



United States of America  
**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**  
1924 Building - Room 2R90, 100 Alabama Street, S.W.  
Atlanta, Georgia 30303-3104

Secretary of Labor,  
Complainant

v.

Joshua Herion dba ECS Roofing  
Professionals, Inc.,  
Respondent.

OSHRC Docket No.: **22-0519 & 22-0536**

Attorney and Law Firm:

Elisabeth P. Nolte, Esq., U.S. Department of Labor, Office of the Solicitor, Chicago, Illinois, for  
Complainant

Joshua Herion, d/b/a ECS Roofing Professionals, Inc., Respondent

JUDGE: Administrative Law Judge Heather A. Joys

### **DECISION AND ORDER OF DEFAULT**

This matter is before the Occupational Safety and Health Review Commission on two Notices of Contest filed May 2, 2022, by Respondent, Joshua Heroin d/b/a ECS Roofing Professionals, Inc. (ECS). Following inspections of two of ECS's worksites in October of 2021, the Secretary issued ECS citations on April 14, 2022. For the reasons that follow, ECS is declared in **DEFAULT** and the citations issued to it on April 14, 2022, pursuant to Inspection Nos. 1559071 and 1560806 are **AFFIRMED** in their entirety and penalties **ASSESSED**.

### **BACKGROUND**

The Des Plaines, Illinois, and Milwaukee, Wisconsin, Area Offices of the Occupational Safety and Health Administration conducted inspections of two ECS worksites in Hoffman Estates, Illinois, and Waukesha, Wisconsin, respectively, in October of 2021. As a result of each inspection, the Secretary issued ECS citations. The Secretary alleged a total of 14 violations of the standards covering construction work at the worksites. 29 C.F.R. § 1926. He characterized one violation as willful, four as repeat, and the remaining violations as serious. The Secretary

proposes a total penalty for all the violations of \$360,531. On May 2, 2022, ECS, through its attorney, filed timely notices of contest to the citations. The Commission docketed the matters on May 12, 2022, assigning Docket No. 22-0536 to Inspection No. 1559071 and Docket No. 22-0519 to Inspection No. 1560806.

Chief Judge Covette Rooney issued an order consolidating the two dockets and assigned the matter to Judge William Coleman under the Commission's settlement proceedings. 29 C.F.R. § 2200.120. The parties filed their respective Complaints and Answers. Judge Coleman held a settlement conference via video teleconference on August 11, 2022, which both parties attended with their attorneys. The parties were not able to reach an agreed resolution to the matter during settlement proceedings and Chief Judge Rooney reassigned the matter to the undersigned on August 16, 2022, under the Commission's conventional proceedings.

By order of August 25, 2022, the undersigned set the matter for a two-week hearing in Chicago, Illinois, to commence on March 28, 2023. The order set out a prehearing schedule that included deadlines for the close of discovery, designation of expert witnesses, and filing of dispositive motions, among other matters. The order was issued and served on counsel for each party via the Commission's e-filing system.

On September 16, 2022, ECS's attorney filed a motion to withdraw as counsel. In the motion, then-counsel for ECS attested that "irreconcilable differences" between it and ECS existed making continued representation "impossible."<sup>1</sup> Counsel went on to attest he had informed ECS of his intent to withdraw, provided ECS a copy of the motion, and requested ECS be given 30 days in which to obtain new counsel. He also included a current mailing address for ECS in the motion. This address was the same as that to which the Secretary had issued, and at which ECS had received, the citations. ECS did not respond to its counsel upon notification of his intent to withdraw. Nor did it file a response with the court to the motion. The Secretary did not object to the request to withdraw. On September 19, 2022, the court granted the motion and directed ECS to provide the court with its record address, have its representative register with the Commission's e-filing system, and notify the court immediately upon retaining new counsel. The order explicitly stated all previously established deadlines remained in effect. This order was

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<sup>1</sup> Counsel for ECS filed a second motion to withdraw the same day. The second motion to withdraw includes the required notification, omitted from the first motion, indicating counsel for ECS had conferred with counsel for the Secretary. The motions are otherwise identical.

issued via the Commission's e-filing system.<sup>2</sup> ECS did not comply with the court's directives in its September 19, 2022, order.

On October 13, 2022, the Secretary filed a motion to compel responses to written discovery and for an order deeming requests for admission admitted. The Secretary had propounded written discovery requests on ECS on August 29, 2022. According to the Secretary's motion, he had contacted Joshua Herion via phone and email on October 5<sup>th</sup> and 12<sup>th</sup> to discuss the outstanding discovery responses. Mr. Herion never responded, prompting the Secretary to file his motion to compel. Pursuant to Commission Rule 40(h), ECS's response to the Secretary's motion to compel was due on November 14, 2022.

On November 4, 2022, the court issued an order requiring ECS to provide the court with updated contact information and setting a November 18, 2022, deadline for it to respond to the Secretary's motion to compel. The court issued this order via the Commission's e-filing system but also served the document on Mr. Herion at the address provided by his former counsel in the motion to withdraw. The court served Mr. Herion via Federal Express.<sup>3</sup> According to Federal Express tracking records, the order was delivered to Mr. Herion on November 7, 2022 (Exhibit A). ECS did not file a response to the Secretary's motion to compel nor provide the court with updated contact information.

On November 29, 2022, the Secretary filed a motion for default based upon ECS's repeated failures to comply with the court's orders. According to counsel for the Secretary, Mr. Herion had refused to communicate with her and stated he "objects to the entire proceeding." ECS's response to the Secretary's motion for default was due December 13, 2022. ECS did not file a response by that date.

On December 21, 2022, the court issued three orders. In the first order, the court granted the Secretary's motion to compel and required ECS to provide complete written responses to the Secretary's written discovery requests by January 13, 2023. In the second, the court deemed the Secretary's requests for admission admitted pursuant to Commission Rule 54(a)(3). The third order was an Order to Show Cause. In that order, the court required ECS to show cause, by January 20, 2023, why it should not be found in default for its repeated failures to comply with

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<sup>2</sup> The court reissued this order on November 4, 2022. The court did so in an abundance of caution when the September 19, 2022, order appeared in the Commission's e-filing system under only one of the two docket numbers. The court notes that both orders were sent to ECS's original counsel and not directly to Joshua Herion.

<sup>3</sup> The court also provided Mr. Herion with a courtesy copy via email.

Commission procedural rules and this court's orders. All three orders were served on Mr. Herion at ECS's business address via Federal Express.<sup>4</sup> According to Federal Express tracking records, ECS received and signed for the orders on December 22, 2022 (Exhibit B). Neither Mr. Herion nor any other representative for ECS responded to the order by January 20, 2023. On January 24, 2023, the Secretary filed a status report attesting ECS had failed to comply with the court's order compelling it to respond to the Secretary's written discovery.

On January 26, 2023, the court issued an order requiring the parties to appear for a telephone conference on February 2, 2023, at 2:00 p.m. EST (1:00 p.m. CST). That order was served on Mr. Herion via Federal Express. According to Federal Express tracking records, the order was delivered and signed for at ECS's business address on January 27, 2023 (Exhibit C). Counsel for the Secretary appeared at the time noticed. No representative for ECS appeared.

On February 3, 2023, the court issued a second Order to Show Cause to ECS. The court required ECS to show cause why it should not be declared in default for its failures to comply with the Commission's procedural rules and the court's orders, most recently for its failure to appear at the telephone conference. The court set a deadline of February 24, 2023, for ECS's response. That order was served on ECS at its business address via Federal Express. According to Federal Express tracking records, the order was delivered and signed for February 6, 2023 (Exhibit D).

To date, ECS had failed to respond to either the December 21, 2022, or the February 3, 2023, orders to show cause. Nor has ECS provided the Secretary with the discovery responses required by the court's order granting the Secretary's motion to compel.

### **DISCUSSION**

Commission Rules 52(f)(2) and 101(a) prescribe the actions a judge may take when a party fails to comply with discovery orders or to obey Commission rules or orders, respectively. Commission Rule 101(a) provides

When any party has failed to plead or otherwise proceed as provided by these rules or as required by the Commission or the Judge, the party may be declared to be in default either on the initiative of the Commission or the Judge, after having been afforded an opportunity to show cause why the party should not be declared to be in default, or on the motion of a party. Subsequently, the Commission or the 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.

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<sup>4</sup> The court again provided Mr. Herion with a courtesy copy via email.

29 C.F.R. § 2900.101(a). Commission Rule 101(a) does not apply where a party has specifically failed to comply with orders compelling discovery. *See* 29 C.F.R. § 2900.101(c). Sanctions for such non-compliance are governed by Commission Rule 52(f). Under Commission Rule 52(f),

If a party fails to comply with an order compelling discovery, the Judge may enter an order to redress the failure. Such order may issue upon the initiative of a Judge, after affording an opportunity to show cause why the order should not be entered, or upon the motion of a party conforming to § 2200.40. The order may include any sanction stated in Federal Rule of Civil Procedure 37<sup>5</sup>, including the following:

- (i) An order that designated facts shall be taken to be established for purposes of the case in accordance with the claim of the party obtaining that order;
- (ii) An order refusing to permit the disobedient party to support or to oppose designated claims or defenses or prohibiting it from introducing designated matters in evidence;
- (iii) An order striking pleadings or parts of pleadings or staying further proceedings until the order is obeyed; and
- (iv) An order dismissing the action or proceeding or any part of the action or proceeding or rendering a judgment by default against the disobedient party.

29 C.F.R. § 2200.52(f).

What constitutes an appropriate sanction where a party has failed to follow Commission procedures is left to the discretion of the judge. *Trinity Industries, Inc.*, Nos. 88-1545 and 1547, 1992 WL 88788, at \*3 (OSHRC Apr. 22,1992). The Commission has provided some guidance on the exercise of that discretion.

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<sup>5</sup> Federal Rule of Civil Procedure 37(b)(2)(A) includes additional sanctions a judge may impose for not obeying a discovery order. These include:

- (i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;
- (ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;
- (iii) striking pleadings in whole or in part;
- (iv) staying further proceedings until the order is obeyed;
- (v) dismissing the action or proceeding in whole or in part;
- (vi) rendering a default judgment against the disobedient party; or
- (vii) treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.

Federal Rule of Civil Procedure 37(b)(2)(C) also allows a judge to require the disobeying party to pay the expenses incurred as a result of its failure to comply.

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).

*Architectural Glass & Metal Co., Inc.*, No. 00-0389, 2001 WL 1041005, at \*2 (OSHR Sept. 6, 2001).

The Court may impose sanctions on ECS under Commission Rule 101(a) for its failure to comply with Commission rules and respond to this Court’s orders or under Commission Rule 52(f) for its failure to comply with this Court’s order compelling it to respond to the Secretary’s written discovery. Both allow sanctions up to dismissal of ECS’s notice of contest. The question before the court is whether ECS’s conduct constitutes a pattern of disregard for Commission proceedings properly characterized as contumacious such that dismissal is warranted. The court finds that it does.

Since the withdrawal of its counsel, ECS had failed to comply with the Commission’s procedural rules or any of the court’s orders. ECS has failed to comply with Commission rules regarding registering for its e-filing system. 29 C.F.R. § 2200.8(c). It has failed to provide the

court with updated contact information. 29 C.F.R. § 2200.6. ECS has refused to cooperate with discovery, ignoring the Commission's rules requiring responses to properly propounded written discovery. 29 C.F.R. §§ 2200.52-2200.55. It has failed to comply with this court's order compelling it to provide responses to discovery. It has failed to respond to either of this court's orders to show cause. When given an opportunity to speak with the undersigned at a telephone conference, ECS failed to appear.

Mr. Herion's prior statements, much like his inaction, evince his intent not to cooperate in these proceedings. For example, counsel for the Secretary has attested Mr. Herion had stated in a phone conversation that he "object[ed] to the entire proceedings" and would no longer communicate with the Secretary (Secretary of Labor's Motion for Default, p. 1). Mr. Herion has, consistent with this statement, had no further contact with the Secretary, his counsel, or the court. The record of this matter establishes a pattern of disregard for these proceedings warranting a finding of contumacious conduct on the part of ECS.

The only indication Mr. Herion has not abandoned his contest is a November 22, 2022, email to the Secretary's counsel in which Mr. Herion writes "I will reach out to another lawyer I spoke on this matter after the last one quit, but at this time I don't know how to proceed." (Exh. A to *Secretary of Labor's Motion for Default*) Although self-represented parties are not exempt from following Commission rules and procedures, the Commission has recognized "parties not trained in the law and appearing *pro se* may require additional consideration of their circumstances." *Imageries*, No. 90-378, 1992 WL 77744, at \*3 (OSHRC Apr. 2, 1992) (citations omitted). Nevertheless, the Commission has recognized, a *pro se* respondent is "required to exercise reasonable diligence in the legal proceedings over which an administrative law judge presides; a *pro se* employer must follow the rules and file responses to a judge's order or suffer the consequences which may include dismissal of the notice of contest." *Ray Wentzell, d/b/a N.E.E.T. Builders*, No. 92-2696, 1993 WL 488210, at \*3 (OSHRC Nov. 19, 1993). The court has taken into consideration that Mr. Herion is not an attorney and written its orders without legalese, using language intended to be understood by a lay person. Since sending the November 22, 2022, email, Mr. Herion has had ample opportunity to seek clarification on how to proceed or otherwise apprise the court of his intent to participate in these proceedings but has failed to do so.

This is a significant case involving alleged violations of the fall protection standards. A default judgment will result in the affirmation of 14 citation items including one alleged willful violation and four alleged repeat violations. A total penalty of \$360,531 will be assessed against ECS. The court does not take lightly issuing a default judgment where the consequences are so substantial. But ECS has left the court with no other effective option. Under the circumstances, the court can find no worthwhile purpose in allowing this case to proceed to a hearing. *See Twin Pines Constr. Inc./Teles Constr.*, No. 12-1328, 2012 WL 6760255, at \*5 (OSHRC Oct. 23, 2012) (ALJ) (No worthwhile purpose in proceeding to hearing where a party has abandoned the case).

The Commission “follows the policy in law that favors deciding cases on their merits.” *DHL Express, Inc.*, No. 07-0478, 2007 WL 2127307, at \*1 (OSHRC July 16, 2007). However, the Commission has limited resources and a “strong interest in preserving the integrity of its orders as well as deterring future misconduct.” *Trinity Indus., Inc.*, 1992 WL 88788, at \*18 n. 6, *citing Pittsburgh Forgings Co.*, No. 78-1361, 1982 WL 22596, at \*3 (OSHRC Mar. 24, 1982). ECS’s conduct has been prejudicial to the administration of justice and to the Secretary’s enforcement responsibility under the Act and cannot be permitted to continue. Dismissal of ECS’s notice of contest is necessary and appropriate to remedy ECS’s continuing prejudicial conduct.

### **ORDER**

Based upon the foregoing Findings of Fact and Conclusions of Law, it is **ORDERED** that Respondent is declared in **DEFAULT** and its Notice of Contest is **DISMISSED**. The Citations issued to Respondent on April 14, 2022, pursuant to Inspection Nos. 1559071 and 1560806 are **AFFIRMED** in their entirety and penalties **ASSESSED**.

**SO ORDERED.**

**Dated: March 20, 2023**  
Atlanta, GA

/s/  
Heather A. Joys  
Administrative Law Judge, OSHRC