



United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR,
Complainant,

v.

KIVA HOTEL & CONVENTION CENTER,
and its successors,
Respondent.

OSHRC
Docket Nos. 03-2333
03-2334

DECISION AND ORDER

This proceeding arises under the Occupational Safety and Health Act of 1970 (19 U.S.C. Section 651-678; hereinafter called the "Act.") Pursuant to an inspection of Respondent's worksite on July 31, 2003, two citations were issued to Respondent (Docket Nos. 03-2333 and 03-2334) on November 26, 2003. These matters are consolidated for purposes of decision. A timely notice of contest was filed by Respondent as to both cases and, upon the filing of Complaints by the Secretary, answers to the Complaints were timely filed by an attorney representing Respondent. The answer to both actions generally denies the allegations contained in the Complaints and further states that Respondent filed for Chapter 11 (bankruptcy) proceedings, is "not in good financial shape" and claims "pauper status." The attorney states that she is appearing on behalf of Respondent pro bono.

By order dated March 25, 2004, these matters were set for trial to commence on June 9, 2004. However, based upon representation by Complainant, the hearing was cancelled by order dated May 24,

2004 on the ground that the matter had been settled. The parties were directed to submit the settlement documents no later than June 23, 2004. That period was extended until July 9, 2004. No settlement agreement was filed by the parties.

On September 28, 2004, a telephone conference was held between the undersigned and the parties at which time it was revealed that Respondent is no longer in business and the principal owner cannot be located by Respondent's attorney. The attorney stated that she believed Respondent's owner had returned to India. She further stated that Respondent's owner was a friend and she filed answers on his behalf as a favor. Although Respondent's attorney has not filed a motion to withdraw from this matter, she stated that she would no longer represent Respondent because she was unable to contact her client.

By order dated September 30, 2004, Complainant was directed to file an appropriate motion to conclude this matter. On October 20, 2004, Complainant filed a motion for summary judgment in both cases. The motion for judgment in Complainant's favor is based upon Respondent's failure to file responses to requests for admissions served upon Respondent's representative. Those requests ask Respondent to admit each element of each alleged violation as well as the jurisdictional basis for the action. No responses to the request for admissions were filed by Respondent. Thus, pursuant to Rule 36, Fed. R. Civ. P. and Commission Rule 54, the requests are deemed admitted by Respondent.

As of this date, no response to Complainant's motion for summary judgment has been received by the undersigned. Thus, it is clear that Respondent and its representative have abandoned any and all defenses to the citations. In view of Respondent's refusal to participate in the litigation of these matters, the notice of contest dated December 17, 2003 as to both citations is vacated and the citations and proposed penalties are AFFIRMED.

ORDER

(a) As to Docket No. 03-2333:

1. Serious citation No. 1, items 1 through 5 is affirmed.
2. The proposed penalty in the total amount of \$6,000 is assessed for the violations.

(b) As to Docket No. 03-2334:

1. Serious citation 1, items 1 through 5 is AFFIRMED.
2. Other citation 2, item 1 is AFFIRMED.
3. The proposed penalty in the total amount of \$7,500 is assessed for the violations.

//_____
Robert A. Yetman
Judge, OSHRC

Dated: January 24, 2005