Secretary of Labor, Complainant, v. Schipper Construction, Inc., Respondent.	OSHRC Docket No. 99-0253

DECISION AND ORDER

BY THE COMMISSION:

Administrative Law Judge Irving Sommer issued a default judgment upon the Secretary of Labor's motion in this case because the employer, Schipper Construction, Inc., failed to file an answer to the complaint within the time permitted by Commission Rule 34(b)(1).[1] For the following reasons, we set aside the default judgment and remand this case for further proceedings.

Schipper is a general contractor that, in October 1998, was performing excavation work with a subcontractor in Fargo, North Dakota. After an inspection by a representative of the Occupational Safety and Health Administration ("OSHA"), the Secretary issued a willful citation alleging that Schipper failed to slope, shore, or otherwise protect the excavation from caving in. An employee of the subcontractor had been working inside the excavation at the time of the OSHA inspection. The Secretary proposed a penalty of $14,000.

Schipper's president, Shaun Schipper, responded by filing a timely notice of contest.[2]

[1]Commission Rule 34(b)(1), 29 C.F.R. § 2200.34(b)(1), provides that "[w]ithin 20 days after service of the complaint" the employer "shall file an answer with the Commission."

[2]Shaun Schipper is representing the corporation; that is, it is appearing *pro se* (without counsel) in these proceedings.

However, Schipper did not file an answer to the Secretary's complaint, which the Secretary served on March 24. On April 27, the Secretary filed a motion for default judgment, which Judge Sommer granted. The judge served notice of his order on Schipper on May 13, and filed his order with the Commission on May 24.[3] Although the judge did not explicitly affirm the Secretary's willful citation and assess her $14,000 proposed penalty, a default judgment automatically has this effect.

On June 8, Schipper sent a letter to the judge asking him to "let me know what I must do" to "appeal your decision." Then, on June 14, Schipper filed a petition for discretionary review with the Commission.

Schipper's June 8 letter and petition for discretionary review both contend that he erroneously mailed a May 5 response to the Secretary's motion for default judgment to the Secretary instead of the judge. Schipper contends that, in the past, the "citations and fines" that he had received from OSHA "were handled directly through the Bismarck office" and that "dealing with a court through the mail is new to me." "I apologize for this and throw myself on the mercy of the Review Commission to take another look at this." Schipper's petition for discretionary review further contends that he thought his notice of contest "would be used" as an answer to the complaint in this case.

Commission Rule 41(b),[4] permits the Commission to set aside a default for reasons it deems "sufficient." As a result, the Commission has wide latitude and discretion in its review of a default sanction. *Choice Electric Corp.,* 14 BNA OSHC 1899, 1900, 1987-90

---

[3]Commission Rule 41 does not require that a judge issue a show cause order before granting a party's motion for a default judgment. Here, Schipper had the same opportunity to show cause why it should not be granted that an order to show cause would have provided. A party "upon whom a motion is served shall have ten days from service of the motion to file a response" pursuant to Commission Rule 40(c), 29 C.F.R. § 2200.40(c). The judge waited ten days from service of the Secretary's motion before ruling on it.

[4]Commission Rule 41(b), 29 C.F.R. § 2200.41(b), provides that, "[f]or reasons deemed sufficient by the Commission or Judge and upon motion expeditiously made, the Commission or Judge may set aside a sanction [of default]."

CCH OSHD ¶ 29,141, p. 38,941 (No. 88-1393, 1990).

In a default case such as this one, the Commission's inquiry has been whether the employer would be able to demonstrate sufficient reason to set aside the default judgment. This has generally required remanding the case to the judge to afford the employer an opportunity to make that showing. However, in *Manti d/b/a Manti Homes,* 16 BNA OSHC 1459, 1460-61, 1993-95 CCH OSHD ¶ 30,265, pp. 41,682-83 (No. 92-2222, 1993), in which the employer did respond to the judge's show cause order (although the response was not technically complete) and did actually raise defenses to the citation, the Commission found sufficient reason to set aside the default judgment without a remand to the judge for an additional showing by the employer.

Schipper's case is similar to *Manti.* After Schipper received notice of the impending default judgment by means of the Secretary's motion (April 27), Schipper promptly filed a response (May 5), although he erroneously mailed his response to the Secretary instead of the judge. While the response did not explain to any substantial extent why the Commission's requirement for an answer to the Secretary's complaint was infringed,[5] the response did raise defenses to the Secretary's citation and proposed penalty. Schipper contended that shoring materials and trench boxes were available at the site of the excavation for Schipper's subcontractor to use to protect its employee. Schipper also contended in considerable detail that the proposed penalty for Schipper's alleged violation should be reduced on the basis of Schipper's good faith. President Schipper described some of the things he has done that demonstrate his concern for safety. Although they do not constitute a technically complete answer to a complaint, Schipper's responses raise defenses to the citation and penalty that can be construed as the "short and plain statement denying those allegations in the complaint that the party intends to contest" pursuant to Commission Rule

[5]We do not need to address whether it was reasonable for Schipper to assume that his notice of contest would serve as an answer despite the fact that it was filed prior to the complaint.

34(b)(2).[6] *See Manti*, 16 BNA OSHC at 1460, 1993-95 CCH OSHD at p. 41,682. In addition, they do meet the standard of reasonable diligence we require of employers appearing before the Commission *pro se* who may not be as familiar with legal proceedings as attorneys. 16 BNA OSHC at 1460, 1993-95 CCH OSHD at p. 41,683. We therefore reinstate Schipper's notice of contest, accept his responses thus far as his answer to the Secretary's complaint, and remand the matter to the judge for a hearing.

This relief is particularly appropriate because of the Secretary's actions in two respects in this case. First, she apparently failed to even attempt to confer with the employer prior to filing her motion for a default judgment, contrary to Commission Rule 40(a) governing motions.[7] In fact, the Secretary's motion asserted that, "[i]nasmuch as the undersigned has not contacted Respondent regarding this Motion, the Secretary is not aware of any opposition or lack thereof regarding this Motion." Although it is probable that an employer will oppose the Secretary's motion for a default judgment, the Commission's rule requiring the moving party to confer or make reasonable efforts to confer with the other parties applies without exception to all motions presented to the judge or Commission.

---

[6]Commission Rule 34(b)(2), 29 C.F.R. § 2200.34(b)(2), states that "[t]he answer shall contain a short and plain statement denying those allegations in the complaint which the party intends to contest" and that "[a]ny allegation not denied shall be deemed admitted."

[7]Commission Rule 40(a), 29 C.F.R. § 2200.40(a), states that, "[p]rior to filing a motion, the moving party shall confer or make reasonable efforts to confer with the other parties and shall state in the motion if any other party opposes or does not oppose the motion."

Second, after the Secretary filed her motion for a default judgment on April 27, Schipper sent a response to her instead of to the judge. Schipper's response was dated May 5th. The judge's order granting the Secretary's motion was issued May 13, eight days later. The record does not indicate when the Secretary received Schipper's response, but it is most likely that she received it before the judge issued his order. Under the circumstances, we think the Secretary should have promptly notified the judge of the response and forwarded it to him. Instead, the Secretary never informed the judge of her receipt of Schipper's May 5 response. The failure to do so compounds the failure to follow Commission Rule 40 discussed above, gives the appearance of unfairness, and suggests gamesmanship. *See Bland Constr. Co.,* 15 BNA OSHC 1031, 1043, 1991-93 CCH OSHD ¶ 29,325, p. 39,403 (No. 87-992, 1991).

We also note that Schipper contends that Bruce Beelman, OSHA's area director in Bismarck, North Dakota, "told me he could work out a settlement on this citation with me if I showed a good faith effort in improving safety policies." President Schipper "informed him that five employees from my company (including me) attended an OSHA Trenching and Excavation seminar in Fargo [on] February 24, 1999 and that I was implementing additional policies in regards to safety." The Commission encourages voluntary dispositions by parties to Commission proceedings, and settlement may be particularly appropriate in this case.

Accordingly, the judge's order dismissing Schipper's notice of contest is set aside and the matter is remanded for a hearing on the merits.

/s/
Thomasina V. Rogers
Chairman

/s/
Gary Visscher
Commissioner

Dated: July 30, 1999