court's clerical mistake in failing to timely docket appellant's response to dismissal

motion). Accordingly, we hereby grant SGS' petition for discretionary review, and address the merits of its petition below.

### **B. The Decision and Order on Default Judgment**

Commission Rule 41 governs the imposition of sanctions providing, in relevant part, as follows.

(a) *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 either: (1) 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 (2) on the motion of a party.

...

(d) *Show cause orders.* All show cause orders issued by the Commission or Judge under paragraph (a) of this section shall be served upon the affected party by certified mail, return receipt requested.

As recently reiterated in *Daniel Koury Construction, Inc.*, 20 BNA OSHC 2089, 2090 (No. 04-1300, 2004), "Commission precedent recognizes the appropriateness of sanctions 'to ensure compliance with prehearing procedures and to adjudicate cases fairly and efficiently,' but prohibits imposition of 'a sanction that is too harsh under the circumstances of the case.'" (Citations omitted). "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.'" *Id.* (citations omitted). In that case, we vacated a default judgment under circumstances almost identical to those present here.

As in the *Koury* case, we find that the judge's dismissal of the citation here was both procedurally and substantively flawed. As a procedural matter, the judge erred on two counts. First, he failed to comply with the Commission Rules of Procedure, Rule 41(a)(1), by sending the Order to Show Cause by means other than certified mail, return receipt requested, and there is no indication in the file whether Respondent ever, in fact, received it. In addition, that Order mandated a response from a pro se party in affidavit form within two days. Rule 41(a) requires not just that a show cause order be sent; the party must be

afforded an *opportunity* to show why default is not warranted. We find that the two-day response time provided in the judge's order for this pro se respondent was patently inadequate and unreasonable. In these circumstances, the judge effectively provided SGS no opportunity to respond at all. *See Richard A. Pulaski Construction Co., Inc.*, 1995-97 CCH OSHD ¶ 30,811 (No. 94-1973, 1995) (reversing and remanding dismissal of notice of contest for failure to telephone judge for scheduled prehearing conference where employer not provided opportunity to show cause and reasons for missing phone call deemed sufficient). *See also Amsco Inc.*, 19 BNA OSHC 2189, 2191-92 (No. 02-0220, 2003) (vacating default sanction where counsel missed a single pre-hearing teleconference).

Substantively, the judge made no finding that Respondent's failure to be present for a single telephone conference was contumacious and, on this record, we find that he could not. Thus, Respondent apparently participated in prior telephone conferences and settlement discussions and, as stated in his Petition before the Commission, was "aware and available" for the missed call but experienced a glitch in his telephone answering system. Although Respondent's failure to contact the judge soon thereafter may have been thoughtless and inconvenient, we find that it falls far short of the type of "serious, repeated, contumacious, extreme, or otherwise inexcusable" conduct that would warrant dismissal. *Bachier-Ortiz v. Colon-Mendoza*, 331 F.3d 193, 195 (1<sup>st</sup> Cir. 2003) (per curiam). Nor do we see any basis to establish that the Secretary suffered prejudice from this single missed telephone conference.

In these circumstances we conclude that the judge abused his discretion in dismissing the case. Accordingly, we vacate the judge's August 6, 2004 Decision and Order on Default Judgment, and order that the case be remanded to the judge for reinstatement and proceedings on the merits of the citation in a manner consistent with this opinion.

So Ordered.

/s/  
W. Scott Railton  
Chairman

/s/  
Thomasina V. Rogers  
Commissioner

/s/  
James M. Stephens  
Commissioner

Dated: April 11, 2005

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SECRETARY OF LABOR,

Complainant,

v.

STRUCTURAL GROUTING SYSTEMS  
EXCAVATING, INC.,

Respondent.

OSHRC Docket No. 03-1913

***DECISION AND ORDER ON DEFAULT JUDGEMENT***

On July 6, 2004, an order notified all parties including the Respondent of a pre-trial telephone conference to be held on Friday, July 9, 2004 at 9:00 a.m. EDT. The Respondent failed to notify the undersigned of its unavailability for the pre-trial telephone conference, and thus failed in its responsibility to this Court.

Thereafter, the undersigned on July 14, 2004, issued an order requiring the Respondent to provide in affidavit form a statement as to reason(s) the Respondent should not be declared to be in default and the Citation and Notification of Penalty issued September 18, 2003, should not be affirmed. The Respondent did not file a reply.

***DISCUSSION AND CONCLUSION***

The Respondent has failed to comply with the Order To Show Cause and is declared to be in default.

IT IS ORDERED that Default Judgement is GRANTED.

IT IS FURTHER ORDERED that the Citation and Notification of Penalty issued September 18, 2003, is affirmed in its entirety.

/s/

G. Marvin Bober

Administrative Law Judge

Dated: August 6, 2004  
Washington, D.C.