



United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
U.S. Customs House
721 19th Street, Room 407
Denver, CO 80202-2517

SECRETARY OF LABOR,

Complainant,

v.

EXCEL MODULAR SCAFFOLD & LEASING
COMPANY d/b/a EXCEL SCAFFOLD &
LEASING COMPANY,

Respondent.

OSHRC Docket No. 18-0361

Lindsay A. Woffard, Esq., Office of the Solicitor, Dallas Texas for Complainant

Steven O. Grubbs, Esq. and Grant Dorfman, Esq., Sheehy Ware & Pappas, PC, Houston, TX for Respondent

William F. Thorne, Esq. Jack Carroll, Esq., Orgain Beller & Tucker, LLP, Beaumont, TX and Nick Graham, Esq. General Counsel for Motiva Enterprise LLC, for Motiva Enterprise, LLC (Entered a Limited Appearance for the sole purpose of defending Motiva's Motion to Quash Subpoena).

Before: Judge Patrick B. Augustine, United States Administrative Law Judge

SANCTIONS ORDER

On July 31, 2018, the Court held an on the record¹ Show Cause hearing to address a *Motion to Quash* (“*Motion*”) filed by Motiva Enterprises, LLC, who is not a party to this proceeding². Respondent’s counsel served Motiva with a subpoena seeking documents in response to 42 requests. (Tr. Ex. B)(Appended to this Order). In addition, Respondent’s counsel appears to have submitted deposition-style questions along with the subpoena. (*Id.*)(Tr. Ex. B)(Appended

¹ The parties were notified by the Court on August 9, 2019, that the Court had received the official transcript of the hearing from the Court Reporter.

² Motiva’s counsel filed a Limited Appearance on July 17, 2018, with the Court to represent Motiva in this matter.

to this Order) In its *Motion*, Motiva provided evidence showing it had been improperly served with a subpoena issued from the State of Texas, and Respondent's requests sought material that was either irrelevant, protected, or both.

The Court convened a show cause hearing, upon proper notice to the parties, to discuss three issues: (1) the subpoena; (2) a protective order; and (3) sanctions. Issues (1) and (2) were resolved during the hearing, and the Court will memorialize below how the parties agreed to resolve those issues. The remaining issue of sanctions can be split into two parts: whether Respondent or its counsel should be sanctioned, and what is an appropriate sanction. Based on the Court's review of the record, it finds that some form of sanction is proper.

The case at bar involves a single-item citation, which alleges Respondent failed to comply with Motiva's safe work practices while working at a Motiva facility. (Ex. A). A flash fire injured one of Respondent's employees while Respondent was performing asbestos remediation at Motiva's facility. (Tr. 29). The substance of the alleged violation, though, is not related to the fire or explosion hazards, but is instead targeted at Respondent's method of clean-up as it relates to the asbestos remediation. (Tr. 29; Ex. A). Nevertheless, Respondent seeks a rather expansive set of documents from Motiva, which Complainant and Motiva have argued exceed the scope of the condition addressed in the Citation.³

According to Respondent's counsel, Mr. Grubbs, he relied on the firm's standard practice for the issuance of subpoenas, which involved sending pleadings and discovery to his paralegal, who, in turn, sent them to a process server. (Tr. 18). The problem, as later admitted by Mr. Grubbs, is he failed to seek the proper subpoena from *this* Court. Commission Rule 57 requires a party to seek the Court's permission to subpoena witnesses and/or documents. *See* 29 C.F.R. § 2200.57(a).

³ The Court, in an Order dated August 8, 2018, disposed of the disputes on the scope and relevancy of discovery in an Order entitled "Order of Respondent's Motion to Compel".

Further, Respondent's counsel submitted deposition-style questions along with its requests for documents without first conferring with either Complainant or Motiva. *See id.* § 2200.56. Notwithstanding Respondent counsel's lengthy experience practicing before the Commission, he failed to comply with Commission Rules 32, 56, and 57. *See id.* §§ 2200.32, 2200.56 and 2200.57. These failures were identified in Motiva's *Motion*.

In response to Motiva's *Motion*, the Court issued a Show Cause Order, directing the parties to appear at the hearing described herein. (Tr. 6). To clarify the issues for the hearing, Respondent and Complainant were directed to file responses to Motiva's *Motion* by July 25, 2018. In a subsequent order, the Court directed Motiva to serve the parties with the subpoena at issue, along with any attachments or documents related to it. (Tr. 7; Ex. B). The Court also stayed enforcement of the subpoena. (Tr. 7). One day later, Respondent's counsel withdrew the disputed subpoena but indicated he would be seeking issuance of a proper subpoena later, the request for which the Court received on the morning of the hearing. (Tr. 7).

Mr. Grubbs' *mea culpa* on the issue of serving a State of Texas subpoena in an OSHRC proceeding quickly short-circuited the question of whether the subpoena was proper. Mr. Grubbs admitted he went through the motions, so to speak, and did not consult Commission Rules for serving a subpoena on a non-party. (Tr. 18–20). Further, since the subpoena had previously been withdrawn, the question of its propriety was moot. However, an equally important issue remained: Prior to the hearing, Respondent's counsel requested a proper subpoena, which meant the controversy over the substance of Respondent's request was still very much alive.

As the Court learned at hearing, the documents sought by Respondent had also been produced by Motiva to Complainant during the pendency of its case against Motiva.⁴ Thus, there

4. Motiva independently settled its case with Complainant. (Tr. 13).

are, by Motiva's count, approximately 2700 documents in Complainant's possession, some of which are relevant to Respondent's case insofar as Complainant relied on them to support the alleged violation. (Tr. 48). After allowing the parties and Motiva to clarify their respective positions regarding the relevance of the documents requested, and the protection that should be afforded to documents that will be produced, the Court proposed a process whereby the concerns of the parties and Motiva could be addressed.

First, the Court held (and will continue to hold) in abeyance Respondent's request for a proper subpoena. (Tr. 52). Next, Motiva agreed to an initial review of the 2700 documents previously produced to Complainant in its own, collateral litigation before the Commission. The purpose of Motiva's first review would be to narrow the universe of documents to those relevant to Respondent's inquiry which Motiva had no objection to producing but potentially subject to a protective order. (Tr. 52–53). Following the initial culling, counsel for the parties and Motiva agreed to confer regarding the remaining documents which Motiva has not consented to be produced and report to the Court within 60 days.⁵ (Tr. 53). During the conferral period, the parties committed to either come up with an agreed-upon set of documents that would be disclosed to Respondent, or, at the very least, narrow the number of requests in dispute. Finally, once the parties agree on documents to be produced, or upon an order from the Court resolving the scope of the production issue, the parties and Motiva are charged with drafting a protective order for the Court's signature.

With respect to the question of sanctions, the Court notes Motiva has not sought recompense for its involvement, and the Court is without evidence regarding what, if any, financial penalty would be appropriate under the circumstances. However, the Court is particularly

5. This deadline can be extended upon application of the parties and a showing of good cause for an extension of time.

concerned about Respondent’s counsel’s abject failure to comply with Commission Rules of Procedure, especially when viewed in the context of Mr. Grubbs’ advertised experience before the Commission. (Tr. 17). Mr. Grubbs has, according to his website, participated in over 300 OSHA investigations and defended 30 of those cases.⁶ (Tr. 17). That he has done this without understanding or reviewing basic rules regarding discovery and procedure defies explanation. (Tr. 17). While the Court understands that certain processes become “automatic”, as it were, such does not justify failing to perform even the most cursory review of the standards and rules applicable to the request being made, whether to the court, a party, or a non-party. Accordingly, the Court finds a remedial sanction, in the form of education, is appropriate.

Commission Rule 32, much like Federal Rule of Civil Procedure 11, dictates that a party or party representative’s signature on a pleading or motion “constitutes a certificate by him that he has read the pleading, motion, or other paper, that to the best of his knowledge, information, and belief, formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law” 29 C.F.R. § 2200.32. Failure to so comply subjects the signing party or his representative to the sanctions set forth in Rules 101 or 104. *Id.*

By Mr. Grubbs’ own admission, he and his colleague drafted the questions/document requests and asked his paralegal to “get these served”, apparently without any additional instruction or review. (Tr. 18). The paralegal, consistent with longstanding prior practice⁷, filled out and submitted the State of Texas form subpoena to U.S. Legal Support, a process serving company, who served Motiva. (Tr. 19). Counsel signed and served documents that, by his own

6. According to Mr. Grubbs, he has only tried one case before a Commission ALJ; the remaining 29 had settled prior to formal discovery began. (Tr. 18).

⁷ Mr. Grubbs’ legal secretary identified as Cindy in a communication with the Court’s Lead Assistant on July 11, 2018 confirmed the longstanding practice of issuing State of Texas subpoenas in OSHA proceedings and it had never been an issue. The parties were provided a copy of the Court’s Internal Memorandum containing this discourse in *Notice of Internal Memo* sent to the parties by the Court on July 18, 2018. *See also* Tr 19-21.

admission, he did not adequately review to ensure compliance with Commission Rules. (Tr. 22). The same can also be said of counsel's failure to confer with Complainant regarding the deposition by written questions, irrespective of their purpose, since such would be in violation of Commission Rule 56.⁸

Rule 101 does not directly relate to the issue currently before the Court, and the sanction of default is an inappropriate remedy for the failures of counsel, as opposed to the party itself. *See* 29 C.F.R. § 2200.101(a). Commission Rule 104, on the other hand, addresses individual conduct before the Court, and references the Model Rules of Professional Conduct and disciplinary actions related to individual actions. *Id.* § 2200.104. In other words, Rule 104 relates more specifically to the actions of counsel, over which Respondent had little control. Though the provided-for sanction under Rule 104 is exclusion from the proceeding, the Court does not find such a drastic remedial measure is warranted in this case. Instead, as previously proposed by the Court and, to some extent, agreed to by Respondent's counsel, the Court finds the appropriate remedy is education.

Coincident with its obligation to meet and confer with counsel for Motiva and Complainant, the Court hereby ORDERS Respondent's counsel to perform the following:

1. Mr. Grubbs, as managing attorney, shall certify he has reviewed and become familiar with the Commission Rules of Procedure, especially those relating to the issuance of subpoenas. The certification shall contain how this was accomplished and the date of completion.
2. Mr. Grubbs shall certify that he, or another individual, has provided training to his subordinate attorneys and legal staff, document how the training was provided, to whom provided, when it was provided and if another individual conducted such training the identity of the individual. This information shall be included in the certification.

8. Counsel asserts that these are pro-forma questions interposed for authenticating the documents produced. (Tr. 22–23).

3. Mr. Grubbs shall certify that he has completed a course on the Model Rules of Professional Conduct⁹ and certify when and how this was accomplished.

4. The foregoing certifications shall be dated and filed with the Court within 60 days.

Counsel's failure to comply with the foregoing requirements may subject it to an exclusion proceeding pursuant to Commission Rule 104. See 29 C.F.R. § 2200.104(b) and (c). If counsel needs additional time to accomplish the foregoing, it shall notify the Court in writing in advance of the 60-day deadline. If good cause is shown, the Court may consider extending the deadline to comply, but in no case will that deadline be extended past the date set for trial in this matter.

SO ORDERED.

Date: September 19, 2018
Denver, Colorado

/s/

Patrick B. Augustine
Judge, OSHRC

⁹ Commission Rule 104(a) imposes upon attorneys who practice before the Commission the obligation to be familiar with the Model Rules of Professional Conduct.