



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.

OSHRC Docket No. 16-0364

Nortek Powder Coating LLC,

Respondent.

ORDER OF DEFAULT

On January 29, 2016, the Occupational Safety and Health Administration (OSHA) issued a Citation and Notification of Penalty (“citation”) to Respondent for OSHA inspection number 1119346. The citation alleged repeat violations of OSHA’s standards with a proposed total penalty of \$3,400. Respondent’s notice of contest was filed by Borin Keith, President. Respondent’s notice of contest was docketed and the Commission’s Notice of Docketing was sent to the Respondent on March 3, 2016. The Notice of Docketing return postcard¹ was not returned to the Commission.

On April 22, 2016, the Secretary filed the complaint in this matter. Respondent did not file an answer as required by Commission Rule 34(b), 29 C.F.R. § 2200.34(b). On May 25, 2016, the undersigned issued an Order to Show Cause Why Notice of Contest Should Not Be

¹ The postcard is the Respondent’s means to certify that it has posted and served the notice of contest to affected employees as required by Commission Rule 7.

Dismissed (“Order”) to Respondent. The Order directed Respondent to show cause on or before June 8, 2016, as to why it should not be declared in default for not filing an answer to the complaint within the time permitted by the Commission’s Rules of Procedure. Respondent was advised that failure to respond to the Order would result in all of the alleged violations set out in the OSHA citation being affirmed and the proposed penalties being assessed without a hearing.

The Order was sent to Respondent at its record address, through the United States Postal Service (“USPS”) by regular first class mail and by certified mail² with return receipt requested. The mailing by regular first class mail was not returned and is presumed delivered. The certified mailing’s green receipt card was signed by “Thar Y. Chea” on May 31, 2016, and returned to the Commission. It is concluded Respondent received the Order.

On July 14, 2016, my office left a voice message and sent an email to Borin Keith³ to notify him that Respondent’s case would be dismissed if an answer was not filed. Respondent did not respond to the call, email, Order, or otherwise communicate with my office.⁴

Commission Rule 101(a), 29 C.F.R. § 2200.101(a), provides in pertinent part that:

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 . . . after having been afforded an opportunity to show cause why he should not be declared to be in default. . . . Thereafter, the . . . Judge, in [her] discretion, may enter a decision against the defaulting party. . . .

A judge has very broad discretion in imposing sanctions for noncompliance with the judge’s orders or the Commission’s Rules of Procedure. *Sealtite Corp.*, 15 BNA OSHC 1130, 1134 (No. 88-1431, 1991). The Commission has long held that dismissal is too harsh a sanction for failure to comply with certain prehearing orders unless the record shows contumacious conduct by the noncomplying party, prejudice to the opposing party, or a pattern of disregard for

² The certified mailing tracking number was 7007-3020-0003-2450-0559.

³ Borin Keith’s email address was listed on his notice of contest as bkeith@nortekpowder.com

⁴ The Commission expects a business to maintain “orderly procedures for handling important documents.” *Louisiana-Pacific Corp.*, 13 BNA OSHC 2020, 2021 (No. 86-1266, 1989) (citations omitted).

Commission proceedings. *Architectural Glass & Metal Co.*, 19 BNA OSHC 1546, 1547 (No. 00-0389, 2001). I find Respondent's conduct here to be contumacious in that, as set out above, the regular first class and certified mailings were received and Respondent failed to respond to the Order or otherwise communicate with my office.

For these reasons, Respondent is found to be in DEFAULT, its notice of contest is DISMISSED, and the OSHA citation issued to Respondent on January 29, 2016, for inspection Number 1119346 is AFFIRMED in its entirety and penalties ASSESSED.

SO ORDERED.

/s/

Covette Rooney
Chief Judge

Dated: September 1, 2016
Washington, D.C.