

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

SECRETARY OF LABOR,
Complainant,

v.

BML CONSTRUCTION

Respondent.

OSHRC DOCKET NO. 16-1231

Leigh Burleson, Esq., Office of the Solicitor, U.S. Department of Labor, Kansas City, Missouri
For Complainant

Brent Lawrenz, Hayseville, Kansas
For Respondent

Before: Administrative Law Judge Patrick B. Augustine

DECISION AND ORDER OF DISMISSAL OF NOTICE OF CONTEST

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”) conducted an inspection of a BML Construction (“Respondent”) worksite in Kansas City, Missouri on May 12, 2016. As a result of the inspection, OSHA issued a Citation and Notification of Penalty (“Citation”) to Respondent alleging two serious violations of the Act with a penalty of \$4,320.00. The Citation was issued on May 23, 2016. Respondent filed a *Notice of Contest* with Complainant. This case was designated to proceed under simplified proceedings of the Commission. *See 29 C.F.R. § 2200.203.* Therefore, no Complaint or Answer were required.

Jurisdiction

The Commission has jurisdiction over this action pursuant to Section 10(c) of the Act due to the filing of a *Notice of Contest* by Respondent. 29 USC § 659(c). Respondent is an employer

engaged in a business affecting interstate commerce within the meaning of Section 3(5) of the Act, 29 U.S.C. § 652(5). See *Slingluff v. OSHRC*, 425 F.3d 861 (10th Cir. 2005). The Commission has stated “[t]here is an interstate market in construction materials and services and therefore construction work affects interstate commerce.” *Id.*, citing *NLRB v. Int’l Union of Operating Engineers, Local 571*, 317 F.2d 638, 643 n. 5 (8th Cir. 1963) (judicial notice taken that construction industry affects interstate commerce). Because Respondent is engaged in construction work, the undersigned finds it is engaged in a business affecting interstate commerce.

Procedural History

On September 9, 2016 the Court issued a *Pretrial Conference Order* directing the parties to appear on a conference call on October 12, 2016. The *Pretrial Conference Order* was not returned as “undeliverable” on either party by the United States Postal Service. Complainant appeared through counsel. Respondent did not appear.

On October 31, 2016, Complainant filed *Complainant’s Motion for Sanctions Against Respondent for Failure to Comply with Commission Rules* (“*Motion for Sanctions*”). As grounds for the *Motion for Sanctions*, Complainant set forth multiple instances of Respondent’s failure to comply. These include:

1. On September 12, 2016, Complainant sent Respondent the unprivileged portion of the investigation file along with a letter requesting Respondent call counsel to discuss the issues set forth in the *Pretrial Conference Order*. Respondent did not make contact with the Solicitor.
2. On October 6, 2016, Complainant sent Respondent a second letter asking Respondent to contact the Solicitor to discuss issues set forth in the *Pretrial Conference Order*. Respondent did not make contact with the Solicitor.

3. Neither communication was returned “undeliverable” by the United States Postal Service.
4. Finally, Complainant represents that Respondent failed to attend the scheduled conference call with the Court set forth in the *Pretrial Conference Order*.

See generally Secretary’s Motion for Sanctions.

In response to Complainant’s *Motion for Sanctions*, the Court issued an *Order to Show Cause*, directing Respondent to “SHOW CAUSE WITHIN ELEVEN (11) DAYS why the Court should not issue judgment against Respondent, affirming the proposed violations in this case for: (1) failure to attend a Pretrial Conference set forth in the *Pretrial Conference Order* dated September 9, 2016; and (2) failure to respond to respond to the *Motion for Sanctions*. To date, Respondent has failed to file a response to the Court’s *Order to Show Cause*.¹

Discussion

Commission Rule 101(a) provides:

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

As noted above, Respondent has been provided an opportunity to show cause why it should not be held in default and failed to respond to the Court’s request.

The Court has a duty to “conduct a fair and impartial hearing, to assure that the facts are fully elicited, to adjudicate all issues, and avoid delay.” 29 C.F.R. § 2200.67. In order to carry out that duty, Commission Rule 67(m) authorizes the Court to “[t]ake any other action necessary . . . and authorized by the published rules and regulations of the Commission.” According to the Commission, “[D]ismissal is too harsh a sanction for failure to comply with certain pre-hearing

1. The Court’s *Order to Show Cause* has not been returned as “Unclaimed” by the United States Post Service by the date of this Order.

orders unless the record shows contumacious conduct by the noncomplying party, prejudice to the opposing party, or a pattern of disregard for Commission proceedings.” *Amsco, Inc.*, 19 BNA OSHC 2189, 2191 (No. 02-0220, 2003). *See also Sealtite Corporation*, 15 BNA OSHC 1130 (No. 88-1431, 1991) (contumacious conduct established where party engaged in a “consistent pattern” of failure to respond to judge’s orders).

As noted, none of the communications sent to Respondent have been returned as ‘undeliverable.’ by the United States Postal Service.² All communications were sent to the address provided Respondent in its *Notice of Contest*. Under Commission Rule 6, it is Respondent’s duty to advise the Court of any change of address. *See 29 C.F.R.* § 2200.6.³ Respondent has not filed a change of address with the Court.

The Court finds that Respondent’s repeated failures to engage in the litigation process illustrate a pattern of disregard for the Commission’s proceedings. Respondent has been given multiple opportunities and plenty of time to comply with Commission Rules of Procedure and this Court’s *Orders*, and the Court has yet to receive any communication or contact from Respondent. Based on the representations of Complainant,⁴ the Court finds that the delays in this case are wholly attributable to Respondent, including Respondent’s failure to respond to or collect mail that was sent to the address that he specifically provided on multiple occasions. *See*

² 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 mails, 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).

³ Rule 6 of the Commission’s Rules of Procedure, 29 C.F.R. § 2200.6, provides that:

Record Address: Every pleading or document filed by any party or intervenor shall contain the name, current address and telephone number of his representative or, if he has no representative, his own name, current address and telephone number. Any change in such information shall be communicated promptly in writing to the Judge, or the Executive Secretary if no Judge has been assigned, and to all other parties and intervenors. *A party or intervenor who fails to furnish such information shall be deemed to have waived his right to notice and service under these rules.*

29 C.F.R. § 2200.6 (emphasis added).

4. Because Respondent has failed to submit a response to either the Court’s *Orders* or Complainant’s *Motion*, the Court accepts Complainant’s representations of the facts as true.

supra note 2. In that regard, the Court finds that Respondent's pattern of disregard for the Commission's proceedings constitutes contumacious conduct warranting the sanction of dismissal.

In addition, the Court finds that the Commission has conveyed due notice to Respondent of its procedural rights and provided ample warning that its failure to comply with Court orders may result in the dismissal of its *Notice of Contest*. At every instance, Respondent has failed to take advantage of the opportunity to advise the Court that it has not abandoned its case before the Commission. Every indication before the Court is that Respondent has walked away from its contest. Under these circumstances, the Court sees no worthwhile purpose in allowing this case to proceed to a hearing when there is no basis to believe that Respondent will fulfill its pre-trial obligations or actually appear at the trial. *11 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). The Court finds that Respondent relinquished its case with the intent to abandon. 1 C.J.S. Abandonment § 13 (2013).

Accordingly, with respect to the above-referenced docket, Respondent's *Notice of Contest* is hereby VACATED and the violations and penalties alleged in the Citation and Notification of Penalty are AFFIRMED.

ORDER

Based on the foregoing, it is ORDERED that:

1. Citation 1, Item 1, and the corresponding penalty of \$2,160.00 are hereby AFFIRMED as final orders of the Commission pursuant to Section 10(a) of the Act.
2. Citation 1, Item 2, and the corresponding penalty of \$2,160.00 are hereby AFFIRMED as final orders of the Commission pursuant to Section 10(a) of the Act.

SO ORDERED.

/s Patrick B. Augustine

Patrick B. Augustine
Judge, OSHRC

Date: December 23, 2016
Denver, Colorado