

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

SECRETARY OF LABOR,

Complainant,

v.

CESAR GARCIA,

Respondent.

DOCKET NO. 21-0555

Appearances:¹

Megan McGinnis, Esq., Elaine Smith, Esq., Office of the Solicitor, U.S. Dept. of Labor, Kansas City, Missouri
For Complainant

Before: Administrative Law Judge Brian A. Duncan

DECISION AND ORDER

Procedural History

This case is before the United States Occupational Safety and Health Review Commission (“Commission”) pursuant to Section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* (“the Act”). On March 3, 2021, the Occupational Safety and Health Administration (“OSHA”) conducted an inspection of Respondent’s worksite, located at 10614 & 10616 Conifer in Wichita, Kansas. As a result of that inspection, OSHA issued a *Citation and Notification of Penalty* (“Citation”) to Respondent alleging five serious violations of the Act and proposed total penalties of \$15,214.00. Respondent timely contested the Citation.

1. As will be discussed further, Respondent failed to appear for trial.

On August 11, 2021, Respondent filed a letter, pursuant to Commission Rule 8(c)(1), requesting to be exempted from mandatory electronic filing. On September 22, 2021, the Court granted Respondent's request and instructed that all filings be mailed to Respondent's address of record. On October 29, 2021, during the Court's first conference call with the parties, Respondent appeared but explained that Spanish was his primary language and requested an interpreter/translation for court proceedings. Respondent also provided the Court and Complainant with his new, preferred address of record. Accordingly, pursuant to the Commissions Language Access Program, the Court ordered that all filings be translated into Spanish so that Respondent could fully and meaningfully participate in the case. All subsequent filings were filed and served in two forms – one in English and one in Spanish.

On November 9, 2021, the Court received notice of returned mail which had been sent to Respondent's address of record. Therefore, on December 14, 2021, pursuant to Commission Rule 6, the Court ordered Respondent (in Spanish and English) to verify his current address and telephone number within two weeks. The Court further identified Respondent's last notified address of record, and stated "if Respondent fails to submit any corrections or changes to its address of record by that date, the Court and the parties will continue to use the address above for service on Respondent. If such filings continue to be returned as non-deliverable, Respondent will be deemed to have waived service and notice pursuant to Commission Rule 6." Respondent did not reply to the *Order*, nor did Respondent ever file notice of a different address of record. Neither the December 14th *Order*, nor any subsequent filings were returned by the U.S. Postal Service.

On December 17, 2021, the parties jointly filed their *Joint Recommendations for Simplified Proceedings*. On January 4, 2022, the Court issued a *Notice of Trial in Simplified Proceedings* setting the trial for June 16-17, 2022 in Wichita, Kansas. On May 17, 2022, the Court issued a

Notice of Trial Location identifying the specific courthouse address for the trial. On June 1, 2022, Complainant filed a *Pre-Trial Statement*. Respondent failed to file a *Pre-Trial Statement*.

The trial commenced, as noticed, in Wichita, Kansas on June 16, 2022.² Complainant appeared, ready to proceed. However, Respondent failed to appear. The Court delayed the trial for approximately one hour to allow for the possibility of Respondent's late arrival. (Tr. 15). The Court then began the trial and heard Complainant's offer of proof on the evidence that would have been presented at trial if Respondent had appeared. (Tr. 17-28). At the close of Complainant's summary of evidence, Complainant moved for *Default Judgment* against Respondent based on his failure to appear at trial, pursuant to Commission Rule 64. (Tr. 28). The Court granted Complainant's *Motion for Default Judgment* (Tr. 29-30).

Jurisdiction

The Court finds that the Commission has jurisdiction over this proceeding pursuant to Section 10(c) of the Act and that, at all times relevant to this proceeding, Respondent was an employer engaged in a business and industry affecting interstate commerce within the meaning of Sections 3(3) and 3(5) of the Act, 29 U.S.C. § 652(5). *Slingluff v. OSHRC*, 425 F.3d 861 (10th Cir. 2005).

Discussion

In addition to failing to appear at trial, Respondent failed to file a *Pre-Trial Statement* as required by the Court's January 4, 2022 *Notice of Trial in Simplified Proceedings*. According to Commission Rule 64, "The failure of a party to appear in person or by a duly authorized representative at the hearing constitutes a waiver of the right to a hearing...A failure of Respondent to appear is deemed an admission of the facts alleged and consent to the relief sought in the

2. The Court notes that it also procured the attendance of a Spanish interpreter for Respondent at trial.

Complaint (or, in Simplified Proceedings, the citation and notification of penalty). The Judge may default the non-appearing party without further proceedings or notice.”

According to the Commission, dismissal is also an appropriate sanction if the record shows contumacious conduct by the noncomplying party, prejudice to the opposing party, or a pattern of disregard for Commission proceedings.” *Amsco, Inc.*, 2003 WL 25548066 (O.S.H.R.C.). *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). Respondent’s repeated failure to comply with both the Commission’s and the undersigned’s rules, deadlines, and orders constitute a pattern of contumacious conduct, prejudice to Complainant, and a disregard for the statutory authority of this Court and the Commission. Respondent’s failure to participate in this proceeding may also illustrate Respondent’s intention to abandon its contest of the violations proposed in this case. Accordingly, the Court finds that the sanction of dismissal of Respondent’s *Notice of Contest*, and entry of *Default Judgment* against Respondent is appropriate.

As an alternative to the foregoing sanction, the Court directed Complainant at trial to present summary evidence in support of the violations alleged in this case. After reviewing the record and applying the cited standards to the facts presented at trial, the Court finds that Complainant proved its *prima facie* case with respect to each of the alleged violations and proposed penalties. *Ormet Corp.*, 14 BNA OSHC 2134 (No. 85-0531, 1991) (setting forth elements of *prima facie* violation). With respect to each citation item, Complainant clearly established that the cited standards applied to the conditions, that the terms of the standards were violated, that Respondent had knowledge of the conditions, that Respondent’s employees were exposed to the violative conditions, and that the violations were properly characterized as serious. (Tr. 17-28; Exs. C-1 through C-12). The Court further finds that Complainant’s penalty assessments for each violation

were appropriate. *J.A. Jones Construction Co.*, 15 BNA OSHC 2201 (No. 87-2059, 1993); *Valdak Corp.*, 17 BNA OSHC 1135 (No. 93-0239, 1995).

Order

Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Respondent's *Notice of Contest* is VACATED pursuant to Commission Rule 64;
2. Citation 1, Item 1 is hereby AFFIRMED as a serious violation of the Act, and a penalty of \$3,511.00 is ASSESSED;
3. Citation 1, Item 2 is hereby AFFIRMED as a serious violation of the Act, and a penalty of \$3,511.00 is ASSESSED;
4. Citation 1, Item 3 is hereby AFFIRMED as a serious violation of the Act, and a penalty of \$3,511.00 is ASSESSED;
5. Citation 1, Item 4a is hereby AFFIRMED as a serious violation of the Act, and a penalty of \$4,096.00 is ASSESSED; and
6. Citation 1, Item 4b is hereby AFFIRMED as a serious violation of the Act, and a penalty of \$0.00 is ASSESSED.

/s/ Brian A. Duncan

Date: August 2, 2022
Denver, Colorado

Judge Brian A. Duncan
U.S. Occupational Safety and Health Review Commission