

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

Secretary of Labor,)	
)	
Complainant,)	
)	
v.)	OSHRC Docket No. 15-1619
)	
Accurate Elevator Fire Door Corp.,)	
)	
Respondent.)	
)	

***DECISION AND ORDER FINDING RESPONDENT IN DEFAULT
AND GRANTING THE SECRETARY’S MOTION FOR SANCTIONS TO DISMISS
COMPLAINANT’S (SIC) NOTICE OF CONTEST***

Background

This proceeding is before the Occupational Safety and Health Review Commission (the Commission) pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et. seq.* (the Act). The Occupational Safety and Health Administration (OSHA) inspected Respondent’s worksite located at 321 West 78th Street, New York City, New York 10024 from December 12, 2013 through June 3, 2014. On June 6, 2014, OSHA issued a two item serious citation to Respondent and proposed penalties in the amount of \$14,000. The case involves a fatality involving Margo Hernandez.

A letter signed by Respondent’s Owner, Michael DePompeis, dated June 11, 2014, allegedly contested the citation.¹

On September 29, 2015, the Commission docketed the matter as Docket No. 15-1619.

After Chief Judge Rooney granted three extensions to the Secretary to file his complaint, the Secretary filed his complaint on February 8, 2016.² On April 7, 2016, the Court ordered

¹ This letter was received at the Commission sometime between September 21 and September 29, 2015.

² The Secretary did not include any motion to dismiss based upon a late filing of a notice of contest by Respondent in his Complaint. The Complaint appears to include several date errors; e.g. date and time violations occurred at p. 2, date Respondent sent a notice of contest [reported June 11, “2016”] at p. 3.

Respondent to show cause why its notice of contest should not be dismissed for failure to file its answer. On about April 8, 2016, Respondent retained Matthew Persanis Esq., Elefante & Persanis, LLP, Eastchester, New York, to represent it in this matter. On May 6, 2016, Mr. DePompeis filed Respondent's response to the show cause order. Respondent stated that it "did not feel that the citations issued to us are just."³ Respondent failed to file a separate declaration listing Respondent's parents, subsidiaries, and affiliates, or stating that it has none as required under Commission Rule 35.⁴

On August 1, 2016, Mr. Persanis filed his Motion by Respondent's Attorney to Withdraw as Attorney of Record and to Adjourn Conference Call (Motion to Withdraw) because Respondent has not responded to telephone calls and letters from counsel since April 28, 2016 and not paid counsel's attorneys' fees since May 1, 2016.⁵

On August 2, 2016, the Court granted Respondent's counsel's Motion to Withdraw. The Court's order also scheduled a pre-hearing scheduling conference with the parties to occur on August 24, 2016.⁶ The pre-hearing scheduling conference call was held on August 24, 2016.⁷

On August 25, 2016, the Court issued a Notice of Hearing and Scheduling Order (Scheduling Order) scheduling the hearing for January 19, 2017.⁸ The Scheduling Order required

³ The Court has treated this response as Respondent's answer to the Complaint and a general denial of the alleged violations.

⁴ Commission Rule 35(a) requires an answer be accompanied by a separate declaration listing all Respondent's parents, subsidiaries, and affiliates, or stating that it has none. *See* 29 C.F.R. § 2200.35(a).

⁵ Mr. Persanis informed Respondent by letter dated July 29, 2016 that he intended to file a motion to withdraw as counsel in this matter.

⁶ The Court's Order stated that "[f]ailure to comply with all parts of this order may result in sanctions, including the dismissal of claim(s), notice of contest, or defense(s), as well as the assessment of costs and expenses incurred by the Commission and the other parties."

⁷ Respondent failed to comply with the Court's August 2, 2016 order and did not participate in the pre-hearing scheduling conference call.

⁸ The Court's Scheduling Order advised Respondent that failure to comply with Court orders may result in sanctions, including the dismissal of Respondent's notice of contest and/or defense(s), as well as the assessment of costs and expenses incurred by the Commission and the other parties.

Respondent to submit a Pre-hearing Statement by December 27, 2016 containing a list of exhibits to be offered into evidence with notations of all objections thereto, a list of all lay witnesses who may be called at hearing, including a brief summary of testimony to be elicited, a concise statement of those facts which are admitted and will require no proof at the hearing, a concise statement of applicable principles of law on which there is agreement, and a concise statement of those issues of fact which remain to be litigated. Respondent was also required to set forth the factual basis of each affirmative defense as it relates to each specific item in its Pre-Hearing Statement. Respondent was further required to provide the Secretary with its trial exhibits by December 20, 2016.

On August 31, 2016, the Secretary served Respondent with its First Set of Interrogatories and Request for Production of Documents. The Secretary's discovery responses were due on or about October 5, 2016.

On October 28, 2016, pursuant to section 2200.52(f) of the Commission's Rules of Procedure, Complainant filed his Motion to Compel asking the Court to issue an order compelling Respondent to produce full and complete responses to the Secretary's First Set of Interrogatories and First Request for Production of Documents (Motion to Compel Discovery). Respondent did not file any response to the Motion to Compel Discovery.

On November 18, 2016, the Court granted the Secretary's Motion to Compel Discovery and directed Respondent to serve upon the Secretary full and complete answers to the Secretary's First Set of Interrogatories and Request for a Production of Documents on or before November 29, 2016.

On November 22, 2016, the Court issued an Order to Show Cause Why Respondent Should not be Held in Default for Failure to Comply with Commission Rule 35 (Order to Show Cause). The Order to Show Cause directed Respondent to show cause on or before January 6,

2017, as to why it should not be declared in default for not filing its Rule 35 declaration within the time permitted by the Commission's Rules of Procedure. The order further stated:

Failure to timely respond to this order may result in Respondent being held in default, the dismissal of Respondent's notice(s) of contest of the citations at issue, Respondent being unable to raise any affirmative defenses in these matters, and/or the assessment of costs incurred by the Commission and other parties relating to these cases.

The Order to Show Cause was served upon Respondent by first-class mail, electronically and certified mail with return receipt requested in accordance with 29 C.F.R. § 2200.101(d).⁹

Respondent failed to comply with the Court's Order compelling discovery response.

On November 30, 2016, the Secretary filed his Motion for Sanctions to Dismiss Complainant's (sic) Notice of Contest (Motion for Default and Dismissal of Notice of Contest). The Secretary now seeks a default decision against Respondent and the dismissal of its Notice of Contest because Respondent has abandoned its case.

On December 19, 2016, the Court conducted its final pre-hearing conference. During the conference, the Secretary's counsel advised the Court that Respondent had neither provided any trial exhibits to the Secretary nor cooperated in the preparation of a joint pre-hearing statement. Later that day, the Secretary timely filed his Pre-Hearing Statement.¹⁰

Respondent has failed to file its Commission Rule 35 Declaration. It has also failed to submit a response to the Court's Order to Show Cause.

The Cited Standards

Citation 1, Item 1, alleges a serious violation of 29 C.F.R. § 1926.21(b)(2), stating that:

⁹ The U.S. Postal Service's Domestic Return Receipt shows that the Court's Order to Show Cause was received by Respondent on November 28, 2016.

¹⁰ The Secretary's counsel stated in its Prehearing Statement that she had "made numerous attempts to confer with Respondent's representative, Michael DePompeis, in order to file a Joint Prehearing Statement in accordance with Your Honor's Notice of Hearing Date and Scheduling Order dated August 25, 2016. However, Mr. DePompeis has failed to return any of the Secretary's overtures either by telephone and/or email. Therefore, the Secretary had no choice but to submit the following Prehearing Statement without any input from Respondent."

The employer did not instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control or eliminate any hazards or other exposure to illness or injury.

On or around December 11, 2013

East Courtyard area:

The employees were inadequately instructed in proper precautions when other contractors were working overhead.

The proposed penalty was \$7,000.00.

Citation 1, Item 2, alleges a serious violation of 29 C.F.R. § 1926.501(c), stating that:

“Protection from falling objects.” When an employee is exposed to falling objects, the employer did not have each employee wear a hard hat and did not implement one of the following measures: Erect toeboards, screens, or guardrail systems to prevent objects from falling from higher levels; or erect a canopy structure and keep potential fall objects far enough from the edge of the higher level so that those objects would not go over the edge if they were accidentally displaced; or, barricade area to which objects could fall, prohibit employees from entering the barricades area, and keep objects that may fall enough away from the edge of a higher level so that those objects would not go over the edge if they were accidentally displaced.

On or around December 11, 2013

East Courtyard area:

There was no protection when an elevator technician (working for Accurate Elevator) was traveling under two swing stage scaffolding while brick façade work was being done. The technician was struck on the head by a section of brick and later died.

The proposed penalty was \$7,000.00.

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 employees knew, or could have known with the exercise of reasonable diligence, of the cited condition. *Astra Pharma. Prods.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981) *aff'd in relevant part*, 681 F.2d 69 (1st Cir. 1982).

Complainant's Motion for Default and Dismissal of Notice of Contest

Commission judges have the discretion to impose sanctions on parties who violate their orders. *See NL Indus. Inc.* 11 BNA OSHC 2156, 2168 (No. 78-5204, 1984). Fed. R. Civ. P. Rule 16(f) permits the Court on its own initiative to order just sanctions if a party or party's attorney fails to obey a scheduling or pretrial order.¹¹ 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 Co.*, 8 BNA OSHC 1218, 1221 (No. 78-5303, 1980). Prejudice to the opposing party,¹² whether there is a showing of willful default by a party, and contumacious conduct by the 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.

¹¹ Procedure before the 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 Enters.* 4 BNA OSHC 1663, 1665 n.2 (No. 4533, 1976).

¹² A party is prejudiced if the failure to make required court ordered disclosures impairs the party's ability to adequately prepare for trial, including understanding the factual merits of the opponent's defense(s). *Avionic Co. v. Gen. Dynamics Corp.*, 957 F.2d 555 (8th Cir. 1992). In this instance, the Secretary has been clearly prejudiced by Respondent's failure to respond to the Secretary's discovery requests and file a pre-hearing statement. *See* 29 C.F.R. § 2200.52(a)(2).

Ford Dev. Corp., 15 BNA OSHC 2003, 2005 (No. 90-1505, 1992); *Circle T Drilling Co. Inc.*, 8 BNA OSHC 1681, 1682 (No. 79-2667, 1980).

In this instance, there is a clear showing of willful default by Respondent. Respondent has not shown any interest in moving the case at hand forward to trial since filing its general denial answer on May 6, 2016. Respondent failed to: 1) file any response to the Secretary's Motion to Compel Discovery, 2) comply with the Court's Order compelling discovery responses, 3) file its Commission Rule 35 declaration when it filed its answer, 4) respond to the Secretary's Motion for Default and Dismissal of Notice of Contest, 5) comply with the Court's Scheduling Order by: a) not providing its trial exhibits to the Secretary by December 20, 2016 and b) cooperating in the preparation of a Joint Prehearing Statement or alternatively submitting its own pre-hearing statement, 6) failed to participate in the pre-hearing scheduling conference or the final pre-hearing conference, and 7) failed to respond to the Court's Order to Show Cause by January 6, 2017. Respondent has not provided any excuse or justification for these failings. By its action and inaction Respondent has made it clear that it does not wish to participate in these proceedings. The Court finds that Respondent has abandoned this case. Collectively, the Court finds these failures to be contumacious conduct by Respondent.

Commission Rule 101 requires parties to obey Commission rules and Judge's orders.

See 29 C.F.R. § 2200.101. Rule 101(a), provides:

(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 either on the initiative of the Commission or Judge, after having been afforded an opportunity to show cause why he should not be declared to be in default, or on the motion of a party. Thereafter, the Commission or Judge, in their discretion, may enter a decision against the defaulting party or strike any pleading or document not filed in accordance with these rules.

29 C.F.R. § 2200.101(a).

Here, the Court provided explicit warning to Respondent in its orders that Respondent's failure to timely respond to the Court's Orders may result in Respondent being held in default and the dismissal of its Notice of Contest of the citation at issue. Respondent has failed to proceed as required by Commission rules and the Court's orders, including the Court's Order to Show Cause. Respondent has not complied with Commission Rule 101 and sanctions, including the dismissal of its Notice of Contest, are justified. The Court recognizes that a party has a strong interest in adjudicating its case on the merits. *See Pearson v. Dennison*, 353 F.2d 24 (9th Cir. 1965). 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)). The Court finds that it has adequately conveyed due notice to Respondent of its procedural rights and provided sufficient warning that its failure to comply with Court orders may result in the dismissal of its notice of contest and it being held in default. Respondent has failed to take advantage of any opportunity to advise the court that it has not abandoned its case before the Commission.

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 Prods.*, 722 F.2d 1319, 1323 (7th Cir. 1983). When

entering a default judgment, factual allegations set forth in the complaint and underlying citations are sufficient to establish a defendant's liability. *Twin Pines Constr., Inc./Teles Constr.*, 2012 WL 6760255, at *5 (No. 12-1328, 2012); *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, at * 6 (E.D. Tenn. July 2, 2008); *Nat'l Satellite Sports, Inc. v. Mosely Entm't, Inc.*, No. 01-CV-74510-DT, 2002 WL 1303039, at * 3 (E.D. Mich. May 21, 2002).

The Court finds that the underlying complaint and citation sufficiently state the description of the alleged violations and a reference to the standards allegedly violated.¹³ The Court further finds that the Secretary has adequately shown the applicability of the cited standards for each of the alleged violations. The Court also finds that the Secretary has sufficiently established that the terms of the cited standards were not met by Respondent in each of the alleged violations. The Court also finds that Respondent's employees had access to the cited conditions. Lastly, the Secretary has adequately proved that Respondent either knew or should have known of the cited conditions. Both of the Citation Items at issue in this case are affirmed in their entirety as alleged by the Secretary.

Penalties

The Secretary has proposed a total penalty of \$14,000 for both of 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); *see also 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 at 1483. The gravity of a

¹³ Section 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.”).

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 proposal. The Court finds the total proposed penalty of \$14,000, along with the classification of the violations as alleged by the Secretary for both of the Citation Items at issue to be appropriate, and the penalties as proposed by the Secretary are assessed by the Court.

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, the Court's Order to Show Cause and Respondent's lack of response thereto, and Complainant's Motion for Default and Dismissal of Notice of Contest and Respondent's lack of response thereto, IT IS ORDERED that Complainant's Motion for Default and Dismissal of Notice of Contest is GRANTED, Respondent is hereby declared in DEFAULT and a default judgment against Respondent is hereby rendered.

IT IS FURTHER ORDERED that Respondent's Notice of Contest is DISMISSED with prejudice;¹⁴ 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. § 1926.21(b)(2) and a penalty of \$7,000 is assessed; and

¹⁴ The scheduled hearing for January 19, 2017 at New York, New York is cancelled.

2. Item 2 of Citation 1 is affirmed as a serious violation of 29 C.F.R. § 1926.501(c) and a penalty of \$7,000 is assessed.

SO ORDERED.

/s/

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

Date: January 17, 2017
Washington, D.C.