

THIS CASE IS NOT A FINAL ORDER OF THE REVIEW COMMISSION AS IT IS
PENDING COMMISSION REVIEW



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

SECRETARY OF LABOR,

Complainant,

v.

TRINCHESE IRON WORKS & CONSTRUCTION
CORP.,

Respondent.

OSHRC Docket No. 22-0385

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission (the Commission) pursuant to § 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* (the Act). The Acting Secretary of Labor (Secretary) filed a Motion for Sanctions for Respondent, Andrew Trinchese's (owner and *pro se* representative of Trinchese Iron Works & Construction Corporation) failure to comply with three (3) Orders compelling him to participate in discovery.¹ Respondent did not file a response to the Secretary's Motion. However, the Court treats Respondent's email (dated September 29, 2023, filed before the Secretary's Motion, and added to the case file) as a rebuttal to the Secretary's Motion. For the reasons that follow, the Court finds that Respondent is in DEFAULT.

¹ Respondent Anrew Trinchese is a self-represented employer in this matter as permitted by Rule 22 of the Occupational Safety and Health Rules of Procedure (Commission Rules). 29 C.F.R. 2200.22(a).

FACTUAL AND PROCEDURAL BACKGROUND²

1. On March 15, 2022, the Occupational Safety and Health Administration (OSHA) issued two citations and a notification of proposed penalties to Respondent for violations that occurred at One Jefferson Ferry Drive, South Setauket, NY on October 2, 2021. The first citation contained two (2) items and the second citation contained one (1) item. These citations arose from Inspection No. 1560013 (Docket No. 22-0385).

2. On March 31, 2022, Respondent filed with the OSHA Long Island Area Office a notice of contest to all of the citations issued in connection with Inspection No. 1560013.

3. On June 6, 2022, the Secretary filed her Complaint. Respondent did not file an Answer. Exhibit 3. On July 12, 2022, the Commission issued, by certified mail and email, an Order to Show Cause Why Respondent's Notice Of Contest Should Not Be Dismissed.

4. On July 19, 2022, the Commission accepted as an Answer, a letter filed by Respondent's President Andrew Trinchese stating; "[p]lease let this letter serve as record to appoint myself, Andrew Trinchese President of Trinchese Ironworks and Construction as the respondent in the case docket noted above."

5. On December 15, 2022, the Secretary served her first set of interrogatories and first set of requests for the production of documents on Respondent by email.

6. On January 9, 2023, the Secretary emailed Respondent seeking to meet and discuss the case and reminding that responses to discovery are due on January 15, 2023.

7. On January 17, 2023, having not received responses to discovery, the Secretary emailed Respondent explaining the responses were overdue.

² The Court adopts the Secretary's uncontroverted recitation of the factual and procedural background of this case as set forth in her Motion for Sanctions. The Court finds this background narrative to be consistent with court filings and the undersigned's contemporaneous notes from prehearing conference calls held.

8. The next day the Secretary's counsel texted Mr. Trinchese asking if he had received the email with the Secretary's discovery requests. Mr. Trinchese responded by text message stating he had received the discovery but "there is nothing for me to answer." The Secretary's counsel texted back pointing out that there are 12 interrogatories starting on page 5 of 11; and 12 requests for documents that relate to the case starting on page 9 of 11.

9. On January 19, 2023, in an effort to engage Respondent in the litigation process, the Secretary voluntarily emailed Respondent a copy of the OSHA's Inspection Report. The Secretary also issued a Notice to remotely depose Respondent's Foreman Steven Fernandez.

10. On January 23, 2023, the Secretary emailed Respondent to ensure he received and understood the Secretary's discovery requests and received copies of the OSHA Inspection Report and Notice to depose Foreman Fernandez.

11. Having received no response, on January 25, 2023, the Secretary emailed Respondent about the overdue discovery:

Andrew, please call/email, or text me to let me know whether you are planning to respond to the written discovery we issued. If you do not respond in writing, we must file a motion in court to compel the responses. Please also let me know if you have issues identifying specifically what we are asking for.

We need to also, in addition to Mr. Fernandez's, schedule your deposition which should only take a few hours. We can do your deposition on the same day as Mr. Fernandez if that works with everyone. Let me know Mr. Fernandez's and your availability to be deposed in the first 2 weeks of February.

12. On January 31, 2023, the Secretary texted Respondent:

Andrew, I'm following up on the discovery and would like to discuss scheduling depositions. Please let me know when you are planning to respond in writing to the discovery requests. Also, what is a good time to talk and figure out the best times to conduct depositions? Please let me know thanks Matt Sullivan.

13. On February 2, 2023, the Secretary emailed Respondent another copy of the discovery requests and then texted Respondent “Andrew can you please respond to my questions. I need to know you’re participating in this litigation. As always, [I’m] am available to discuss the case at your convenience thanks Matt.”

14. Having received no response, on February 6, 2023, the Secretary emailed the Court to schedule a conference to discuss the Secretary’s need to file a motion to compel discovery responses and schedule depositions in the above case.

15. The Court scheduled a conference for February 16 but when Respondent did not appear it rescheduled the conference for February 22, 2023. During the February 22 conference call, Respondent did appear, and the Court ordered Respondent to respond to discovery by February 27, 2023.

16. On February 27, 2023, after being directed to do so, Respondent produced responses to the Secretary’s discovery requests.

17. On February 28, 2023, at the Secretary’s request, the Court held a conference call to address Respondent’s failure up to that point to cooperate in discovery generally and in particular, for scheduling of depositions. During the call Andrew Trinchese agreed that he and Respondent’s Foreman, Steven Fernandez, who was supervising the worksite when the fall incident occurred would both sit for depositions. The parties agreed that both depositions would be taken remotely on Friday March 17, 2023, starting at 2 pm. The Secretary issued deposition notices.

18. On March 17, Mr. Trinchese appeared and was sworn in as scheduled. However, from the beginning of the deposition Mr. Trinchese was contumacious, argumentative, and nonresponsive on numerous questions. Moreover, on multiple questions Mr. Trinchese responded (without explanation) that he was asserting the Fifth Amendment and, on that basis, refused to

answer at all. Furthermore, he informed the Secretary, for the first time, that Mr. Fernandez would not appear at all for his deposition scheduled to begin at 4pm, after Mr. Trinchese's. Mr. Trinchese explained that Mr. Fernandez was not appearing and told him "Boss, I already spoke to OSHA, and I already spoke to the insurance company. Why do I have to keep getting interviewed?"

19. On March 29, 2023, at the Secretary's request, the Court held a conference to discuss the discovery disputes in this case. During the conference the Court approved the Secretary's request to file a motion seeking adverse inferences related to Mr. Trinchese's pleading the Fifth Amendment and refusing to answer questions during his deposition. Mr. Trinchese also agreed to produce Foreman Fernandez for a remote deposition which was subsequently scheduled for 4pm on May 12, 2023.

20. On May 8, 2023, the Secretary emailed Respondent's Foreman Steven Fernandez, and copied Respondent, a copy of the subpoena confirming that his deposition will be held remotely and commence at 4pm on Friday May 12, 2023.

21. On May 10, 2023, Respondent emailed confirmation that Foreman Fernandez would appear for his May 12 deposition.

22. Mr. Fernandez appeared on May 12 as scheduled, was sworn in, and began answering questions. However, after a few minutes had elapsed, Mr. Trinchese, who unbeknownst to the Secretary was in the room with Mr. Fernandez, began to make what turned out to be the first of twenty-five (25) separate interruptions of Mr. Fernandez's testimony. His interruptions ranged in nature including interjecting that the questions were insulting and irrelevant to the case ("[i]f you're going to insult people and ask their level of education that is insulting. Why does that have anything to do with this case?" (Dep. 8), a waste of time ("Wasted a lot of my time." *Id.* 10) and reframing the Secretary's questions in his own words. ("Steven, you never seen me at the jobsite?

That's what he's asking" *Id.* 26). These repeated interruptions substantially impeded the Secretary's ability to conduct the deposition causing it to end early.

23. On May 16, 2023, the Secretary sent a letter to the Court regarding the status of discovery disputes and explaining that in light of Respondent's refusals and contumacious behavior throughout this litigation, the Secretary would file a motion to address these deficiencies.

24. On June 27, 2023, the Secretary filed a Motion for Adverse Inferences based on Mr. Trinchese's assertion of the Fifth Amendment and for an order that Foreman Fernandez be deposed without interference at Respondent's expense.

25. On June 28, 2023, this Court issued an Order Granting Secretary's Motion To Depose Foreman Fernandez At Respondent's Expense And Directing The Secretary To Supplement Her Motion For Adverse Inferences. The Court found that Mr. Trinchese's conduct during Foreman Fernandez's deposition was argumentative and suggestive so as to taint any testimony provided by Mr. Fernandez and hinder the Secretary's efforts to obtain full discovery of this witness. The Court concluded these actions were in violation of Federal Rule of Civil Procedure 30(c)(2) and warranted "appropriate sanctions." The Court also warned that any efforts to interfere with the rescheduled deposition of Foreman Fernandez would be met with sanctions pursuant to Commission Rule 101. 29 C.F.R. § 2200.101.

26. On June 30, 2023, the Secretary filed her Supplemental Filing Withdrawing Proposed Adverse Inference Numbers 2 And 3.

27. On July 14, 2023, in an effort to assist Respondent to comply with the Court's Order dated June 28, 2023, the Secretary sent this email containing pertinent information to schedule Foreman Fernandez's deposition:

Andrew,

To comply with Judge Bell's Order (attached) please let us know what dates and times work to schedule Foreman Fernandez's deposition. Please keep in mind the trial is scheduled to be held virtually on September 5-6, 2023, so we need to schedule the deposition promptly.

Per the Judge's Order, the deposition is to be taken at Respondent's expense. Here is the contact information for Capital Reporting, the stenographer we have used in the case so far. Once we agree on a date and time, I suggest that you contact Capital Reporting to procure their services for the deposition. Please let me know if you have any questions.

Capital Reporting Company
1250 I St NW Ste 350
Washington, DC 20005 (202) 857-3376
www.capitalreportingcompany.com

Thanks,

28. That day Andrew Trinchese responded by sending the below email stating in pertinent part that he flatly refuses to comply with this Court's Order while launching unnecessary personal attacks on the Secretary's counsel and impugning the integrity of this Court:

Look sir, I am not going back and forth with you. I will not pay for any kind of deposition nor does Steven want to sit in another one. We are really getting tired of being bullied by you. I am no longer going to even respond to you, unless we are going straight to trial with this. I want a jury trial. I'm not going to sit here and endure your abuse. We have done nothing wrong other than having a possible checkbook for you to steal from. you are an osha lawyer and with no disrespect to judge bell because he has been nothing but a gentleman but he is an osha judge. I asked you questions that you couldn't answer. Why can't you answer my questions if I am obviously the opposing attorney and defendant. You are the one charging me with something I'm not responsible for. My only fault here is your say-so. There are so many people that are ahead of me in this case that can be at fault if you want to fault someone, as you clearly do. don't think for a second i don't know what your depositions are about. It's your lawyer's tactic to try and get a timid guy like Steven to say something to benefit your case. I'm going to pay for a deposition that is not necessary? Why? because we can go to court tomorrow if you want to, but you don't because you have nothing on us. you actually insult me.

Let me set the record straight for you one more time Mr Osha lawyer. you are osha! you train and give out cards to people saying that they completed a course and are certified as long as they pay your fee. but you don't actually test the

employees. so you don't know if they learned anything or even slept in your class. you don't care. the people should be tested to see if they learned anything about safety. but that's not what this is really about. It's about money! the very reason you are attacking me. Imagine you get into an accident with a guy and it's his fault. but he is an off duty cop, and the cops get called to the scene. how's your chances now? same here! I'm getting accused of something, I still don't know what it is, by osha and the people judging me work for osha. How's that a fair trial? so you can order another deposition if you like but good luck getting me to attend it. But when you tell me we are going to trial with this then I'll comply. Of course I need to be there to pick the jury. or you can call me and tell me you're accepting my generous offer I gave you. but until then please stop harassing me.

29. On July 17, 2023, the Secretary emailed the Court to inform about Respondent's stated refusal to comply with the Court's order. The Secretary also notified the Court of her intention to move for sanctions against Respondent for its failure to comply with the Order.

30. The Court scheduled a conference for July 27, 2023, to discuss Respondent's noncompliance. That morning, Respondent sent an email stating he could not attend the conference due to a personal emergency. The Court advised the Secretary that she could file her Motion for Sanctions.

31. On August 10, 2023, the Secretary filed her Motion for Sanctions. That day the Secretary also obtained a subpoena from the Court requiring Foreman Fernandez appear for a deposition.

32. On August 11, 2023, the Court issued an Order noting "that the Secretary has not filed, neither has the Court granted, a Motion to Compel. The Secretary is hereby ordered to supplement the Motion for Sanctions to address this issue."

33. On August 18, 2023, the Secretary filed her Motion to Compel Respondent to Coordinate and Pay for foreman Fernandez's Deposition.

34. On August 23, 2023, the Court granted the Secretary's Motion to Compel Respondent to Coordinate and Pay for Foreman Fernandez's Deposition. That day the Court held a conference call with the parties to discuss compliance with the Order wherein Andrew Trinchese

declared that Respondent would not comply with the Order and clarified that it understood and was prepared to deal with the consequences of its decision.

35. During the call, despite refusing to cooperate and arrange Foreman Fernandez's deposition, Mr. Trinchese nevertheless explicitly requested that the Secretary obtain and serve a subpoena on Foreman Fernandez requiring his deposition testimony. Mr. Trinchese explained that he would not contact Foreman Fernandez regarding this deposition because he respected Foreman Fernandez's wish to not participate in this case. The Secretary agreed to serve the subpoena and immediately following the conference call emailed Respondent ". . . as we just discussed during our conference call with Judge Bell, please forward me Steven Fernandez's home address and phone number."

36. Respondent did not respond and on August 30, 2023, the Secretary again emailed Mr. Trinchese requesting Foreman Fernandez's home address:

As you requested during our conference call with Judge Bell last Wednesday, we (the Secretary of labor) have obtained and are prepared to serve Steven Fernandez with the attached subpoena requiring him to appear for the deposition that Judge Bell Ordered As Judge Bell ordered, Mr. Fernandez's deposition must occur **by** September 29, 2023.

However, we do not have Mr. Fernandez's home address which prevents us from serving him by certified mail- return receipt requested. Therefore, we ask again, that you send Mr. Fernandez's home address and ideally his phone number so we can serve him with the subpoena.

If you are not willing to provide Mr. Fernandez's home address, please let us know, so we may decide how to respond to this circumstance. Please let me know if you have any questions.

37. On August 31, 2023, the Secretary emailed Foreman Fernandez to try and obtain his home address:

As you know Trinchese iron Works & Construction Corp. is currently engaged in an OSHA lawsuit with the Secretary of Labor. Judge Bell who presides over the case has ordered that your deposition be held before September 29, 2023.

We are trying to serve a subpoena requiring your attendance at the yet-to-be scheduled deposition, but we do not have your home address to send you a certified letter.

We are therefore asking that you send us your home address as soon as possible so we can mail you the deposition subpoena by certified mail.

38. Unable to obtain Foreman Fernandez's home address, on September 6, 2023, the Secretary wrote the Court a letter and requested a conference to address Respondent's failure to provide Mr. Fernandez's home address.

39. In response the Court scheduled a conference call for September 7, 2023, which was rescheduled to September 11, 2023. During the September 11th call, Mr. Trinchese repeated his refusal to provide Foreman Fernandez's address because he personally does not want to get Foreman Fernandez further involved in the litigation and repeated, he understood the potential consequences of failing to comply, including default.

40. On September 13, 2023, the Secretary filed a Motion to Compel Respondent to Produce Foreman Fernandez's Home Address and Phone Number. Secretary's Counsel also emailed the Motion to Mr. Trinchese.

41. On September 14, 2023, the Court granted the Secretary's Motion and Ordered Respondent to produce Foreman Fernandez's contact information.

42. Having not received a response, on September 19, 2023, the Secretary emailed Mr. Trinchese asking that he "[p]lease let us know immediately whether you plan on complying with this Order." The Secretary did not receive a response.

43. After ignoring the Orders and the Secretary's multiple requests that he comply, on September 29, 2023, which was the deadline to comply with the Court's August 23, 2023, Order requiring Respondent to coordinate and pay for Foreman Fernandez's deposition, Respondent

wrote an email titled “Forced Defiance” to the Court flatly declaring again his refusal to comply with the Order.

Discussion

Rule 52(f)(2) of the Commission Rules of Procedure (Commission Rules), 29 C.F.R.

§ 2200.52(f)(2), provides in pertinent part:

Sanctions. If a party fails to comply with an order compelling discovery, the Judge may enter an order to redress the failure. Such an order may issue upon the initiative of a Judge, after affording an opportunity to show cause why the order should not be entered or upon the motion of a party conforming to § 2200.40. The order may include any sanction stated in Federal Rule of Procedure 37, including the following:

- (i) An order that designated facts shall be taken to be established for purposes of the case in accordance with the claim of the party obtaining matters in evidence;
- (ii) An order refusing to permit the disobedient party to support or to oppose designated claims or defenses or prohibiting it from introducing designated matters into evidence;
- (iii) An order striking pleadings or parts of pleadings or staying further proceedings until the order is obeyed; and
- (iv) **An order dismissing the action or proceeding or any part of the action or proceeding or rendering a judgment by default against the disobedient party.**

(emphasis added.)

Rule 101 also provides for sanctions, to include default, for failure to obey Commission Rules or Orders of the Commission or its Judges. However, by express terms, it does not apply to sanctions for failure to comply with orders compelling discovery. 29 C.F.R. § 2200.101(a) and (c).

By Order dated June 28, 2023, the Court granted the Secretary’s Motion to Depose Foreman Steven Fernandez at Respondent’s Expense.³ By Order dated August 23, 2023, the Court granted the Secretary’s Motion to Compel Respondent to Coordinate and Pay for Foreman Steven

³ Although this motion was not specifically styled as a “Motion to Compel,” the Secretary moved the Court to compel Respondent, Andrew Trinchese, to provide for another deposition of his Foreman, Steven Fernandez, at Mr. Trinchese’s expense.

Fernandez's Deposition. Then, by Order dated September 14, 2023, the Court granted the Secretary's Motion to Compel Respondent to Produce Foreman Fernandez's Home Address and Phone Number. Respondent failed to comply with these Orders.

The Commission has an obligation to provide all parties to a case with an opportunity to for a "full, fair, and equal opportunity to be heard." *Choice Elec. Corp.*, 14 BNA OSHC 1899, 1900-01 (No. 88-1393, 1990). The Commission recognizes that employers who participate in proceedings before the Commission self-represented, without an attorney, may require additional consideration as they may not be knowledgeable about the Commission's procedural requirements and legal procedures. *Id.*; *Sealtite Corp.*, 15 BNA OSHC 1133-34 (No. 88-1431, 1991).

Respondent Andrew Trinchese is a *pro se* (self-represented) litigant in this proceeding. Beyond the initial prehearing conference call, the Court held five (5) additional prehearing conference calls for this case. During each of these conference calls, the Court took time to explain to Respondent, Andrew Trinchese, applicable Commission rules --- especially those related to participation in discovery, and the consequences of failure to comply with the rules and Court Orders to enforce the rules. However, during the conference calls, Respondent vented his frustration with the process and, at some point, communicated an unwillingness to participate in the discovery process as it related to the follow-up deposition of his employee Foreman Fernandez. *See Ark. Abatement*, 17 BNA OSHC 1163, 1164-65 (No. 94-2210, 1995), ("[W]hat we will require of a *pro se* party is sufficient diligence and reasonableness to show that it is willing to have its alleged violations resolved by the Commission....[But] where a party's default indicates disrespect for, or indifference to, Commission proceedings, the party's claims properly are dismissed.") It is also worth noting that Mr. Trinchese's tone and demeanor made it clear that he was not intimidated by this administrative process even though he was self-represented. On the contrary, he pushed

back on requests from Counsel for the Secretary and even admonitions from the Court regarding his obligation to participate in the discovery process. For example, in response to the Court's June 28, 2023, Order in which the Court granted the Secretary's Motion to Depose Foreman Steven Fernandez at Respondent's Expense, Mr. Trinchese sent an email to Counsel for the Secretary stating, "I will not pay for any kind of deposition nor does Steven want to sit in another one." His email went on to say, "I am no longer going to even respond to you, unless we are going straight to trial with this." Subsequently, on August 23, 2023, the Secretary filed, and the Court granted, a Motion to Compel Respondent to Coordinate and Pay for Foreman Steven Fernandez's Deposition.⁴ In that Order, the Court mandated that the deposition take place by/before September 29, 2023, and rescheduled the hearing date to accommodate this delay. During a phone conference with the parties on August 23, 2023 (before the Secretary filed, and the Court granted, her Motion to Compel on the same day), Mr. Trinchese said he would not comply with the Court's Order, neither would he help the Secretary serve Mr. Fernandez with a subpoena for the follow-up deposition. Rather, he insisted that the Secretary obtain and serve a subpoena directly to Mr. Fernandez. When asked if he had Mr. Fernandez's contact information, he responded in the affirmative. Thereafter, Mr. Trinchese ignored attempts by Counsel for the Secretary to obtain contact information for Steven Fernandez in order to serve a deposition subpoena. The Court held another conference call on September 11, 2023, to discuss these events. Mr. Trinchese was steadfast in his refusal to provide Mr. Fernandez's contact information because he did not want to "get involved," and out of respect for Mr. Fernandez's desire to not participate in another deposition. He further indicated that he understood the possible consequences of his failure to

⁴ Although the Secretary's Motion for Sanctions (dated August 10, 2023) was properly filed based on the Court's June 28, 2023, Order Granting Secretary's Motion to Depose Foreman Fernandez at Respondent's Expense, the Court took extra care to ensure strict compliance with the Commission Rules and provided Respondent with yet another opportunity and more time to comply by insisting that a Motion to Compel be filed before sanctions would be imposed.

comply. Finally, on September 13, 2023, the Secretary filed, and the Court granted, a Motion to Compel Respondent to Produce Foreman Fernandez's Home Address and Phone Number. On September 29, 2023, Mr. Trinchese filed an email with the Court and Counsel for the Secretary in which, among other things, he objected to a second deposition of Mr. Fernandez although he admitted his interruptions during the first one, which triggered the need to complete this discovery by setting up a second one. In his email, Mr. Trinchese went on to assert that Counsel for the Secretary's attempts to get Mr. Fernandez's contact information in order to serve a deposition subpoena amounted to an "abuse of power."

The Commission has held that prehearing procedures that aid in the early formulation of issues benefit all parties during trial preparation and result in the more efficient use of Commission resources at both the hearing and review stages. *Architectural Glass & Metal Co., Inc.*, 19 BNA OSHC 1546 (No. 00-0389, 2001). The Commission has also held that the imposition of appropriate sanctions is important to ensure compliance with prehearing procedures and to adjudicate cases fairly and efficiently. *Duquesne Light Co.*, 8 BNA OSHC 1218, 1221 (No. 78-5034, 1980) (consolidated).

Here, Respondent took his time providing responses to the Secretary's written discovery. Only after multiple reminders by the Secretary and an admonition by the Court did Respondent provide scant responses to some of Respondent's interrogatories and Request for Production of Documents. Regarding his deposition, the transcript reveals that Mr. Trinchese's conduct was obstreperous, and his answers were, for the most part, evasive, and argumentative.⁵ In response, the Secretary chose to forego full and complete answers to written discovery and a second

⁵ A copy of Respondent Andrew Trinchese's deposition was previously provided as an attachment to the Secretary's Motion for Adverse Inferences and to Depose Foreman Fernandez at Respondent's Expense. Despite the Secretary's initial request for five (5) adverse inferences based on Mr. Trinchese's deposition responses, the Court only granted three (3) and the Secretary withdrew the other two (2).

deposition of Mr. Trinchese. Instead, the Secretary decided to settle for a few adverse inferences based on Mr. Trinchese's Fifth Amendment assertions during his deposition along with a follow-up deposition of Steven Fernandez paid for by Respondent. The Court finds that Respondent's failure to comply with prehearing discovery procedures prevented the Secretary from identifying and assessing issues in preparation for a hearing.

SANCTIONS

It has been held that a judge has very broad discretion in imposing sanctions for noncompliance with the Commission's Rules or the judge's orders. *See Sealtite*, 15 BNA OSHC at 1134. However, although a judge has very broad discretion in imposing sanctions for noncompliance with the Commission's Rules or his own orders, the judge must not impose a sanction that is too harsh under the circumstances of the case. "Reviewing courts universally recognize the harshness of dismissal with prejudice and generally require that lesser sanctions first be considered." *Duquesne* 8 BNA OSHC at 1222. The Commission has held that a default judgment is "too harsh a sanction for failure to comply with certain prehearing orders unless the record shows contumacious conduct by the noncomplying party or prejudice to the opposing party," or "where a party displays a 'pattern of disregard' for Commission proceedings." *Architectural Glass* 19 BNA OSHC at 1547. Sanctions, however, 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 was contumacious. *See, e.g., Phila. Constr. Equip. Inc.*, 16 BNA OSHC 1128, 1130-31 (No. 92-899, 1993) (finding a pattern of disregard for Commission proceedings where Respondent was late for hearings 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).

For the following reasons, the Court finds that sanctions are appropriate in this case. The Court has rescheduled this case twice in consideration of delays caused by Mr. Trinchese's refusal to comply with Court Orders compelling discovery. Although self-represented, Mr. Trinchese never indicated that he did not understand what any of the Orders required him to do, but rather his unwillingness to do it. Finally, the Secretary asserts, and the Court agrees, that her inability to conduct a thorough deposition of Steven Fernandez who is identified as a key witness in this case, prevents the Secretary from making a determination of Respondent's defense and the merits of any such defense. The Court agrees with the Secretary's contention that Respondent's failure to comply with the Court's Orders has resulted in prejudice to the Secretary. Sec'y Mtn. 13.

The Court understands and takes seriously that the imposition of sanctions should be guided by proportionality between the offense and the sanction. *See Shea v. Donohoe Constr. Co.*, 795 F.2d 1071, 1077 (D.C. Cir.1986); *Butler v. Pearson*, 636 F.2d 526, 531 (D.C. Cir.1980). Here, the Court finds Respondent's conduct to be contumacious based on his refusal to comply with the Court's June 28, 2023, Order granting the Secretary's Motion to Depose Foreman Steven Fernandez at Respondent's Expense; the Court's August 23, 2023 Order granting the Secretary's Motion to Compel Respondent to Coordinate and Pay for Foreman Steven Fernandez's Deposition; and the Court's September 14, 2023, Order granting the Secretary's Motion to Compel Respondent to Produce Foreman Fernandez's Home Address and Phone Number. Moreover, the Court finds that Respondent's written and verbal refusals to comply with its Orders reflect a pattern of willful conduct and flagrant disregard for Commission proceedings. The Court finds that the appropriate sanction here is DEFAULT.

ORDER

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

that:

- Respondent is declared in DEFAULT and its Notice of Contest is DISMISSED.
- The Citations, to include Citation 1, Items 1 & 2; and Citation 2, Item 1 are AFFIRMED, and proposed penalties for each are ASSESSED.
- The hearing scheduled to commence on November 14, 2023, is hereby CANCELED.

SO ORDERED.

/s/ Keith E. Bell
Honorable Keith E. Bell
OSHRC

Dated: November 1, 2023
Washington, D.C.