



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

SECRETARY OF LABOR,

Complainant,

v.

PRO-SPEC CORPORATION, dba PRO-SPEC PAINTING,

Respondent.

OSHRC Docket Nos. 17-0153

DECISION AND ORDER OF DISMISSAL OF NOTICE OF CONTEST

The Occupational Safety and Health Administration (OSHA) inspected three of Respondent's worksites: one in Morristown, New Jersey, and two in Old Bridge, New Jersey. As a result, and for each of these three inspections, OSHA issued Respondent a Citation and Notification of Penalty (Citation) for alleged violations of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (the OSH Act).¹ Respondent filed a

¹ OSHA Inspection No. 115194 was performed on Respondent's worksite in Morristown, New Jersey from May 26 – December 12, 2016. OSHA issued the citation resulting from that inspection on December 12, 2016, alleging one Serious four-sub-item citation and three Serious single-item citations, and proposing a total penalty of \$24,944. Respondent filed a timely notice of contest on December 15, 2016, and this matter was docketed as Docket Number 17-0153 on January 26, 2017.

OSHA Inspection No. 1166176 was performed on Respondent's worksite in Old Bridge, New Jersey on July 23, 2016. OSHA issued the Citation resulting from that inspection on January 20,

timely notice of contest for each of these three Citations, bringing these matters before the Occupational Safety and Health Review Commission (Commission).² The parties agree, and the record establishes, that the Commission has jurisdiction over this matter and Respondent is covered under the Act.³ (Complaints at ¶¶ 1, 2 & 3; Answers at ¶¶ 1, 2 & 3).

These cases have not progressed past the pre-hearing stage. Indeed, Respondent has not fully cooperated with pre-hearing procedures due to bankruptcy proceedings, according to Respondent. *See* Respondent Letter dated July 28, 2017. The undersigned has issued several orders to keep these matters moving. *See* Order to File Answer (August 8, 2017); Order Granting Complainant's Motion to Compel and Deeming Complainant's First Requests for Admissions Admitted (December 6, 2017); Order Denying Respondent's Motion and Request for an Extension of Time to Comply with the Submission of Documents and Interrogatories, and Denying Respondent's Motion for Reconsideration to Extend Time to Answer the Secretary's First Request for Admissions (January 9, 2018).

2017, alleging three serious single-item citations, and proposing a total penalty of \$11,589. Respondent filed a timely notice of contest on January 27, 2017, and this matter was docketed as Docket Number 17-0200 on February 2, 2017.

OSHA Inspection No. 1165173 was performed on Respondent's worksite in Old Bridge, New Jersey from July 27, 2016 to January 20, 2017. OSHA issued the Citation resulting from that inspection on January 26, 2017, alleging one serious four-item citation, and proposing a total penalty of \$15,936. Respondent filed a notice of contest for this Citation on January 27, 2017, and this matter was docketed as Docket Number 17-0201 on February 2, 2017.

² It is noted that Respondent addressed all three of these docket numbers in a pleading on July 28, 2017. Since then, the undersigned has issued orders addressing all three of these docket numbers together.

³ Each of these Citations were docketed at the Commission individually, per inspection. The Secretary filed individual Complaints in each of these three matters, all certifying jurisdiction in this matter. (Complaints at ¶¶ 1, 2 & 3.) After being ordered to file an Answer for each case, Respondent filed three individual Answers, on August 18, 2017, addressing all three Complaints

The Secretary filed the subject motion, Motion for Sanctions Pursuant to Commission Rule 52(f) (“Motion for Sanctions”) on January 5, 2018. Respondent filed a Response to Motion for Sanctions on January 17, 2018 (“Respondent’s Response”). On January 19, 2018, the Secretary filed a Reply Brief in Opposition to Respondent’s Request to Assign These Matters to Simplified Proceedings (“Secretary’s Reply”). As set forth below, the undersigned GRANTS the Secretary’s Motion for Sanctions. Respondent’s notice of contest for the above-captioned matter is DISMISSED, each Citation is AFFIRMED and each proposed penalty is ASSESSED as proposed.

Background

The hearings for these matters are scheduled to commence on February 26, 2018. Discovery was to be completed in these matters by January 8, 2018. In his Motion for Sanctions, filed January 5, the Secretary requests that these cases be dismissed because Respondent has allegedly failed to comply with its discovery obligations and, as a result, Respondent’s failure has “deprived the Secretary of the opportunity to prepare for trial.” (Motion for Sanctions at 4.) Additionally, the Secretary claims that Respondent has displayed willful and contumacious conduct by (1) failing to respond to discovery, (2) failing to meet and confer with the Secretary, and (3) disregarding the December 6, 2017 Order to Compel. (Motion for Sanctions at 6.)

In Respondent’s Response, filed January 17, Respondent “respectfully objects to the General Secretary’s assertion that the Respondent ‘refused’ at any time to comply with the Commission’s Orders.” (Respondent’s Response at 1.) Respondent also states that:

for these matters. In its Answers, Respondent admits that it is an employer as defined in the

The General Secretary and this Commission are fully aware that on July 31, 2017 Respondent filed a Petition for Bankruptcy in the U.S. Bankruptcy Court. The Secretary and the Commission are fully aware that Respondent lacks basic financial resources to staff, respond and to participate in any meaningful way in these and other matters that are before the Review Commission.

(Respondent at 1-2) (emphasis added). Respondent then requests that this matter be “reverted” to Simplified Proceedings, or in the alternative, that “the Commission to rule in favor of Respondent’s motion to extend the maximum permissible time necessary to enable participation of the Respondent to provide evidence that a 10-foot wide doorway was installed in the Cedar Knolls Tank and that no painters ever sandblasted and that they were simply operating a machine.” (Response at 2.) Respondent further claims:

Basic facts that the Secretary is aware of may enable and encourage discussions that could lead to a settlement or hearing that might accomplish the Commission’s goal and enable the most basic level of fairness to the Respondent. The Secretary prevails by the perpetuation of the General Secretary’s lie and misrepresentations when the Commission rules in favor of the Secretary’s Motion for Sanctions which results in another one-sided hearing with no opportunity for the Respondent to present evidence.

(Response at 2-3.)

In his Reply, the Secretary states, correctly, that these matters had never been requested to be placed, or placed at all, in Simplified Proceedings. (Secretary’s Reply at 2 n.1). The Secretary then argues that Respondent’s request to place these matters in Simplified Proceedings is untimely, and unsuitable, according to the Commission’s Rules at 29 C.F.R. §§ 2200.201(a), 203(b) (“Simplified Proceedings”).

Discussion

Commission judges have a duty “to assure that the facts are fully elicited, to adjudicate all issues, and avoid delay.” 29 C.F.R. § 2200.67. To carry out this duty, Commission Rule 67(m), 29 C.F.R. § 2200.67(m), authorizes judges to take any action necessary (as long as it authorized by the Commission Rules). The Commission’s prehearing procedures aid in the early formulation of issues, which benefits all parties during trial preparation as well as resulting in the more efficient use of Commission resources at both the hearing and review stages. *Architectural Glass & Metal Co.*, 19 BNA OSHC 1546, 1547 (No. 00-0389, 2001). The imposition of appropriate sanctions is important to ensure compliance with prehearing procedures and to permit the fair and efficient adjudication of cases. *Id.*

Default judgments may be appropriate when a party fails to comply with an order compelling discovery. 29 C.F.R. § 2200.52(f) (sanctions for failing to comply with discovery requirements); 29 C.F.R. § 2200.101(a) (default appropriate when a party fails to proceed as provided by the Commission Rules or as required by a judge); *see also St. Lawrence Food Corp.*, 21 BNA OSHC 1467, 1472 (Nos. 04-1734 & 04-1735, 2006). Judges have very broad discretion to impose sanctions for noncompliance with orders or the Commission Rules. *See Sealrite Corp.*, 15 BNA OSHC 1130, 1134 (No. 88-1431, 1991) (affirming the sanction of dismissal). Still, dismissal is considered too harsh a sanction for failing to comply with certain prehearing orders unless the record shows contumacious conduct by the noncomplying party, prejudice to the opposing party, or a pattern of disregard for Commission proceedings. *Architectural Glass & Metal Co.*, 19 BNA OSHC at 1547 (re-instating a notice of contest when party failed to attend a single meeting when the party did not receive appropriate notice of the meeting). Failing to comply with Commission Rules and orders so as to delay proceedings may constitute

contumacious conduct. *Carson Concrete Corp. v. Sec’y of Labor*, 21 BNA OSHC 1393, 168 Fed. Appx. 543 (3d Cir. 2006) (unpublished) (upholding default judgment for OSH Act violations when employer sought to disavow admission provided during discovery until a few days before trial).

The Secretary claims that Respondent violated the undersigned’s December 6, 2017 Order to Compel. Respondent denies that it “refused” to comply with this Order. The Order to Compel directed the following:

(1) Respondent shall produce all documents in its possession responsive to the Secretary's First Request for Production of Documents in such manner as required by 29 C.F.R. § 2200.53 no later than fourteen (14) days from the date of this Order for each of the above three matters;

(2) Respondent shall provide written answers to the Secretary's First Set of Interrogatories in such manner as required by 29 C.F.R. § 2200.55 no later than fourteen (14) days from the date of this Order for each of the above three matters[.]

Order to Compel at 2. It is now well past 14 days of the December 6, 2017 Order to Compel. It is undisputed that Respondent has not produced all responsive documents, and has not provided written answers, to the Secretary as directed in the Order to Compel. Respondent has violated the Order to Compel. Respondent has failed to proceed as required by Commission Rules and the Order to Compel. *See* 29 C.F.R. § 2200.52(f)(4) (authorizing judges to issue a judgment of default when a party refuses or obstructs discovery).

Additionally, Respondent does not dispute that the Secretary’s ability to prepare for trial has been impaired and prejudiced by its failure to respond to the Discovery Requests and comply with the Order to Compel. *See e.g., Adriana Intern. Corp. v. Thoeren*, 913 F.2d 1406, 1412 (9th Cir. 1999) (upholding dismissal as a sanction for discovery abuses); *Wanderer v. Johnston*, 910

F.2d 652, 655 (9th Cir. 1990) (upholding the sanction of default and concluding that when defendants fail to produce any evidence, “prejudice is palpable”).

It is noted that Respondent elected not to be represented by counsel.⁴ Not having counsel, does not obviate a party’s obligation to engage in discovery. All litigants, including those declining to hire counsel, must obey orders and to permit and respond to discovery as required by the Commission Rules. *See JGB LLC*, 21 BNA OSHC 1402, 1403 (No. 04-2153, 2006) (vacating direction for review when unrepresented party failed to respond to a briefing notice); *Swimmer v. IRS*, 811 F.2d 1343, 1345 (9th Cir. 1987) (“Ignorance of court rules does not constitute excusable neglect, even if the litigant appears *pro se*”). An unrepresented employer must “exercise reasonable diligence in the legal proceedings” and “must follow the rules and file responses to a judge's orders, or suffer the consequences, which can include dismissal of the notice of contest.” *Wentzel d/b/a N.E.E.T. Builders*, 16 BNA OSHC 1475, 1476 (No. 92-2696, 1993) (citations omitted). Still, the undersigned recognizes that sometimes unrepresented employers “can fail to grasp exactly what [it] is being asked to do.” *Id.* Thus, where an employer has a substantial reason for having failed to comply with a discovery order, and where the employer's conduct also does not indicate disrespect toward the judge, the failure to comply may not necessarily be an indication of bad faith or contumacious conduct. *Id.*

In these matters, however, Respondent’s failure to participate in discovery has not been a matter of innocent oversight or inadvertence. Here, there has been no response to the Discovery Requests as set out in the Order to Compel, and Respondent admits:

⁴ The undersigned notes that employers of limited means who hire counsel and successfully contest a citation can recover attorney fees and other expenses under the Equal Access to Justice Act, 5 U.S.C. § 504. *See* 29 C.F.R. § 2204.

The Secretary and the Commission are fully aware that Respondent lacks basic financial resources to staff, respond and to participate in any meaningful way in these and other matters that are before the Review Commission.

(Respondent at 1-2). Respondent makes no claims about not receiving or understanding any of the Discovery Requests or any of the undersigned's prior communications and orders. *See Philadelphia Constr. Equip., Inc.*, 16 BNA OSHC 1128, 1131 (No. 92-889, 1993) (affirming dismissal when the party did not deny the facts showing a pattern of disregard for Commission proceedings). Respondent has also been given several extensions of time to respond to the Discovery Requests. This is not a situation involving less than fulsome disclosure or one where the substantive response was adequate even if there were procedural errors. *Cf. Wentzel*, 16 BNA OSHC at 1476 (re-instating a notice of contest when employer answered each interrogatory and document request briefly); *Arkansas Abatement Servs. Corp.*, 17 BNA OSHC 1163 (No. 94-2210, 1995) (excusing unrepresented party's mailings to the wrong location).

Despite Respondent's assertions that, due to its bankruptcy proceedings, it cannot participate in "any meaningful way in this matter or any other matters before the Commission," the undersigned takes judicial notice of Respondent's participation in its other Commission cases presently before the Commission: Docket Numbers 16-1747 and 17-0125.⁵ *See United States v. Jones*, 29 F.3d 1549, 1553 (11th Cir. 1994) ("[A] court may take notice of another court's order only for the limited purpose of recognizing the 'judicial act' that the order represents or the subject matter of the litigation."); *Liberty Mutual Ins. Co. v. Rotches Pork Packers, Inc.*, 969 F.2d 1384, 1388 (2d Cir. 1992) ("A court may take judicial notice of a document filed in another court 'not for the truth of the matters asserted in the other litigation, but rather to establish the

⁵ In contrast to the matters at issue here, Docket Numbers 16-1747 and 17-0125 had at one time been placed temporarily on the Simplified Proceedings track.

fact of such litigation and related filings.’ ”) (quoting *Kramer v. Time Warner, Inc.*, 937 F.2d 767, 774 (2d Cir.1991)); *Wyatt v Terhune*, 315 F. 3d 1108, 1114 n.5 (9th Cir. 2003) (“Judicial notice is limited, however, to the existence and terms of the judicial record; it does not extend to the truth of statements quoted in the record, or to factual findings.”). In these other dockets, Respondent participated meaningfully enough in the pre-hearing proceedings to make it through the hearings, which were held on December 5, 2017 and which Respondent attended. Under these circumstances, the undersigned finds that Respondent is familiar with Commission procedures and the procedural requirements under which it is obligated.

Respondent has been repeatedly informed in these matters that bankruptcy proceedings do not stay these Commission proceedings. The undersigned provided explicit written warnings to Respondent informing it that the failure to appropriately and timely respond may result in Respondent being held in default and the dismissal of its Notice of Contest, the affirmance of the allegations set forth in the Complaint, and imposition of penalties. Instead, in the Respondent’s Response, Respondent has again used the bankruptcy proceedings to request Simplified Proceedings or, in the alternative, yet another extension. First of all, these requests do not address, at all, the Secretary’s claims in his Motion for Sanctions. Secondly, these requests are denied because, as correctly pointed out by the Secretary: (1) Respondent’s request for Simplified Proceedings is untimely, (2) Respondent had the opportunity under the Commission’s rules to request Simplified Proceedings when these cases were docketed, but chose not to, and (3) these cases are not suitable for Simplified Proceedings.

Finally, the undersigned finds the requests in Respondent’s Response to be yet another stalling tactic by the Respondent, and therefore, they add to the pattern of contumacious conduct

displayed by Respondent designed to stall these proceedings. These tactics must stop. The purpose of this extreme sanction under Commission Rule 52(f) is to penalize those who warrant such punishment and to deter those who may be tempted to act similarly without such punishment. *Organik Kimya San ve Tic AS vs International Trade Commission*, 848 F.3d 994, 1004 (Fed. Cir. 2017) (regarding Federal Rule of Civil Procedure 37(b)) citing *Nat'l Hockey League v. Metro. Hockey Club, Inc.*, 427 U.S. 639, 642–43 (1976).

The undersigned recognizes that a party has a strong interest in adjudicating its case on the merits. See e.g., *Nealey v. Transportacion Maritima Mexicana, S.A.*, 662 F.2d 1275, 1280 (9th Cir. 1980). However, the Commission has limited resources and a “strong interest in preserving the integrity of its orders as well as deterring future misconduct.” *Carson*, 21 BNA OSHC at 1395-96; *Trinity Indus., Inc.*, 15 BNA OSHC 1579, 1583 (No. 88-1545, 1991) (consolidated). The Commission adequately conveyed due notice to Respondent of its procedural rights and provided sufficient warning that its failure to comply with orders could result in the dismissal of its Notices of Contest and it being held in default. Respondent’s contumacious and prejudicial conduct warrants the sanction of dismissal under Commission Rule 52(f)(4), 29 C.F.R. § 2200.52(f)(4).

Consequently, for the reasons set forth above, the Secretary’s Motion is **GRANTED**. Respondent’s notice of contest for Commission docket number 17-0153 is **DISMISSED**.

ORDER

For Docket Number 17-0153, arising out of OSHA inspection 1151294:

1. Citation 1, Items 1a, 1b, 1c, and 1d, setting forth violations of 29 C.F.R. § 1926.103 are AFFIRMED as serious violations and a penalty of \$6,236 is ASSESSED.
2. Citation 1, Item 2, setting forth a violation of 29 C.F.R. § 1926.52(d)(1) is AFFIRMED as a serious violation, and a penalty of \$6,236 is ASSESSED.
3. Citation 1, Item 3, setting forth a violation of 29 C.F.R. § 1926.1203(d) is AFFIRMED as a serious violation, and a penalty of \$6,236 is ASSESSED.
4. Citation 1, Item 4, setting forth a violation of 29 C.F.R. § 1926.1203(e)(2)(iii) is AFFIRMED as a serious violation, and a penalty of \$6,236 is ASSESSED.

SO ORDERED.

/s/Covette Rooney
COVETTE ROONEY
Chief Judge, OSHRC

DATE: February 15, 2018
Washington, D.C.