

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

SECRETARY OF LABOR,  
Complainant,

v.

DURAFRAME DIPNET,  
Respondent.

OSHRC DOCKET NO. 12-1040

Marla J. Haley, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, IL  
For Complainant

Maryann T. Crook, Owner, Duraframe Dipnet, Viola, WI  
For Respondent

Before: Administrative Law Judge Patrick B. Augustine

**DECISION AND ORDER OF DISMISSAL OF NOTICE OF CONTEST**

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 Duraframe Dipnet (“Respondent”) in Viola, Wisconsin from November 28, 2011 through April 2, 2012. As a result of the inspection, OSHA issued a Citation and Notification of Penalty (“Citation”) to Respondent alleging sixteen serious violations, three repeat violations and one other-than-serious violation of the Act with penalties totaling \$71,400.00. The citations were issued on April 18, 2012. Respondent contested the citation items on May 9, 2012 (“Notice of Contest”) and also filed an Answer to the Complaint. This case was designated to proceed under the conventional rules of the Commission Rules of Procedure (“Commission Rules”). *See* 29 C.F.R. §§ 2200 *et seq.*

## **Jurisdiction**

Jurisdiction over this action is conferred upon the Commission pursuant to Section 10(c) of the Act by the filing of a Complaint and an Answer. Respondent is an employer engaged in a business affecting interstate commerce within the meaning of Section 3(5) of the Act, 29 U.S.C. §652(5). *Slingsuff v. OSHRC*, 425 F.3d 861 (10th Cir. 2005)

## **Procedural History**

On March 28, 2013, Complainant filed a *Motion for Sanctions* (“Motion for Sanctions”) seeking to dismiss Respondent’s Notice of Contest and requesting the Citation be affirmed as a final order of the Commission. *See Villa Marina Yacht Harbor, Inc.*, 19 BNA OSHC 2185 (No. 01-0830, 2003). In support of his requested relief, Complainant argues that Respondent has (i) failed to comply with numerous Orders of this Court and, therefore, has engaged in contumacious conduct; and (ii) abandoned its case. In either instance, the Complainant argues that dismissal of the Notice of Contest is justified.

Respondent did not file a response to Complainant’s *Motion for Sanctions*. On April 15, 2013, the Court issued an *Order to Show Cause* (“Show Cause Order”), whereby Respondent was “**ORDERED TO SHOW CAUSE WITHIN TEN (10) DAYS** of that Order as to why the Court should not issue judgment against Respondent and affirm the proposed violations in this case . . . .” The *Show Cause Order* was sent Certified Mail, Return Receipt Requested, which Maryann T. Crook signed on April 18, 2013. 29 C.F.R. § 2200.101(d). More than ten days has lapsed, and Respondent has not responded to Complainant’s *Motion for Sanctions* or the Court’s *Show Cause Order*. *See* 29 C.F.R. §§ 2200.40, 2200.52(f), 2200.101(a).

Respondent has a longstanding history of not complying with the Commission Rules or the Orders issued by this Court. First, Respondent failed to respond to the Complainant’s requests for written discovery. The failure to respond to the discovery requests caused the

Complainant to file his *Motion to Compel Answers to Interrogatories and Requests for Production, and to Deem Admitted the Complainant's Admission by Operation of Law* on February 12, 2013 (“Motion to Compel”). Respondent failed to respond to the *Motion to Compel*. Therefore, on March 12, 2013 the Court issued an Order directing the Respondent to provide responses to the propounded Interrogatories and Requests for Production of Documents within ten days. Respondent failed to comply, which led to Complainant filing his *Motion for Sanctions*. In addition, by a Court Order dated October 26, 2012, the Respondent was directed to appear for a Final Pretrial Conference Call to be held on March 18, 2013. The Complainant appeared. The Respondent did not appear and did not contact the Court to offer a reason for its non-appearance. The Court’s *Show Cause Order* required Respondent to address each of the above-listed failures.

### **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.

When, as here, a party refuses, obstructs, or fails to respond to written discovery, Commission Rule 52(f)(4) authorizes the Court to issue “[a]n order dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party.” Finally, 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.”

Respondent has demonstrated a pattern of disregard for the procedural requirements and authority of the Commission by: (1) failing to comply with the Commission Rules requiring a party to supply answers to written discovery; (2) failing to respond to the Court’s April 15, 2013 *Show Cause Order*; (3) failing to respond to the Complainant’s *Motion for Sanctions*; (4) failing to comply with the Court’s Order dated March 1, 2013 directing Respondent to provide written discovery responses and to produce certain documents; and (5) failing to appear for the Final Pretrial Conference call scheduled pursuant to an *Order* of the Court dated October 26, 2012. Respondent’s repeated failure to participate in this proceeding has caused unnecessary and repeated delays and has unduly impeded Complainant’s ability to move forward with his case. Respondent’s actions constitute contumacious conduct justifying sanctions. *See, e.g., Philadelphia Construction Equipment, Inc.*, 16 BNA OSHC 1128, 1993 CCH OSHD ¶ 30,051 (No. 92-0899, 1993); *Sealtite Corporation*, 15 BNA OSHC 1130, 1991 CCH OSHD ¶ 29,398 (No. 88-1431, 1991).

Also, Respondent has demonstrated a pattern of disregard for: (i) the Commission’s procedural requirements, resulting in delay; (ii) the timely filing of responses to Complainant’s motions or the Court’s Orders; and (iii) the discovery process and timely exchange of documents. Respondent’s repeated failure to engage in the litigation process is tantamount to an abandonment of its case. In this case, Respondent’s abandonment has been clearly proved by competent evidence. 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’s Notice of Contest is hereby VACATED and the violations and penalties alleged in the Citation and Notification of Penalty are AFFIRMED.

## **ORDER**

1. Citation 1, Items 1a and 1b are AFFIRMED and a penalty of \$3,600.00 is ASSESSED.
2. Citation 1, Item 2 is AFFIRMED and a penalty of \$3,600.00 is ASSESSED.
3. Citation 1, Item 3 is AFFIRMED and a penalty of \$3,000.00 is ASSESSED.
4. Citation 1, Item 4 is AFFIRMED and a penalty of \$4,200.00 is ASSESSED.
5. Citation 1, Items 5a and 5b are AFFIRMED and a penalty of \$4,200.00 is ASSESSED.
6. Citation 1, Items 6a, 6b and 6c are AFFIRMED and a penalty of \$3,000.00 is ASSESSED.
7. Citation 1, Item 7 is AFFIRMED and a penalty of \$3,600.00 is ASSESSED.
8. Citation 1, Item 8 is AFFIRMED and a penalty of \$3,000.00 is ASSESSED.
9. Citation 1, Item 9 is AFFIRMED and a penalty of \$3,000.00 is ASSESSED.
10. Citation 1, Item 10 is AFFIRMED and a penalty of \$3,000.00 is ASSESSED.
11. Citation 1, Item 11 is AFFIRMED and a penalty of \$2,400.00 is ASSESSED.
12. Citation 1, Item 12 is AFFIRMED and a penalty of \$4,200.00 is ASSESSED.
13. Citation 1, Item 13 is AFFIRMED and a penalty of \$3,600.00 is ASSESSED.
14. Citation 1, Items 14a, 14b and 14c are AFFIRMED and a penalty of \$4,200.00 is ASSESSED.
15. Citation 1, Item 15 is AFFIRMED and a penalty of \$1,800.00 is ASSESSED.
16. Citation 1, Item 16 is AFFIRMED and a penalty of \$1,800.00 is ASSESSED.
17. Citation 2, Item 1 is AFFIRMED and a penalty of \$8,400.00 is ASSESSED.
18. Citation 2, Item 2 is AFFIRMED and a penalty of \$4,800.00 is ASSESSED.
19. Citation 2, Item 3 is AFFIRMED and a penalty of \$6,000.00 is ASSESSED.
20. Citation 3, Item 1 is AFFIRMED and no penalty is ASSESSED.

SO ORDERED.

Date: May 17, 2013  
Denver, Colorado

/s/  
Patrick B. Augustine  
Judge, OSHRC