



UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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Washington, DC 20036-3419

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SECRETARY OF LABOR
Complainant,
v.
TOWER CONTRACT SERVICES
Respondent.

OSHRC DOCKET
NO. 93-2797

**NOTICE OF DOCKETING
OF ADMINISTRATIVE LAW JUDGE'S DECISION**

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on May 18, 1994. The decision of the Judge will become a final order of the Commission on June 17, 1994 unless a Commission member directs review of the decision on or before that date. **ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW.** Any such petition should be received by the Executive Secretary on or before June 7, 1994 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary
Occupational Safety and Health
Review Commission
1120 20th St. N.W., Suite 980
Washington, D.C. 20036-3419

Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Avenue, N.W.
Washington, D.C. 20210

If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 606-5400.

FOR THE COMMISSION

Ray H. Darling, Jr.
Executive Secretary

Date: May 18, 1994

DOCKET NO. 93-2797

NOTICE IS GIVEN TO THE FOLLOWING:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Ave., N.W.
Washington, D.C. 20210

Catherine Oliver Murphy
Deputy Regional Solicitor
Office of the Solicitor, U.S. DOL
14480 Gateway Building
3535 Market Street
Philadelphia, PA 19104

George Georgeoff, President
Tower Contract Services, Inc.
220 East Broadway
Alton, IL 62002

Michael H. Schoenfeld
Administrative Law Judge
Occupational Safety and Health
Review Commission
One Lafayette Centre
1120 20th St. N.W., Suite 990
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SECRETARY OF LABOR,

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v.

TOWER CONTRACT SERVICES, INC.,

Respondent.

OSHRC Docket No. 93-2797

Appearance:

Anthony G. O'Malley, Esquire
Office of the Solicitor
U.S. Department of Labor
For Complainant

Before: Administrative Law Judge Michael H. Schoenfeld

DECISION AND ORDER

This case arises under the Occupational Safety and Health Act of 1970, 29 U.S.C. § § 651 - 678 (1970) ("the Act").

Having had its worksite inspected by a compliance officer of the Occupational Safety and Health Administration, Tower Contract Services, Inc., was issued one citation alleging ten (10) serious violations of the Act and one citation alleging two (2) other-than-serious violations of the Act. Penalties totalling \$24,800.00 were proposed. Respondent timely contested. After Respondent failed to reply to the Secretary's complaint, it did respond to an order to show cause why the notice of contest should not be dismissed due to the failure to file an answer.

On December 16, 1993, a Notice of Hearing was issued scheduling the hearing for April 11, 1994. With the Notice of Hearing was a Pre-Hearing Planning Order which, among other things, required the parties to consult with one another as to the possibility of settlement and if the matter could not be settled, the parties were directed to submit proposed schedules for discovery and other pre-trial activities. Complainant filed a statement to the effect that Respondent failed to return several telephone calls thus precluding even preliminary settlement negotiations or discussions as to pre-hearing scheduling. The Secretary thus submitted his own recommended time table.

A Scheduling Order was issued on January 7, 1994, reminding the parties of the hearing date and directing that the parties, on or before April 1, 1994, exchange with one another and file with the Judge a pre-hearing statement of anticipated legal and factual issues, lists of witnesses and descriptions of anticipated evidence. Respondent never filed the required pre-hearing statement.

On February 17, 1994, Complainant served on Respondent its Request for Admissions and Complainant's First Set of Interrogatories. On March 21, 1994, not having received any reply to its requests for discovery, the Secretary warned Respondent that if replies were not forthcoming, motions to compel or for sanctions would be filed. Receiving no response to his discovery requests, the Secretary, on March 23, 1994, filed a Motion to Deem Admitted Complainant's Request for Admissions. Respondent did not reply to the motion. On April 5, 1994, the Secretary's motion was granted.

A Notice of Precise Location (address) of Hearing was issued to Respondent on April 4, 1994. Copies were sent by regular mail, certified mail (return receipt requested) and by facsimile transmission (FAX). At approximately 4:20 p.m. on that date, a person identifying himself as Respondent's President, George Georgeoff, telephoned the office of the judge and conversed with the Judge's Legal Assistant. The judge's assistant explained the purpose of the fax and was told by Mr. Georgeoff "I don't know if I can make it." The assistant explained that he had better speak to the judge who was out of the office but would be in the following day. Mr. Georgeoff ended the conversation and never called back.

The hearing opened ten minutes late at 10:10 a.m., Monday, April 11, 1994, as announced initially on December 16, 1993. The Secretary was represented and was prepared to go forward. No affected employees appeared. Respondent did not appear in person or by representative. Respondent did not notify the Commission, the Judge or Secretary's counsel that he would not appear in court. The Secretary moved for default pursuant to Rules 41(a) and 64.¹

The sanction of dismissal is severe and not to be applied lightly. It is, however, appropriate in this matter. Thus, the Secretary's motion is GRANTED.

Throughout the course of these proceedings Respondent has embarked upon and maintained a course of obstruction and non-compliance with the orders of the Judge. It has shown, at virtually every turn, disdain for these proceedings. The Commission proceedings, designed to afford the opportunity for a full and fair hearing to those respondents who contest the Secretary's allegations of violations cannot be conducted where, as here, the only reasonable inference to be drawn from Respondent's behavior is that it does not want to pursue its contest. Moreover, the manner in which it has conducted itself amounts to contumacious conduct and a refusal to proceed which, by itself, warrants dismissal of the notice of contest. Accordingly,

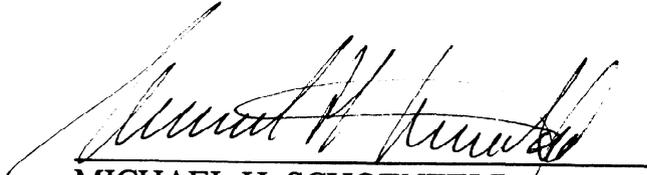
¹ Rule 41(a), 20 C.F.R. § 2200.41(a)(1992), provides, in pertinent part;

(a) *Sanctions.* 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. Thereafter, the Commission or Judge, in their discretion, may enter a decision against the defaulting party

Rule 64(a), 29 C.F.R. § § 2200.64(a) (1992), provides;

(a) *Attendance at hearing.* The failure of a party to appear at a hearing may result in a decision against that party.

IT IS ORDERED that the citations and notification of proposed penalty issued to Respondent in September 16, 1993, are AFFIRMED in their entirety.

A handwritten signature in black ink, appearing to read "Michael H. Schoenfeld", written over a horizontal line.

MICHAEL H. SCHOENFELD
Judge, OSHRC

Dated: **MAY 10 1994**
Washington, D.C.