



United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1924 Building - Room 2R90, 100 Alabama Street, S.W.
Atlanta, Georgia 30303-3104

Secretary of Labor,
Complainant

v.

Masis Multi Services, Inc.,
Respondent.

OSHRC Docket No. **17-0980**

DECISION AND ORDER OF DEFAULT

This matter is before the Occupational Safety and Health Review Commission on a timely Notice of Contest filed by Respondent, Masis Multi Services, Inc. (Masis), May 23, 2017, relating to the issuance of a Citation and Notification of Penalty on March 27, 2017, from Inspection No. 1216944. For the reasons that follow, Masis is declared in **DEFAULT**, its Notice of Contest is **DISMISSED**, and the citation issued to Respondent on March 27, 2017, pursuant to Inspection No. 1216944 is **AFFIRMED** in its entirety and penalties **ASSESSED**.

Background

This proceeding is before the Occupational Safety and Health Review Commission pursuant to § 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 (the Act). On March 9, 2017, a Compliance Safety and Health Officer from the Fort Lauderdale Area Office of the Occupational Safety and Health Administration (OSHA) conducted Inspection No. 1216944 at a Masis worksite at 4854 N.W. 55th Place, Tamarac, Florida. Following the inspection, the Secretary issued a Citation and Notification of Penalty on March 27, 2017, alleging a serious violation of 29 C.F.R. § 1926.453(b)(2)(v). The Secretary proposed a total penalty of \$3,622.00 for the Citation.

The Secretary mailed the Citation to Masis at the company's address at 1010 10th Avenue North #1, Lake Worth, Florida, 33460. Upon receipt of the Citation, Masis filed a timely Notice of Contest. The Fort Lauderdale OSHA Office received the Notice of Contest May 23, 2017. The Commission docketed the matter June 5, 2017. Chief Judge Covette Rooney designated the matter for the Commission's Simplified Proceedings and assigned it to me by Order of June 16, 2017.

On June 27, 2017, I issued a Scheduling Order. Commission Rule 207 requires the judge to hold a prehearing conference in matters designated for Simplified Proceedings. The June 27, 2017, Scheduling Order set the prehearing conference, to be conducted telephonically, for August 28, 2017, at 11:00 a.m. (E.S.T.), and provided the information necessary to call into the Commission's conference line. Counsel for the Secretary appeared at the prehearing conference. No representative for Masis appeared.

On September 8, 2017, this office received a Motion to Continue Hearing from the Secretary. In it, the Secretary represented, despite counsel's best efforts, she had no contact with a Masis representative. On September 15, 2017, I granted the Secretary's Motion and rescheduled the hearing to commence on November 14, 2017. I further ordered a second prehearing telephone conference to be held on November 3, 2017, at 11:00 a.m. (E.S.T.). This order was sent to the address at which Masis received the Citation and on its Notice of Contest. It was not returned to this office as undeliverable. Despite being on notice of the scheduled prehearing telephone conference, Masis again failed to appear.

On November 3, 2017, I issued an Order to Show Cause to Masis. That order was sent via certified mail to the address on Masis's Notice of Contest and listed with the Florida Secretary of State for the company. On December 13, 2017, this order was returned to this office indicating Masis had failed to claim it.

To ensure Masis was in receipt of this order and was given the opportunity to comply with Commission rules and orders, I issued a Second Order to Show Cause December 28, 2017. This Second Order to Show Cause was sent via first class and certified mail. Masis again failed to claim the certified mail. The order sent via first class mail was not returned as undeliverable. As of today's date, this office has not received any response from Masis.

Discussion

Commission Rule 64(a) provides: "The failure of a party to appear at a hearing may result in a decision against the party." Under Commission Rule 101(a), a judge may declare a party in default for failure to "proceed as provided by [Commission] rules or as required by the Commission or Judge," after having been afforded an opportunity to show cause why he should not be declared in default. The Commission "follows the policy in law that favors deciding cases on their merits." *DHL Express, Inc.*, 21 BNA OSCH 2179, 2180 (No. 07-0478, 2007).

However, the Commission has limited resources and a "strong interest in preserving the integrity

of its orders as well as deterring future misconduct.” *Carson Concrete Corp. and Carco Constr. Corp.*, 21 BNA OSHC 1206 (No. 03-2229, 2005); *Trinity Indus., Inc.*, 15 BNA OSHC 1579, 1583 (No. 88-1545, 1991) (consolidated) (citing *Pittsburgh Forgings Co.*, 10 BNA OSHC 1512, 1514 (No. 78-1361, 1982)). Thus, Rule 101(a) permits the harsh sanction of dismissal of a Notice of Contest where a party has displayed a “pattern of disregard” of Commission proceedings. *Philadelphia Constr. Equip., Inc.*, 16 BNA SOHC 1128, 1131 (No. 92-899, 1993); *Architectural Glass & Metal Co.*, 19 BNA OSHC 1546, 1547 (No. 00-0389, 2001).

Masis’s conduct displays a pattern of disregard of Commission proceedings. All orders throughout this proceeding were sent to Masis at the address provided by Masis and listed with the Florida Secretary of State for it. Orders sent from this office via first class mail, including both Scheduling Orders and the Second Order to Show Cause, were not returned as undeliverable. In *Crude Oil Corp. v. Commissioner*, 161 F.2d 809 (10th Cir.1947), the Court stated that “[w]hen mail matter is properly addressed and deposited in the United States mail, with postage duly prepaid thereon, there is a rebuttable presumption of fact that it was received by the addressee in the ordinary course of mail.” *Id.* at 810. *See also Arkansas Motor Coaches, Ltd., Inc. v. C.I.R.*, 198 F.2d 189, 191 (8th Cir. 1952); *Central Paper Co. v. C.I.R.*, 199 F. 902, 904 (6th Cir. 1952); *Legille v. Dann*, 544 F.2d 1 (D.C. Cir. 1976). Having received the notices regarding its obligations to appear for a prehearing conference, Masis has failed or refused to do so. Masis received notice of the prehearing date, time, and call-in information, but chose not to appear. When this office and the counsel for the Secretary repeatedly attempted to reach out to Masis to afford it the opportunity to show cause why it failed to appear, Masis failed to respond.¹

Masis has failed to take advantage of the opportunity to advise the Court or opposing counsel it has not abandoned its case before the Commission. Every indication is that Masis has walked away from its contest. Under these circumstances, I see no worthwhile purpose in allowing this case to proceed to a hearing when there is no basis to believe that Masis will fulfill its pre-trial obligations or appear at the trial. *See Twin Pines Constr. Inc./Teles Constr.*, 24 BNA OSHC 1500, 1504 (No. 12-1328, 2012) (No worthwhile purpose in proceeding to a hearing where a party has abandoned the case).

¹ Also assigned to me is Docket No. 17-1073, in which Masis filed an untimely notice of contest to a citation issued April 4, 2017. Masis has also failed to respond all pleadings in that matter, including an Order to Show Cause.

By its inaction, Masis has displayed disregard for Commission proceedings. Its conduct has been prejudicial to the administration of justice and to the Secretary's enforcement responsibility under the Act, and cannot be permitted to continue. Dismissal of Masis's Notice of Contest is necessary and appropriate to remedy its continuing prejudicial conduct.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, it is **ORDERED** that Respondent is declared in **DEFAULT** and its Notice of Contest is **DISMISSED**. The citation issued to Respondent on March 27, 2017, pursuant to Inspection No. 1216944 is **AFFIRMED** in its entirety and penalties **ASSESSED**.

SO ORDERED.

Date: February 7, 2018

/s/ _____

Judge Heather A. Joys
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