

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

SECRETARY OF LABOR,
Complainant,

v.

DESTINY BUILDERS CONSTRUCTION
SERVICES, INC.,
Respondent.

OSHRC DOCKET NO. 20-0930

Attorneys and Parties:

Edward V. Hartman, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, IL
For Complainant

Ben Watkins, Self-Represented Litigant, Evergreen Park, IL
For Respondent

JUDGE: First Judge Patrick B. Augustine, United States Administrative Law Judge

DECISION AND ORDER OF DISMISSAL PURSUANT TO 29 C.F.R. § 2200.101

This proceeding is before the Occupational Safety and Health Review Commission (“the Commission”) pursuant to Section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* (“the Act”). The Occupational Safety and Health Administration (“OSHA”) conducted an inspection of a Destiny Builders Construction Services, Inc. (“Respondent”) worksite in Chicago, IL on April 21, 2020 through May 7, 2020 . As a result of the inspection, OSHA issued a Citation and Notification of Penalty (“Citation”) to Respondent alleging three serious violations and two other-than-serious violations of the Act with a proposed penalty of \$38,556.00. The Citation was issued on May 18, 2020. Respondent filed a Notice of Contest (“*Notice of Contest*”). This case was designated to proceed under conventional proceedings of the Commission. The Complaint was filed on July 2, 2020. On November 3, 2020, the Court issued an *Order to Show Cause Why the Notice of Contest Should Not be Dismissed* (“First Show

Cause Order”) for failure of Respondent in filing its Answer. On November 18, 2020, after receiving the First Show Cause Order, Respondent filed its Answer.

Jurisdiction

The Commission has jurisdiction over this action pursuant to Section 10(c) of the Act due to the filing of a *Notice of Contest* by Respondent. 29 USC § 659(c).

Respondent is engaged in a business affecting interstate commerce within the meaning of Section 3(5) of the Act, 29 U.S.C. § 652(5). *See Slingshuff v. OSHRC*, 425 F.3d 861 (10th Cir. 2005). The Commission has stated “[t]here is an interstate market in construction materials and services and therefore construction work affects interstate commerce.” *Id.*, citing *NLRB v. Int’l Union of Operating Engineers, Local 571*, 317 F.2d 638, 643 n. 5 (8th Cir. 1963) (judicial notice taken that construction industry affects interstate commerce). Even a small employer, like Respondent, whose activities and purchases are purely local, when aggregated with others engaged in similar activities, has a substantial effect on interstate commerce. *Slingshuff*, 425 F.3d at 867, *Clarence M. Jones*, 11 BNA OSHC 1529, 1531 (No. 77-3676, 1983)(“There is an interstate market in construction materials and services and therefore construction works affects interstate commerce.”) Because Respondent is engaged in construction work, the Court finds it is engaged in a business affecting interstate commerce.

Controlling Case Law

The Commission has held that “[w]here it is highly probable that a case will be appealed to a particular circuit, the Commission generally has applied the precedent of that circuit in deciding the case— even though it may differ from the Commission's precedent.” *Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2067 (No. 96-1719, 2000). The Court applies the precedent of the Seventh Circuit where it differs from the Commission in deciding this case.

Although the Commission recognizes the difficulties a self-represented litigant may face

when participating in the Commission’s proceedings, the Commission still requires the self-represented litigant to follow the rules and exercise reasonable diligence in the legal proceedings in which it is taking part. *Sealtite Corp.*, 15 BNA OSHC 1130 (No. 88-1431, 1991); *Wentzell d/b/a N.E.E.T. Builders*, 16 BNA OSHC 1475, 1476 (No. 92-2696, 1993) (stating that “[a] pro se employer is required to exercise reasonable diligence... [they must] follow the rules and file responses to a judge’s orders or suffer the consequences...”).

Not having counsel, does not obviate a party’s obligation to engage in in the adjudicatory process. 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 Court 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.*

Procedural History

On November 24, 2020, the Court issued an Order to Respondent requiring it to register in the electronic filing system of the Court as required by Commission Rules or provide the Court with an explanation as to why registering would be a hardship to Respondent. Respondent

did not respond to that Order. Accordingly, the Court issued a Show Cause Order dated December 7, 2020 (“Second Show Cause Order”) to Respondent requiring Respondent to provide an explanation for its failure to comply with the Court’s November 24, 2020 Order requiring registration. The *Second Show Cause Order* was sent via U. S. Mail, Certified Mail. The Court received the signed receipt for the Certified Mail noting the *Second Show Cause Order* was received on December 14, 2020 with the person receiving the Certified Mail using the signature “Covid 19.” No response to the *Second Show Cause Order* was received from Respondent. The Court notes that COVID 19 does not prevent Respondent from communicating by telephone, email or text. Therefore, any excuse of Respondent relying on COVID 19 is rejected.

On December 1, 2020, the Court issued an *Order to Confer and Submission of Joint Pretrial Recommendations* (“Order to Confer”) directing the parties to jointly file within forty-five (45) days pretrial recommendations addressing the items set forth in that Order. The *Order to Confer* was not returned as “undeliverable” on either party by the United States Postal Service. On January 15, 2021, the Secretary filed his Proposed Pretrial Recommendations noting that various attempts by the Secretary’s representative to contact and confer with Respondent have been to no avail. On January 19, 2021, the Court issued an Order to the Secretary (which was sent to Respondent) requiring the Secretary’s representative to file an affidavit containing a summary and documentation of his attempt to contact and communicate with Respondent. On January 26, 2021, the Secretary filed his Response to the Court’s Order. The Secretary set forth his attempts to communicate with Respondent to comply with the Court’s December 1, 2020 Order.

Pursuant to the Declaration of Edward V. Hartman, attached to the Secretary’s Response dated January 26, 2021, the following is documented:

1. The CSHO received a text from Mr. Ben Watkins, the representative of Respondent. The text contained the email address of Mr. Watkins.
2. The CSHO also received an email from Mr. Watkins.
3. The Secretary's representative then utilized the provided email to send Mr. Watkins a Notice of Appearance and Complaint on July 2, 2020. Both of these documents contained the contact information for the Secretary's counsel.
4. The Secretary's counsel received no response from Mr. Watkins and no response from telephone calls made to Mr. Watkins.
5. On December 21, 2020, the Secretary's counsel sent an email to Mr. Watkins requesting Mr. Watkins contact him to discuss information required in the Court's December 1, 2020 Order. Mr. Watkins never responded to that email.
6. In an attempt to continue to reach out to Mr. Watkins, the Secretary's counsel called Mr. Watkins telephone numbers provided in Respondent's Answer, text, email to the CSHO and in the Notice of Contest. Voice messages were left when the telephone number called permitted. Mr. Watkins did not return the calls.
7. On January 22, 2021, Secretary's counsel at 1:48 pm attempted to contact Mr. Watkins again by telephone. When one of the numbers were called, Secretary's counsel received a text from Mr. Watkins saying, "I will call you right back." Secretary's counsel responded as follows: "Mr. Watkins let me know when. I need to step away from my desk at 3 but will be back at 3:30. Ed Hartman". Secretary's counsel received no reply and at 4:24 pm Mr. Hartman called the same number and left a message for Mr. Watkins to call him back to discuss the OSHA case. Respondent did not respond by returning the call, nor via email or text.

On, February 5, 2021 the Court issued its Final Show Cause Order ("Third Show

Cause Order”) to Respondent directing Respondent to show cause within fourteen (14) days why the Court should not issue judgment against Respondent, affirming the proposed violations and penalties in this case for: (1) failing to comply with the Court’s Order dated November 14, 2020; (2) failure to respond to the Court’s *Second Show Cause Order* dated December 7, 2020; (3) for failure to communicate and confer with the Secretary’s counsel as directed in the Court’s Order dated December 1, 2020; (4) failure to cooperate with Secretary’s counsel to submit the Joint Pretrial Recommendations required by the Court’s Order dated December 1, 2020; and (5) failure to engage and prosecute its case as required by Respondent filing its Notice of Contest and by the above referenced Court Orders. *See* Commission Rules 7(o) and 101. Pursuant to the *Third Show Cause Order*. Respondent was directed to file with the Court an explanation as why it failed to do the above and provide good faith supportable reasons. The *Third Show Cause Order* was sent to the same address as all previous Orders which was the address denoted in Respondent’s *Notice of Contest*. The *Third Show Cause Order* was sent by United States Mail, Certified Mail, Return Receipt Requested. According to the USPS Tracking record, the *Third Show Cause Order* was delivered on February 13, 2021. Respondent did not respond to the *Third Show Cause Order*.

Discussion

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 Judge, he 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 he should not be declared in default Thereafter, the Commission or Judge, in their discretion, may enter a decision against the defaulting party

As noted above, Respondent has been provided an opportunity to show cause why it should not be held in default and failed to respond to the Court’s Orders.

The Court has a duty to “conduct a fair and impartial hearing, to assure that the facts are

fully elicited, to adjudicate all issues, and avoid delay.” 29 C.F.R. § 2200.67. In order to carry out that duty, Commission Rule 67(m) authorizes the Court to “[t]ake any other action necessary . . . and authorized by the published rules and regulations of the Commission.” The Court’s prehearing procedures aid in the early formulation of issues, which benefits all parties during trial preparation as well as resulting in the more effective use of the Court’s resources at the hearing stage. *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 issues. *Id.* The Judge has broad discretion to decide whether sanctions should be ordered. *Id.* See also, *Jersey Steel Erectors*, 16 BNA OSHC 1162, 1165 (No. 90-1307, 1993), *Sealtite Corp.*, 15 BNA OSHC 1130, 1134 (88-1431, 1991) and *Duquesne Light Co.*, 8 BNA OSHC 1218, 1222 (No. 78-5034, 1980)(consolidated). Therefore, sanctions are an appropriate tool to ensure compliance where the sanctioned party has engaged in a pattern of disregard for Commission rules, or where the party’s conduct is contumacious. See, e.g., *Phila. Constr. Equip., Inc.*, 16 BNA OSHC 1128, 1130-31 (No., 92-899, 1993)(pattern of disregard for Commission proceedings found where Respondent was late for hearing twice, failed to certify posting of the citation and failed to file an answer until threatened with dismissal, failed to respond to a discovery request and failed to respond to a pre-hearing order).

According to the Commission, “[D]ismissal is too harsh a sanction for failure to comply with certain pre-hearing orders unless the record shows contumacious conduct by the noncomplying party, prejudice to the opposing party, or a pattern of disregard for Commission proceedings.” *Amsco, Inc.*, 19 BNA OSHC 2189, 2191 (No. 02-0220, 2003). See also *Sealtite Corporation*, 15 BNA OSHC 1130 (No. 88-1431, 1991) (contumacious conduct established where party engaged in a “consistent pattern” of failure to respond to judge’s orders).

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). 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).

As noted, none of the communications sent to Respondent have been returned as “undeliverable” by the United States Postal Service.¹ All communications were sent to the address provided by Respondent in its *Notice of Contest*. Under Commission Rule 6, it is Respondent’s duty to advise the Court of any change of address. *See 29 C.F.R. § 2200.6.*² Respondent has not filed a change of address with the Court.

The Court finds that Respondent’s repeated failures to engage in the litigation process illustrate a pattern of disregard for the Commission’s proceedings. Respondent has been given multiple opportunities and plenty of time to comply with Commission Rules of Procedure and this Court’s *Orders*, and the Court has yet to receive any communication or contact from

¹ In *Crude Oil Corp. v. Commissioner*, 161 F.2d 809 (10th Cir.1947), the Court stated that “[w]hen mail matter is properly addressed and deposited in the United States mails, with postage duly prepaid thereon, there is a rebuttable presumption of fact that it was received by the addressee in the ordinary course of mail.” *Id.* at 810. *See also Arkansas Motor Coaches, Ltd., Inc. v. C.I.R.*, 198 F.2d 189, 191 (8th Cir. 1952); *Central Paper Co. v. C.I.R.*, 199 F. 902, 904 (6th Cir. 1952); *Legille v. Dann*, 544 F.2d 1 (D.C. Cir. 1976).

² Rule 6 of the Commission’s Rules of Procedure, 29 C.F.R. § 2200.6, provides that:

Record Address: Every pleading or document filed by any party or intervenor shall contain the name, current address and telephone number of his representative or, if he has no representative, his own name, current address and telephone number. Any change in such information shall be communicated promptly in writing to the Judge, or the Executive Secretary if no Judge has been assigned, and to all other parties and intervenors. *A party or intervenor who fails to furnish such information shall be deemed to have waived his right to notice and service under these rules.*

29 C.F.R. § 2200.6 (emphasis added).

Respondent. Based on the representations of Complainant, the Court finds that the delays in this case are wholly attributable to Respondent, including Respondent's failure to respond to mail that was sent to the address that it specifically provided on multiple occasions. In that regard, the Court finds Respondent's pattern of disregard for the Commission's proceedings constitutes contumacious conduct warranting the sanction of dismissal.

In addition, 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. 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 finds that Respondent relinquished its case with the intent to abandon. 1 C.J.S. Abandonment § 13 (2013).

Accordingly, with respect to the above-referenced docket, Respondent is declared in DEFAULT, its *Notice of Contest* is hereby DISMISSED and the violations and penalties alleged in the Citation and Notification of Penalty are AFFIRMED in its entirety and penalties ASSESSED.

ORDER

Based on the foregoing, it is ORDERED that:

1. Citation 1, Item 1, issued as a Serious Citation and the corresponding penalty of \$2,902.00, are hereby AFFIRMED as final orders of the Commission pursuant to Section

10(a) of the Act.

2. Citation 1, Item 2, issued as a Serious Citation and the corresponding penalty of \$13,494.00, are hereby AFFIRMED as final orders of the Commission pursuant to Section 10(a) of the Act.
3. Citation 1, Item 3, issued as a Serious Citation and the corresponding penalty of \$2,892.00, are hereby AFFIRMED as final orders of the Commission pursuant to Section 10(a) of the Act.
4. Citation 2, Item 1, issued as an Other-Than-Serious Citation and the corresponding penalty of \$9,639.00, are hereby AFFIRMED as final orders of the Commission pursuant to Section 10(a) of the Act.
5. Citation 2, Item 2, issued as an Other-Than-Serious Citation and the corresponding penalty of \$9,639.00, are hereby AFFIRMED as final orders of the Commission pursuant to Section 10(a) of the Act.

SO ORDERED.

Date: March 22, 2021
Denver, Colorado

/s/ Patrick B. Augustine

Patrick B. Augustine
First Judge, OSHRC