UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

Secretary of Labor, Complainant, v. Lucas Shrewsbury dba Infinite Installation and Repair, Respondent.	)	OSHRC Docket No. 21-0513

DECISION AND ORDER GRANTING SECRETARY'S MOTION FOR DEFAULT JUDGMENT

I. Background

This matter is before the Court as a matter pursuant to the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (Act).

On May 6, 2021, the Occupational Safety and Health Administration's (OSHA) Syracuse Area Office issued two citations and a notification of proposed penalties to Respondent for violations that occurred at 600 East Brighton Avenue, Syracuse, NY 13210. The first citation contained two items and the second citation contained one item. These citations arose from OSHA Inspection No. 1501701.

Citation 1, Item 1, alleged a Willful – Serious violation of 29 C.F.R. § 1926.501(b)(4)(i), where "on or about 11/9/20: Employees working on the roof were not protected from falling through skylights …." The proposed penalty for Citation 1, Item 1, is $30,037. Citation 1, Item 2, alleged a Willful – Serious violation of 29 C.F.R. § 1926.501(b)(10), where "on or about 11/9/20: Employees were working on a low slope roof with a ground to eave height of 19 feet without fall protection of any kind." The proposed penalty for Citation 1, Item 2, is $30,037. Citation 2, Item 1, alleged an Other-Than-Serious violation of 29 C.F.R. § 1926.503(b)(1), where "on or about 11/9/20:

Employees were working on a low slope roof with a ground to eave height of 19 feet without fall protection of any kind and where the employer did not produce requested fall protection training certificates." The proposed penalty for Citation 2, Item 1, is $0.00.

By letter dated May 24, 2021, Respondent filed its Notice of Contest contesting all aspects of the citations.

On September 15, 2021, the Secretary served his First Set of Interrogatories and Requests for the Production of Documents on Respondent's counsel. Respondent's responses to the Secretary's Written Discovery were due to the Secretary on October 15, 2021.

In response to repeated demands by the Secretary for discovery responses, Respondent's counsel offered numerous promises to fully respond to discovery in short order, and offered a variety of excuses for Respondent's continued refusal to comply with its discovery obligations, including a possible change in counsel, the Thanksgiving holidays, computer difficulties, etc.

On December 1, 2021, the Secretary moved the Court to compel discovery responses.

On December 10, 2021, Respondent filed a response to the Secretary's motion, stating among other things that it "does not object to an order compelling responses to the outstanding discovery demands."

On December 14, 2021, the Court granted the Secretary's Motion to Compel discovery responses and instructed Court personnel to serve its order on the parties. The Court ordered Respondent to provide responses to the Secretary's First Set of Interrogatories and the Secretary's First Requests for the Production of Documents by December 29, 2021. Due to an inadvertent administrative oversight, Court personnel did not date and serve the Court's order on the parties until January 11, 2022.

On or about January 14, 2022, the principal of the company, Lucas Shrewsberry, died.

On March 2, 2022, the Secretary moved for sanctions, explaining that Respondent had

failed to take any steps to comply with the Court's order compelling Respondent to respond to the Secretary's Written Discovery.

On March 16, 2022, Respondent's counsel filed Respondent's opposition to the Secretary's Motion for Sanctions.

On April 11, 2022, the Court granted the Secretary's Motion for Sanctions and sanctioned Respondent for failing to comply with its discovery obligations. Specifically, the Court ordered that: 1) Respondent's defenses set out in its answer were stricken and Respondent shall not be allowed to offer any evidence on any of these stricken defenses, or on any other defenses, at the trial or in any post-trial brief filed; 2) Respondent was not allowed to: a) call any witnesses to testify at the trial other than OSHA personnel, b) offer into evidence any documentary material the Secretary had sought in his Written Discovery requests, and c) object to any offer of proof the Secretary may make as to any expected testimony of witnesses the Secretary has been unable to locate due to Respondent's failure to respond to the Written Discovery requests; 3) Respondent shall pay for the costs and attorney's fees associated with the Secretary having to file his Motions to Compel and for Sanctions; and 4) Respondent's failure to fully comply with all parts of this order may result in further sanctions, including the dismissal of its notice of contest and the assessment of other costs and expenses incurred by the Secretary. (April 11, 2022 Order). The Court did not hold Respondent in default because of "the fact that Respondent has not abandoned this case." (*Id.*, at 4 n.2).

On May 4, 2022, Respondent's then counsel, Michael Rubin Esq., Goldberg, Segalla, LLP (Respondent's counsel), filed Respondent's Counsel's Motion to Withdraw as Counsel pursuant to Commission Rule 23(b) (Motion to Withdraw as Counsel) since Respondent has not paid Respondent's counsel's attorneys' fees since about August, 2021, and other reasons.

On May 19, 2022, the Court granted Respondent's counsel unopposed Motion to Withdraw as Counsel.

On July 11, 2022, pursuant to 29 CFR §§ 2200.40(a) and 2200.52(f), the Secretary moved the Court for an order imposing a default judgment against Respondent for abandoning this case after failing to comply with the Court's order granting the Secretary's Motion to Compel Discovery Responses (Motion for Default). In his Motion for Default, the Secretary's counsel indicated that he had spoken with [redacted], the [redacted]/family representative of Respondent, who stated that following Respondent's principal's death, the business has permanently ceased operations, there are no employees or (other) representatives of the business, and that she wanted nothing to do with this case. Accordingly, the Secretary asserts that Respondent has abandoned this case, has no representative with an interest in these proceedings, will not comply with the Court's orders, and should be declared in default.

Respondent has not filed any response to the Motion for Default.

To date, Respondent has not provided any response to the Secretary's written discovery.[1]

The Court's schedule calls for discovery to be ongoing. The case is scheduled for trial commencing on October 11, 2022.

II. Jurisdiction

The Court finds that the Commission has jurisdiction of the parties and the subject matter in this case.

III. *The Secretary's Burden of Proof*

To prove a violation of a specific standard, the Secretary must demonstrate by a preponderance of the evidence that: 1) the cited standard applies, 2) the terms of the standard were not met, 3) employees had access to the cited condition, and 4) the employer knew, or could have known with the exercise of reasonable diligence, of the cited condition. *Astra Pharm. Prods.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981) *aff'd in relevant part,* 681 F.2d 69 (1st Cir. 1982).

IV. Motion to Default

Commission Rule of Procedure (CRP) 101 permits a judge to declare a party in default and enter a final decision for failure to otherwise proceed as required by the rules or judge on the motion of a party. *See* 29 C.F.R. § 2200.101. The rule permits the Court to enter a default order and dismiss a notice of contest where an employer has shown a "pattern of disregard for Commission proceedings." *Heave Ho Crane Co.*, 24 BNA OSHC 2058, 2060 (No. 14-0250, 2014); *see also Twin Pines Constr., Inc*., 24 BNA OSHC 1500, 1502 (No. 12-1328, 2012) (ALJ).

"Commission judges have the discretion to impose sanctions on parties who violate their orders." *NL Indus., Inc.* 11 BNA OSHC 2156, 2168 (No. 78-5204, 1984). The Commission and federal courts generally consider eight criteria when determining whether a Judge's decision to sanction a party through dismissal is appropriate. *Duquesne Light Co.*, 8 BNA OSHC 1218, 1221 (No. 78-5303, 1980) (consolidated). Prejudice to the opposing party,[1] whether there is a showing of willful default by a party, and contumacious conduct by the noncomplying party are three of the more significant criteria to consider. Only one of these three criteria is needed to affirm the Judge's decision to render a judgment by default against a party. *Ford Dev. Corp.*, 15 BNA OSHC 2003, 2005 (No. 90-1505, 1992); *Circle T Drilling Co.*, *Inc*., 8 BNA OSHC 1681, 1682 (No. 79-2667, 1980).

In this instance, there is a clear showing of willful default by Respondent. The Court finds that Respondent has abandoned its case pending before the Commission. Respondent failed to respond to Respondent's counsel's Motion to Withdraw as Counsel. Respondent has not had a successor representative make an appearance before the Commission in this case after the Court granted Attorney Rubin's Motion to Withdraw as Counsel. Respondent failed to respond to the

[1] A party is prejudiced if the failure to make required court ordered disclosures impairs the party's ability to adequately prepare for trial, including understanding the factual merits of the opponent's defense(s). *Avionic Co. v. Gen. Dynamics Corp.,* 957 F.2d 555 (8th Cir. 1992). In this instance, the Secretary has been clearly prejudiced by Respondent's failure to comply with the Court's Order compelling discovery.

Secretary's Motion to Default. Respondent has failed to comply with the Court's order compelling discovery per 29 C.F.R. § 2200.52(f). Respondent's family representative has told the Secretary's counsel "that neither she, nor anyone once associated with Respondent, intends to participate in this matter." (Motion for Default, at 6). Collectively, the Court finds these failures to be contumacious conduct by the Respondent.

The Court may dismiss a matter when "the record shows contumacious conduct by the noncomplying party or prejudice to the opposing party." *St. Lawrence Food Corp. D/b/a/ (sic) Primo Foods*, 21 BNA OSHC 1467, 1472 (No. 04-1734, 2006) (consolidated). Respondent has now shown no interest in moving this case forward to trial. Under these circumstances, the Court sees no worthwhile purpose in allowing this case to proceed to a trial when there is no basis to believe that Respondent will appear.[2]

The Court is mindful of policy considerations in the law that weigh in favor of deciding cases on their merits. *See Pearson v. Dennison*, 353 F.2d 24 (9th Cir. 1965). The Court finds that due notice of Respondent's procedural rights has been conveyed to Respondent. The Court has provided ample warning that Respondent's failure to comply with Court orders may result in the dismissal of its notice of contest. Respondent has failed to take advantage of the opportunity to advise the Court that it has not abandoned its case before the Commission.[3] Every indication presently before the Court is that Respondent has now walked away from its contest.

The Court grants Complainant's Motion for Default and finds Respondent to be in default

---

[2] The failure of a party to appear at a trial may result in a decision against that party. *See* 29 C.F.R. § 2200.64.
[3] The Court's reasoning in *Twin Pines Constr., Inc*. applies with equal force here:

> Having submitted its notice of contest, Respondent has shown no interest since then in moving this case forward to trial. Respondent has done nothing to prepare to address the merits of the citations before the Court in an orderly fashion. Under these circumstances, the Court sees no worthwhile purpose in allowing this case to proceed to a trial when there is no basis to believe that Respondent will appear.

Twin Pines Constr. Inc., 24 BNA OSHC at 1504.

pursuant to 29 C.F.R. §§ 2200.52(f)(4) and 2200.101(a). "A defaulting party 'is taken to have conceded the truth of the factual allegations in the complaint as establishing the grounds for liability as to which damages will be calculated.'" *Ortiz-Gonzalez v. Fonovia*, 277 F.3d 59, 62-63 (1st Cir. 2002) (quoting *Franco v. Selective Ins. Co.*, 184 F.3d 4, 9 n.3 (1st Cir. 1999)), *Tower Painting Co.*, 22 BNA OSHC 1368, 1375 (No. 07-0585, 2008). Because of the default, the factual allegations of the underlying citations relating to liability are taken as true. *Dundee Cement Co. v. Howard Pipe & Concrete Prods.*, 722 F.2d 1319, 1323 (7th Cir. 1983). When entering a default judgment, factual allegations set forth in the complaint and underlying citations are enough to establish a defendant's liability. *Trs. of the Iron Workers Dist. Council of Tenn. Valley and Vicinity Pension Fund et al. v. Charles Howell,* No. 1:07-cv-5, 2008 WL 2645504, at * 6 (E.D. Tenn. July 2, 2008); *Nat'l Satellite Sports, Inc. v. Mosely Entm't, Inc.*, No. 01-CV-74510-DT, 2002 WL 1303039, at * 3 (E.D. Mich. May 21, 2002).

The Court finds that the underlying complaint and citations sufficiently state the description of the alleged violations and a reference to the standards allegedly violated.[4] The Court also finds that the Secretary has adequately shown the applicability of the cited standards for each of the alleged violations. The Court further finds that the Secretary has sufficiently established that the terms of the cited standards were not met by Respondent in each of the alleged violations. The Court also finds that Respondent's employees had access to the cited conditions. Lastly, the Secretary has adequately proved that Respondent either knew or should have known of the cited conditions. All the Citations' items at issue are affirmed in their entirety as alleged by the Secretary.

[4] Section 9(a) of the Act notes that a citation must "describe with particularity the nature of the violation, including reference to the provision of the Act, standard, rule, regulation, or order alleged to have been violated."

V. ***Penalties***

The Secretary has proposed a total penalty of $60,074 for all the Citations' items at issue. In assessing penalties, the Commission must give due consideration to the gravity of the violation and to the employer's size, prior history of violations and good faith. 29 U.S.C. § 666(j); *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2213-14 (No. 87-2059, 1993). These factors are not necessarily accorded equal weight, and gravity is generally the principal factor in penalty assessment. *Trinity Indus., Inc.*, 15 BNA OSHC 1481, 1483 (No. 88-2691, 1992). The gravity of a violation depends upon such matters as the number of employees exposed, duration of exposure, precautions taken against injury, and the likelihood that an injury would result. *J.A. Jones*, 15 BNA OSHC at 2213-14. Based on the record of this case and Respondent's default, the Court finds that the Secretary properly considered the statutory factors in his penalty proposal. The Court finds the total proposed penalty of $60,074, along with the classification of the violations as alleged by the Secretary, for all of the Citations' items at issue to be appropriate, and the proposed penalties are assessed as proposed by the Secretary.

VI. ***Findings of Fact and Conclusions of Law***

All finding of fact and conclusions of law relevant and necessary to a determination of the contested issues have been found and appear in the decision above. *See* Fed. R. Civ. P. 52(a).

VII. ***Order***

After considering the entire record of this case, Complainant's Motion to Default and Respondent's lack of response thereto, IT IS ORDERED THAT Complainant's Motion for Default is GRANTED, a default judgment against Respondent is warranted and that Respondent be declared in DEFAULT;

IT IS FURTHER ORDERED THAT Respondent's Notice of Contest is DISMISSED with

prejudice;[5] and

based upon the foregoing findings of fact and conclusions of law, IT IS FURTHER ORDERED that:

1. Item 1 of Citation 1 is affirmed as a Willful-Serious violation of 29 C.F.R. § 1926.501(b)(4)(i), and a penalty of $30,037 is assessed;

2. Item 2 of Citation 1 is affirmed as a Willful-Serious violation of 29 C.F.R. § 1926.501(b)(10), and a penalty of $30,037 is assessed; and

3. Item 1 of Citation 2 is affirmed as an Other-than-Serious violation of 29 C.F.R. § 1926.503(b)(1), and a penalty of $0.00 is assessed.

SO ORDERED.

/s/
The Honorable Dennis L. Phillips
U.S. OSHRC Judge

Date: August 8, 2022
Washington, D.C.

[5] The trial scheduled to commence on October 11, 2022 at Syracuse, New York is now hereby cancelled.