

**UNITED STATES OF AMERICA  
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

Secretary of Labor,	)	
	)	
Complainant,	)	
	)	
v.	)	OSHRC Docket No. 21-0513
	)	
Lucas Shrewsbury dba Infinite Installation and Repair,	)	
	)	
	)	
Respondent.	)	
	)	

**ORDER GRANTING SECRETARY’S MOTION FOR SANCTIONS TO THE  
EXTENT INDICATED HEREIN**

**I. FACTUAL AND PROCEDURAL BACKGROUND**

1. On May 6, 2021, the Occupational Safety and Health Administration (OSHA) Syracuse Area Office issued two citations and a notification of proposed penalties to Respondent for violations that occurred at 600 East Brighton Avenue, Syracuse, NY 13210. The first citation contained two items and the second citation contained one item. These citations arose from OSHA Inspection No. 1501701.

2. Citation 1, Item 1, alleged a Willful – Serious violation of 29 C.F.R. § 1926.501(b)(4)(i), where “on or about 11/9/20: Employees working on the roof were not protected from falling through skylights ....” The proposed penalty for Citation 1, Item 1, is \$30,037. Citation 1, Item 2, alleged a Willful – Serious violation of 29 C.F.R. § 1926.501(b)(10), where “on or about 11/9/20: Employees were working on a low slope roof with a ground to eave height of 19 feet without fall protection of any kind.” The proposed penalty for Citation 1, Item 2, is \$30,037. Citation 2, Item 1, alleged an Other-Than-Serious violation of 29 C.F.R. § 1926.503(b)(1), where “on or about 11/9/20: Employees were working on a low slope roof with a ground to eave height of 19 feet without fall protection of any kind and where the employer did not produce requested fall protection training certificates.” The proposed

penalty for Citation 2, Item 1, is \$0.00.

3. On May 24, 2021, Respondent filed with the OSHA Syracuse Area Office a notice of contest to all the citations issued.

4. On September 1, 2021, Respondent filed an answer to the complaint, including a denial of the citations, and raising the defenses of employee misconduct and an “impossibility/infeasibility of compliance”. In its answer, Respondent admitted that jurisdiction of this action is conferred upon the Occupational Safety and Health Review Commission by section 10(c) of the Act and that it was an unincorporated sole proprietor.

5. The Secretary served his First Set of Interrogatories and Requests for the Production of Documents (collectively, Secretary’s Written Discovery) on Respondent’s counsel on September 15, 2021. Respondent’s responses to the Secretary’s Written Discovery were due to the Secretary on October 15, 2021.

6. On October 11, 2021, counsel for Respondent requested a three-week extension of time to respond to November 1, 2021. The Secretary consented.

7. On October 19, 2021, the Court conducted a pre-trial scheduling conference with the parties. On October 20, 2021, with the parties’ agreement, the Court ordered that the trial would commence on May 3, 2022 at Syracuse, New York.

8. On November 9 and 10, 2021, counsel for the Secretary emailed counsel for Respondent informing him that Respondent’s discovery responses were long past due and expressing a desire to resolve this amicably.

9. On November 10 and 12, 2021, counsel for Respondent emailed to say that a different attorney from the same law firm would be representing Respondent, and that Respondent would provide discovery responses the following week, *i.e.* by November 19, 2021.

10. On November 17, 2021, counsel for Respondent emailed to say that his client was sick,

and that accordingly another week was needed to respond to the Secretary's Written Discovery. Counsel for the Secretary emailed back to say if any further extensions were sought, the Secretary would seek the Court's assistance.

11. On November 24, 2021, counsel for Respondent called to say that his law firm's computers were down, preventing him from accessing the draft responses to the Secretary's Written Discovery, and the responsive documents. Because of the server problems and the upcoming Thanksgiving holidays, Respondent would not provide responses to the Secretary's Written Discovery until Tuesday November 30, 2021.

12. On November 29 and 30, 2021, counsel for the Secretary advised that if written discovery responses were not received by November 30, 2021, close of business, a motion to compel would be filed shortly. Counsel for the Secretary asked if Respondent would consent to the motion but did not receive a reply.

13. On December 1, 2021, the Secretary moved to compel discovery responses.

14. On December 10, 2021, Respondent filed a response to the Secretary's motion, stating among other things that it "does not object to an order compelling responses to the outstanding discovery demands."

15. On December 14, 2022, the Court granted the Secretary's Motion to Compel Discovery Responses, and ordered that Respondent provide responses to the Secretary's Written Discovery by December 29, 2021.

16. Respondent did not provide any discovery responses by December 29, 2021, and as of this date, has still not responded to the Secretary's Written Discovery.

17. On January 27, 2022, Respondent's counsel moved for a sixty day stay of the proceedings in this case, stating that the principal of the company died on or about January 14, 2022, and that thus Respondent's counsel needed time to "obtain more information about Respondent's status and

future.” In its motion for a stay, Respondent’s counsel also made a number of assertions about the status of the business “on information and belief,” emphasizing that “Respondent is still investigating” the basis for these assertions. The Secretary did not oppose Respondent’s Motion for a Stay.

18. On February 4, 2022, Respondent’s counsel emailed the Secretary to say that Respondent would not comply with the Court’s order to compel discovery because they could not get in contact with any representative of Respondent. Respondent’s counsel also claimed that Respondent had “little if any assets.”

19. On February 7, 2002, the Court conducted a telephone hearing on Respondent’s Motion for a Stay.

20. On February 8, 2022, the Court denied Respondent’s Motion for a Stay, but with the parties’ agreement, continued the May 3, 2022 trial through to October 11, 2022.

21. On February 14, 2022, the Secretary emailed Respondent warning that he was considering filing a motion for sanctions for failing to comply with the Court’s order compelling discovery responses and requesting Respondent’s position. Counsel for Respondent responded by saying that he intended to file a motion to withdraw as counsel. To date, no motion to withdraw as counsel has been filed.

22. On March 2, 2022, the Secretary filed his Motion for Sanctions. The Secretary asserts that Respondent’s failure over the last six or more months to respond to any of the Secretary’s discovery requests is highly prejudicial to his ability to prepare this case for trial.<sup>1</sup> The Secretary asks that Respondent be sanctioned with an order imposing a default judgment.<sup>2</sup> In the alternative, the Secretary asks the Court to order Respondent to pay for the costs and attorney’s fees associated with the Secretary’s

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<sup>1</sup> The Secretary asserts that as of the date of his motion for sanctions, he has not received any responses to the Secretary’s Written Discovery. Furthermore, the Secretary asserts that Respondent has not indicated any intention to comply with the Court’s order compelling discovery responses.

<sup>2</sup> In view of the untimely death of Mr. Lucas Shrewsbury and the fact that Respondent has not abandoned the case, a default judgment is not warranted here at this time. *See* Respondent’s Affirmation in Opposition to Secretary’s Motion for Sanctions Against Respondent filed March 16, 2022.

having to file his Motion for Sanctions, and prohibit Respondent from calling any witnesses to testify at the hearing and from introducing any exhibits into evidence at the hearing.

23. On March 16, 2022, Respondent filed its Affirmation in Opposition to Secretary's Motion for Sanctions Against Respondent. Respondent argues that the Secretary's Motion for Sanctions should be denied because Mr. Lucas Shrewsbury is deceased, Respondent is no longer operating, and Respondent's counsel has no authority or ability to comply with the Secretary's discovery demands. Respondent's counsel asserts that he now has no ability to comply with any discovery demands because there is no one with whom he can speak to get any responses. Respondent's counsel asserts that Respondent has no ability to defend itself because Respondent now has no owner or employees. Respondent's counsel says he has no ability to produce any client for a deposition, to sign interrogatory answers, or certify any responses to requests for admissions.<sup>3</sup> Respondent's counsel also asserts that he has no authority or ability to make any decisions on behalf of Respondent because the only person who previously could make and authorize any decisions or who could provide any assistance is deceased. Respondent objects to any notion that a person can be sanctioned for not taking certain actions when the person is deceased. Respondent's counsel asks that the Secretary's Motion for Sanctions be denied since Respondent's counsel has no ability or authority to comply with any Court orders. Citing to Federal Rule of Civil Procedure 25, Respondent also argues that the Secretary's motion should be denied because no motion to substitute a proper party for the decedent has been made.<sup>4</sup> Lastly, Respondent's counsel asserts that the Secretary's motion should be denied because Respondent has not acted willfully.

## II. DISCUSSION

### A. SANCTIONS ARE APPROPRIATE BASED UPON RESPONDENT'S FAILURE TO COMPLY WITH THE COURT'S ORDER COMPELLING DISCOVERY.

This proceeding is before the Occupational Safety and Health Review Commission (the

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<sup>3</sup> The Secretary's Written Discovery did not include any Requests for Admissions or seek any depositions.

<sup>4</sup> Respondent asserts that "there is no Review Commission rule addressing this situation."

Commission) under section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 et seq. (the Act).

Commission Rule 52(f) (2) provides that if a party fails to comply with an order compelling discovery, upon motion of a party the Court may issue sanctions 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 out pleadings or parts thereof, or staying further proceedings until the order is obeyed; and
- (iv) An order dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party.

29 C.F.R. § 2200.52(f); *see also* Fed. R. Civ. P. Rule 37(b)(2)(A). The Commission has stated that the imposition of sanctions is “important . . . to ensure compliance with prehearing procedures and to adjudicate cases fairly and efficiently.” *Architectural Glass & Metal Co., Inc.*, No. 00-0389, 2001 WL 1041005, at \*2 (O.S.H.R.C., Sept. 6, 2001).

Commission judges have broad discretion to impose sanctions when a party violates their orders. *Sealtite Corp.*, No. 88-1431, 1991 WL 132733, at \*6 (O.S.H.R.C., June 28, 1991). “A party is prejudiced if the failure to make discovery impairs the party’s ability to determine the factual merits of the opponent’s defense.” *Int’l. Diving Servs.*, No. 08-1886, 2009 WL 3191936, at \*5-6 (O.S.H.R.C.A.L.J., Aug. 15, 2009) (This Court granted the Secretary’s motion for default and finding Secretary prejudiced by Respondent’s willful failure to respond to discovery requests). Whether and to what extent discovery sanctions are warranted are for the court to decide in its discretion. *Nat’l Hockey League v. Metro. Hockey Club, Inc.*, 427 U.S. 639, 642 (1976), *NL Indus., Inc.*, No. 78-5204, 1984 WL 34827, at \*14 (O.S.H.R.C., July 20, 1984) (when a party’s failure to comply with a discovery order is either contumacious or acts to prejudice the opposing party, that party will profit from its own

wrongdoing and gain an unfair advantage unrelated to the merits of their case).

Here, Respondent has failed to respond to the Secretary's discovery requests, and the Secretary is left without the information necessary to prepare his case. Absent discovery responses, the Secretary is at a loss as to how to determine the factual merits of the defenses Respondent raised in its answer or may otherwise have otherwise raised at trial. The Secretary has therefore been severely prejudiced in preparing his case for trial. *See, e.g., Wanderer v. Johnston*, 910 F.2d 652, 656 (9th Cir. 1990) (upholding default as sanction and stating that when defendants fail to produce any evidence, "prejudice is palpable").

Furthermore, Respondent's conduct in this matter has been willful. Four months elapsed between when the Secretary served his Written Discovery on September 15, 2021 and the death of Respondent's principal that occurred on January 14, 2022. During these four months, Respondent's counsel offered numerous promises to fully respond to discovery in short order, and further offered a variety of excuses for Respondent's continued refusal to comply with its discovery obligations, including a possible change in counsel, the Thanksgiving holidays, computer difficulties, and non-meritorious arguments relating to the loss of an owner during litigation. However, none of these offerings provide an absolute excuse for Respondent not to respond to Court-ordered discovery. Respondent's counsel had plenty of time to discuss the Secretary's Written Discovery with Mr. Shrewsbury. Since Mr. Shrewsbury's death, other than checking with [redacted] and Respondent's former employee, Michael Curtis, there is no other indication that Respondent's counsel sought to identify information responsive to the Secretary's Written Discovery. Respondent's counsel signed Respondent's notice of contest in May, 2021 and is still the attorney of record in this case. More is required.<sup>5</sup>

Respondent has failed to comply with the Court's order compelling discovery and has not provided

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<sup>5</sup> For example, Respondent's counsel could have informed the Secretary where Respondent's business documents were last seen and who the custodian of the documents was. Respondent's counsel could have arranged for the Secretary to inspect and copy Respondent's business documents at that location that were responsive to his Written Discovery requests.

any indication that it will comply with the Court's discovery order.

**B. RESPONDENT'S ARGUMENT THAT IT IS EXCUSED FROM RESPONDING TO THE SECRETARY'S DISCOVERY REQUESTS BECAUSE MR. LUCAS SHREWSBURY IS DECEASED IS WITHOUT MERIT.**

Respondent has admitted that it is covered by the Act. To be covered by the Act, an employer must have employees at the time of the alleged violation(s). It is not necessary that the employer have employees at the time of the citation's issuance or trial. *See Yandell*, No. 94-3080, 1999 WL 1411464 (O.S.H.R.C., Mar. 12, 1999) (for jurisdictional purposes, the critical time is when the violation is alleged to have occurred and not later when the employer had no employees and ceased operations.). It is no defense that the company went out of business after the citations were issued. *See Reich v. Occupational Safety and Health Review Comm'n*, 102 F.3d 1200 (11th Cir. 1997). Here, the citations alleged that Respondent had employees working on: 1) the roof where employees were not protected from falling through skylights, 2) a low slope roof with a ground to eave height of 19 feet without fall protection of any kind, and 3) a low slope roof with a ground to eave height of 19 feet without fall protection of any kind and where the employer did not produce requested fall protection training certificates. At the time of the alleged violations, Respondent had employees who are covered by the Act. Mr. Shrewsbury's death does not extinguish the Commission's jurisdiction over this case and Respondent. Respondent was a business at the time of the alleged violations notwithstanding Mr. Shrewsbury's death that happened after the citations were issued that led to this action.

**III. CONCLUSION**

The Secretary has been severely prejudiced, and Respondent has engaged in conduct sufficient to warrant sanctions as provided in Commission Rule 52(f) and Federal Rule of Civil Procedure Rule 37. Accordingly, Respondent's defenses set out in its answer are hereby stricken. Respondent shall not be allowed to offer any evidence on any of the defenses put forth in its answer, or on any other defenses, at



the trial or in any post-trial brief filed. Respondent shall also not be allowed to: 1) call any witnesses to testify at the trial other than OSHA personnel, 2) offer into evidence any documentary material the Secretary has sought in his Written Discovery requests, and/or 3) object to any offer of proof the Secretary may make as to any expected testimony of witnesses the Secretary has been unable to locate due to Respondent's failure to respond to the Written Discovery requests. *See Roy's Constr., Inc.*, No. 11-0892, 2012 WL 4872800, at \*2 (O.S.H.R.C.A.L.J., Jun. 29, 2012). Under Federal Rule of Civil Procedure Rule 37, an award of expenses and fees against Respondent as to the Secretary's motion to compel and motion for sanctions is also appropriate. *Id.*, at \*9.

#### IV. ORDER

WHEREFORE IT IS ORDERED that the Secretary's Motion for Sanctions is GRANTED to the extent indicated herein;

IT IS FURTHER ORDERED that Respondent's defenses set out in its answer are hereby stricken and Respondent shall not be allowed to offer any evidence on any of these stricken defenses, or on any other defenses, at the trial or in any post-trial brief filed;

IT IS FURTHER ORDERED that Respondent is not allowed to: 1) call any witnesses to testify at the trial other than OSHA personnel, 2) offer into evidence any documentary material the Secretary had sought in his Written Discovery requests, and/or 3) object to any offer of proof the Secretary may make as to any expected testimony of witnesses the Secretary has been unable to locate due to Respondent's failure to respond to the Written Discovery requests;

IT IS FURTHER ORDERED that Respondent shall pay for the costs and attorney's fees associated with the Secretary having to file his Motions to Compel and for Sanctions;<sup>6</sup> and

IT IS FURTHER ORDERED that Respondent's failure to fully comply with all parts of this order

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<sup>6</sup> The Secretary shall file an accounting of its cost and attorney's fees that he seeks from Respondent with the Court by May 31, 2022. Respondent shall file its response to the Secretary's accounting by June 30, 2022.

may result in further sanctions, including the dismissal of its notice of contest and the assessment of other costs and expenses incurred by the Secretary.

SO ORDERED.

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

Date: April 11, 2022  
Washington, D.C.