

UNITED STATES OF AMERICA  
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION  
1120 20<sup>th</sup> Street, N.W., Ninth Floor  
Washington, D.C. 20036-3419

SECRETARY OF LABOR,

Complainant,  
v.

OSHRC DOCKET NO. 01-1369

KEVIN DALLAS ROOFING,

Respondent.

**DECISION AND ORDER OF DEFAULT**

**Factual Background**

This proceeding arises under the Occupational Safety and Health Act of 1970, 29 U.S.C. §651, *et. seq.* On June 6, 2001, the Occupational Safety and Health Administration conducted a safety inspection at Respondent's worksite located at Century Manors on Brunnersdale Avenue, NW., Jackson, OH. As a result of that inspection, on June 18, 2001, Respondent was issued one serious citation and one other-than-serious citation, with a total proposed penalty in the amount of \$1,650.00. In a letter received in the Cleveland OSHA Area Office on July 17, 2001, Respondent, Kevin Dallas, objected to the subject inspection. Respondent's letterhead indicated that its address was 4721 Grant Street, Mineral City, Ohio 44654. The Area Office notified Respondent in a letter dated July 18, 2001, that its objection was accepted as a notice of contest and the letter was forwarded to the Review Commission, and docketed on August 6, 2001. On August 6, 2001, counsel for Complainant forwarded to the Review Commission and Respondent a Complaint. On September 17, 2001, the Review Commission received a letter from Respondent dated September 6, 2001, wherein Respondent again objected to the legality of the subject inspection.

On September 14, 2001, the Chief Judge assigned this matter to the undersigned for E-Z Trial. On September 18, 2001, the undersigned issued the parties in this matter an E-Z Trial Notice and Scheduling Order which scheduled a telephonic pre-hearing conference for Monday,

October 29, 2001 at 9:30 am. In preparation for this conference call and in light of the fact that Respondent is *pro se*, Wednesday, October 24, 2001, Georgiana Jones, the administrative assistant of the undersigned, called the telephone number which counsel for Complainant had provided the Commission, to advise Respondent of the same. At that time Ms. Jones was advised that she had the wrong number for Respondent. She again attempted to call this same number on Thursday, October 25, 2001, however, the only response to this number was an answering machine which repeated the number called (330-859-8000) and provided no other identifying information. On Monday, October 29, 2001, Ms Jones called this same telephone number in preparation for the scheduled pre-trial conference call. At that time a woman answered and advised Ms. Jones that Respondent lived at this location and had left to go to work very early that day. She stated that she was completely unaware of this matter, and expressed no interest in participating in the call.

In view Respondent's failure to participate in the scheduled pre-trial conference call or have someone available to act on his behalf at the scheduled time, the undersigned ordered Respondent to show cause within 10 working days of receipt the Order why he did not comply with this Court's September 18, 2001 Order, and should not be declared in default. Respondent was advised that failure to respond to this Order would indicate a lack of interest in pursuing its notice of contest. Respondent was further advised that failure to comply with this order will result in the dismissal of its notice of contest, the citation affirmed, and the penalties assessed. *See* Review Commission Rule 41(a), 29 C.F.R. §2200.41(a). This Order to Show Cause, was sent by first class mail, and certified mail with return receipt on October 29, 2001.

The certified letter was returned to the Commission, with the following notations from the Postal Service: the word "unclaimed" had been rubber-stamped; and this chronology with the dates hand-written --"1st Notice 10-31; 2nd Notice 11-05; Return 11-15." The address on both the first class mail letter and the certified letter were the same as that provided initially by Respondent in his notice of contest letter. The Order to Show Cause which was also mailed via first class mail has not been returned, and the undersigned has received no other communication from Respondent.

## **Discussion**

Rule 41(a) of the Commission's Rules of Practice, 29 C.F.R. 2200.41(a), in pertinent part 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 in default . . . (1) on the initiative of the . . . Judge, after having been afforded an opportunity to show cause why he should not be declared in default . . . thereafter, ... Judge, in [her] discretion, may enter a decision against the defaulting party . . .

There is no evidence in the record that indicates that Respondent has not received any of the Commission's prior mailings. In absence of evidence to the contrary, it is reasonable to presume that the Postal Service officials properly discharged their duties. *See Powell v. Commissioner*, 958 F.2d 53,54 (4<sup>th</sup> Cir. 1992). A judge has very broad discretion in imposing sanctions for noncompliance with Commission Rules of Procedure or the judge's orders. *See Sealite Corp.*, 15 OSHC BNA 11130, 1134 (No. 8801431, 1991). In view of the record before me, the undersigned finds that the Respondent has received all documents forwarded to him in this matter, and that Respondent has been given due notice and an opportunity to respond to my Order to Show Cause. The undersigned further finds that Respondent has failed to respond to her October 29, 2001, Order to Show Cause. Respondent has not responded, and has offered no reason for not complying.

### **Findings of Fact and Conclusions of Law**

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Federal Rule of Civil Procedure 52(a).

### **ORDER**

Based on the foregoing decision, Respondent is declared in DEFAULT, and his notice of contest is DISMISSED, and the citations issued in this matter are AFFIRMED.

Serious Citation 1, Item 1, 29 C.F.R. §1926.451(B)(2)(i) is AFFIRMED, and a penalty of \$600.00 is assessed.

Serious Citation 1, Item 2, §1926.501(b)(13) is AFFIRMED, and a penalty of \$450.00 is assessed .

Serious Citation 1, Item 3, §1926.1053(b)(1) is AFFIRMED, and a penalty of \$600.00 is

assessed .

Other Citation 2, Item 1a, §1926.1200(e)(1) is AFFIRMED, and a penalty of \$0.00 is assessed .

Other Citation 2, Item 1b, §1926.152(a)(1) is AFFIRMED, and a penalty of \$0.00 is assessed.

SO ORDERED.

Dated: Dec. 6, 2001

Washington, DC.

/s/

COVETTE ROONEY

Judge, OSHRC