



United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR,

Complainant,

v.

ROMANCING THE STONE, INC.

Respondent.

OSHRC DOCKET NO. 23-0243

ORDER OF DISMISSAL FOR LATE NOTICE OF CONTEST

AND FAILURE TO FILE AN ANSWER

Procedural History

This matter is before the United States Occupational Safety and Health Review Commission (“Commission”) and the undersigned based on Respondent’s filing of a Notice of Contest on February 8, 2023.

On August 1 and November 14, 2022, the United States Occupational Safety and Health Administration (“OSHA”) inspected a worksite in Coventry, Rhode Island under inspection number 1611694. As a result of those inspections, on January 5, 2023, OSHA issued two Citations and Notifications of Penalty (“Citations”) to Romancing the Stone, Inc. (“Respondent”) for alleged violations of the Occupational Safety and Health Act, 29 U.S.C. §§ 651, et seq (“OSH Act”). The Citations alleged three failure-to-abate violations of OSHA’s general industry safety standards.¹

¹ Although it appears additional violations were at some point alleged against Respondent, in the Citations filed with the Commission, only Citation 1, Item 2 and Citation 2, Items 1a and 1c were included with the filing. Citation 1, Item 2 alleges a failure to abate a serious violation of 29 C.F.R. § 1910.95(c)(1) for failing to administer an effective hearing

The Citations proposed a total penalty of \$122,364.

The Citation were mailed to Respondent at 140 Centre of New England Boulevard, Coventry, Rhode Island, 02816. On February 8, 2023, an individual named Keyur Patel, whose relationship to Respondent is not clear from the instant record, filed a Notice of Contest with OSHA challenging the Citations on behalf of Respondent. In his email Notice of Contest, Mr. Patel indicated that an individual named Mike Rego, whose relationship to Respondent is also not clear from the instant record, would “be handling this from our side.” The Secretary has not argued that the Notice of Contest was untimely.

Thereafter, on February 16, 2023, two individuals registered with the Commission’s e-filing system on behalf of Respondent: 1) Mr. Patel, with the email address kpatel@romancingthestoneri.com; and 2) Mr. Rego, with the email address mrelement1000@yahoo.com. Both individuals are currently listed as Active Contacts for Respondent in the Commission’s e-filing system.²

Also on February 16, 2023, after having received the Notice of Contest, the Commission mailed a Notice of Docketing and Instructions to Employer (“Notice of Docketing”) to Respondent’s address in Coventry, Rhode Island. The Notice of Docketing included a guide to the Commission’s procedures and a postcard that was to be returned to the Commission to verify

conservation program; Citation 2, Item 1a alleges a failure to abate a serious violation of 29 C.F.R. § 1910.1053(d)(3)(i) for failure to perform initial monitoring of crystalline quartz; and Citation 2, Item 1c alleges a failure to abate a serious violation of 29 C.F.R. § 1910.1053(j)(3)(i) for failure to ensure employee knowledge of protections from crystalline silica.

² Anyone listed as an “Active Contact” in the Commission’s e-filing system automatically receives an email notification whenever a new document is electronically filed for the case. See *Intro. to OSHRC E-Filing* at 8, Occupational Safety & Health Review Comm’n, https://www.oshrc.gov/assets/1/6/supplemental_user_training_guide1.pdf (May 2020); *Occupational Safety & Health Review Comm’n E-File Sys. Elec. Case Filing – Pol’y & Proc. Guide* at 12, Occupational Safety & Health Review Comm’n, <https://www.oshrc.gov/assets/1/6/Commission E-File System Guide - FINAL 2-21.pdf> (June 2019).

Respondent had complied with the employee posting requirements of Commission Rule 7 for the Citation and Notice of Contest. *See* 29 C.F.R. § 2200.7. To date, this postcard has not been returned to the Commission.

On February 24, 2023, the Secretary filed a Motion to Extend Time to File Complaint. In this motion, the Secretary's representative indicated that he "attempted to contact the Respondent regarding this motion, but was not successful." The undersigned granted the Secretary's motion on March 9, 2023. On April 20, 2023, the Secretary filed a Motion to Further Extend Time to File a Complaint. In this motion, the Secretary's representative indicated that Respondent consented to the motion. The undersigned granted the Secretary's second motion to extend on April 24, 2023.

Thereafter, on June 7, 2023, the Secretary filed his Complaint. The Certificate of Service for the Complaint indicates it was filed in the Commission's e-filing system and was also served directly on both Mr. Patel and Mr. Rego at their email addresses used to register with the Commission's e-filing system. Respondent was required to respond to the Complaint within 21 days of service. 29 C.F.R. § 2200.34(b)(1). To date, Respondent has not filed an Answer or otherwise responded to the Complaint.

On July 11, 2023, the undersigned issued an Order to Show Cause Why Notice of Contest Should Not Be Dismissed ("Show Cause Order") for failure to file an Answer. The Show Cause Order directed Respondent to show cause, on or before July 25, 2023, as to why it should not be declared in default for not filing an Answer to the Complaint. The Show Cause Order explained that if there was no response, all the alleged violations set out in the Citations would be affirmed and the proposed penalties would be assessed without a hearing. The Show Cause Order was served via e-filing on both Mr. Patel and Mr. Rego. *See* note 2, *supra*.

Out of an abundance of caution because Respondent is presumably self-represented, a

member of the undersigned's staff attempted to contact both Mr. Rego and Mr. Patel at their respective email addresses. Copies of these emails are attached to this Order as Exhibits A and B. In the detailed emails, sent on August 24 and 28, 2023, the undersigned's staff member explained that the deadline set forth in the Show Cause Order had since passed but Respondent had still not filed a response or an Answer to the Complaint. The emails went on to state "you **MUST** file an Answer in this matter for your case to go forward. If you do not file an Answer in this matter, you are at risk of being placed in default and having the proposed penalty of **\$122,364 imposed.**" (emphasis in original). The emails contained the full text of Commission Rule 34(b), regarding the filing of answers. Attached to the emails was a sample answer taken from the Commission's website. These emails were not returned as undeliverable to the undersigned's staff member who sent them.³ No one has replied to either email on behalf of Respondent.

To date, Respondent has not filed a response to the Show Cause Order, nor has it filed an Answer to the Secretary's Complaint.

Analysis

A Commission judge has very broad discretion in imposing sanctions for noncompliance with the judge's orders or the Commission's Rules of Procedure. *See Sealtite Corp.*, 15 BNA OSHC 1130, 1134 (No. 88-1431, 1991). However, the Commission has held that dismissal is too harsh a sanction for failure to comply with certain prehearing orders unless the record shows contumacious conduct by the noncomplying party, prejudice to the opposing party, or a pattern of

³ As can be seen in Exhibit A, the original email sent on August 24, 2023 was intended for both Mr. Patel and Mr. Rego. However, due to a typographical error in Mr. Patel's email address, the email intended for Mr. Patel was originally returned as undeliverable. Once that typographical error was fixed on August 28, 2023, however, the email to Mr. Patel was not returned as undeliverable.

disregard for Commission proceedings. *See Architectural Glass & Metal Co.*, 19 BNA OSHC 1546, 1547 (No. 00-0389, 2001).

The undersigned finds the conduct of Respondent to be contumacious and demonstrative of a pattern of disregard for these proceedings. Two individuals received the Show Cause Order on behalf of Respondent when it was filed in the Commission's e-filing system. *See note 2, supra.* However, neither representative has filed a reply to the Show Cause Order or filed an Answer. Moreover, neither representative responded to the detailed emails sent to them following the lapse of the Show Cause Order's deadline, emails which contained information on filing an Answer and specifically stated that failure to respond to the Show Cause Order or file an Answer would result in the dismissal of the Notice of Contest and imposition of the penalties proposed in the Citations.⁴ *See Exs. A & B.* Nearly six weeks have passed since the deadline in the Show Cause Order, and yet Respondent has not filed a response, has provided no excuse for its failure to do so, and has still not filed an Answer to the Secretary's Complaint, which was filed nearly three months ago.

Based on the foregoing considerations, the undersigned finds dismissal of Respondent's Notice of Contest is warranted. *See Ark. Abatement Servs., Inc.*, 17 BNA OSHC 1163, 1164-65 (No. 94-2210, 1995) (“[W]here a party's default indicates disrespect for, or indifference to, Commission proceedings, the party's claims properly are dismissed.”); *Sealtite Corp.*, 15 BNA

⁴ Since neither email was returned as undeliverable (once properly addressed), delivery of these emails is presumed. *See, e.g., TV Ears, Inc. v. Joyshiya Dev. Ltd.*, No. 3:20-CV-01708-WQH-BGS, 2021 WL 165013, at *3-4 (S.D. Cal. Jan. 19, 2021) (finding notice was sufficient where pleadings were sent to email addresses and were not “bounced back” or returned as undeliverable); *Viahart, LLC v. Does 1-73*, No. 6:18-CV-604-RWS-KNM, 2020 WL 10692890, at *4 (E.D. Tex. June 17, 2020) (“Federal Courts have presumed delivery of an email if it is not returned undeliverable and the email address is used by the Defendant in conducting business.” (citing cases)); *see also Shu Chung Lee v. Dir., Div. of Tax'n*, No. 007387-2017, 2017 WL 2544295, at *2 (N.J. Tax Ct. June 8, 2017) (State tax agency was “under no obligation to ensure plaintiff read his emails, or to re-send an application especially when there is no notice or indication that its initial emails were undeliverable.”); *Alexander v. State*, No. 04-15-00545-CR, 2016 WL 805494, at *1 (Tex. App. Mar. 2, 2016) (dismissing appeal where the appellant failed to appear for an ordered hearing and failed to respond to the court's email which “was not returned as undeliverable”).

1130, 1134 (88-1431, 1991) (contumacious conduct established where party engaged in a “consistent pattern” of failure to respond to judge’s orders).

ORDER

Based on the foregoing, Respondent is found to be in DEFAULT, its Notice of Contest is DISMISSED, and the Citation issued to Respondent on January 5, 2023, as a result of OSHA inspection number 1611694 is AFFIRMED in its entirety and \$122,364 in penalties are ASSESSED.

SO ORDERED.

/s/Covette Rooney
Covette Rooney
Chief Judge, OSHRC

Dated: September 21, 2023
Washington, D.C.

Exhibit A

From: [McComas, Tyler C.](#)
To: kaptel@romancingthestone.com; mrelement1000@yahoo.com
Subject: Romancing the Stone, OSHRC Docket No. 23-0243
Date: Thursday, August 24, 2023 5:00:28 PM
Attachments: [Answer_and_Certificate_of_Service^Oct2020-Final.pdf](#)

Dear Mr. Patel & Mr. Rego:

I am an Attorney-Advisor in the Office of the Chief Administrative Law Judge of the United States Occupational Safety and Health Review Commission. I am writing regarding a Notice of Contest received by the Commission on February 8, 2023, for OSHA Inspection Number 1611694.

On January 5, 2023, Romancing the Stone, Inc. was issued an Order to Show Cause on or before **July 25, 2023**, as to why it should not be placed in default for failing to file an Answer to the Secretary of Labor's complaint. Our records indicate you both have registered for e-filing on behalf of Romancing the Stone and therefore received this Order on its behalf. However, as of today, no one from Romancing the Stone has filed an Answer to the Complaint or a response to the Order to Show Cause.

I am writing to inform you that you **MUST** file an Answer in this matter for your case to go forward. If you do not file an Answer in this matter, you are at risk of being placed in default and having the proposed penalty of **\$122,364 imposed**.

Since you are already registered in the Commission's e-filing system, you must prepare and submit an Answer to the Secretary of Labor's Complaint. For your convenience, I have provided the Commission's rule on what constitutes an Answer below and have also attached a sample Answer, also available on the Commission's website.

(b) Answer.

(1) Within 21 days after service of the complaint, the party against whom the complaint was issued shall file an answer with the Commission.

(2) The answer shall contain a short and plain statement denying those allegations in the complaint which the party intends to contest. Any allegation not denied shall be deemed admitted.

(3) The answer shall include all affirmative defenses being asserted. Such affirmative defenses include, but are not limited to, "infeasibility," "unpreventable employee misconduct," and "greater hazard."

(4) The failure to raise an affirmative defense in the answer may result in the party being prohibited from raising the defense at a later stage in the proceeding, unless the Judge finds that the party has asserted the defense as soon as practicable.

Sincerely,

Tyler McComas
Attorney-Advisor
Office of the Chief Administrative Law Judge
U.S. Occupational Safety & Health Review Commission

Exhibit B

From: McComes, Tyler C.
To: tpatel@romancingthestoneerl.com
Subject: Romancing the Stone, OSHRC Docket No. 23-0243
Date: Monday, August 28, 2023 11:01:00 AM
Attachments: [Answer_and_Certificate_of_Service^Oct2020-Final.pdf](#)

Dear Mr. Patel:

I am an Attorney-Advisor in the Office of the Chief Administrative Law Judge of the United States Occupational Safety and Health Review Commission. I am writing regarding a Notice of Contest received by the Commission on February 8, 2023, for OSHA Inspection Number 1611694.

On July 11, 2023, Romancing the Stone, Inc. was issued an Order to Show Cause on or before **July 25, 2023**, as to why it should not be placed in default for failing to file an Answer to the Secretary of Labor's complaint. Our records indicate you have registered for e-filing on behalf of Romancing the Stone and therefore received this Order on its behalf. However, as of today, no one from Romancing the Stone has filed an Answer to the Complaint or a response to the Order to Show Cause.

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Sincerely,

Tyler McComas
Attorney-Advisor
Office of the Chief Administrative Law Judge
U.S. Occupational Safety & Health Review Commission