UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. K & E BUILDERS, LLC, Respondent.	OSHRC DOCKET NO. 18-0522

Attorneys and Parties:

Navi Jani, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, TX
For Complainant

Michael Almager, *Pro Se*, Albuquerque, NM
For Respondent

JUDGE: Patrick B. Augustine, United States Administrative Law Judge

DECISION AND ORDER OF DISMISSAL PURSUANT TO 29 C.F.R. § 2200.101

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 K & E Builders, LLC ("Respondent") worksite at 120 111th, Lubbock, Texas on September 14, 2017. As a result of the inspection, OSHA issued a Citation and Notification of Penalty ("Citation") to Respondent alleging one serious violation of the Act with a proposed penalty of $3,880.00. The Citation was issued on March 1, 2018. Respondent filed a *Notice of Contest.* This case was designated to proceed under simplified proceedings of the Commission. *See 29 C.F.R.* § 2200.203. Therefore, no Complaint or Answer was 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 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). Even a small employer, like Respondent, whose activities and purchases are purely local, when aggregated with other engaged in similar activities, has a substantial effect on interstate commerce. *Slingluff*, 425 F.3d at 867, *Clarence M. Jones*, 11 BNA OSHC 1529, 1531 (No. 77-3676, 1983)("There is an interstate market in construction materials and services and therefore construction works affects interstate commerce.") Because Respondent is engaged in construction work, the undersigned finds it is engaged in a business affecting interstate commerce.

Respondent has presented no contrary proof to dispute that it is an employer except to state in its *Notice of Contest* that "the guys you found working were subcontracted." While Complainant has the burden of proving its case by substantial evidence, what constitutes substantial evidence varies with the circumstances. The "evidence a reasonable mind might accept as adequate to support a conclusion" is surely less in a case like this where it stands entirely unrebutted in the record by a party having full possession of all the facts, than in a case where there is contrary evidence to detract from its weight. *See, e.g., Noranda Aluminum, Inc. v. OSHRC*, 593 F.2d 811, 814 & n.5 (8th Cir. 1979) (decision to leave Secretary's case unrebutted "a legitimate but always dangerous defense tactic in litigation"); *Stephenson Enterprises, Inc. v. Marshall*, 578 F.2d 1021, 1026 (5th Cir. 1978). It is well established that when one party has it peculiarly within its power to produce witnesses whose testimony would elucidate the situation and fails to do so, it gives rise

to the presumption that the testimony would be unfavorable to that party. *Graves v. United States*, 150 U.S. 118, 121 (1893). The Court finds Respondent was an employer under the Act.

Controlling Case Law

Although the Commission recognizes the difficulties a *pro se* litigant may face when participating in the Commission's proceedings, the Commission still requires the *pro s*e litigant to follow the rules and exercise reasonable diligence in the legal proceedings in which it is taking part. *Sealtite Corp*., 15 BNA OSHC 1130 (No. 88-1431, 1991); *Wentzell d/b/a N.E.E.T. Builders*, 16 BNA OSHC 1475, 1476 (No. 92-2696, 1993) (stating that "[a] pro se employer is required to exercise reasonable diligence… [they must] follow the rules and file responses to a judge's orders, or suffer the consequences…").

Not having counsel, does not obviate a party's obligation to engage in the adjudicatory process. All litigants, including those declining to hire counsel, must obey orders and to permit and respond to discovery as required by the Commission Rules. *See JGB LLC*, 21 BNA OSHC 1402, 1403 (No. 04-2153, 2006) (vacating direction for review when unrepresented party failed to respond to a briefing notice); *Swimmer v. IRS*, 811 F.2d 1343, 1345 (9th Cir. 1987) ("Ignorance of court rules does not constitute excusable neglect, even if the litigant appears pro se"). An unrepresented employer must "exercise reasonable diligence in the legal proceedings" and "must follow the rules and file responses to a judge's orders, or suffer the consequences, which can include dismissal of the notice of contest." *Wentzel d/b/a N.E.E.T. Builders*, 16 BNA OSHC 1475, 1476 (No. 92-2696, 1993) (citations omitted).

Procedural History

On May 14, 2018, the Court issued a *Pretrial Conference Order* directing the parties to appear on a conference call on July 2, 2018. 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 August 8, 2018, Complainant filed *Complainant's Amended Motion to Compel Responses to Discovery* ("*Motion to Compel*").[1] As grounds for the *Motion to Compel*, Complainant set forth multiple instances of Respondent's failure to comply. These include:

1. On July 5, 2018, Complainant served his First Set of Interrogatories on Respondent, via U. S. Mail.
2. Discovery responses were due on August 8, 2018.
3. Respondent failed to respond to the First Set of Interrogatories nor was there any other communication with Respondent.

See generally Secretary's Motion to Compel.

Respondent failed to respond to the *Motion to Compel*. In response to the *Motion to Compel*, the Court issued an Order dated August 9, 2018 directing Respondent to respond to the First Set of Interrogatories by August 23, 2018.

On August 29, 2018, Complainant filed *Complainant's Motion for Default* ("Default Motion"). As grounds for the *Default Motion*, Complainant set forth multiple instances of Respondent's default. These include:

1. Respondent's failure to attend the July 2, 2018 conference with the Court.
2. Respondent's failure to respond to the First Set of Interrogatories.
3. Respondent's failure to comply with the Court's Order dated August 9, 2018 directing Respondent to answer the Frist Set of Interrogatories.
4. Respondent has failed to comply with the Court's August 9, 2018 Order.
5. All attempts to communicate with or contact Respondent have been fruitless.

[1] On July 2, 2018, a pre-hearing conference was held during which the Court authorized Complainant to propound interrogatories on Respondent, despite the case being in simplified proceedings.

See generally Secretary's Motion for Default.

In response to Complainant's *Motion for Default*, 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 on July 2, 2018; (2) failure to respond to respond to the Court's *Order Granting Motion to Compel* dated August 9, 2018; and (iii) failure to respond to the *Secretary's Motion for Default*. To date, Respondent has failed to file a response to the Court's *Order to Show Cause*.[2]

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." The Court's prehearing procedures aid in the early formulation of issues, which benefits all parties during trial preparation as well as resulting in the more effective use if the Court's resources at the hearing stage. *Architectural Glass & Metal Co.*, 19 BNA OSHC 1546, 1547 (No. 00-0389, 2001). The

2. The Court's *Order to Show Cause* was signed for on September 21, 2018 by Martha Almager.

imposition of appropriate sanctions is important to ensure compliance with prehearing procedures and to permit the fair and efficient adjudication of issues. *Id*. The Judge has broad discretion to decide whether sanctions should be ordered. *Id. See also, Jersey Steel Erectors,* 16 BNA OSHC 1162, 1165 (No. 90-1307, 1993), *Sealtite Corp*., 15 BNA OSHC 1130, 1134 (88-1431, 1991) and *Duquesne Light Co*., 8 BNA OSHC 1218, 1222 (No. 78-5034, 1980)(consolidated). Therefore, sanctions are an appropriate tool to ensure compliance where the sanctioned party has engaged in a pattern of disregard for Commission rules, or where the party's conduct is contumacious. *See, e.g., Phila. Constr. Equip., Inc,* 16 BNA OSHC 1128, 1130-31 (No., 92-899, 1993)(pattern of disregard for Commission proceedings found where Respondent was late for hearing twice, failed to certify posting of the citation and failed to file an answer until threatened with dismissal, failed to respond to a discovery request and failed to respond to a pre-hearing order).

According to the Commission, "[D]ismissal is too harsh a sanction for failure to comply with certain pre-hearing 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).

Default judgments may be appropriate when a party fails to comply with an order compelling discovery. 29 C.F.R. § 2200.52(f) (sanctions for failing to comply with discovery requirements); 29 C.F.R. § 2200.101(a) (default appropriate when a party fails to proceed as provided by the Commission Rules or as required by a judge); *see also St. Lawrence Food Corp*., 21 BNA OSHC 1467, 1472 (Nos. 04-1734 & 04-1735, 2006). Failing to comply with Commission Rules and orders so as to delay proceedings may constitute contumacious conduct. *Carson Concrete Corp. v. Sec'y of Labor*, 21 BNA OSHC 1393, 168 Fed. Appx. 543 (3d Cir. 2006)

(unpublished) (upholding default judgment for OSH Act violations when employer sought to disavow admission provided during discovery until a few days before trial).

The Court finds 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,[3] the Court finds that the delays in this case are wholly attributable to Respondent, including Respondent's failure to respond to mail that was sent to an address where it is presumed it received the mail since none of the mail was returned as "undeliverable." 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 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 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 Respondent relinquished its case with the intent to abandon. 1 C.J.S. Abandonment § 13 (2013).

3. 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.

Accordingly, with respect to the above-referenced docket, Respondent is declared in DEFAULT, its *Notice of Contes*t is hereby DISMISSED and the violations and penalties alleged in the Citation and Notification of Penalty are AFFIRMED in its entirety and penalties ASSESSED.

ORDER

Based on the foregoing, it is ORDERED that:

1. Citation 1, Item 1, and the corresponding penalty of $3,880.00 are hereby AFFIRMED as a final order of the Commission pursuant to Section 10(a) of the Act.

SO ORDERED.

Date: October 25, 2018

/s/ Patrick B. Augustine

Denver, Colorado

Judge Patrick B. Augustine
Judge, OSHRC