

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

Secretary of Labor,

Complainant,

v.

Michael Buckley, dba

Respondent.

OSHRC Docket No. 13-1027

Appearances:

Ralph R. Minichiello, Esquire
Office of the Regional Solicitor
U.S. Department of Labor
John F. Kennedy Federal Building
Room E-375
Boston, MA 02203
For the Secretary.

Michael Buckley, dba
Pro se
86 Edgewood Street
Apartment #B2
Hartford, Connecticut 06112
For the Respondent.

Before: Dennis L. Phillips
Administrative Law Judge

**DECISION AND ORDER GRANTING COMPLAINANT'S
MOTION FOR DEFAULT JUDGEMENT**

Background

This proceeding is before the Occupational Safety and Health Review Commission (“the Commission”) pursuant to § 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* (“the Act”). On April 9, 2013, the Occupational Safety and Health Administration (“OSHA”) inspected the work site of Respondent, Michael Buckley dba, (“Respondent” or “Buckly”) at 539-541 Blue Hills Avenue, Hartford, Connecticut 06112 (“work site”). As a result of the inspection, on May 10, 2013, OSHA issued a two item serious citation. The total proposed penalty for the citation items is \$4,400.

Citation 1, Item 1, alleged that Respondent’s employees, at the work site on April 9,

2013, working in areas where there was a possible danger of head injury from impact, or falling or flying objects, or from electrical shock and burns, were not protected by protective helmets in violation of 29 C.F.R. § 1926.100(a). The citation item alleged that an employee was observed cleaning up roofing debris on the ground while an employee was stripping shingles directly overhead. The citation item further alleged that the employee on the ground was not wearing head protection. The proposed penalty for Citation 1, Item 1, is \$1,600.

Citation 1, Item 2, alleged that each of Respondent's employee(s) at the work site engaged in residential construction activities 6 feet (1.8 m) or more above lower levels were not protected by guardrail systems, safety net system, or personal fall arrest system, nor were employee(s) provided with an alternative fall protection measure under another provision of paragraph 29 C.F.R. § 1926.501(b) in violation of 29 C.F.R. § 1926.501(b)(13). The citation item alleged that an employee was exposed to a 25 to 30 foot fall hazard while removing asphalt shingles on the roof of a three story house with no fall protection systems in use.

The proposed penalty for Citation 1, Item 2, is \$2,800.

Citation 1, Items 1 through 2, described herein are together referred to as the "Citation Items at issue."

On about May 28, 2013, Respondent contested the citation and the proposed penalties pursuant to § 10 (c) of the Act.

On June 26, 2013, the Chief Judge assigned the case for Simplified Proceedings. The complaint and answer requirements were suspended.

On July 2 and 3, 2013, the Secretary attempted to contact Respondent by telephone – leaving messages both times with individuals who identified themselves as Mr. Buckley's employees – to discuss the Court's Simplified Proceedings Order and to ascertain whether Mr.

Buckly objected to the Complainant's Motion to Discontinue Simplified Proceedings and return the case to conventional proceedings. Respondent did not return these two telephone calls.

By Court Order dated July 23, 2013, the Court granted Complainant's Motion Requesting Discontinuance of Simplified Proceedings.¹ The Order directed Complainant to file his complaint within 20 days after receipt of the Order and ordered Respondent to file its answer within 20 days after service of the complaint. Per 29 C.F.R. § 2200.51, the Order NOTIFIED the parties that a telephone pre-hearing scheduling conference would take place on September 27, 2013, at 2:00 p.m., E.D.T.² The Order further stated that following the pre-hearing scheduling conference, a pre-hearing order will be issued establishing a calendar for the conduct of pre-hearing matters and for the hearing.

On August 14, 2013, Complainant filed his complaint with the Court and served it upon Respondent.

Respondent's answer was due on September 3, 2013. No answer has been filed.

Respondent also did not respond to the Secretary's telephone calls requesting a time to confer pursuant to the Court's Order.

The pre-hearing scheduling conference was conducted on September 27, 2013 pursuant

¹ Respondent did not file any response to the Motion for Discontinuation of Simplified Proceedings.

² The Order stated that at the time of the pre-hearing scheduling conference, the parties shall be prepared to stipulate that a settlement has been reached, or, in the alternative, shall be prepared to commit to a specific schedule in preparation for and the conduct of the hearing in this matter, including, but not limited to, specific dates for the following:

1. Hearing date(s).
2. Identification of expert witnesses and submission of their written reports.
 - 2a. Completion of depositions of experts.
3. Close of all other discovery.
4. Submission of motions seeking amendment(s) of the pleadings.
5. Submission of all dispositive and partially dispositive motions and motions *in limine*.
6. Submission of pre-hearing position statements which shall include:
 - a. A brief narrative statement of the unresolved factual and legal issues.
 - b. A list and brief description of all documents and other exhibits to be offered in evidence.
 - c. An estimate of the time needed by each party to present its case.

to the Court's Order dated July 23, 2013. Respondent inexplicably failed to participate in the pre-hearing scheduling conference call. During the pre-hearing scheduling conference, the Secretary stated his intention to file a Motion for Default.

On September 18, 2013, Complainant filed his Motion for Default Judgment. The Secretary cited to OSHRC Rule of Procedure 101.³ Complainant asserts that Respondent's failures to comply with the Commission's Rules of Procedure and Court's Order put Complainant at a disadvantage, not knowing Respondent's positions and how to prepare to meet them at trial, and not being able to initiate discovery. The Secretary seeks the Court's affirmance of the Citation and penalties.

Respondent has not filed a response to the Secretary's Motion for Default Judgment.

Jurisdiction

The Court finds that the Commission has jurisdiction of the parties and the subject matter in this case.

The Secretary's Burden of Proof

To prove a violation of a specific standard, the Secretary must demonstrate by a preponderance of the evidence that: 1) the cited standard applies, 2) the terms of the standard were not met, 3) employees had access to the cited condition, and 4) the employer knew, or could have known with the exercise of reasonable diligence, of the cited condition. *Astra Pharmaceutical Prod.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981).

Motion for Default Judgment

Commission judges have the discretion to impose sanctions on parties who violate their orders. *See NL Industries, Inc.* 11 BNA OSHC 2156, 2168 (No. 78-5204, 1984). Rule 16(f),

³ OSHRC Rule of Procedure 101 states, in part:

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 ... on the motion of a party.

Federal Rules of Civil Procedure (Fed. R. Civ. P.),⁴ permits the Court on motion to order just sanctions if a party or party's attorney fails to obey a scheduling or pretrial order.⁵ Rule 16(f) was added in 1983 to "reflect that existing practice [to enforce failures by appropriate sanctions] and to obviate dependence upon Rule 41(b) or the court's inherent power to regulate litigation." Notes of Advisory Committee on Rules, 1983 Amendment, Subdivision (f); Sanctions.

Considerable discretion is vested in judges to decide whether to impose sanctions and what form they should take.

The Commission and federal courts generally consider eight criteria when determining whether a Judge's decision to sanction a party through dismissal is appropriate. *Duquesne Light Company*, 8 BNA OSHC 1218, 1221 (No. 78-5303, 1980). Prejudice to the opposing party,⁶ whether there is a showing of willful default by a party, and contumacious conduct by the

⁴ Rule 16(f), Fed. R. Civ. P. states:

(f) Sanctions.

(1) *In General*. On motion or on its own, the court may issue any just orders, including those authorized by Rule 37(b)(2)(A)(ii)-(vii), if a party or its attorney:

(A) fails to appear at a scheduling or other pretrial conference;

(B) is substantially unprepared to participate--or does not participate in good faith--in the conference; or

(C) fails to obey a scheduling or other pretrial order.

(2) *Imposing Fees and Costs*. Instead of or in addition to any other sanction, the court must order the party, its attorney, or both to pay the reasonable expenses--including attorney's fees--incurred because of any noncompliance with this rule, unless the noncompliance was substantially justified or other circumstances make an award of expenses unjust.

⁵ Procedure before the Occupational Safety and Review Commission is in accordance with the Federal Rules of Civil Procedure in the absence of a specific provision in the Commission's own Rules of Procedure. Rule 2(b) of the Commission's Rules of Procedure, 29 C.F.R. § 2200.2(b), *see also Williams Enterprises* 4 BNA OSHC 1663, 1665 n.2 (No. 4533, 1976).

⁶ A party is prejudiced if the failure to comply with Commission rules or Court orders impairs the party's ability to adequately prepare for trial, including understanding the factual merits of the opponent's defense(s). *Avionic Co. v. General Dynamics Corp.*, 957 F.2d 555 (8th Cir. 1992). In this instance, the Secretary has been clearly prejudiced by Respondent's failure to comply with Commission rules and the Court's Order requiring it to commit to a specific schedule in preparation for and the conduct of the hearing and by failing to file an answer and accompanying disclosure statement.

noncomplying party are three of the more significant criteria to take into account. Only one of these three criteria is needed to affirm the Judge's decision to render a judgment by default against a party. *Ford Development Corp.*, 15 BNA OSHC 2003, 2005 (No. 90-1505, 1992), *Circle T Drilling Company, Inc.*, 8 BNA OSHC 1681, 1682 (No. 79-2667, 1980).

In this instance, there is a clear showing of willful default by Respondent. The Court finds that Respondent has abandoned its case pending before the Commission. Respondent did not participate in the Court ordered pre-hearing scheduling conference. No explanation for its absence was tendered. Respondent failed to comply with the Court's Order requiring it to commit to a specific schedule in preparation for and the conduct of the hearing in this matter. Respondent failed to file an answer or accompanying disclosure statement (Disclosure of corporate parents, subsidiaries, and affiliates) pursuant to 29 C.F.R. § 2200.35. Respondent failed to respond to the Secretary's Motion for Default Judgment. Again, no explanations for these failings were offered. Collectively, the Court finds these failures to be contumacious conduct by the Respondent.

The Court may dismiss a matter when "the record shows contumacious conduct by the noncomplying party or prejudice to the opposing party." *St. Lawrence Food Corp. D/b/a/ (sic) Primo Foods*, 21 BNA OSHC 1467, 1472 (Nos. 04-1734 and 04-1735, 2006). Having submitted its notice to contest the citation at issue on about May 28, 2013, Respondent has shown no interest since then in moving this case forward to trial or addressing the merits of the citation before the Court in an orderly fashion. 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 appear.⁷

The Court is mindful of policy considerations in the law that weigh in favor of deciding cases on their merits. *See Pearson v. Dennison*, 353 F.2d 24 (9th Cir. 1965). However, every indication before the Court is that Respondent has walked away from its contest.

The Court finds Respondent to be in default. “A defaulting party ‘is taken to have conceded the truth of the factual allegations in the complaint as establishing the grounds for liability as to which damages will be calculated.’” *Ortiz-Gonzalez v. Fonovia*, 277 F.3d 59, 62-63 (1st Cir. 2002)(quoting *Franco v. Selective Ins. Co.*, 184 F.3d 4, 9 n.3 (1st Cir. 1999)), *Tower Painting Co.*, 22 BNA OSHC 1368, 1375 (No. 07-0585, 2008). As a result of the default, the factual allegations of the underlying citation relating to liability are taken as true. *Dundee Cement Co. v. Howard Pipe & Concrete Products*, 722 F.2d 1319, 1323 (7th Cir. 1983). When entering a default judgment, factual allegations set forth in the underlying citation are sufficient to establish a defendant’s liability. *Trustees of the Iron Workers District Council of Tennessee Valley and Vicinity Pension Fund et al. v. Charles Howell*, No. 1:07-cv-5, 2008 WL 2645504, * 6 (E.D. Tenn. July 2, 2008); *National Satellite Sports, Inc. v. Mosely Entertainment, Inc.*, No. 01-CV-74510-DT, 2002 WL 1303039, * 3 (E.D. Mich. May 21, 2002).

The Court finds that the underlying citation and Complaint sufficiently state the description of the alleged violations and a reference to the standards allegedly violated.⁸

The Court further finds that the Secretary has: 1) adequately shown the applicability of the cited standards for each of the alleged violations, 2) sufficiently established that the terms of the cited standards were not met by Respondent in each of the alleged violations, and 3)

⁷ The failure of a party to appear at a hearing may result in a decision against that party. *See* 29 C.F.R. § 2200.64.

⁸ § 9(a) of the Act (a citation must “describe with particularity the nature of the violation, including reference to the provision of the Act, standard, rule, regulation, or order alleged to have been violated.”).

adequately proved that Respondent either knew or should have known of the cited conditions. The Court also finds that Respondent's employees had access to the cited conditions. The Citation Items at issue are all affirmed, in their entirety, as alleged by the Secretary.

Penalties

The Secretary has proposed a total penalty of \$4,400 for the Citation Items at issue. In assessing penalties, the Commission must give due consideration to the gravity of the violation and to the employer's size, prior history of violations and good faith. 29 U.S.C. § 666(j); *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2213-14 (No. 87-2059, 1993). These factors are not necessarily accorded equal weight, and gravity is generally the principal factor in penalty assessment. *Trinity Indus., Inc.*, 15 BNA OSHC 1481, 1483 (No. 88-2691, 1992). The gravity of a violation depends upon such matters as the number of employees exposed, duration of exposure, precautions taken against injury, and the likelihood that an injury would result. *J.A. Jones*, 15 BNA OSHC at 2213-14. Based on the record of this case and Respondent's default, the Court finds that the Secretary properly considered the statutory factors in his penalty proposals. The Court finds the total proposed penalty of \$4,400, along with the classification of the violations as alleged by the Secretary, for the Citation Items at issue to be appropriate, and the proposed penalties are assessed.

Findings of Fact and Conclusions of Law

All finding of fact and conclusions of law relevant and necessary to a determination of the contested issues have been found and appear in the decision above. *See* Fed. R. Civ. P. 52(a).

Order

After considering the entire record of this case and Respondent's lack of response to the Motion For Default Judgment, the Court finds that a default judgment against Respondent is

warranted, and IT IS ORDERED THAT Complainant's Motion for Default Judgment is GRANTED and that Respondent be declared in DEFAULT;

IT IS FURTHER ORDERED THAT Respondent's Notice of Contest is DISMISSED with prejudice; and based upon the foregoing findings of fact and conclusions of law;

IT IS FURTHER ORDERED that:

1. Item 1 of Citation 1 is affirmed as a serious violation of 29 C.F.R. § 1926.100(a) and a penalty of \$1,600 is assessed.

2. Item 2 of Citation 1 is affirmed as a serious violation of 29 C.F.R. § 1926.501(b)(13) and a penalty of \$2,800 is assessed.

SO ORDERED.

/s/
The Honorable Dennis L. Phillips
U.S. OSHRC Judge

Date: Nov 04 2013
Washington, D.C.