United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3419

SECRETARY OF LABOR, Complainant, v. RISA MANAGEMENT CORP., Respondent.	OSHRC DOCKET No. 13-1775

ORDER OF DEFAULT

For the reasons described below, the Respondent is found to be in default and its notice of contest is dismissed.

Background

On September 3, 2013, the Albany, New York, Area Office of the Occupational Safety and Health Administration (OSHA) issued a ten-item serious citation and a one-item other-than-serious citation proposing penalties totaling $34,300.00 to the Respondent, arising out of inspection number 915763 that OSHA had conducted on June 28, 2013, at a worksite in New Lebanon, New York. The Respondent timely contested the citations and proposed penalties by letter from the Respondent signed by Mr. Rishi Prashad, who is the Respondent's Chief Operating Officer.

The Secretary filed his complaint in the matter on May 6, 2014. The Respondent did not file an answer to the complaint, so on June 23, 2014 the Chief Judge issued an order directing the Respondent to show cause why its notice of contest should not be dismissed for its failure to file an answer. The Respondent responded to that order by letter dated July 7, 2014, from Attorney Gary C. Fischoff, stating that he was the attorney for the Respondent in connection with Chapter

11 bankruptcy proceedings that had been commenced on December 12, 2013 in the Bankruptcy Court for the Eastern District of New York. Attorney Fischoff asserted in his letter that it appeared to him that "OSHA is simply trying to enforce a money judgment against property of the Debtor's estate" and that "[i]t is submitted that this is stayed by the filing of the petition."

Following receipt of Attorney Fischoff's letter, on July 8, 2014, the Chief Judge assigned the matter to the undersigned administrative law judge for disposition.

By letter of July 14, 2014 to the undersigned from the attorney for the Secretary, the Secretary stated his position regarding the effect of the claimed bankruptcy proceedings on the instant case. The attorney stated that the Secretary had no information that the Respondent had corrected the violative conditions alleged in the citations and noted that the Secretary had no authority to require the Respondent to correct the alleged violative conditions so long as the instant proceedings continued. The attorney for the Secretary asserted that the "enforcement proceeding brought by the Secretary to secure abatement of safety and health violations … and to affirm the alleged violations as Final Orders of the Review Commission" are within the scope of an exception set forth in 11 U.S.C. § 362(a)(4) to the bankruptcy code's automatic stay provision. The attorney for the Secretary stated further, however, that the "Secretary recognizes that any money which may ultimately be paid by respondent in connection with the alleged OSHA violations would be paid under the auspices of the Bankruptcy Court."

The attorney for the Secretary also stated that in February 2014 the Albany OSHA Area Office had negotiated a settlement of the citations with an attorney for the Respondent named Glen Doherty. According to the attorney for the Secretary, in May 2014 Mr. Doherty informed the Secretary that he had recently learned that the Respondent had filed a bankruptcy petition December 2013 and that the Respondent had determined not to sign the settlement agreement.

Mr. Doherty informed the attorney for the Secretary that he was no longer representing the Respondent in connection with the citations, and that he understood that Attorney Fischoff would be representing the Respondent in the instant proceedings.

On August 1, 2014, I conducted an initial telephone conference in the matter, in which Attorney Fischoff participated. Attorney Fischoff stated that he was the attorney for the Respondent in the bankruptcy proceedings, but stated that he was not experienced in proceedings before the Commission and that he would *not* be entering an appearance for the Respondent in the instant matter. During the telephone conference, I informed the participants that I had determined the instant matter was not automatically stayed by the bankruptcy proceedings for the reasons described by the attorney for the Secretary in her letter dated July 14, 2014. The participants expressed an interest in renewing settlement discussions, so I informed the parties that I would conduct a follow up telephone conference on August 26, 2014, in order to allow the parties in the interim to explore an agreed settlement. On August 4, 2014, I issued a notice of the follow up telephone conference for August 26, 2014, with a copy sent to both Attorney Fischoff and to the Chief Operating Officer of the Respondent, Rishi Prashad.

On August 13, 2014, the attorney for the Secretary informed me by email (on which Attorney Fischoff was copied) that the Secretary had renewed his previous offer of compromise that had been agreed upon in February 2014 when Attorney Doherty had represented the Respondent.

By email dated August 20, 2014 from Attorney Fischoff to the attorney for the Secretary (and copied to me), Attorney Fischoff stated, "Please respond to my request for a change to the payment schedule."

On August 26, 2014, I conducted a follow up telephone conference in which the attorney

for the Secretary participated, but for whom no representative participated on behalf of the Respondent. The attorney for the Secretary stated that the Secretary had agreed to change the payment schedule as requested by Attorney Fischoff and that parties had agreed to the terms of a settlement, which she understood the Respondent could enter into only if it were first approved by the bankruptcy court. I followed up this telephone conference with an email message that same day to both the attorney for the Secretary and to Attorney Fischoff, wherein I stated that I would issue an order acknowledging the proposed settlement and allowing the parties 60 days to submit the fully executed settlement agreement to the undersigned. I allowed more than the customary 30 days for the submission of a fully executed settlement agreement because more time appeared necessary for the Respondent to obtain the approval of the proposed settlement by the bankruptcy court. I also indicated that upon a showing of good cause I would allow extensions for the filing of the fully executed settlement agreement. Attorney Fischoff did not make any comment or acknowledgement in response to my email message.

On August 26, 2014, I issued an Order Acknowledging Proposed Settlement, in which I ordered the matter removed from the hearing calendar and directed the parties to file a fully executed settlement agreement within 60 days. The order provided also that if a fully executed settlement agreement was not filed within 60 days, then "this matter will be placed on the trial calendar and a hearing will be immediately scheduled."

The parties did not file a fully executed settlement agreement by the October 26, 2014 deadline or request an extension of that deadline, so on December 18, 2014, I issued an order restoring this matter to the trial docket.

Also on December 18, 2014, I issued to the Respondent an "Order to Show Cause Why Notice of Contest Should Not be Dismissed" due to the Respondent's continuing failure to file

an answer to the Secretary's complaint. The Respondent was ordered to show such cause on or before January 6, 2015. The Order to Show Cause was served by both regular first class mail and by a separate certified mailing, both of which were addressed to the Respondent as follows: "Rishi Prashad; Risa Management Corp.; 55-01 43rd Street, 3rd Floor; Maspeth, NY 11378-2023." The certified mailing was delivered as addressed on December 20, 2014. The letter sent by regular first class mail was not returned by the postal service undelivered, and thus is presumed to have been duly delivered to the Respondent as well. *See Legille v. Dann*, 544 F.2d 1 (D.C. Cir. 1976) (applying the rebuttable presumption that post office has delivered a properly mailed item).[1] The Respondent did not file a response to the Order to Show Cause.

Even though the Respondent did not respond to the order to show cause, in recognition of the policy in law that favors deciding cases on their merits, I determined to allow the Respondent another opportunity to participate in these proceedings. Accordingly, on January 13, 2015, I issued a "Second Order to Show Cause Why the Notice of Contest Should Not Be Dismissed," which required the Respondent to show cause on or before January 30, 2015, "why the Respondent should not be declared in default and its notice of contest dismissed due to its failure to file an answer to the complaint." This order to show cause also included the following admonition in distinctive typeface: "NOTICE!! If the Respondent fails to respond as required by this Order, I will likely issue an order finding the Respondent to be in default and dismissing the Respondent's notice of contest." The order further warned the Respondent as follows: "Such dismissal of the notice of contest would result in the citation that was issued on September 3, 2013, in connection with inspection number 915763 being deemed a final order of the

[1]A copy of the Order to Show Cause was also sent to Attorney Fischoff only as a courtesy, inasmuch as he had earlier affirmatively stated that was not formally entering an appearance pursuant to Commission Rule 23. 29 C.F.R. § 2200.23.

Commission and not subject to review by any court of agency pursuant to 29 U.S.C. § 659(a)."

This second order to show cause was sent to the Respondent's Chief Operating Officer, Rishi Prashad, by both certified mailing and by separate first class mailing. The certified mailing was delivered as addressed on January 16, 2015, and the first class mailing was not returned by the postal service undelivered.[2]

The Respondent did not file a response to the second order to show cause within the time specified.

By email message dated February 5, 2015, to my administrative assistant, from Mr. Shafqat Tanweer, who identified himself to be the Respondent's "General Manager & CFO," Mr. Tanweer stated as follows: "I just spoke with our Bankruptcy Attorney Mr. Gary Fischoff and he told me that we did file a pre-petition claim for proposed penalty of $49,000 for OSHA."

As a result of my office receiving this email communication directly from the Respondent, I determined to allow the Respondent additional time to respond to the second order to show cause, so on February 6, 2015 I issued an "Order Extending Time for Respondent to Show Cause Why Notice of Contest Should Not Be Dismissed." This order extended the time for the Respondent to file a written response to the Second Order to Show Cause to February 13, 2015. This order again admonished the Respondent as follows in distinctive typeface: "The Respondent is again reminded that if the Respondent fails to file a written response to the order to show cause, I will likely issue an order finding the Respondent to be in default and dismissing the Respondent's notice of contest."

Also on February 6, 2015, I issued a notice of telephone conference to be conducted on February 20, 2015 at 9:30 a.m., for the purpose of addressing the second order to show cause as

[2] A copy of the second order to show cause was also sent to Attorney Fischoff as a courtesy.

well as the Respondent's anticipated written response thereto. The notice noted in distinctive typeface that participation in the telephone conference was mandatory. This notice was served on the Respondent, and a courtesy copy was again sent to Attorney Fischoff.

The Respondent did not file a written response to the second order to show cause by February 13, 2015, or any time thereafter.

The Respondent did not participate in the telephone conference conducted on February 20, 2015. During that telephone conference, the attorney for the Secretary stated that she had not had any recent contact with any representative of the Respondent. The attorney for the Secretary was unaware whether the Respondent had made any efforts to have the bankruptcy court approve the settlement on the terms agreed in August 2014. I informed the attorney for the Secretary that in view of the Respondent's failure to respond to two separate orders to show cause and failure to call in for the telephone conference on February 20, 2015, that I intended to issue an order finding the Respondent to be in default and dismissing its notice of contest.

Discussion

Commission Rule 101(a), 29 C.F.R. § 2200.101(a), provides in relevant 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 in default …. Thereafter, the . . . Judge, in [his] discretion, may enter a decision against the defaulting party . . . .

The Commission "follows the policy in law that favors deciding cases on their merits." *DHL Express, Inc.*, 21 BNA OSHC 2179, 2180 (No. 07-0478, 2007). Rule 101(a) nevertheless permits the harsh sanction of dismissal of a notice of contest where a party has displayed a "pattern of disregard" of Commission proceedings. *Philadelphia Constr. Equip., Inc.*, 16 BNA OSHC 1128, 1131 (No. 92-899, 1993); *Architectural Glass & Metal Co.*, 19 BNA OSHC 1546,

1547 (No. 00-0389, 2001); *see also* Commission Rule 101(b), 29 C.F.R. § 2200.101(b) (a default sanction may be set aside "[f]or reasons deemed sufficient by the Commission or Judge and upon motion expeditiously made").

The Respondent's conduct described above displays a pattern of disregard of Commission proceedings that warrants an order of default. After the parties failed to submit a fully executed settlement agreement by the October 26, 2014 deadline, and after the Respondent had provided no communication to the Secretary or to the undersigned as to whether the Respondent had sought approval of the proposed settlement from the bankruptcy court, I restored the matter to the trial docket. I also allowed the Respondent three separate deadlines (January 6 & 30 and February 13, 2015) to show cause why its notice of contest should not be dismissed. The Respondent failed to file a response on any of the three separate occasions, despite the clear warning that failure to respond would likely result in the issuance of an order of default and dismissal of its notice of contest. The Respondent also failed to participate in the telephone conference conducted on February 20, 2015.

I have provided the Respondent with serial opportunities to respond to two separate orders to show cause, and I have made it unmistakably clear that if the Respondent failed to respond to the orders to show cause that I would likely issue an order of default. It is impossible to move this case forward to trial in view of the Respondent's continuing failure to participate as directed. The Respondent's actions demonstrate either that it has abandoned this case or that it is disdainful of the orders of the Commission. The Respondent's conduct has been prejudicial to the administration of justice and to the Secretary's enforcement responsibilities under the OSH Act, and cannot be permitted to continue. Dismissal of the Respondent's notice of contest is necessary and appropriate to remedy the Respondent's continuing prejudicial conduct.

ORDER

For these reasons, the Respondent is determined to be in DEFAULT, its notice of contest is DISMISSED, and the serious and other-than-serious citations issued to the Respondent on September 3, 2013, as a result of Inspection Number 915763, are AFFIRMED in their entirety.

SO ORDERED.

/s/
WILLIAM S. COLEMAN
Administrative Law Judge

DATED: March 6, 2015