SECRETARY OF LABOR, Complainant, v. ARCHITECTURAL GLASS & METAL CO., INC., Respondent.	OSHRC Docket No. 00-0389

ORDER

Before: ROGERS, Chairman; EISENBREY, Commissioner.

BY THE COMMISSION:

On December 29, 1999, the Occupational Safety and Health Administration ("OSHA") inspected an Architectural Glass & Metal Co., Inc. ("AGM") facility in Dublin, Ohio. As a result of this inspection, OSHA cited AGM for one serious violation of a standard under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-78 ("the Act"). AGM timely contested the citation, and the case was assigned to Judge Michael H. Schoenfeld.

A. Procedural Background

On May 2, 2000, the judge issued a discovery order directing the Secretary to turn over to AGM a copy of any videotapes taken during the inspection of its facility.[1] This order also notified the parties that a telephone conference call would take place no later than May 19, 2000. On the same day that the judge issued his order, May 2, 2000, the Secretary mailed AGM a letter informing the company that the OSHA compliance officer had not videotaped or photographed AGM's employees during the inspection, and apologizing for any confusion caused by the prior letter. The Secretary did not forward a copy of this letter to the judge, however.

Although the judge's discovery order stated that a conference call would take place no later than May 19, 2000, the judge did not hold or schedule a conference call by that date. Instead, on Sunday, May 21, 2000, the judge's administrative assistant sent by facsimile transmission a one-page document to the Cleveland Solicitor's Office which stated that the judge would have a conference call on Wednesday, May 24, 2000, at 10:30 a.m.[2] This document was directed to the attention of Anthony Stevenson, the attorney assigned to the AGM case. At the designated time, the judge's administrative assistant attempted to contact Stevenson by phone. However, Stevenson was attending a conference outside the office and was unavailable for the call. AGM was represented at the phone conference by Robert Peel, its vice president and chief financial officer. Peel told the judge that Stevenson had previously informed him that OSHA did not have a tape of its inspection of AGM's facility. Peel also stated that the Secretary "had no evidence" to support her allegations. The judge

---

[1]The Secretary had previously informed AGM, by letter dated April 20, 2000, that OSHA had videotaped work-related activities during the inspection of its facility.

[2]The body of the document was typed in 16-point font, and read in its entirety:

> The Judge will have a telephone conference call on Wednesday, May 24, 2000, at 10:30 (EDT). This office will place call. Thank You.

deemed that statement to be a motion to dismiss the citation. The judge granted this motion on May 24, 2000, without a hearing and without giving the Secretary notice of the motion or an opportunity to oppose it, finding that the Secretary's failure to participate in the telephone conference scheduled for that day supported dismissal of the citation, with prejudice, pursuant to either Rule 41 or 64 of the Commission's Rules of Procedure, 29 C.F.R. § 2200.41[3] or § 2200.64.[4]

On June 2, 2000, the Secretary filed a Motion for Reconsideration of the dismissal order, arguing that her attorney was not available for the prehearing conference call because he never received the notice from the judge's office. In her motion, the Secretary did not dispute that the Cleveland Solicitor's Office received the judge's notice, but rather stated that the notice was never forwarded to Stevenson. The Secretary also stated that she had attempted to find the notice from the judge's office, but was unable to determine its location. The judge denied the Secretary's motion for reconsideration in a June 5, 2000 order. The Secretary thereafter petitioned for review of this order. In her petition, the Secretary argues that while the failure to forward the judge's notice to Stevenson "ultimately is attributable to one of the Secretary's representatives . . . the memo's informal format, the manner in which it was served, and the time and date on which it was served may have created a

---

[3]Rule 41(a) provides:

Sanctions. When any party has failed to plead or otherwise proceed as provided by these rules or as required by the Commission or 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.

Thereafter, the Commission or Judge, in their discretion, may enter a decision against the defaulting party or strike any pleading or document not filed in accordance with these rules.

[4]Rule 64(a) provides:

Attendance at hearing. The failure of a party to appear at a hearing may result in a decision against that party.

situation in which someone in the Solicitor's office failed to recognize the importance of the document and failed to deliver it to the Secretary's counsel." However, the Secretary has not submitted any affidavits from the Cleveland Solicitor's office staff attesting to the handling of the facsimile.

B. Discussion

Prehearing procedures that aid in the early formulation of issues benefit all parties during trial preparation and result in the more efficient use of Commission resources at both the hearing and review stages. The imposition of appropriate sanctions is important, therefore, to ensure compliance with prehearing procedures and to adjudicate cases fairly and efficiently. *Duquesne Light Co.*, 8 BNA OSHC 1218, 1221, 1980 CCH OSHD ¶ 24,384, p. 29,718 (No. 78-5034, 1980). Although a judge has very broad discretion in imposing sanctions for noncompliance with Commission Rules of Procedure or his own orders, the judge must not impose a sanction that is too harsh under the circumstances of the case. "Reviewing courts universally recognize the harshness of dismissal with prejudice and generally require that lesser sanctions first be considered." *Id.* at 1222, 1980 CCH OSHD at p. 29,719.

The Commission has held that dismissal of a citation is too harsh a sanction for failure to comply with certain prehearing orders unless the record shows contumacious conduct by the noncomplying party or prejudice to the opposing party. *Noranda Aluminum, Inc.,* 9 BNA OSHC 1187, 1189, 1981 CCH OSHD ¶ 25,086, p. 30,988 (No. 79-1059, 1980); *Circle T. Drilling Co.,* 8 BNA OSHC 1681, 1682, 1980 CCH OSHD ¶ 24,583, p. 30,155 (No. 79-2667, 1980). However, the Commission has also held that a default order may be appropriate where a party displays a "pattern of disregard" for Commission proceedings. *Philadelphia Construction Equipment Inc.*, 16 BNA OSHC 1128, 1131, 1993-95 CCH OSHD ¶ 30,051, p. 41,295 (No. 92-899, 1993). In addition, the Commission has indicated that the "extreme sanction" of exclusion of evidence critical to a party's case may be appropriate, but only where a party has willfully deceived the Commission or flagrantly disregarded a Commission

order. *Jersey Steel Erectors,* 16 BNA OSHC 1162, 1166, 1993-95 CCH OSHD ¶ 30,041, p. 41,218 (No. 90-1307, 1993), *aff'd without published opinion,* 19 F.3d 643 (3d Cir. 1994).

Under Commission Rule 41(b), the Commission may set aside a sanction imposed under Rule 41(a).[5] In considering whether to reinstate a case under Rule 41(b), the Commission has also looked at the criteria under Rule 60(b) of the Federal Rules of Civil Procedure, particularly whether the sanctioned party has shown "excusable neglect."[6] *Choice Electric Corp.*, 14 BNA OSHC 1899, 1900, 1987-90 CCH OSHD ¶ 29,141, p. 38,942 (No. 88-1393, 1990). In determining whether there is "excusable neglect," the Commission has looked at evidence on the adequacy of office procedures. *Northwest Conduit Corp.*, 18 BNA OSHC 1948, 1951, 1999 CCH OSHD ¶ 31,949, pp. 47,458-49 (No. 97-851, 2000).

In this case, there is no evidence that Stevenson's failure to be available for the May 24, 2000, prehearing telephone conference was contumacious, or the result of contumacious conduct by other employees in the Cleveland Solicitor's Office. There is also no evidence that AGM was prejudiced by Stevenson's failure to appear at the conference. Nor is there evidence of willful deception by the Secretary or a pattern of disregard for Commission proceedings. The judge did not find otherwise, but concluded that the Secretary's failure to assure that the notice of the prehearing conference was delivered properly "shows a lack of concern amounting to disrespect and disregard for the judicial process and the authority of the Commission[.]"

---

[5]Rule 41(b) provides:

Motion to set aside sanctions. For reasons deemed sufficient by the Commission or Judge and upon motion expeditiously made, the Commission or Judge may set aside a sanction imposed under paragraph (a) of this rule. See § 2200.90(b)(3).

[6]Fed. R. Civ. P. 60(b) provides in relevant part that "[o]n motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect[.]"

We disagree with the judge's factual finding. A single incident involving a lost or misdirected document does not necessarily show disrespect or disregard for the judicial process. While the judge found that the "record establishes neglect but no excuse," the record does not reflect consideration of noteworthy circumstances here, including the facts that the conference did not take place when originally scheduled, the facsimile was sent on a non-business day, and the facsimile, which was not labeled an order, was sent on plain paper. Furthermore, the record is not fully developed, as it contains no information regarding the procedures for handling facsimiles in the Cleveland Solicitor's office.

C. Order

Because the Commission has typically considered evidence regarding mailroom procedures in determining whether relief may be granted from sanctions imposed in cases which involve lost or misdirected documents, we remand this case to the judge so that he can consider evidence on the Secretary's office procedures for handling facsimiles, and so that he may conduct further proceedings consistent with the Commission's procedural rules and this order.

/s/
Thomasina V. Rogers
Chairman

Date: September 6, 2001

EISENBREY, Commissioner, concurring:

I join in the decision to remand this case, but do so only to expedite its ultimate resolution. I would have preferred simply to vacate the dismissal order as wholly disproportionate to the underlying conduct and an abuse of the administrative law judge's discretion.

Commission precedent, which holds that sanctions must be proportionate to the misconduct for which they were imposed, does not support dismissal of this case. It is also instructive to review federal court decisions applying Rule 41 of the Federal Rules of Civil Procedure, upon which Commission Rule 41 is modeled. In particular, the courts hold that it is an abuse of discretion to dismiss a case, as the judge did here, in the early stages of litigation, without warning, for the single act of missing a pretrial conference, status call or motion hearing. For example, in *Tolbert v. Leighton,* 623 F.2d 585, 587 (9th Cir. 1980), the Ninth Circuit held

> that it is an abuse of discretion to dismiss a plaintiff's case for failure to prosecute where (1) the *only* evidence of dilatoriness is his or his attorney's failure to attend a pretrial conference; (2) the court has not warned that failure to attend will create a risk of dismissal; and (3) the case is still "young."

(Emphasis in original.) Here, the only evidence of dilatoriness is attorney Stevenson's failure to attend a pretrial conference call (perhaps as much because of the judge's actions as his own). The judge did not warn that failure to participate in the call could lead to dismissal, and the case was barely four months old. *See also Fischer v. Buehl,* 450 F.2d 950, 951 (3d Cir. 1971) (dismissal for failure to prosecute following counsel's failure to appear at scheduled pretrial conference unwarranted); *Bush v. United States Postal Service*, 496 F.2d 42, 44-45 (4th Cir. 1974) (in absence of deliberate delay or prejudice, court vacated "ultimate penalty of dismissal" for failure to prosecute following counsel's absence from hearing on opposing party's motion to dismiss); *Moreno v. Collins*, 362 F.2d 176, 178 (7th Cir. 1966) (vacating dismissal for want of prosecution following counsel's ignorance of status call notice and consequent failure to appear in court); *cf. Jackson v. Washington Monthly*

Company, 569 F. 2d 119, 121, 123 (D.C. Cir. 1977) (dismissal is rarely if ever appropriate when there is but a single instance of attorney misconduct).

The Sixth Circuit, in which this case arises, has been particularly forceful in holding that it is an abuse of discretion to dismiss a case for a single act of misconduct, without any warning that dismissal would be the sanction, and without a showing of prejudice to the other party.

> In the Sixth Circuit, we have frequently reversed district courts for dismissing cases simply because litigants failed to appear or comply with pretrial orders when the district courts did not put the derelict parties on notice that further noncompliance would result in dismissal. *See, e.g., Carter v. City of Memphis*, 636 F.2d 159, 161 (1980) (penalty of dismissal applies only in "extreme situations" of deliberate delay or "contumacious conduct"); *Holt v. Pitts*, 619 F.2d 558, 562 (1980) (same); *Patterson v. Township of Grand Blanc*, 760 F.2d 686, 688 (1985) (same); *Bishop v. Cross*, 790 F.2d 38, 39 (1986) (dismissal requires a "degree of willfulness, bad faith or contumacious conduct").

Harris v. Callwood, 844 F.2d 1254, 1256 (6th Cir. 1988). The case before us involves an attorney's single failure to attend a conference call, no warning of impending dismissal, no hint of contumacy, no prejudice to the opposing party, and nothing approaching an "extreme situation of deliberate delay." Dismissal under these circumstances was a clear abuse of discretion.

I cannot see how the proceedings we are directing could develop facts sufficient to support the dismissal order. It is unfortunate that our review of the use of a rule intended to help expedite case processing is leading to further and, in my view, unnecessary delay in review of the merits of this case.

/s/
Ross Eisenbrey
Commissioner

Date: September 6, 2001

UNITED STATES OE AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR,
Complainant,

v. DOCKET No. 00-0389

A.G.M. ARCHITECTURAL GLASS AND METAL CO.,

Respondent. I

ORDER

On May 2, 2000, order was issued directing the Secretary to turn over to Respondent a copy of any video tapes taken during the inspection. The Order notified the parties that a prehearing conference would take place no later than May 19, 2000. By facsimile transmission on May 21,2000, the parties were notified that the conference would take place at 10:30 a.m. on May 24,2000. At the appointed time Respondent was ready to proceed pro *se*. Counsel for the Secretary, however, was not available by phone. Respondent stated that counsel for the Secretary had informed him by phone that there was no tape. Respondent maintained that the Secretary "had no evidence" to support the allegations.

In light of the fact that Respondent appeared pro *se* and is not legally trained, his argument is taken as a motion to dismiss the Citation and Notification of Proposed Penalty. The motion is granted.

Whether considered to be a failure to proceed as required by the Judge (Rule 41) or a failure to appear (Rule 64)is inconsequential. Complainant's failure to participate in the conference was both. Accordingly, dismissal on the motion of Respondent is appropriate. Accordingly,

IT IS ORDERED that the Citation and Notification of Proposed Penalty issued to Respondent on January 19, 2000 is DISMISSED WITH PREJUDICE.

/s/
Michael H Schoenfeld
Judge, OSHRC

Dated: 6 /5/00
Washington, D.C.