U.S. Department of Labor

Administrative Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

IN THE MATTER OF:

RHONDA MILLER, O/B/O EUGENE MITCHELL,

COMPLAINANT,

v.

RHINO, INC.,

RESPONDENT.

ARB CASE NO. 2024-0002

ALJ CASE NO. 2021-STA-00041
ALJ LYSTRA A. HARRIS

DATE: July 18, 2024

Appearances:

For the Complainant:
Rachel B. Canfield, Esq.; *The Kirby G. Smith Law Firm, LLC*; Atlanta, Georgia

For the Respondent:
Douglas H. Duerr, Esq. and Andrew C. Suarez, Esq.; *Elarbee, Thompson, Sapp & Wilson, LLP*; Atlanta, Georgia

Before WARREN, THOMPSON, and ROLFE, Administrative Appeals Judges; Judge Rolfe, *concurring*

ORDER VACATING AND REMANDING

This case arises from a complaint filed by Eugene Mitchell (Complainant) against his employer, Rhino, Inc., (Respondent), alleging retaliation in violation of the whistleblower protections of the Surface Transportation Assistance Act of 1982 (STAA) and its implementing regulations.[1] After Complainant moved for sanctions for Respondent's failure to comply with several discovery orders, the Administrative Law Judge (ALJ) entered a default judgment against it and a second, corresponding order awarding damages including $147,974.94 in back pay, $5,565.66 in pre-

[1] 49 U.S.C. § 31105(a); 29 C.F.R. Part 1978 (2024).

judgment interest, post-judgment interest, and $150,000.00 in compensatory damages for emotional distress.

As discussed below, however, we find that the ALJ abused her discretion in finding that a default judgment was an appropriate sanction under 29 C.F.R. § 18.57(b)(1)(vi) as the record (at this juncture) does not permit such a harsh penalty for Respondent's failure to comply with discovery and other orders. We therefore vacate both orders and remand the case to the ALJ to analyze the factors necessary to support a default judgment or to determine what sanctions, if any, are appropriate for Respondent's failure to respond to the ALJ's orders. Alternatively, the ALJ may determine that further adjudication of this claim on the merits is warranted.

BACKGROUND

On February 22, 2021, Complainant filed a complaint with the Occupational Safety and Health Administration (OSHA), alleging that Respondent violated the employee protection provisions of the STAA when it terminated his employment as a commercial truck driver on September 1, 2020.[2] In a letter dated March 10, 2021, OSHA dismissed the complaint, finding that there was no cause to believe that Respondent violated the STAA.[3]

Complainant timely requested a hearing before an ALJ.[4] On May 14, 2021, the ALJ issued a Notice of Assignment, Hearing, and initial Pre Hearing Order (Hearing Order), which provided the parties directives regarding initial disclosures, discovery, and prehearing submissions.[5] The Hearing Order further provided, in pertinent part, that "failure to comply with this order may result in sanctions including, but not limited to, the following: the exclusion of evidence, the dismissal of the claim, the entry of a default judgment, or the removal of the offending representative from the case."[6]

On August 31, 2021, Complainant filed a "Motion to Compel Discovery and for Sanctions" alleging that Respondent had failed to respond to his discovery requests and had not provided the initial disclosures directed by the Hearing

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[2] Order Granting Motion for Default Judgment (Default Order) at 1 (ALJ Nov. 8, 2021).

[3] *See* March 10, 2021 OSHA letter at 1.

[4] Default Order at 1.

[5] *Id.*

[6] *Id.* at 3. The May 14, 2021 Hearing Order was served to Respondent at its business address. *See* Service Sheet attached to Hearing Order.

Order.[7] Complainant attached an August 13, 2021 letter and mailing envelope that were addressed to "Rhino & K.A.C.E.A. 6 Corp c/o Donald D. Liaping."[8]

On September 15, 2021, the ALJ issued an Order Granting Complainant's Motion to Compel Discovery (Order to Compel Discovery), which directed Respondent to respond to Complainant's previously served discovery requests.[9] Respondent, however, did not respond.[10]

On October 7, 2021, the ALJ issued an Order Directing Respondent to Show Cause as Why Sanctions Should Not Be Imposed Against It (Order to Show Cause).[11] The order directed Respondent to explain, within 15 days of receipt, why a default judgment should not be entered against it for its failure to comply with the ALJ's previous orders directing initial disclosure and discovery responses.[12] Respondent again did not respond.[13]

On November 8, 2021, the ALJ issued an Order Granting Motion for Default Judgment against Respondent.[14] In the Order, the ALJ reasoned that a default judgment was justified because "Respondent repeatedly failed to comply with the discovery and other orders issued by the [ALJ]."[15] The ALJ went on to note that Respondent further failed to provide "any explanation for its failure to comply with these orders . . . [which] resulted in the denial of Complainant's right to discovery, as well as the impeding of the OALJ's

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7 Default Order at 2.

8 *See* Complainant's August 31, 2021 Motion to Compel, Attachment 1. As discussed below, after obtaining counsel, Respondent explained that Rhino & K.A.C.E.A.6 Corp. is its competitor owned by Donald D. Liaping, a relative and former employee who did not forward the correspondence. Petition for Review at 2.

9 The September 15, 2021 Order to Compel Discovery was served to Respondent at its business address and to Rhino & K.A.C.E.A.6 at its Piedmont Circle address. *See* Service Sheet attached to Order to Compel Discovery.

10 Default Order at 3.

11 The Order to Show Cause also suspended all deadlines and directives set forth in the May 14, 2021 Hearing Order. Order to Show Cause at 4.

12 The October 7, 2021 Order to Show Cause was served to Respondent at its business address and to Rhino & K.A.C.E.A.6 at its Piedmont Circle address. *See* Service Sheet attached to Order to Show Cause.

13 Default Order at 4.

14 Default Order (formally cited as *Mitchell v. Rhino, Inc.*, ALJ No. 2021-STA-00041 (ALJ Nov. 8, 2021)).

15 *Id.* at 4.

adjudication of the instant matter."[16] Thus, the ALJ found that "pursuant to 29 C.F.R. § 18.57(b)[(1)](vi), the issuance of a default decision and order against Respondent is deemed an appropriate sanction for Respondent's persistent noncompliance."[17]

On November 10, 2021, Respondent's general manager contacted the ALJ, explaining he had received the default order and requesting an opportunity to obtain counsel to respond to it.[18] On November 30, 2021, the ALJ issued an Order Granting Respondent's Request for Additional Time to Obtain Representation.[19]

On January 28, 2022, after retaining counsel, Respondent filed a pleading entitled "Response to Default Order" that moved the ALJ to set aside the November 8, 2021 Default Order.[20] Respondent for the first time alleged it had no notice of the proceeding, and contended it would have engaged counsel and vigorously defended OSHA's preliminary decision had it been aware of the appeal—as it had with similar litigation Complainant had filed against it.[21] While Respondent admitted the ALJ sent the orders to the correct address, it denied ever receiving them.[22] And it noted that some of Complainant's correspondence had been sent to a former employee—Respondent's nephew—at an allegedly incorrect address and never forwarded.[23]

By order dated May 10, 2022, the ALJ denied Respondent's motion, specifically finding that Respondent was properly served the May 12, 2021 Hearing Order, the September 15, 2021 Order to Compel, and the October 7, 2021 Order to Show Cause.[24] The ALJ additionally analyzed the motion as seeking

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16 *Id.*

17 *Id.*

18 *Mitchell v. Rhino, Inc.*, ALJ No. 2021-STA-00041, slip op. at 2 (ALJ Nov. 30, 2021) (Order Granting Respondent's Request for Additional Time to Obtain Representation). The ALJ construed the email as Respondent's request for additional time. *Id.*

19 *Id.* at 3.

20 Decision and Order on Damages (D. & O.) at 1 (ALJ Sept. 25, 2023).

21 Respondent's Response to Order Granting Motion for Default Judgment at 1-3.

22 *Id.* at 2-3.

23 *Id.* at 1-2.

23 *Mitchell v. Rhino, Inc.*, ALJ No. 2021-STA-00041, slip op. at 8 (ALJ May 10, 2022) (Order Denying Respondent's Motion). The ALJ primarily relied on the rationale that the "Mailbox rule" establishes a rebuttable presumption that correctly labeled mail is received by parties and the fact that the UPS tracking information showed that each of the above-mentioned orders were properly addressed and delivered to Respondent's business address. *Id.* at 6-8.

reconsideration, and summarily found that Respondent established no new evidence or error of law that would permit revisiting the prior order.[25] The ALJ further pointed out that Respondent's failure to respond to the previous orders constituted "willful noncompliance throughout the pendency of this case."[26]

On May 11, 2022, the ALJ issued an Order Regarding Relief and Damages, which instructed Complainant to file proof of damages, setting forth the compensatory and special damages Complainant alleges entitlement to under the STAA.[27]

On September 1, 2022, Complainant submitted an unopposed motion requesting an extension of the deadline for filing submissions regarding the issue of relief and damages because Complainant had passed away on August 30, 2022.[28] The ALJ granted Complainant's motion on September 8, 2022.[29] On January 19, 2023, the ALJ granted the request for Rhonda Miller (Miller) to be substituted in place of Complainant as his common law wife.[30]

On March 6, 2023, Miller submitted Complainant's proof of damages and evidence in support of Complainant's request for damages.[31] Respondent did not respond.[32] On September 25, 2023, the ALJ issued a Decision and Order Awarding Damages directing Respondent to pay Complainant: (1) back pay in the amount of $147,974.94, pre-judgment interest in the amount of $5,565.66, and post-judgment interest; and (2) compensatory damages in the amount of $150,000.00.[33]

On October 9, 2023, Respondent timely filed a petition for review of the ALJ's November 8, 2021 Default Order and September 25, 2023 D. & O. arguing that it had not received proper notice and, therefore, default judgment was

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25 *Id.* at 8.

26 *Id.*

27 D. & O. at 2; *see also Mitchell v. Rhino, Inc.,* ALJ No. 2021-STA-00041, slip op. at 1-2 (ALJ May 11, 2022) (Order Regarding Relief and Damages). The ALJ subsequently granted two requests for extensions by Complainant regarding submissions on the issue of relief and damages.

28 D. & O. at 2.

29 *Id.*

30 *Id.*

31 *Id.*

32 *Id.*

33 *Id.* at 8.

inappropriate.[34] Miller filed a Response Brief on December 11, 2023, defending the ALJ's orders. Respondent filed a Reply Brief.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to the ARB to hear appeals from ALJ decisions and issue agency decisions in cases arising under the STAA.[35] The Board reviews ALJ's determinations on procedural issues, evidentiary rulings, and sanctions under an abuse of discretion standard.[36]

DISCUSSION

1. The Process an ALJ Must Follow Prior to Entering a Default Judgment

The Department of Labor's Rules of Practice and Procedure for hearings before the Office of Administrative Law Judges (OALJ) permit an ALJ to issue sanctions against parties for failing to comply with a judge's discovery order, including to "[r]ender[] a default decision and order against the disobedient party."[37]

The Board has recognized that ALJs have a reasonable degree of discretion in the imposition of discovery sanctions under the OALJ's rules, as well as sanctions pursuant to the inherent authority of ALJs to manage the orderly and expeditious disposition of cases.[38] ALJs, however, still "must exercise this power cautiously . . .

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[34] Complainant's Response Brief (Resp. Br.) at 17 and Respondent's Reply Brief (Reply Br.) at 3-4.

[35] Secretary's Order No. 01-2020 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board (Secretary's discretionary review of ARB decisions)), 85 Fed. Reg. 13,186 (Mar. 6, 2020).

[36] *Butler v. Anadarko Petroleum Corp.*, ARB No. 2012-0041, ALJ No. 2009-SOX-00001, slip op. at 2 (ARB June 15, 2012) (the Board reviews an ALJ's imposition of discovery sanctions on an abuse of discretion standard); *Waechter v. J.W. Roach & Sons Logging and Hauling,* ARB No. 2004-0183, ALJ No. 2004-STA-00043, slip op. 2 (ARB Dec. 29, 2005) (same) *see also Forrand v. FedEx Express,* ARB No. 2019-0041, ALJ No. 2017-AIR-00016, slip op. at 2 (ARB Jan. 4, 2021) ("The Board reviews an ALJ's determinations on procedural issues under an abuse of discretion standard, examining whether the ALJ abused [their] power to preside over the proceedings in ruling as [they] did.").

[37] 29 C.F.R. § 18.57(b)(1)(vi).

[38] *Jenkins v. EPA,* ARB No. 2015-0046, ALJ No. 2011-CAA-00003, slip op. at 8 (ARB Mar. 1, 2018); *Newport v. Fla. Power & Light Co.,* ARB No. 2006-0110, ALJ No. 2005-ERA-00024, slip op. at 4 (ARB Feb. 29, 2008); *see Link v. Wabash R. R. Co.,* 370 U.S. 626, 630-31 (1962) ("The authority of a court to dismiss sua sponte for lack of prosecution has generally been considered an 'inherent power,' governed not by rule or statute but by the control

and should take care in fashioning sanctions for conduct that abuses the judicial process."[39] And given the drastic nature of a default sanction, ALJs must follow uniquely strict guidelines prior to imposing such a sanction: default "deserves closer scrutiny within the abuse-of-discretion framework."[40]

Given its uniquely harsh consequence, the Board has held that an ALJ should consider several factors when determining whether a default judgment or dismissal under 29 C.F.R. § 18.57(b)(1)(vi) is warranted:

> (1) the prejudice to the other party, (2) the amount of interference with the judicial process, (3) the culpability, willfulness, bad faith or fault of the litigant, (4) whether the party was warned in advance that dismissal of the action [or default judgment] could be a sanction for failure to cooperate or noncompliance, and (5) whether the efficacy of lesser sanctions [was] considered.[41]

The Eleventh Circuit, which has appellate jurisdiction over this case, has limited the "severe" sanction of default to instances where "a party demonstrates a

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necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.").

[39] *Pfeifer v. AM Retail Grp., Inc.,* ARB No. 2023-0009, ALJ No. 2021-SOX-00030, slip op. at 3-4 (ARB Mar. 22, 2023) (citing *Newport,* ARB No. 2006-0110, slip op. at 4).

[40] *Adm'r, Wage & Hour Div., U.S. Dep't of Lab. v. Global Horizons Manpower, Inc.,* ARB No. 2009-0016, ALJ No. 2008-TAE-00003, slip op. at 11 (ARB Dec. 21, 2010); *see also Jenkins,* ARB No. 2015-0046, slip op. at 10 (citing *Washington Metro. Area Transit Comm'n v. Reliable Limousine Serv.,* 776 F.3d 1, 4 (D.C. Cir. 2015) (noting that "where a lower court's order of dismissal or default as a discovery sanction is under review, the review 'is more thorough because the drastic sanction deprives a party completely of its day in court.'")).

[41] *Adm'r, Wage & Hour Div., U.S. Dep't of Lab. v. Deepali Co., LLC,* ARB No. 2021-0028, ALJ No. 2017-DBA-00022, slip op. at 4 (ARB Sept. 20, 2021) (citing *Howick v. Campbell-Ewald Co.,* ARB Nos. 2003-0156, 2004-0065, ALJ Nos. 2003-STA-00006, 2004-STA-00007, slip op. at 8 (ARB Nov. 30, 2004)); *see also Jenkins*, ARB No. 2015-0046. The Board acknowledges that it has not consistently applied the above-mentioned factors when determining whether the issuance of a default judgment or dismissal was a proper sanction under the OALJ's Rules of Practice and Procedure and that the current case requires stronger consideration of lesser sanctions as required by the Eleventh Circuit. Because these factors have not been consistently applied, we are providing clarification in this Decision and Order. Accordingly, as the concurrence notes, the ALJ's approach in this case is understandable.

flagrant disregard for the court and the discovery process."[42] Thus, violation of a discovery order caused by "simple negligence, misunderstanding, or inability to comply" will not justify default judgment.[43] Instead, the factfinder must make a determination of willfulness or bad faith to comply with a discovery order.[44]

2. The ALJ Abused Their Discretion by Not Considering the Relevant Factors Prior to Entering Default Judgment

The Eleventh Circuit, in reviewing default judgments as a sanction, has made clear that a tribunal abuses its discretion "if it applies an incorrect legal standard, follows improper procedures in making the determination, or makes findings of fact that are clearly erroneous."[45] In the present case, the ALJ did not properly consider the above-mentioned factors before issuing a default judgment against Respondent under 29 C.F.R. § 18.57(b)(1)(vi). The ALJ thus abused her discretion.[46]

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[42] *Aztec Steel Co. v. Fla. Steel Corp.,* 691 F.2d 480, 481-82 (11th Cir. 1982) (in which the Eleventh Circuit concluded that the district court did not abuse its discretion in dismissing the claim as a discovery sanction after Aztec Steel willfully refused to provide the defendants with basic information in the six years that the case was pending); *see also Cox v. Am. Cast Iron Pipe Co.,* 784 F.2d 1546, 1556 (11th Cir. 1986) ("The decision to dismiss a claim, like the decision to enter a default judgment, ought to be a last resort—ordered only if noncompliance with discovery orders is due to willful or bad faith disregard for those orders.").

[43] *In re Se. Banking Corp.,* 204 F.3d 1322, 1332 (2000) (quoting *Malautea v. Suzuki Motor Co.*, 987 F.2d 1536, 1542 (11th Cir. 1993)); *see also EEOC v. Troy State Univ.,* 693 F.2d 1353, 1357 (11th Cir. 1982) ("A party's simple negligence or other action grounded in a misunderstanding of a court order does not warrant dismissal.") (citation omitted).

[44] *Maus v. Ennis,* 513 F. App'x 872, 878 (11th Cir. 2013) (in which the Eleventh Circuit concluded that the district court did not abuse its discretion when it imposed a default judgment based on the pro se defendant's disrespectful conduct and refusal to participate in discovery); *Malautea,* 987 F.2d at 1542 (citation omitted) ("a default judgment sanction requires a willful or bad faith failure to obey a discovery order.") (citing *Societe Internationale pour Participations Industrielles et Commerciales v. Rogers,* 357 U.S. 197, 212 (1958)).

[45] *Vega v. T-Mobile USA, Inc.,* 564 F.3d 1256, 1264 (11th Cir. 2009) (quoting *Klay v. Humana, Inc.*, 382 F.3d 1241, 1251 (11th Cir. 2004)).

[46] *See Pfeifer,* ARB No. 2023-0009, slip op. at 4 (dismissal as a discovery sanction was not warranted when complainant made "good-faith efforts to comply with the ALJ's orders and directives"); *see also Stalworth v. Justin Davis Enters., Inc.,* ARB No. 2009-0038, ALJ No. 2009-STA-00001, slip op. at 5 (ARB June 16, 2010) (in which the Board concluded the ALJ abused his discretion in finding Respondent defaulted because Respondent's conduct was "not so egregious that [it] should be denied the opportunity to present its case"); *Adm'r, Wage & Hour Div., U.S. Dep't of Lab. v. Siliconlinks, Inc.,* ARB No. 2009-0131, ALJ 2009-LCA-00024, slip op. at 6-7 (ARB Oct. 28, 2009) (in which the Board concluded that the ALJ

In this case, while the ALJ referenced some of the factors listed above when determining that a default judgment was a proper sanction for Respondent's repeated failure to comply with the discovery and other orders, the ALJ did not address all the factors necessary to properly balance the harsh consequence of a default judgment with the effects of Respondent's conduct. Specifically, the ALJ briefly referenced prejudice to the other party, interference with the judicial process,[47] willful noncompliance,[48] and advanced warning of the possibility of a default judgment in both the May 14, 2021 Hearing Order and October 7, 2021 Order to Show Cause.[49]

The ALJ erred, however, by failing to address why lesser sanctions would be ineffective.[50] Here, default constituted the first and only sanction by the ALJ. While a court is not required to issue lesser sanctions before finding default judgment appropriate, the Board has held it must *at least* "explain its reason for issuing a default judgment rather than a lesser sanction."[51] Likewise, the Eleventh Circuit has established that default judgment is "appropriate only as a last resort, when less drastic sanctions would not ensure compliance with the court's orders."[52] Here, the ALJ failed to provide any discussion of the other sanctions allowed under

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abused his discretion in dismissing the claim as a discovery sanction where the Administrator did not receive the pre-hearing order and had no notice of the hearing until the day before it was scheduled); *Adm'r, Wage & Hour Div., U.S. Dep't of Lab. v. Mitchem Transports, Inc.,* ARB No. 2003-0115, ALJ No. 2002-SCA-00016, slip op. 7-8 (ARB June 30, 2004) (in which the Board concluded that the ALJ abused his discretion in entering default judgment when the respondents had filed an answer to the complaint).

47 Default Order at 4.

48 Order Denying Respondent's Motion at 8.

49 Default Order at 3-4.

50 *In re Se. Banking Corp.,* 204 F.3d at 1333, 1334-35 (in which the Eleventh Circuit agreed with district judge's determination that defendant's violation of discovery orders was willful, not due to misunderstanding or negligence, but nonetheless reversed dismissal of the claim under Fed. R. Civ. P. 41(b) because the district judge failed to consider lesser alternative sanctions); *see also Pfeifer,* ARB No. 2023-0009, slip op. at 4 (the Board noted that it was error "for the ALJ to conclude that sanctions less than dismissal would be ineffective.").

51 *Jenkins,* ARB No. 2015-0046, slip op. at 11 (citing *Webb v. Dist. of Columbia,* 146 F.3d 964, 971 (D.C. Cir. 1998)); *see also Malautea,* 987 F.2d at 1544 ("A default sanction may be proper even when not preceded by the imposition of lesser sanctions.").

52 *Malautea*, 987 F.2d at1542 (citing *Navarro v. Cohan,* 856 F.2d 141, 142 (11th Cir. 1988)); *see also Wouters v. Martin Cnty., Fla.,* 9 F.3d 924, 933-34 (11th Cir. 1993) ("We have consistently held that while district courts have broad powers under the rules to impose sanctions for a party's failure to abide by court orders, dismissal is justified only in extreme circumstances and as a last resort.").

29 C.F.R. § 18.57(b)(1), nor did they offer an explanation as to why these sanctions would be insufficient to induce Respondent to comply with the previous orders.[53]

Because the ALJ did not follow the process outlined in Board precedent and required by the Eleventh Circuit, the Board finds the ALJ abused their discretion in issuing a default judgment against Respondent as a discovery sanction under 29 C.F.R. § 18.57(b)(1)(vi) and, therefore, remands this matter to the ALJ. On remand, the ALJ should consider the above-mentioned factors as applied to Respondent's conduct and consider what other sanction(s), if any, are appropriate under the applicable factors and circumstances of this case.

CONCLUSION

For the above reasons, we **VACATE** the ALJ's Order Granting Motion for Default Judgment and **REMAND** this matter for further proceedings consistent with this order. Furthermore, in light of this Order Vacating and Remanding the default judgment against Respondent, the Decision and Order on Damages issued on September 25, 2023, and the Supplemental Decision and Order Awarding Attorney's Fees and Costs are hereby **VACATED** as well.

SO ORDERED.

IVEY S. WARREN
Administrative Appeals Judge

ANGELA W. THOMPSON
Administrative Appeals Judge

[53] *See Manoharan v. HCL Am., Inc.,* ARB No. 2021-0060, ALJ Nos. 2018-LCA-00029, 2021-LCA-00009*,* slip op. at 7 (ARB Apr. 14, 2022) (The Board specifically noted that the ALJ had concluded that "lesser sanctions would not alter Complainant's conduct . . . .").

Judge Rolfe, *concurring*:

I agree with my colleagues that the ALJ did not do enough under controlling ARB and Eleventh Circuit precedent in discussing why lesser sanctions would not be effective before entering the extreme sanction of a default judgment. I therefore concur in the decision to remand the case for a determination of what lesser sanction, if any, is appropriate under the circumstances.

I write separately, however, to express my view that in addition to not considering whether lesser sanctions would be effective, the ALJ also did not sufficiently address the remaining factors of Respondent's culpability, the prejudice suffered by Complainant, or the amount of interference with the judicial process to adequately sustain a default sanction.

Balancing those factors, I do not believe the prejudice suffered by the delay at the outset of the ALJ proceedings -- at a time when Respondent was not represented by counsel -- reasonably can justify the $322,940.60 in resulting fines the ALJ ultimately imposed. I would therefore instruct the ALJ on remand to take default off the table for now and consider a more proportional sanction for Respondent's misconduct, while keeping default available in the event of future misconduct. *Jenkins,* ARB No. 2015-0046, slip op. at 10 (citation omitted) (the choice of penalty initially must be "guided by the 'concept of proportionality' between offense and sanction.").[54]

The bar under the relevant factors for entering either a default judgment or a dismissal as a sanction is high. As a threshold matter, a party's offending conduct must go beyond mere negligence. The ARB has held an ALJ may only impose these sanctions after she first concludes "willfulness, bad faith, or fault" caused "a party's failure to cooperate in discovery." *Global Horizons Manpower, Inc.,* ARB No. 2009-0016, slip op. at 11 (citation omitted). The Board has further explained that if "'fault' has any meaning not subsumed in 'willfulness' and 'bad faith,' it must at least cover gross negligence amounting to a 'total dereliction of professional responsibility' even though not a conscious disregard of a court's orders." *Jenkins,* ARB No. 2015-0046, slip op. at 12 (citation omitted).

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[54] The ALJ entered default in this case six months after issuing the initial scheduling order and less than two months after Complainant filed a motion to compel production of initial disclosures and responses to his initial discovery requests. That failure to respond to discovery at the outset of the case was the only misconduct at issue. In calculating damages, the ALJ subsequently accepted Complainant's unopposed submission in its entirety, awarding: $147,974.94 in backpay with pre-judgment interest of $5,565.66 and post-judgment interest pursuant to 26 U.S.C. § 6621(a)(2) compounding quarterly; compensatory damages of $150,000.00 for emotional distress; and attorney fees of $19,400.00. Default Order at 5; D. & O. at 8; Attorney Fee Order at 2.

The Eleventh Circuit similarly holds "the severe sanction of a dismissal or default judgment is appropriate only as a last resort, when less drastic sanctions would not ensure compliance with the court's orders." *Malautea,* 987 F.2d at 1542. "Violation of a discovery order caused by simple negligence, misunderstanding, or inability to comply" does not justify "a default judgment or dismissal." *Id.*

Moreover, the prejudice suffered by the opposing party must be severe, quantifiable, and attributable to the bad faith action. An ALJ must determine a party "severely hampered the other party's ability to present his case," to the point where "it would be unfair to require him to proceed" or that it "impairs [his] ability to determine the factual merits of [his] claim." *Jenkins,* ARB No. 2015-0046, slip op. at 12 (citations omitted). The Eleventh Circuit has likewise affirmed default sanctions in instances where a party prejudiced their opponent's preparation for trial, preventing it from effectively litigating the case. *See, e.g., Lyons v. O'Quinn*, 746 F. App'x 898, 902 (11th Cir. 2018).

An ALJ must be similarly direct when addressing the harm to the judicial process. Rather than speaking in generalities, an ALJ should explain how the misconduct "put an intolerable burden on the trial court" by explaining the extent to which a party's failure to comply with a discovery order required the ALJ "to modify its own docket and operations to accommodate the delay." *Jenkins,* ARB No. 2015-0046, slip op. at 12. The Eleventh Circuit similarly limits default to instances where "a party demonstrates a flagrant disregard for the court and the discovery process." *Aztec Steel Co.,* 691 F.2d at 481.

In my view, the ALJ did not do enough under these demanding standards to establish either Respondent's bad faith or a significant enough harm to Complainant or the judicial process to justify a default as a sanction. In her initial order granting default, the ALJ first found "self-represented parties are not excused from any orders issued regarding initial disclosures and discovery in these proceedings." Default Order at 2.

The ALJ then provided a general justification for the sanction, stating only Respondent's unexplained failure to comply with her discovery order "has resulted in the denial of Complainant's right to discovery, as well as the impeding of the OALJ's adjudication of the instant matter." *Id.* at 4. Without explaining how an unrepresented party's failure to initially answer discovery automatically amounted to bad faith or quantifying the degree of harm to Complainant and the process, the ALJ then concluded "the issuance of a default decision is deemed an appropriate sanction for Respondent's persistent noncompliance." *Id.*[55]

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[55] Default would comprise the first and only sanction the ALJ would contemplate in the case; as my colleagues correctly hold, the ALJ independently erred by not discussing whether lesser sanctions would be effective.

In her order denying reinstatement after Respondent retained counsel, the ALJ primarily relied on the rationale that the "mailbox rule" establishes a rebuttable presumption that correctly labeled mail is received by parties and that Respondent failed to rebut the presumption. Order Denying Respondent's Motion at 6. The ALJ additionally analyzed the motion as seeking reconsideration, and summarily found that Respondent established no new evidence or any error of law that would permit revisiting her prior order. *Id.* at 8.

Finally, the ALJ briefly analyzed reinstatement under Fed. R. Civ. P. 60(b), which provides an "excusable neglect" standard for reinstatement of final judgments. *Id.* The ALJ found under that standard that Respondent did "not offer any credible reason for its failure to comply" and is not entitled to relief "for that reason alone." *Id.* at 10. The ALJ then mentioned Complainant's multiple allegations of prejudice, but did not evaluate any of them, finding "[r]egardless of the veracity of Complainant's claims [of harm]" there "would certainly be some amount of prejudice to Complainant if the undersigned set aside the default decision." *Id.* The ALJ thus refused to reinstate the action.[56]

Once again, however, the ALJ did not discuss whether bad faith motivated Respondent (other than arguably suggesting the failure to respond itself automatically amounted to "willful noncompliance" notwithstanding that some of Complainant's discovery correspondence was sent to the wrong address), the degree to which the delay prejudiced Complainant or to the OALJ's ability to manage its docket (other than to generally infer reinstatement would necessarily cause "some" prejudice to Complainant), or whether something less drastic than a default judgment could remedy Respondent's failure to initially respond. The ALJ concluded instead that the regulations authorize "rendering a default decision as a discovery sanction" and "the undersigned did just that." *Id.* at 8.

But that, in my view, is just not enough to bypass the merits of this case and subsequently enter fines of this magnitude. While Respondent did not participate at

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[56] The ALJ erred to the extent she analyzed reinstatement under Fed. R. Civ. P. 60 instead of Fed. R. Civ P. 55(c). As noted, Rule 60 applies only to final judgments. The judgment here was not final: a final judgment "ends the litigation on the merits and leaves nothing for the court to do but execute [it,]" *Pearson v. Kemp*, 831 F. App'x 467, 470 (11th Cir. 2020), and the ALJ had yet to determine damages in this case. Significantly, the importance in distinguishing these two rules *"lies in the standard to be applied in determining whether or not to set aside the default." EEOC v. Mike Smith Pontiac GMC, Inc.*, 896 F.2d 524, 528 (11th Cir. 1990) (emphasis added). Good cause, the standard under Rule 55(c), is far more lenient than excusable neglect: "'Good cause' is a mutable standard, varying from situation to situation." *Compania Interamericana Exp-Imp, S.A. v. Compania Dominicana de Aviacion*, 88 F.3d 948, 951 (11th Cir. 1996). *"It is also a liberal one*[.]" *Id.* (emphasis added).

the ALJ level prior to the default order, I find it unreasonable, without more, to automatically infer the kind of bad faith, willfulness, or even gross negligence amounting to a blatant disregard for the process necessary to support default, motivated Respondent's inaction.

Instead, Respondent's initially unrepresented status provides a much more likely cause of its unresponsiveness. Although proceeding pro se does not give unfettered license to ignore court orders as the ALJ correctly noted, it does provide meaningful context to Respondent's explanation why it failed to initially respond -- particularly since Respondent actively participated both below and at the Board after retaining counsel.

Indeed, that lack of counsel must be considered in determining "the standard of gross negligence amounting to a 'total dereliction of professional responsibility,'" *Jenkins,* ARB No. 2015-0046, slip op. at 12, the Board has required for a negligence-based default rather than one based on intentional bad faith: whether a party is represented by counsel necessarily establishes the standard of care covering professional responsibility. It also makes intentional bad faith more difficult to establish in these circumstances where Respondent alleges it thought the action was over when OSHA dismissed Complainant's complaint and further points out that it did hire counsel and vigorously defend the other actions it was aware of arising out of the same facts.[57]

Regardless of Complainant's motivation, in my view the roughly two-month period between the time Complainant filed his motion to compel and the time the ALJ entered the default order also cannot be shown to cause the degree of harm independently necessary to justify "the death penalty of sanctions." *EEOC v. General Dynamics*, 999 F.2d 113, 119 (5th Cir. 1993). While on remand that delay

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[57] The ARB recently has held that a party's unrepresented status does not insulate it from a default sanction. *Smith v. Akal Express, Inc.,* ARB No. 2022-0041, ALJ No. 2021-STA-00028 (ARB Apr. 21, 2023). That much is true. *Smith*, however, inexplicably did not address the factors the ARB and the courts have long held must be considered prior to entering a default, including whether a party's pro se status can be *a consideration* in establishing bad faith or gross negligence. It merely held that a party's pro se status, *standing alone*, is not enough to avoid a default. *Id.* at 6 (holding "ignorance of the law is neither a sufficient basis for granting equitable tolling nor by itself an independent ground for establishing entitlement."). Moreover, the facts of the two cases are materially distinct on this issue. In *Smith*, the offending party had appeared before the OALJ and entered some pleadings that the Board held undermined its argument it thought the case was over. *Id.* at 6, n.35 ("Filing a response with the OALJ contradicts Respondents' argument that they believed the matter to be over following the OSHA dismissal. If Respondents thought the matter was truly over, there would have been no reason for [it] to have prepared and filed such a response.") Here, Respondent's behavior, not appearing in the case at all prior to the default, is in line with such a belief.

absolutely could be shown to prejudice Complainant to some degree in developing her claim, it cannot be reasonably found so severe at this point to prevent Complainant from developing her case going forward. *Jenkins,* ARB No. 2015-0046, slip op. at 12. Neither the ALJ's decision, nor Complainant's Response Brief, contain any discussion of the kind of spoilation of evidence that can support a default judgment. Likewise, there is nothing inherent about the several month delay that can reasonably be said to have put an "intolerable burden" on OALJ's docket. *Id.*[58]

Indeed, a survey of ARB cases and those arising in the Eleventh Circuit demonstrates that default or dismissal are typically reserved for far longer delays caused by far more serious intentional disruptions of the judicial process. *See, e.g., Pfeifer,* ARB No. 2023-0009, slip op. at 5 (dismissal not warranted despite party intentionally ignoring several court orders and warnings because "errors and lack of proper courtesy" do not warrant the extreme sanction of dismissal); *Deepali Co., LLC,* ARB No. 2021-0028, slip op. at 4 (default justified where party's repeated misconduct over three years generated extensive back and forth between the parties, three motions to compel, and a postponed hearing); *Jenkins,* ARB No. 2015-0046, slip op. at 32-37 (default justified where EPA's intentional refusal to participate in discovery resulted in several motions to compel and a postponement of the hearing); *In re Sunshine Jr. Stores, Inc.*, 456 F.3d 1291, 1305, 1306 (11th Cir. 2006) (affirming default where a party's bad faith "stonewalling," including ignoring multiple discovery orders and orders to appear over several years, interfered with the "courts ability to manage its case load"); *Aztec Steel Co.,* 691 F.2d at 481-82 (dismissal warranted after party willfully refused to provide basic information in the six years that the case was pending); *Hornady v. Outokumpu Stainless USA*, 572 F.Supp.3d 1162, 1175 (S.D. Ala. 2021) (granting default judgment where the record was "littered with discovery orders, discovery conferences, [five] motions to

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[58] The ALJ's entering of the default judgment (while premature and in my view counter to controlling law) was understandable given the difference between the Federal Rules of Civil Procedure and OALJ's Rules of Practice and Procedure. The Federal Rules contemplate default in two distinct circumstances: under Rule 55 when a party fails to respond to a complaint and under Rule 37 when a party who has responded subsequently fails to cooperate in discovery. Because ordinarily there is no need to respond to a complaint under the OALJ rules, there is no OALJ corollary to Fed. R. Civ. P. 55. Instead, OALJ Rule 18.57 is based on Fed. R. Civ. P. 37, which requires a continued pattern of abuse to justify default rather than a simple failure to initially respond to discovery requests. This case -- where Respondent did not appear at all before the default was entered -- is much more analogous to a Rule 55 default rather than a Rule 37 default. But the distinction ultimately makes no difference: whether analyzed under the demanding Rule 37 standards to impose the sanction or under the "liberal" good cause standard to forgive it under Rule 55, the degree of Respondent's bad faith and resulting harm to Complainant simply are not significant enough to sustain a default judgment.

compel, and [two] motions for sanctions" all designed to "deter Defendant's . . . continued obstinate refusal" to participate in discovery).[59]

This is not to say Complainant should go without recourse or Respondent should get a free pass for its conduct to this point. To the contrary, to the extent Respondent's delay can be shown to have caused the spoilation of evidence or other difficulties in the prosecution of Complainant's case, more measured responses -- such as creating inferences regarding credibility for unavailable witnesses or unpreserved documents or limiting defenses affected by any lost or damaged evidence -- should be considered on remand to appropriately address the circumstances.

I would therefore instruct the ALJ to hold off on default (for now). And I would also vacate the damage and attorney fee orders.[60]

JONATHAN ROLFE
Administrative Appeals Judge

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[59] Given the lack of discussion in some recent ARB cases regarding default, the ALJ's approach is, once again, understandable. In *Deepali*, for example, the Board provided a one-page summary affirmance of an ALJ's default judgment. But while the discussion was similar to that in this case, the underlying substance dramatically differed. The Department of Labor's Wage and Hour Division concluded there the respondent disregarded labor standards under several contracts, failed to pay employees their full hourly rate, failed to pay required overtime, did not submit certified payrolls, and misclassified workers as independent contractors. During the debarment procedures in front of the ALJ, the respondent continued to engage in a continued pattern of abuse of discovery lasting nearly three years. By contrast, OSHA dismissed Complainant's action here finding both that Respondent legitimately terminated Complainant after he was involved in an accident and that he had not engaged in any protected activity prior to his termination. Miller, for her part, continues to vigorously dispute OSHA's findings. These legitimate conflicts, in my view, should be resolved based on substance: "Defaults are seen with disfavor because of the strong policy of determining cases on their merits." *Fla. Physician's Ins. Co. v. Ehlers*, 8 F.3d 780, 783 (11th Cir. 1993) (citation omitted).

[60] Notably, Respondent's failure to respond to the ALJ's Order Regarding Relief and Damages after retaining counsel remains deeply concerning and highly relevant to any future sanction the ALJ might impose. But in my view it is not yet enough (even when combined with Respondent's prior misconduct) to sustain a default judgment under the authority cited above.