



United States of America  
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR,

Complainant,

v.

NORTH PAC CORPORATION d/b/a  
NORTH PAC CONSTRUCTION,  
Respondent.

OSHRC DOCKET NO. 18-1477

**Attorneys and Parties:**

Martin D. Christopher Santos Esq., Office of the Solicitor, U.S. Department of Labor,  
For Complainant

Miguel Cruz, Jr., Self Represented, Northpac Corporation d/b/a Northpac Construction  
For Respondent

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

**DECISION AND ORDER DISMISSING RESPONDENT'S NOTICE OF CONTEST AND  
ORDER DECLARING DEFAULT 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 Northpac Corporation ("Respondent") worksite in Saipan, Northern Mariana Islands ("Saipan, MP") on June 27, 2018. As a result of the inspection, OSHA issued a Citation and Notification of Penalty ("Citation") to Respondent alleging one serious violation and two repeat violations of the Act with a proposed penalty of \$12,197.00. The Citation was issued on August 22, 2018. Respondent filed a timely *Notice of Contest* on September 17, 2018.

Complainant timely filed his *Complaint* on October 9, 2018. *See 29 C.F.R. § 2200.34.* Respondent filed an Answer on November 23, 2018 which was received on December 3, 2018.

### **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 U.S.C. § 659(c).

### **Procedural History**

On December 14, 2018, Complainant sent Respondent his first set of discovery requests consisting of Interrogatories, Request for Production of Documents and Request for Admissions. (“*Discovery Request*”). *See Compln’t Motion* at 2; *Compln’t Exs. C-1.* Answers to the *Discovery Request* were due by January 14, 2019. *See April 3, 2019 Order* (Dkt No. 18-1477). Respondent, a self represented litigant, provided either no response or incomplete responses to the *Discovery Request* on January 12, 2019. *See Compln’t Exs. C-2.* Complainant states it made multiple attempts to communicate with Respondent about supplementing the *Discovery Request.* *See Compln’t Motion* at 2. The parties, however, were able to confer and submit the *Proposed Joint Pretrial Recommendations* to the Court on January 29, 2019.

The Court then issued a *Scheduling Order* on February 11, 2019. *See February 11, 2019 Order* (Dkt No. 18-1477). By March 7, 2019, Respondent still had not served responsive and complete answers to the *Discovery Request* and was not communicating with Complainant. *See Compln’t Motion* at 2. Complainant requested a conference call with the Court, and the conference call took place on April 2, 2019, which was April 3, 2019 in Saipan, MP. *Id.*; *See Compln’t Motion* at 3. Respondent was present for the conference call. *See April 3, 2019 Order* (Dkt No. 18-1477). The Court found Respondent’s responses to the *Discovery Request* inadequate and incomplete and ordered Respondent to supplement its’ responses. *Id.* During the conference call, Respondent told the Court he found the *Discovery Request* complex and difficult because he was not an attorney.

Respondent was reminded of its responsibility to make a good faith effort to follow the Commission Rules and respond to the *Discovery Request*, even if the response is difficult. *Id.* In fact, the *April 3, 2019 Order*, issued after the close of the conference call, contained the following language:

While Respondent states the Interrogatories and Requests for Production of Documents are complicated, the complexity does not relieve Respondent to make a good faith effort to respond to Interrogatories and produce documents. 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 se* litigant to follow the rules and exercise reasonable diligence in the legal proceedings in which it is taking part. [Citations omitted]

*Id.*

After the conference call with the Court, Complainant alleges Respondent twice more provided inadequate responses to the Interrogatories and Request for Production, and improperly changed answers to a number of the Requests for Admissions, on April 18, 2019 and May 2, 2019. *See Compln't Motion* at 3-4; *Compln't Exs.* C-5; C-6. Complainant continued to attempt communication and clarification about the *Discovery Request* with Respondent after the conference call but to little avail. *See Compln't Exs.* C-7.

On May 16, 2019, 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. Respondent's refusal to obey the Court's Order dated April 3, 2019 constitutes prejudice. *See Compln't Motion* at 5. Complainant states it cannot determine the factual merits of Respondent's defense based on the responses to the *Discovery Request*. *Id.*
2. Respondent demonstrates contumacious conduct with its inadequate responses and

disregard for communication with Complainant. *See Compln't Motion* at 7.

3. Based on Respondent's past conduct with the Commission, Respondent has demonstrated a pattern of disregard for the Commission rules and authority, which will likely not be altered for this case. *See Compln't Motion* at 8; *North Pac Corp.*, 26 BNA OSHC 2361 (No. 16-1830, 2017).

*See generally Secretary's Motion for Sanctions.*

Respondent failed to file a Response to the *Secretary's Motion for Sanctions*. Due to Respondent's failure to respond, the Court issued an *Order to Show Cause*, directing Respondent to "SHOW CAUSE WITHIN TWENTY-ONE (21) DAYS<sup>1</sup> why the Court should not issue judgement against Respondent, affirming the proposed violations in this case for: (1) failure to timely respond to the *Secretary's Notice of Motion and Motion for Sanctions*, and (2) to provide complete and responsive answers to discovery as required by the Court's Order dated April 3, 2019." A response to the *Order to Show Cause* was due July 2, 2019. The Court's *Order to Show Cause* was delivered to Respondent on June 19, 2019. The Order was sent and tracked via United States Post Service. *See* USPS Tracking log. Therefore, from the time Respondent actually received the *Order to Show Cause* and the date a response was due to the Court Respondent was provided thirteen days to prepare a response.

The Court did receive Respondent's Response ("*Response*") on July 16, 2019 – fourteen days after the deadline for a response. The *Response* was placed in the U. S. Mail, Priority Mail, on July 9, 2019. *See* U. S. Priority Mail postage stamp dated July 9, 2019. Even using the July 9, 2019 date as the operative date, the *Response* was still seven days late. The Court could simply ignore the *Response* since it is out-of-time and Respondent provided no good cause for the delay

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<sup>1</sup> The Court provided extra time from its normal time frame to provide a response to the *Order to Show Cause* due to the distance Saipan is from Denver and the delivery periods required for mail to reach Respondent.

in filing a timely response. However, the Court will address the two arguments advanced by Respondent in its *Response*.

### **Discussion**

According to Complainant, Respondent has engaged in contumacious conduct and disregarded the Rules of the Commission, resulting in undue prejudice against Complainant. Thus, Complainant seeks dismissal of Respondent's Notice of Contest and an Order declaring Respondent in default. *See generally Secretary's Motion for Sanctions*.

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 of the Court's resources at the hearing stage. *Architectural Glass & Metal Co.*, 19 BNA OSHC 1546, 1547 (No. 00-0389, 2001). The 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 (No. 88-1431, 1991) and *Duquesne Light Co.*, 8 BNA OSHC 1218, 1222 (No. 78-5034, 1980) (consolidated).

The *Order to Show Cause* required Respondent to provide good cause for Respondent's failure to; (i) respond to *Complainant's Motion for Sanctions Against Respondent for Failure to Comply with Commission Rules*; and (ii) supplement or answer the *Discovery Request* as ordered in the Court's April 3, 2019 Order. The *Response* does not directly respond to the questions posed in the *Order to Show Cause*. Respondent advances two arguments. The first centers around the complexity of the *Discovery Request* because he is a non-attorney. Respondent also attached responses he filed with Complainant after the Conference call with the Court and which are the

subject matter to the *Motion for Sanctions*<sup>2</sup>. The second response advances Respondent's settlement discussions with Complainant's counsel and Respondent's position on the proposed penalties. As to the second argument regarding settlement, this is non-responsive to the *Order to Show Cause* and the Court declines the invitation to become involved in settlement discussions. As to Respondent's first response, it appears to again go to an issue Respondent has been advised on at least three times.

Respondent, in this case, was advised by the Court in the April 2, 2019 conference call of the need for him to comply with Court orders and Commission Rules. Again, in this Order Respondent is advised of the need for compliance with Commission Rules and Court orders. Although the Commission recognizes the difficulties a self represented litigant may face when participating in the Commission's proceedings, the Commission still requires a self represented 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..."). The undersigned recognizes that sometimes unrepresented employers "can fail to grasp exactly what [it] is being asked to do." *Sealtite Corp.*, 15 BNA OSHC 1130 (No. 88-1431, 1991). Thus, where an employer has a substantial reason for having failed to comply with a discovery order, and where the employer's conduct also does not indicate disrespect toward the judge, the failure to comply may not necessarily be an indication of bad faith or contumacious conduct. *Id.*

Not having counsel, does not obviate a party's obligation to engage in the adjudicatory

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<sup>2</sup> The Court has reviewed the responses of Respondent in its supplemental filing on the Discovery Request. The Court finds the supplemental response deficient and unresponsive.

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).

Respondent has been before the Commission before in a case that substantially has the same facts as is present in this case. A *Decision and Order of Dismissal of Notice of Contest* was issued on December 4, 2017 by Chief Judge Covette Rooney. *See North Pac Corp.*, 26 BNA OSHC 2361 (No. 16-1830, 2017). In Chief Judge Covette Rooney’s case, Respondent failed to address discovery requests appropriately and demonstrated deficient communication with the Secretary and Chief Judge Rooney. *Id.* Chief Judge Rooney determined Respondent acted in a contumacious manner, disavowed Commission rules, prejudiced the Secretary and has demonstrated a pattern of disregard of Commission procedures and bad faith conduct as a *pro se* litigant. She dismissed Respondent’s *Notice of Contest* and entered a default judgment against Respondent. *Id.*

Once again, Respondent has acted in a similar manner in this case. As documented by Complainant, Respondent received and responded to the *Discovery Request* but in many respects the answers were incomplete, not responsive or some questions ignored. *See Compln’t Ex. C-3; C-7.* Respondent’s delayed and inadequate response to the *Discovery Request*, and other deficient communication with Complainant and the Court, is not an innocent oversight or inadvertence that

can be excused as related to complexity or self represented representation. Respondent appears to communicate just enough to maintain a claim with the Commission yet provide inadequate responses that hinders Complainant's ability to prepare for trial. This is contumacious conduct by Respondent. Likewise, Respondent's non-response to Complainant's *Motion for Sanctions* and the delayed, untimely and unresponsive Response to the *Order to Show Cause* has nothing to do with self representation. It demonstrates a behavior which delays the proceeding, prejudices Complainant and requires Court time and supervision to ensure timely adherence to the Court's order and Commission Rules.

Finally, the Court has reviewed the questions propounded by Complainant in the *Discovery Request*. Those questions are written where an average person could understand the meaning of the question. For instance, Respondent should know all individuals associated with the worksite that have knowledge of what happened the day of the inspection. Also, when Complainant asks for the basis for Respondent's position it is taking in regard to a certain citation, asking Respondent to explain its position is not a complex question. Also, questions as to when the first day of work began, which employees worked with portable cement and work schedules is clearly understandable. The providing of responsive answers to the questions propounded are not of so much complexity that self representing oneself does not make it impossible to answer the inquiry or comply with Commission Rules and the Court'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, or when it engages in discovery the answers are misleading or incomplete, 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*. Complainant has yet to receive adequate responses to *Discovery Requests* from Respondent. 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.” Based on the representations of Complainant,<sup>3</sup> the Court finds that the delays in this case are wholly attributable to Respondent, including Respondent’s failure to answer the *Discovery Request* fully and in a responsive way. In that regard, the Court finds that Respondent’s contumacious conduct warrants the sanction of dismissal.

In addition, the Court finds 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*. See April 3, 2019 *Order* (Dkt No. 18-1477); June 11, 2019 *Order* (Dkt No. 18-1477). Respondent has failed to take advantage of the opportunity to adequately communicate with Complainant and the Court, and demonstrate good faith conduct in the proceeding. Under these circumstances, the Court sees no worthwhile purpose in allowing this

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3. Because Respondent has failed in its *Response* to rebut any statement or representation made by Complainant in his motions, the Court accepts Complainant’s representations of the facts as true.

case to proceed to a hearing when there is a pattern of bad faith conduct, and thus 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 Commission recognizes “[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). With Respondent’s history and current conduct, there is a consistent pattern of disregard for Commission Rules, contumacious conduct, and prejudicial conduct that supports the sanction of dismissal under 29 C.F.R. § 2200.52(f) and 29 C.F.R. § 2200.101(a).

Accordingly, with respect to the above-referenced docket, Respondent is declared in DEFAULT, its *Notice of Contest* 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**

The foregoing Decision constitutes the Findings of Fact and Conclusions of Law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure. Based on the foregoing, it is ORDERED that:

1. Citation 1, Item 1, and the corresponding penalty of \$2,439.00 are hereby AFFIRMED as final orders of the Commission pursuant to Section 10(a) of the Act.
2. Citation 2, Item 1, and the corresponding penalty of \$4,879.00 are hereby AFFIRMED as

final orders of the Commission pursuant to Section 10(a) of the Act.

3. Citation 2, Item 2, and the corresponding penalty of \$4,879.00 are hereby AFFIRMED as final orders of the Commission pursuant to Section 10(a) of the Act.

SO ORDERED.

Date: August 2, 2019

/s/ \_\_\_\_\_

Denver, Colorado

Patrick B. Augustine  
Judge, OSHRC