United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, D.C. 20036-3457

SECRETARY OF LABOR,

Complainant,

v.

American Made Tires, Inc., and its Successors,

Respondent.

OSHRC DOCKET NO. 14-0928 (FTA), 14-0928

Appearances: David M. Jaklevic, Esquire
Office of the Solicitor
U.S. Department of Labor
201 Varick Street, Room 983
New York, NY 10014
For the Secretary.

Steve Georgilis
President
American Made Tires
27-40 Hoyt Avenue South
Astoria, New York 11102
For the Respondent.

Before: Dennis L. Phillips
Administrative Law Judge

DECISION AND ORDER

Background

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to § 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq*. ("the Act"). Between about March 19, 2013 and July 15, 2013, the Occupational Safety and Health Administration ("OSHA") inspected the work site of Respondent, American Made Tires, Inc. ("Respondent" or "American Made Tires") located at 1717 Grand Central Avenue, Elmira Heights, New York 14903 ("worksite") under Inspection No. 896494. At the

time, Respondent was engaged in tire manufacturing, tire retreading, and related business activities. On about July 19, 2013, OSHA issued one citation containing thirty-two (32) "serious" items and sub-items. On August 15, 2013, the citation and proposed penalties were amended and penalties reduced as a result of an informal settlement agreement between the parties.[1] Respondent agreed to abate the cited violative conditions on or before September 6, 2013. The citation relating to Inspection No. 896494 thereafter became a final order of the Commission on August 15, 2013 by operation of § 10(a) of the Act.[2]

On November 22, 2013, OSHA again inspected Respondent's worksite; this time under Inspection No. 950323. The Secretary alleges that Respondent failed to correct the violations of the standards pertaining to Citation 1, Items 2, 6a through 6e, 7a, 8a and 8c, 11, and 16a & 16c, which were identified during Inspection No. 896494.

On May 21, 2014, OSHA, issued a three item repeat citation and a one item serious citation as a result of its November 22, 2013 inspection. The proposed penalty for the citation items relating to inspection no. 950323 is $16,280.

On May 21, 2014, OSHA also issued a Notification of Failure to Abate Alleged Violations of standards pertaining to Citation 1, Items 2, 6a through 6e, 7a, 8a and 8c, 11, and 16a & 16c, which had been identified in Inspection No. 896494, and a notification proposing additional penalties of $144,000.

On about June 11, 2004, Respondent contested the citations and the proposed penalties issued on May 21, 2014. Docket No. 14-0928 and 14-0928 (FTA) were assigned to the case.

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[1] Respondent did not file a notice of contest contesting the citation.

[2] *See* Admitted Request for Admission 1; *see also Kit Manufacturing Company,* 2 BNA OSHC 1672, 1673 (No. 603, 1975); OSHA's Field Operations Manual ("FOM"), Ch. 15-XIII-B *(*Informal Settlement Agreement becomes final on the date of the last signature of the parties on the agreement.).

The case was assigned to Mandatory Settlement Proceedings from July 2, 2014 through August 26, 2014. It appears that Respondent did not participate in a telephone scheduling conference with the settlement judge conducted on July 29, 2014. On August 8, 2014, the Secretary's representative advised the settlement judge that he had been unsuccessful in his attempts to contact Respondent's owner, Steven Georgilis. The Secretary also indicated that he did not oppose the removal of the case from mandatory settlement proceedings.

On August 18, 2014, the Secretary filed his complaints in Docket Nos. 14-0928 and 14-0928 (FTA).

On August 26, 2014, the case was removed from mandatory settlement proceedings and assigned to the undersigned for trial purposes.

By Court Order dated August 28, 2014, the parties were informed that on September 19, 2014 at 9:30 a.m., E.D.T., the Court would hold a telephone pre-hearing scheduling conference with the parties.

The pre-hearing scheduling conference was conducted on September 19, 2014 pursuant to the Court's Order dated August 28, 2014. Respondent inexplicably failed to participate in the pre-hearing scheduling conference call.

On September 22, 2014, the Court issued its Notice of Hearing and Scheduling Order, ("Scheduling Order"), which scheduled the trial to commence on April 7, 2015 at Binghamton, New York. The Scheduling Order advised Respondent "that further failure to comply with Court orders may result in sanctions, including the dismissal of its notice(s) of contest in these matters."

On September 22, 2014, the Court also issued its Order to Show Cause Why Respondent should not be Held in Default for Failure to Comply with Commission Rule 35 and for Failure to

File Answers.[3] Respondent was informed that a party that fails to file an answer may be held in default after being given an opportunity to show cause why it should not be held in default. Respondent was further informed that a party that fails to file an adequate Rule 35 declaration may also be held in default after being given an opportunity to show cause why it should not be held in default. *See* 29 C.F.R. § 2200.35(b). Respondent was ordered to show cause on or before October 6, 2014 why Respondent should not be held in default for failing to file its answers and adequate declaration. Respondent was again advised that "Failure to timely respond to this order may result in Respondent being held in default, the dismissal of Respondent's notice (s) of contest of the citations at issue, Respondent being unable to raise any affirmative defenses in these matters, and/or the assessment of costs incurred by the Commission and the other parties relating to these cases."

On October 29, 2014, the Secretary served his first set of discovery requests upon Respondent.[4]

On November 17, 2014, Respondent's President Georgilis informed the Secretary that it would not respond to the Secretary's discovery requests, provide the Secretary any requested documents, or appear at the trial.[5] Respondent failed to provide any responses to the Secretary's discovery requests.

On December 5, 2014, Complainant filed his Motion to Compel Discovery seeking an order compelling the Respondent to respond to the Complainant's discovery requests and deeming

[3] U.S. Postal Service PS Forms 3811 indicate Respondent received the Court's Order to Show Cause.
[4] On November 17, 2014, Respondent confirmed receipt of the Secretary's discovery requests.
[5] The Secretary advised the Court in its Motion to Compel Discovery that Mr. Georgilis stated his opinion that OSHA and its employees are a farce, the Secretary cannot force him to participate in the proceedings, and that he could not afford to pay the proposed penalties. *See* Motion to Compel Discovery, at p. 3.

the Secretary's First Request for Admissions as "admitted" due to Respondent's failure to respond.[6] Respondent failed to file any response to the Secretary's Motion to Compel Discovery.

On January 15, 2015, the Court granted Complainant's Motion to Compel Discovery and Ordered Respondent to provide complete and responsive answers to the Secretary's First Set of Interrogatories and First Request for Production of documents to the Secretary by January 26, 2015. The Court also deemed admitted Complainant's First Request for Admissions, Numbers 1 through 5, pursuant to Commission Rule of Procedure ("CRP") 54(b). The Court again informed Respondent that its continued inaction in this matter or refusal to comply with this order may result in Respondent being held in default, the dismissal of Respondent's notice(s) of contest of the citations at issue, Respondent being unable to raise any affirmative defenses in these matters, and/or the assessment of costs incurred by the Commission and the other parties relating to these cases.

Respondent has not filed its answers, Rule 35 declaration, or a response to the Court's show cause order.

Jurisdiction

The Court finds that the Commission has jurisdiction of the parties and the subject matter in this case.

[6] On December 1, 2014, Respondent's Mr. Georgilis again told the Secretary's representative that he had no intention of participating in the proceedings. The Secretary advised Mr. Georgilis that he intended to file a motion to compel discovery and told him that continued inaction could result in a default judgment. *See* Motion to Compel Discovery, at p. 4.

The Secretary's Burden of Proof

To prove a violation of a specific standard, the Secretary must demonstrate by a preponderance of the evidence that: 1) the cited standard applies, 2) the terms of the standard were not met, 3) employees had access to the cited condition, and 4) the employer knew, or could have known with the exercise of reasonable diligence, of the cited condition. *Astra Pharmaceutical Prod.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981).

Where there is no contest of the original citation [Inspection No. 896494] and there is a re-inspection subsequent to the scheduled abatement date, as here, the Secretary's prima facie case of failure to abate is made upon showing that: 1) the original citation has become a final order of the Commission, and 2) the condition or hazard found upon re-inspection is the identical one for which respondent was originally cited. *Sea-Jet Trucking Corp*., No. 96-0624, 1997 WL 720755 at *2 (O.S.H.R.C.A.L.J., Nov. 10, 1997) citing *York Metal Finishing Co.*, 1 BNA OSHC 1655 (No. 245, 1974), *pet. for review dismissed*, No. 74-1554 (3d. Cir.1974); *Advance Bronze Inc. v. Sec. Of Labor,* 917 F.2d 944 (6th Cir.1990) (employer's challenge to failure to abate notice must fail where it cannot show (1) the original violation was cited in error or; (2) the original violation was subsequently corrected). Where the initial citation was not contested, as here, the Secretary must also "prove that the alleged violative condition was in fact violative at the time of the inspection…" *See Kit Manfuacturing Co.*, 2 BNA OSHC at 1673.

Show Cause Order

CRP 101 permits a judge to declare a party in default for failure to proceed as required by the judge on its own initiative after having been afforded an opportunity to show cause why the party should not be declared to be in default.[7]

Commission judges have the discretion to impose sanctions on parties who violate their orders. *See NL Industries, Inc.* 11 BNA OSHC 2156, 2168 (No. 78-5204, 1984). Rule 16(f), Federal Rules of Civil Procedure ("Fed. R. Civ. P."),[8] permits the Court on its own initiative to order just sanctions if a party or party's attorney fails to obey a scheduling or pretrial order.[9] Rule 16(f) was added in 1983 to "reflect that existing practice [to enforce failures by appropriate sanctions] and to obviate dependence upon Rule 41(b) or the court's inherent power to regulate litigation." Notes of Advisory Committee on Rules, 1983 Amendment, Subdivision (f); Sanctions. Considerable discretion is vested in judges to decide whether to impose sanctions and what form they should take.

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[7] As done here, CRP 101(d) requires that the show cause order be served upon the affected party by certified mail, return receipt requested.

[8] Rule 16(f), Fed. R. Civ. P., states:

(f) Sanctions.

(1) *In General.* On motion or on its own, the court may issue any just orders, including those authorized by Rule 37(b)(2)(A)(ii)-(vii), if a party or its attorney:

(A) fails to appear at a scheduling or other pretrial conference;

(B) is substantially unprepared to participate--or does not participate in good faith--in the conference; or

(C) fails to obey a scheduling or other pretrial order.

(2) *Imposing Fees and Costs.* Instead of or in addition to any other sanction, the court must order the party, its attorney, or both to pay the reasonable expenses--including attorney's fees--incurred because of any noncompliance with this rule, unless the noncompliance was substantially justified or other circumstances make an award of expenses unjust.

[9] Procedure before the Occupational Safety and Review Commission is in accordance with the Federal Rules of Civil Procedure in the absence of a specific provision in the Commission's own Rules of Procedure. Rule 2(b) of the Commission's Rules of Procedure, 29 C.F.R. § 2200.2(b), s*ee also Williams Enterprises* 4 BNA OSHC 1663, 1665 n.2 (No. 4533, 1976).

The Commission and federal courts generally consider eight criteria when determining whether a Judge's decision to sanction a party through dismissal is appropriate. *Duquesne Light Company*, 8 BNA OSHC 1218, 1221 (No. 78-5303, 1980). Prejudice to the opposing party,[10] whether there is a showing of willful default by a party, and contumacious conduct by the noncomplying party are three of the more significant criteria to take into account. Only one of these three criteria is needed to affirm the Judge's decision to render a judgment by default against a party. *Ford Development Corp.*, 15 BNA OSHC 2003, 2005 (No. 90-1505, 1992), *Circle T Drilling Company*, Inc., 8 BNA OSHC 1681, 1682 (No. 79-2667, 1980).

In this instance, there is a clear showing of willful default by Respondent. The Court finds that Respondent abandoned its case pending before the Commission. Respondent did not participate in mandatory settlement proceedings and the Court ordered pre-hearing scheduling conference conducted on September 19, 2014. No excusable explanation for its absences was tendered. Respondent failed to respond to Complainant's discovery requests and file a response to the Secretary's Motion to Compel Discovery. Respondent failed to file its answers, Rule 35 declaration, or a response to the Court's show cause order. Again, no explanations for these failings has been offered to the Court by Respondent. Collectively, the Court finds these failures to be contumacious conduct by the Respondent.

The Court may dismiss a matter when "the record shows contumacious conduct by the noncomplying party or prejudice to the opposing party." *St. Lawrence Food Corp. D/b/a/ (sic) Primo Foods*, 21 BNA OSHC 1467, 1472 (Nos. 04-1734 and 04-1735, 2006). Having submitted its notice to contest the citations at issue in June, 2014, Respondent has shown no interest since

[10] A party is prejudiced if the failure to make required court ordered disclosures impairs the party's ability to adequately prepare for trial, including understanding the factual merits of the opponent's defense(s). *Avionic Co. v. General Dynamics Corp.,* 957 F.2d 555 (8th Cir. 1992). In this instance, the Secretary has been clearly prejudiced by Respondent's failure to respond to the Secretary's discovery requests.

then in moving this case forward to trial. Rather than prepare to address the merits of the citation before the Court in an orderly fashion, Respondent seems willing only to posture its views to OSHA during telephone conversations initiated by the Secretary's counsel. Under these circumstances, the Court sees no worthwhile purpose in allowing this case to proceed to a hearing when there is no basis to believe that Respondent will fulfill its pre-trial obligations or actually appear at the trial.[11] *See Twin Pines Constr. Inc./Teles Constr.,* 24 BNA OSHC 1500, 1504 (No. 12-1328, 2012) (No worthwhile purpose in proceeding to a hearing where a party has abandoned the case).

The Court is mindful of policy considerations in the law that weigh in favor of deciding cases on their merits. *See Pearson v. Dennison*, 353 F.2d 24 (9th Cir. 1965). The Court finds that the Commission has conveyed due notice to Respondent of its procedural rights and provided ample warning that its failure to comply with Court orders may result in the dismissal of its notice of contest. At every instance, Respondent has failed to take advantage of the opportunity to advise the Court that it has not abandoned its case before the Commission. Every indication before the Court is that Respondent has walked away from its contest.

The Court finds Respondent to be in default. "A defaulting party 'is taken to have conceded the truth of the factual allegations in the complaint as establishing the grounds for liability as to which damages will be calculated.'" *Ortiz-Gonzalez v. Fonovia*, 277 F.3d 59, 62-63 (1st Cir. 2002)(quoting *Franco v. Selective Ins. Co.*, 184 F.3d 4, 9 n.3 (1st Cir. 1999)), *Tower Painting Co.*, 22 BNA OSHC 1368, 1375 (No. 07-0585, 2008). As a result of the default, the factual allegations of the complaints and the underlying citations relating to liability are taken as true. *Dundee Cement Co. v. Howard Pipe & Concrete Products*, 722 F.2d 1319, 1323 (7th Cir.

[11]The failure of a party to appear at a hearing may result in a decision against that party. *See* 29 C.F.R. § 2200.64.

1983). When entering a default judgment, factual allegations set forth in the complaints and underlying citations are sufficient to establish a defendant's liability. *Trustees of the Iron Workers District Council of Tennessee Valley and Vicinity Pension Fund et al. v. Charles Howell,* No. 1:07-cv-5, 2008 WL 2645504, *6 (E.D. Tenn. July 2, 2008); *National Satellite Sports, Inc. v. Mosely Entertainment, Inc.*, No. 01-CV-74510-DT, 2002 WL 1303039, *3 (E.D. Mich. May 21, 2002).

Based upon Respondent's default and deemed admissions, the Court finds with regard to Docket No. 14-0928 that: 1) the Complaints and underlying citations sufficiently state the description of the alleged violations and a reference to the standards allegedly violated,[12] 2) the Secretary has adequately shown the applicability of the cited standards for each of the alleged violations, 3) the Secretary has sufficiently established that the terms of the cited standards were not met by Respondent in each of the alleged violations, 4) Respondent's employees had access to the cited conditions, and 5) the Secretary has adequately proved that Respondent either knew or should have known of the cited conditions. The Citation items at issue are all affirmed, in their entirety, as alleged by the Secretary.

Based upon Respondent's default and deemed admissions, the Court further finds with regard to Docket No. 14-0928 (FTA) that: 1) the original citation relating to Inspection No. 896494 became a final order of the Commission as of August 15, 2013, 2) the conditions or hazards found upon re-inspection of the worksite on November 22, 2013 are the identical ones for which respondent was originally cited under Inspection No. 896494, and 3) the Secretary has proved that the alleged violative conditions were in fact violative at the time of Inspection No. 896494 was conducted.

[12]§ 9(a) of the Act (a citation must "describe with particularity the nature of the violation, including reference to the provision of the Act, standard, rule, regulation, or order alleged to have been violated.").

Penalties

The Secretary has proposed a $16,280 penalty for the citation items relating to inspection no. 950323. He also proposed an additional penalty of $144,000 for Respondent's failure to correct the violations of standards pertaining to Citation 1, Items 2, 6a through 6e, 7a, 8a and 8c, 11, and 16a & 16c, identified during Inspection No. 896494. In assessing penalties for the citation items relating to inspection no. 950323, the Commission must give due consideration to the gravity of the violation and to the employer's size, prior history of violations and good faith. 29 U.S.C. § 666(j); *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2213-14 (No. 87-2059, 1993). These factors are not necessarily accorded equal weight, and gravity is generally the principal factor in penalty assessment. *Trinity Indus., Inc.*, 15 BNA OSHC 1481, 1483 (No. 88-2691, 1992). The gravity of a violation depends upon such matters as the number of employees exposed, duration of exposure, precautions taken against injury, and the likelihood that an injury would result. *J.A. Jones*, 15 BNA OSHC at 2213-14.

As stated in the May 21, 2014 Notification of Failure to Abate Alleged Violations of standards pertaining to Citation 1, Items 2, 6a through 6e, 7a, 8a and 8c, 11, and 16a & 16c, the additional penalty was computed by multiplying a daily penalty times the number of days the violation remained unabated. Under Section 17(d) of the Act, any employer who fails to correct a violation within the period permitted for its correction may be assessed penalties in the amount of $7,000 per day for each day during which such failure or violation continues.[13] In assessing penalties for an unabated citation, only the reduction factor for size, based upon the circumstances

[13] *See Bay Marina, Inc.* 2 BNA OSHC 1598, 1599 (No. 2102, 1975) (Computation of number of days for which daily penalty should be assessed for failure to abate should begin with the abatement date specified in citation and include all days employer conducts business operations, regardless of whether work days fall on weekends or holidays, including date of re-inspection.).

noted during the re-inspection, is applied by the Secretary to arrive at the daily proposed penalty.[14] Normally, the maximum penalty for failure to abate a particular violation will not exceed 30 times the amount of the daily proposed penalty.[15] *See also Sea-Jet Trucking Corp.*, 1997 WL 720755 at *5 (The gravity based penalty for unabated violations calculated on the basis of the facts noted upon re-inspection.).

Based on the record of this case and Respondent's default, the Court finds that the Secretary properly considered the statutory factors in his penalty proposals. The Court further finds the Secretary's proposed a $16,280 penalty for the citation items relating to inspection no. 950323 and proposed $144,000 additional penalty for Respondent's failure to correct the violations of standards pertaining to Citation 1, Items 2, 6a through 6e, 7a, 8a and 8c, 11, and 16a & 16c, identified in Inspection No. 896494, along with the classification of the violations as alleged by the Secretary, to be appropriate.[16] The Court assesses the proposed penalties totaling $160,280.

Findings of Fact and Conclusions of Law

All finding of fact and conclusions of law relevant and necessary to a determination of the contested issues have been found and appear in the decision above. *See* Fed. R. Civ. P. 52(a).

[14] FOM ch. 6-VII-B-3.
[15] FOM ch. 6-VII-B-4-b.
[16] The Commission is not bound to follow the Secretary's penalty computation formula. The Secretary's penalty proposals are advisory only. The Commission is the final arbiter of penalties and a judge assesses a penalty de novo. *See Roberts Pipeline Constr., Inc. v. Sec. of Labor*, 85 F.3d 632 (7th Cir. 1996), *Brennan v. Occupational Safety and Health Review Comm'n*, 487 F.2d 438 (8th Cir. 1973); *accord Long Mfg. Co., N.C., Inc.*, 554 F.2d 903 (8th Cir. 1977).

Order

After considering the entire record of this case and Respondent's lack of response to the September 22, 2014 show cause order, IT IS ORDERED THAT a default judgment against Respondent is warranted and that Respondent be declared in DEFAULT;

IT IS FURTHER ORDERED THAT Respondent's Notice of Contest is DISMISSED with prejudice;[17]

based upon the foregoing findings of fact and conclusions of law, IT IS FURTHER ORDERED that for Inspection No. 950323, Docket No. 14-0928:

1. Item 1 of Citation 1 is affirmed as a serious violation of 29 C.F.R. § 1910.107(c)(8) and a penalty of $2,200 is assessed;

2. Items 1a and 1b of Citation 2 are affirmed as a repeat violation of 29 C.F.R. § 1910.303(b)(1) and 29 C.F.R. § 1910.305(b)(2)(i), respectively, and a penalty of $6,160 is assessed;

3. Items 2a and 2b of Citation 2 are affirmed as a repeat violation of 29 C.F.R. § 1910.22(a)(1) and 29 C.F.R. § 1910.22(a)(2), respectively, and a penalty of $4,400 is assessed;

4. Item 3 of Citation 2 is affirmed as a repeat violation of 29 C.F.R. § 1910.107(c)(2) and a penalty of $3,520 is assessed; and

based upon the foregoing findings of fact and conclusions of law, IT IS FURTHER ORDERED that for Docket No. 14-0928 (FTA) the Secretary's notification of Respondent's failure to correct the violations of standards pertaining to Citation 1, Items 2, 6a through 6e, 7a, 8a and 8c, 11, and 16a & 16c, identified in Inspection No. 896494, is approved and affirmed and additional penalties in the amount of $144,000 are assessed.

[17]The hearing scheduled for April 7, 2015 at Binghamton, New York is cancelled.

SO ORDERED.

_____/s/_____
The Honorable Dennis L. Phillips
U.S. OSHRC Judge

Date: March 20, 2015
Washington, D.C.