

UNITED STATES OF AMERICA  
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR,

Complainant,

v.

EVERETT GROUP,

Respondent.

Docket No. 01-1012

**DECISION AND ORDER**

On July 5, 2001, the undersigned issued his Notice of Pre-Trial Conference and Scheduling Order which scheduled a pre-trial telephone conference for July 24, 2001 at 9:30 a.m. EDT.

On July 12, 2001, the Complainant's counsel filed a Motion To Continue. The request for a continuance of the pre-trial telephone conference was based upon the fact that "counsel for Complainant will be out of the country from July 18, 2001 until July 25, 2001." The motion was granted by Order dated July 16, 2001, and a new pre-trial telephone conference was schedule for July 26, 2001 at 9:00 a.m. EDT.

At the request of the Office of the Solicitor, U. S. Department of labor, Cleveland, Ohio, (herein after referred to as "SOL"), the time of the pre-trial telephone conference scheduled for July 26, 2001 was changed to 10:00 a.m. EDT. At the designed date and time, this Office initiated the pre-trial telephone conference call. The SOL informed the undersigned that the Complainant's counsel had been delayed, but his return to the office was expected. This Office requested that Complainant's counsel notify the undersigned upon his arrival. While the Respondent's counsel was available for the pre-trial telephone conference, the Complainant's counsel did not contact this Office as requested. Despite the request of this Office to have Complainant's counsel telephone this Office upon his arrival at work on July 26, 2001, no contact was made with either this Office or with counsel for the Respondent then or at any time thereafter.

On July 27, 2001, Respondent's counsel filed his Motion to dismiss. The basis of the Motion is that " \* \* \* the Complainant has failed to appear, participate and thus otherwise no comply on July 26, 2001 with instructions by the Court."

On July 30, 2001, the undersigned issued an Order To Show Cause. It required the

Complainant's counsel to file a response "setting forth the reason(s) the Secretary should not be declared to be in default and the Motion To Dismiss be granted."

On August 14, 2001 the Secretary fled her response to the Order To show Cause. In his response, the Complainant's counsel asserts that "[o]n the morning of his scheduled return [July 26, 2001], counsel was unavoidably delayed"; that "Ms. [Mary Anne] Garvey {another counsel in SOL} \* \* \* made a second request that the call be rescheduled"; that "[t]he conference call was then set for 11:00 a.m."; and that [c]ounsel returned to the office shortly after 11:00 a.m.". In summary, counsel sates that his "failure to appear for the telephone pre-trial conference was the result of unavoidable travel delay, and was not an intentional or negligent act."

#### DISCUSSION AND CONCLUSION

Rule 51 of the Commission's Rules of Procedure, 29 C.F.R. 2200. 51 provides, in pertinent part, that the Judge shall consult with all attorneys by scheduling a telephone conference. The purpose of the conference is to narrow the issues, encourage settlement and expedite the administrative trial process.

Rule 41(a) of the Commission's Rules of Practice, 29 C.F.R. 2200.41(a), as pertinent, provides:

*Sanctions:* When any party has failed to plead or otherwise proceed as provided by these rules or as required by the \* \* \* Judge, he may be declared to be in default \* \* \* (2) on motion of a party. Thereafter, the \* \* \* Judge, in [his] discretion, may enter a decision against the defaulting party \* \* \*.

Commission Judges have the discretion to impose sanctions on parties who violate their orders. *TRG Drilling Corporation (Mid-Continent Division)*, 10 BNA OSHC 1268 (No.80-6008, 1981). Those sanctions may, at the Judges' discretion, include the rendering of a default judgment where the noncomplying party's conduct has been contumacious. Contumacious conduct can include a failure to appear at a pre-trial conference, a failure to file a pre-trial statement, a failure to prepare for a pre-trial conference or a failure to comply with a pre-trial order. *J. F. Edwards Construction Co. V. Anderson Safeway Guard Rail Corp.*, 542 F2d 1318, 1323 (7th Cir. 1976). *Carter v. City of Memphis, Tennessee*, 636 F2d 159 (6th Cir. 1980). *Harmon v. CSX Transportation, Inc.* 110 F3d 364 (6th Cir. 1997) and *Duquesne Light Company*, 8 BNA OSHC 1218 (No. 78-5303, 1980).

It is the opinion of the undersigned that the Complainant's counsel has shown total disregard for this Court, the administrative process and the pending proceeding. See *Quinn & Kwolek, Inc.*,

18 BNA OSHC 2100 (No. 99-1285, 2000). Pre-trial procedures including pre-trial telephone conferences, aid in the early formulation of issues benefit all parties, and result in the more efficient use of Commission resources. The Complainant's counsel's failure to appear at the appointed time and place and to thereafter fail to contact the Court regarding this failure, even after the pre-trial telephone conference had been rescheduled to conform to his schedule amounts to the type of contumacious behavior that the Rules were enacted to avoid. In order to ensure that the Complainant, in the future, fully complies with all orders of this Court, the complaint, in this case, is DISMISSED.

IT IS ORDERED that the Motion to Dismiss is GRANTED.

IT IS FURTHER ORDERED that the Complaint is DISMISSED.

Dated: 27 AUG 2001  
Washington, D.C.

/s/  
G. Marvin Bober  
Administrative Law Judge