



United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR,

Complainant,

v.

MARTORELL CONSTRUCTION COMPANY
and its Successors,

Respondent.

OSHRC Docket No. 09-1511

APPEARANCES:

Christopher L. Green, Attorney; Michael Schoen, Attorney; James E. Culp, Regional Solicitor; Joseph M. Woodward, Associate Solicitor of Labor for Occupational Safety and Health; Carol A. De Deo, Deputy Solicitor of Labor for National Operations; U.S. Department of Labor, Washington, DC

For the Complainant

John C. Viggiano, Martorell Construction Company, Galveston, TX

For the Respondent

DIRECTION FOR REVIEW AND REMAND ORDER

Before: ROGERS, Chairman; THOMPSON, Commissioner; and ATTWOOD, Commissioner.

BY THE COMMISSION:

In a Decision and Order dated March 15, 2010, Administrative Law Judge Patrick B. Augustine affirmed a serious citation issued to Martorell Construction Company (“Martorell”) and assessed the proposed penalty of \$4,500. Martorell timely contested the citation, but failed to appear at the hearing as scheduled for February 10, 2010. At the hearing, the judge heard evidence from the Secretary and found in his decision that she had established the alleged violations, without receiving any evidence or argument from Martorell. Alternatively, the judge found Martorell in default “in accordance with Commission Rule[s] 64 and 101” based on its failure to appear at the hearing “without good cause being established[.]”

On April 6, 2010, Martorell, appearing *pro se*, filed a timely Petition for Discretionary Review (“PDR”) claiming that its failure to appear at the hearing should be excused because: (1) it never received any of the written notices of the hearing date that were sent to an address where “[it] does not receive mail”;¹ and (2) it “does not remember having received verbal notice of any trial date” nor does it “remember participating in any pre-trial conference.” For the following reasons, we direct this case for review and remand it to the judge for further proceedings.

As an initial matter, because the remedy Martorell seeks is to excuse its failure to appear, we construe its PDR as a request for reinstatement governed by Commission Rule 64, 29 C.F.R. § 2200.64, which pertains generally to the failure of a party to appear at a hearing. *See New Age, Inc.*, 1998 WL 863596 (No. 98-0415, 1998) (construing PDR as request for reinstatement under Rule 64 where *pro se* employer failed to appear for hearing and judge affirmed citation based solely upon Secretary’s evidence). Under Rule 64(b), “[r]equests for reinstatement must be made, in the absence of extraordinary circumstances, within five days after the scheduled hearing date.” *See also Phila. Const. Equip. Inc.*, 16 BNA OSHC 1128 n. 1 (No. 92-899, 1993) (waiving 5-day filing requirement for Rule 64(b) request for reinstatement pursuant to procedure set forth under Commission Rule 107). In addition, even if a request is timely, a party still must establish good cause for its failure to appear as set forth under Rule 64(c) (“The Commission or the Judge, upon a showing of good cause, may excuse such failure to appear.”).

Here, Martorell did not request reinstatement “within five days after the scheduled hearing date.” Commission Rule 64(b), § 2200.64(b). Thus, on remand, the judge should provide Martorell with an opportunity to address its failure to timely request reinstatement and, if appropriate, also provide Martorell with an opportunity to establish good cause for its failure to appear at the hearing. *See New Age, Inc.*, 1998 WL 863596 (remanding case to judge to determine whether *pro se* employer is entitled to a new hearing under Rule 64); *Phila. Const. Equip. Inc.*, 16 BNA OSHC at 1129 (same); Commission Rule 107, 29 C.F.R. § 2200.107 (“In special circumstances not contemplated by the provisions of these rules and for good cause shown, the Commission or Judge may, upon application by any party or intervenor or on their own motion, after 3 working days notice to all parties and intervenors, waive any rule or make such orders as justice or the administration of the Act requires.”).

¹ This is the address that appears on Martorell’s Notice of Contest.

In addressing these issues, the judge should clarify an inconsistency that appears in the record. In the Complainant’s Stipulation Statement dated January 29, 2010, the Secretary states that “[r]espondent’s lack of participation is further evidenced by its failure to appear for either of the Pretrial Telephone Conferences *held on December 1, 2009* and January 28, 2010.” (Emphasis added.) Yet, in his decision, the judge states that “on *December 1, 2009*, the date of the [first] pretrial conference *both parties were present.*” (Emphasis added.) Moreover, the judge noted that during the December 1 pretrial conference, (1) “this case was set for trial with the agreement of the parties for February 10, 2010 with the trial to be held in Houston, Texas”;² and (2) Martorell, when asked, verified its address as the one currently on record.

Accordingly, we direct this case for review and remand the case to the judge for further proceedings consistent with this opinion.

SO ORDERED.

/s/ _____
Thomasina V. Rogers
Chairman

/s/ _____
Horace A. Thompson III
Commissioner

/s/ _____
Cynthia L. Attwood
Commissioner

Dated: 4/16/2010

² It is not clear whether Martorell was ever advised of the hearing’s specific location, including the precise building or address. In determining whether Martorell is entitled to relief, the judge may want to consider whether Martorell was properly notified of this information.

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
DENVER REGIONAL OFFICE

SECRETARY OF LABOR,	§	
	§	
Complainant,	§	
	§	
v.	§	OSHRC DOCKET
	§	NO.: 09-1511
MARTORELL CONSTRUCTION	§	
COMPANY, and its	§	
successors,	§	
	§	
Respondent.	§	

DECISION AND ORDER

Appearances:

Mr. Christopher L. Green
U.S. DEPARTMENT OF LABOR
OFFICE OF THE SOLICITOR
525 Griffin Street
Suite 501
Dallas, Texas 75202
Office: (972) 850-3119
Fax: (972) 850-3101
E-mail: green.christopher.l@dol.gov
For Complainant

No appearance at trial for Respondent

Before:

Administrative Law Judge, Patrick B. Augustine

1 I'll ask the court reporter to
2 reflect my decision and order that I will dictate
3 onto the record, and my dictation onto the record
4 will constitute the official findings of the
5 court relating to this case.

6 The record will reflect that
7 Christopher Green is present on behalf of the
8 Secretary of Labor. The record will also reflect
9 that Mr. Viggiano, on behalf of the Respondent,
10 is not present, nor is there any authorized
11 representative of the Respondent present. It is
12 24 minutes after nine o'clock Central Standard
13 Time in Houston, Texas.

14 Number 1, jurisdiction of this action
15 is conferred upon the Occupational Safety and
16 Health Review Commission pursuant to Section 10(c)
17 of the Occupational Safety Act of 1970, 29 U.S.C.
18 §651 *et seq.*, hereinafter, referred to as "the
19 Act."

20 Number 2, the Court finds that the
21 Respondent is an employer engaged in the business
22 affecting interstate commerce within the meaning
23 of Section 3(5) of the Act, specifically engaging
24 in residential construction. The residential
25 construction standards, as cited, will be

1 applicable to this case.

2 Number 3, the Occupational Safety
3 and Health Administration, hereinafter, referred
4 to as "OSHA," conducted an inspection of the
5 Respondent's work or job site on August 12, 2009.

6 Number 4, as the result of the
7 inspection, OSHA issued a citation and notification
8 of penalty on August 13, 2009, to the Respondent
9 alleging the violation of Section 1926.20(b)(2),
10 Section 1926.501(b)(13), and 1926.1053(b)(1) with a
11 proposed cumulative penalty of \$4,500.

12 Number 5, the Respondent, in a
13 communication dated September 2, 2009, contested
14 the citations and the penalties.

15 Number 6, the citation and
16 notification of penalty was sent to the following
17 address: P.O. Box 239, 1718 35th Street,
18 Galveston, Texas 77550. The Respondent received
19 the notice of citation and notification of penalty
20 at that address in light of the fact that the
21 Respondent contested the citation and notification
22 of penalty.

23 Number 7, in the Respondent's notice
24 of contest, it is noted that the street address
25 used by the Respondent is 2517 Winnie, Galveston,

1 Texas 77550. All future correspondence by this
2 Court was sent to that address. Pursuant to the
3 offer of proof of the Secretary of Labor's
4 attorney, all correspondence sent by the
5 Solicitor's office was also sent to that address.

6 Number 8, this case was assigned to
7 OSHRC Judge, Patrick B. Augustine, on October 15,
8 2009.

9 Number 9, all notices and orders
10 sent by OSHRC -- by the OSHRC judge were sent to
11 the same address noted in the return of contest,
12 which is the Winnie Street address, and it is
13 further noted that none of the notices or orders
14 have been returned undeliverable by the United
15 States Postal Service.

16 Pursuant to the offer of proof of the
17 Secretary of Labor's attorney, they also testified
18 that all correspondence and communication sent
19 from the Solicitor's office to the Respondent at
20 that address was also not returned undeliverable
21 by the United States Postal Service to the
22 Solicitor's office.

23 Number 10, on October 26, 2009, the
24 Court issued a pretrial conference call order
25 indicating that a pretrial conference was set for

1 pursuant to his telephone conversation with
2 Mr. Green as set forth in Mr. Green's offer of
3 proof to the Court.

4 Number 14, this Court sent a notice to
5 of trial to the parties on December 2, 2009, and a
6 notice of place of trial to the parties on February
7 2, 2010. Neither the notice of trial nor the
8 notice of location of the trial was returned
9 undeliverable by the United States Postal Service
10 to the Judge.

11 Number 15, on January 15, 2010, the
12 Court scheduled a final pretrial conference on this
13 case prior to it going to trial. A notice of the
14 pretrial conference was sent to the parties on
15 January 15, 2010, and the notice to the Respondent
16 was not returned as undeliverable.

17 Number 17 [sic], the Respondent failed
18 to participate in the final pretrial conference
19 call. Madeleine Li from the Solicitor's office
20 attended via telephonically in that pretrial
21 conference call and indicated that all attempts to
22 contact Mr. Viggiano, either by phone or by mail,
23 were to no avail.

24 Number 17, the Court is now in session
25 on February 10, 2010, Houston, Texas, pursuant to

1 the notice of trial and the notice of trial
2 location.

3 Number 18, to establish a prima facie
4 violation of the Act, the Secretary must prove, 1,
5 the standard applies to the cited condition; 2, the
6 terms of the standard were violated; 3, one or more
7 of the employer's employees had access to the cited
8 condition; and 4, the employer knew or with the
9 exercise of reasonable diligence could have known
10 of the violent conditions. *Ormet, O-r-m-e-t,*
11 *Corporation* 13 BNA OHSC 2134, 1991 CCH OSHD Page
12 29,254 (No. 85-0531, 1991).

13 In regards to Citation 1, Item 1,
14 the Secretary has charged that the employer did
15 not maintain an inspection program conducted by
16 competent persons that examined job sites,
17 materials, and equipment on a frequent and
18 regular basis. Specifically, the regulation
19 states that such programs shall provide for
20 frequent and regular inspections of the job sites,
21 materials, and equipment to be made by competent
22 persons designated by the employers.

23 There is testimony that Mr. Hernandez
24 was the foreman on this project. The testimony of
25 the compliance officer also indicates that the

1 employees were exposed to fall hazards of greater
2 than 30 feet. He also testified that the ladders
3 did not extend more than 3 feet above the landing.

4 The compliance officer also indicated
5 in his communications with Mr. Hernandez that he
6 conducted no safety inspections of the work site
7 on a daily basis, nor was he aware of the
8 requirement to do so. The compliance officer
9 also testified that there was no evidence of a
10 safety and health policy. His attempts to secure
11 a copy of the safety and health policy was
12 unsuccessful and has not been produced by either
13 Mr. Hernandez or Mr. Viggiano.

14 In communications, the compliance
15 officer indicates that the extent of the safety
16 program was that they talked to the guys as to
17 the requirements, but there was no written
18 documentation as to a formal health and safety
19 plan produced by Mr. Viggiano.

20 The evidence indicates that there
21 was six employees on site that day. At various
22 times, four or more were exposed to the cited
23 conditions.

24 Therefore, as to Citation 1, Item 1,
25 the Secretary's undisputed evidence established all

1 of the elements necessary for a prima facie
2 violation of 29 C.F.R. 1926.20(b)(2). The activity
3 engaged in could undoubtedly result in serious
4 injury or death.

5 In relation to Citation 1, Item 2, the
6 Secretary alleges that each employee engaged in
7 residential construction activities 6 feet or more
8 above lower levels was not protected by guardrail
9 systems, a safety net system, or personal fall
10 protection system.

11 Specifically, Section 1926.501(b)(13)
12 defines residential construction, which is
13 applicable in this case as requiring each employee
14 engaged in residential construction activity as 6
15 feet or more above lower levels shall be protected
16 by guardrails, a safety net system, or a personal
17 fall arrest system unless another provision in
18 paragraph (b) of this section provides for an
19 alternative fall protection measure.

20 Exception is noted when the employer
21 can demonstrate that it is infeasible or creates a
22 greater hazard to use those systems. The employer
23 shall develop and implement a fall protection
24 system which meets the requirements of paragraph
25 "k" of section 1926.502. The regulation also notes

1 that there is presumption that it is feasible and
2 will not create a greater hazard to implement at
3 least one of the above listed fall protection
4 systems.

5 Accordingly, the employer has the
6 burden of establishing that it is appropriate to
7 implement a fall protection plan which complies
8 with section 1926.502(k) for a particular
9 workplace situation in lieu of implementing any
10 of those systems. The evidence indicates that
11 residential construction activities were being
12 performed at heights greater than 6 feet. The
13 compliance officer set forth the measurements and
14 how he obtained those measurements in the record
15 upon which the administrative law judge will give
16 great weight to.

17 He also indicated that -- Mr. Donnelly
18 indicated that four employees were working on the
19 roof at the time of the inspection. He also noted
20 in his conversations with Mr. Hernandez that the
21 equipment necessary to provide fall protection was
22 not on the premises but was at a different location
23 on the day of the inspection.

24 The Respondent has not claimed
25 infeasibility or provided proof or documentation

1 that an alternative personal fall protective
2 system was in place. Therefore, the Secretary's
3 undisputed evidence established all the elements
4 necessary for a prima facie violation of 29 C.F.R.
5 1926.501(b)(13).

6 In regards to Citation 1, Item 3,
7 the Secretary alleges a violation of that -- of
8 Section 29 C.F.R. 1926.1053(b)(1) by indicating
9 that portable ladders were not used for access to
10 an upper landing surface and the ladder side
11 rails did not extend at least 3 feet above the
12 upper landing surface to which the ladder was
13 used to gain access.

14 Specifically, that regulation requires
15 when portable ladders are used for access to an
16 upper landing surface, the ladder side rails shall
17 extend at least 3 feet above the upper landing
18 surface to which the ladder is used to gain access.
19 Or, when such an extension is not possible because
20 of a ladder's length, then the ladder shall be
21 secured at its top to a rigid support that will not
22 deflect in a grasping device, such as a grab rail,
23 shall be provided to and assist employees in
24 mounting and dismounting the ladder. In no case
25 shall the extension be such that the ladder

1 deflection under a load would, by itself, cause the
2 ladder to slip off of its support.

3 The testimony indicated that the
4 compliance officer observed and assessed that
5 portable ladders were being used for access to
6 the upper landing surface. One of the exhibits
7 of the Secretary indicates that an employee was
8 actually climbing either up or down the ladder on
9 the day of the inspection.

10 Also, the compliance officer testified
11 that the ladder side rails did not extend at least
12 3 feet above the upper landing. He indicated,
13 based upon his visual inspection and also Exhibit
14 C-1 and C-2, that the ladder did not extend at
15 least 3 feet simply because each rung on the ladder
16 is approximately 14 inches and there is no
17 documentation in the record which indicates that at
18 least two steps are visible in the photographs
19 which would indicate that the ladder was in excess
20 of 3 feet above the upper landing surface.

21 Also, it was observed that there
22 were two employees on the roof so, therefore,
23 they would have used the ladder to gain access to
24 and also to get down from the roof.

25 So, therefore, the Secretary's

1 undisputed evidence established all of the elements
2 necessary for a prima facie violation of 29 C.F.R.
3 Section 1926.105(b)(1). The activity engaged in
4 could undoubtedly result in serious injury or
5 death.

6 As alternative findings, the Court
7 will find, A, pursuant to Commission Rule 64, the
8 failure of the party to appear at the hearing may
9 result in a decision -- in a decision against the
10 party at the hearing;

11 B, the Court finds that the
12 respondent had notice of the time, date, and
13 place of the hearing both from written orders and
14 notices issued which had not been returned as
15 undeliverable by the Postal Service and from the
16 Respondent's participation in the pretrial
17 conference in which the trial was set and, also,
18 based upon a conversation that he had with
19 Mr. Green approximately one week before the trial;

20 C, attempts by the Secretary of Labor as
21 set forth in these proceedings indicate that the
22 Respondent has not returned phone calls or
23 responded to communications from the Secretary of
24 Labor. There is no indication that the Respondent
25 has not received the notices and orders of this

1 Court or the written communications from the
2 Secretary of Labor as such no -- as no such orders,
3 notices, or communications have been returned as
4 undeliverable.

5 And, D, the Respondent has failed
6 to appear and to proceed pursuant to an order of
7 the Court without good cause being established.
8 The Court deems that the Respondent has abandoned
9 its position and is therefore in default;

10 E, Therefore, in accordance with
11 Commission Rule 64 and 101, the Court finds the
12 Respondent's failure to appear at the hearing
13 justifies vacating the Respondent's notice of
14 contest and affirming the proposed citations as
15 issued. *Philadelphia Construction Equipment,*
16 *Inc.*, 16 BNA OSHC 1128, 1993 CCH OSHD Page 30,051
17 (No. 92-0899, 1993). The Respondent is therefore
18 declared in default.

19 Therefore, the notice of contest is
20 dismissed and the following citations are
21 affirmed. Section 17(j) of the Act requires the
22 Commission to give due consideration to four
23 criteria when assessing penalties: 1, the size
24 of the employer's business; 2, the gravity of the
25 violation; 3, the good faith of the employer; and

1 4, the employer's prior history of violations.
2 29 USC 666(j) gravity is the primary
3 consideration and is determined by the number of
4 employees exposed, the duration of the exposure,
5 the precautions taken against injury, and the
6 likelihood of an actual injury. *J.A. Jones*
7 *Construction Co.*, 15 BNA OSHC 2201, 1993 CCH OSHD
8 Page 29,964 (No. 87-2059, 1993). Based upon the
9 Secretary's undisputed evidence, the Court finds
10 the proposed penalties for each violation are
11 appropriate.

12 Based upon the above findings of
13 fact and conclusions of law, it is ordered that
14 Citation 1, Item 1, is affirmed and a penalty of
15 \$1,500 is assessed. Citation 1, Item 2, is
16 affirmed and a penalty of \$1,500 is assessed.
17 Citation 1, Item 3, is affirmed and a penalty of
18 \$1,500 is assessed.

19 The time is now 9:46 a.m. and the
20 Respondent has not appeared at any time during
21 these proceedings. The Court directs that the
22 foregoing constitutes its findings of fact and
23 conclusions of law and its decision and order in
24 this case. The Court directs the court reporter
25 to submit an official certified transcript of

1 this proceeding, which will serve as the decision
2 and order of the Judge pursuant to Commission
3 Rules 90(a) and Sections 209(f). It is so
4 ordered. The Court is adjourned.

5

6

7 3/15/2010 /s/

8 Date HONORABLE PATRICK B. AUGUSTINE

9 Judge, OSHRC

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25