



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.

PROFESSIONAL GRADE CONSTRUCTION
GROUP, INC.,

Respondent.

OSHRC Docket No. 13-1447

ORDER OF DEFAULT

On February 26, 2013, the Occupational Safety and Health Administration issued Respondent a thirteen-item serious citation and a two-item repeat citation, alleging violations of the safety standards at 29 C.F.R. Part 1926, and proposing a penalty of \$43,560. The citation was sent to Respondent at its record address. Respondent filed a timely notice of contest, sent by Michael Rubinstein. The Commission's Notice of Docketing was sent to Respondent at the record address, but the Notice of Docketing return card was not returned.

On December 17, 2013, this office received the Secretary's complaint.¹ Respondent did not file an answer as required under 29 C.F.R. § 2200.34(b). On February 25, 2014, the undersigned issued an Order to Show Cause Why Notice of Contest Should Not Be Dismissed ("Order") for failing to file an answer to the Secretary's complaint. The Order directed

¹ On December 6, 2013, the undersigned had issued an Order to Secretary to Show Cause Why Contested Citations Should Not Be Vacated because my office was not yet in receipt of the Complaint. The undersigned accepted the Secretary's certification that he mailed the Complaint on November 25, 2013, in satisfaction of the Order to Secretary to Show Cause Why Contested Citations Should Not Be Vacated.

Respondent to show cause on or before March 11, 2014, 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 record address, by regular first class mail and by certified mail with return receipt requested in accordance with 29 C.F.R. § 2200.101(d). The Order was returned, unopened, marked "return to sender, unclaimed, unable to forward," on March 28, 2014.² My office attempted to contact Respondent at its record telephone number, leaving a voice message on April 10, 2014. To date, Respondent has not communicated with my office.

Rule 6 of the Commission's Rules of Procedure, 29 C.F.R. § 2200.6, provides that:

Record Address: Every pleading or document filed by any party or intervenor shall contain the name, current address and telephone number of his representative or, if he has no representative, his own name, current address and telephone number. Any change in such information shall be communicated promptly in writing to the Judge, or the Executive Secretary if no Judge has been assigned, and to all other parties and intervenors. *A party or intervenor who fails to furnish such information shall be deemed to have waived his right to notice and service under these rules.*

29 C.F.R. § 2200.6 (emphasis added).³ Rule 101(a) of the Commission's Rules of Procedure, 29 C.F.R. § 2200.101(a), provides in relevant part that:

² The certified mailing tracking number 7012-1640-0002-4863-1687 confirms the attempted delivery on February 27, 2014, and the "status of item" was marked "notice left (no authorized recipient available)." As of March 25, 2014, the "status of item" was marked "unclaimed."

³ The record address seems to have been taken from Respondent's letterhead from the April 12, 2013 notice of contest, which was forwarded to the Commission by the Secretary, along with the Citation and Notification of Penalty, on August 30, 2013. The website address on Respondent's letterhead, www.progradeonline.com, links to a website that contains the same record address and telephone number on the letterhead. The website also contains "News" entries that are dated as recently as April 30, 2014.

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....

29 C.F.R. § 2200.101(a). 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).

Respondent has failed to comply with the Commission's rules by not filing an answer. By not filing a change of address, Respondent has also waived its right to service and notice provided by the Commission's rules. I also find Respondent's conduct here to be contumacious in that, as set out above, Respondent has failed to respond to the Commission's attempts at contact, especially the voice message left on April 10, 2014. For these reasons, Respondent is found to be in DEFAULT, its notice of contest is DISMISSED, and the OSHA citation issued to Respondent on February 26, 2013, Inspection Number 640678 is AFFIRMED in its entirety.

SO ORDERED.

/s/ _____
Covette Rooney
Chief Judge

Dated: May 27, 2014
Washington, D.C.