UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. CARSON CONCRETE CORP., and CARCO CONSTRUCTION CORP., Respondents.	OSHRC DOCKET NO. 03-2229

APPEARANCES:

Donald K. Neely, Esq.
Brian J. Mohin, Esq.
U.S. Department of Labor
Philadelphia, Pennsylvania
For the Complainant

Peter J. Leyh, Esq.
Kaufman, Coren & Ress, P.C.
Philadelphia, Pennsylvania

James F. Sassaman
Director of Labor Relations
General Building Contractors Association, Inc
Philadelphia, Pennsylvania
For the Respondents

BEFORE: Administrative Law Judge William C. Cregar

DECISION AND ORDER

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"). By order dated July 26, 2004, this matter was scheduled for a hearing to commence on November 16, 2004. On Friday, November 12, 2004, Respondents' representative, James Sassaman, moved for a continuance of the hearing date. At a telephone prehearing conference call held, also on November 12, 2004, I denied the motion, finding no good cause for granting the requested continuance. At the

commencement of the hearing on November 16, 2004, Respondents' newly-retained attorney, Peter Leyh, moved for reconsideration of the denial of the motion for a continuance; being unfamiliar with the case, he requested an additional 30 days in order to prepare. I denied Respondents' motion for reconsideration and, following Respondents' refusal to proceed, I granted Complainant's motion to dismiss the notice of contest for failing to defend. *See* 29 C.F.R. § 2200.41(a). This Decision and Order constitutes this tribunal's final disposition of this matter. 29 C.F.R. § 2200.90(a).

Findings of Fact

Procedural History

1. Respondents, Carson Concrete Corporation ("Carson") and Carco Construction Corporation ("Carco") are corporations engaged in business as concrete contractors. They share the same office and place of business located at 625 West Ridge Pike, Bldg. A, Suite 104, Conshohocken, Pennsylvania. Anthony J. Samango, Jr., President/Secretary-Treasurer, is the sole corporate officer of Carson.[1] His son, Anthony J. Samango III, President/Secretary-Treasurer, is the sole corporate officer of Carco. Answer, ¶ 2. Response to Complainant's Second Interrogatory Nos. 1, 7; Oral Deposition of Anthony J. Samango III, p. 18, lns. 10-13 (Attached to Secretary's Motion to Amend Citations and Complaint to add Carco as a Respondent).

2. From May 12, 2003 to July 2, 2003, the Occupational Safety and Health Administration ("OSHA") inspected Carson's work site in Philadelphia, Pennsylvania. As a result of the inspection, OSHA issued Carson a Citation and Notification of Penalty on November 7, 2003. The total penalties proposed were $176,000.00.

3. James Sassaman is the Director of Labor Relations of General Building Contractors Association, Inc. On November 14, 2003, Carson, through Mr. Sassaman, responded to the

[1]Hereafter, Anthony J. Samango, Jr. will be referred to as "Mr. Samango."

citations with a timely notice contesting the citations, the proposed abatement dates, and the proposed penalties.

4. On February 17, 2004, the Chief Administrative Law Judge designated the case for mandatory settlement proceedings, assigning Judge Covette Rooney as settlement judge. *See* 29 C.F.R. § 2200.120.

5. On February 25, 2004, Complainant served Carson with 24 Requests for Admission. Most of these requested either an admission or a denial that a named individual had been exposed to a hazard as set forth in one of the items identified in the citations and that the individual was employed by Carson. Proposed Govt. Exh. 18A.[2]

6. Prior to April 4, 2004, Mr. Sassaman discussed the case with Mr. Samango. At the November 16, 2004 hearing, the following dialogue occurred:

> Mr. Sassaman: Your Honor, I remember meeting with Mr. Samango for the purpose of going into the discovery. And when I meet with that employer the very first thing I go over is the request for admissions. Why? Because they're usually very straight forward sentences as opposed to the compound labyrinths of interrogatories with their definitions and identified sections.
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> We went over that stuff. Mr. Samango said, "These are not my employees," I'll grant him that, he's consistent with that theme. However, having practiced in this area as long as I have, I know that one doesn't have the luxury of saying I don't know because the rule for RFA [Requests for Admissions] states that that's not good enough, that you have to do some reasonable inquiry.
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> We had the OSHA file, I had sent copies of everything. He sat behind his desk. He has a little round table, big pile of papers I kept sending him. I said, "Let's go through the OSHA inspector's notes." The OSHA inspector is like a police officer, he has a police report. I said, "Look, here's [the] citation whatever, here's a photograph of some guy, here's a hazard, here's his notes.

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[2]Four proposed exhibits marked for identification as Govt. Exhibits 18A, 18B, 18C and 18D, and referred to by these designations at the hearing, are already a part of the administrative record. They are: Complainant's First Set of Interrogatories, Requests for Admission and Request for Production of Documents (18A); Respondent's Responses to Complainant's Requests for Admission (18B); Complainant's Second Set of Interrogatories and Request for Production of Documents (18C); and Respondent's Discovery Responses (18D).

It's clear to me just looking at this, assuming this man is documenting what is true, that hazards existed," and I suggested "You have to either admit or deny, we have to do inquiry"....

[The Court]: But let me ask you a question here. Your heard Mr. Samango say that he didn't know anything about these requests for admissions until November 5th [2004].[3]

Mr. Sassaman: I don't believe that. Perhaps he has —

[The Court]: Why do you not believe that?

Mr. Sassaman: Because I discussed them with him I went over the RFA's , then the interrogatories, then the request for production.

[The Court]: Was it over the phone or did you —

Mr. Sassaman: In person.

[The Court]: In person. And when was that?

Mr. Sassaman: That was prior to April 4th, late March or early April. Whenever the discovery was filed he was copied on the finished product.

[The Court]: When was he copied on the finished product?

Mr. Sassaman: When they went out the door to Judge Rooney and Mr. Neely. I always copied him.

[The Court]: Did he respond back?

Mr. Sassaman: No.

(Tr. 29-31).

7. On April 12, 2004, Carson, through Mr. Sassaman, responded to Complainant's Requests for Admission. The typical response was: "Admitted in part and denied in part, employment relationship denied."

8. A mandatory settlement conference, held on June 28, 2004, did not result in a settlement. Accordingly, the Chief Administrative Law Judge reassigned this case to the undersigned on June 29, 2004.

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[3]Anthony J. Samango, Jr. testified he had not become aware of the Complainant's Requests for Admissions, the motion to admit the responses, or the order granting the motion until November 5, 2004. (Tr. 18-19). I do not credit his testimony, as it requires one to accept either of two very unlikely scenarios. Either Mr. Sassaman acted as a "rogue" representative, making major litigation decisions and filing significant documents without informing his client, or the president of a company facing several OSHA citations with substantial penalties was totally incurious or completely oblivious to a serious matter facing his company. In contrast, having observed Mr. Sassaman's demeanor, I found his testimony to be both credible and consistent with common experience.

9. By my order of June 29, 2004, the matter was set for hearing to commence on Tuesday, November 16, 2004. On July 23, 2004, the parties submitted a joint recommendation for pretrial scheduling acknowledging the scheduled hearing date. On July 26, 2004, I issued an order setting forth dates for the completion of discovery, the filing of motions, etc. This order reiterated the November 16, 2004, hearing date.

10. On August 27, 2004, Complainant moved for an order that Carson's responses to her Requests for Admission be conclusively established. Carson did not oppose the motion, and I granted the motion on October 5, 2004. This order preserved the issue of whether Carson employed the employees exposed to the various hazards.

11. On October 8, 2004, Complainant moved for an order to amend the citations and complaint to add Carco as a Respondent. No opposition to the motion was filed, and I granted the motion on October 26, 2004. Throughout these proceedings, Mr. Sassaman purported to represent Carco in addition to Carson.

12. On November 5, 2004, counsel for Complainant submitted to the court what he and Mr. Sassaman had agreed upon as their joint pre-hearing statement. However, this document was not signed by Mr. Sassaman.

13. On Friday, November 12, 2004, Mr. Sassaman filed a motion to be relieved as representative and for a continuance to permit Respondents to obtain a new representative. The motion states that on November 9, 2004, Mr. Samango met with Mr. Sassaman and disavowed the responses to Complainant's Requests for Admission and ordered him to not sign the joint pre-hearing statment. Complainant opposed the motion, claiming that Respondents failed to demonstrate good cause. On November 12, 2004, the parties argued their respective contentions at a conference call among the undersigned, counsel for Complainant, and Mr. Sassaman. Counsel for Complainant stated that the issue of whether it was Carsons's or Carco's employees that were exposed to the various alleged hazards was discussed during the settlement negotiations and that the issue of whether the violations occurred was not in issue. At the conclusion of the conference call I denied the motion,

finding that it was not supported by a sufficient showing of good cause. I ordered Mr. Sassaman to continue as representative and to be present at the hearing.

14. At the beginning of the hearing on November 16, 2004, Peter Leyh appeared on behalf of Respondents and moved for reconsideration of the denial of the postponement. He requested an extension of 30 days to become familiar with the case and to prepare for hearing. Complainant's counsel opposed the motion, noting he was prepared to proceed, having subpoenaed witnesses who were present; he also noted that one of the witnesses, the OSHA compliance officer, faced back surgery in the next few months. (Tr. 23).

15. I denied the motion for reconsideration, after which Respondents refused to proceed. Complainant then moved for dismissal of the Notice of Contest for failure to obey rules pursuant to 29 C.F.R. § 2200.41(a). I granted the motion.

The Violations

The following are the alleged violations, as amended:[4]

1. On May 12, 2003, an employee of Carson and/or Carco was exposed to a fall from the 17th floor of the worksite while patching an exterior wall and was not protected by a guardrail system, safety net system or personal fall arrest system. Admission No. 1.

2. On May 13, 2003, Cecil Hawkins, an employee of Carson and/or Carco, was installing a guardrail system and was exposed to a two story fall while going to and from his work area and was not protected by a guardrail system, safety net system, or personal fall arrest system. Admission No. 2.

3. On May 12, 2003, Arthur Maycontonio, an employee of Carson and/or Carco, was exposed to a fall of approximately nine feet while constructing the leading edge of the form

[4]The citations state, and it is admitted, that from at least May 12, 2003 though July 2, 2003, Respondents had a workplace at 8th and Walnut Streets, Philadelphia, Pennsylvania, and that from May 12, 2003 through July 2, 2003, an authorized representative of the Secretary of Labor inspected the workplace. Answer, ¶¶ 2, 6.

work above the 20th floor and was not protected from falling by a guardrail system, safety net system, personal fall arrest system or any other fall protection. Admission No. 3.

4. On May 12, 2003, Bill McHale, an employee of Carson and/or Carco, was exposed to a fall of approximately nine feet while constructing the leading edge of the form work above the 20th floor and was not protected from falling by a guardrail system, safety net system, personal fall arrest system or any other fall protection. Admission No. 4.

5. On May 12, 2003, Tracy Lanjity, an employee of Carson and/or Carco, was exposed to a fall of approximately nine feet while bracing a wall form to enclose an opening on the 20th floor and was not protected from falling by a guardrail system, safety net system, personal fall arrest system or any other fall protection. Admission No. 5.

6. On May 12, 2003, an employee of Carson and/or Carco was exposed to a fall of approximately nine feet while enclosing an opening during the construction of the leading edge of the form work above the 20th floor and was not protected from falling by a guardrail system, safety net system, personal fall arrest system or any other fall protection. Admission No. 6.

7. On May 12, 2003, Dwain Hayter, an employee of Carson and/or Carco, was exposed to a fall of approximately nine feet while constructing the leading edge of the form work above the 20th floor and was not protected from falling by a guardrail system, safety net system, personal fall arrest system or any other fall protection. Admission No. 7.

8. On May 12, 2003, an employee of Carson and/or Carco was exposed to a fall of approximately 9 feet while waiting for the Peri form pans to be delivered by a tower crane, and the employee was not protected from falling by a guardrail system, safety net system, personal fall arrest system or any other fall protection. Admission No. 8.

9. As of May 13, 2003, Respondents Carson and/or Carco did not provide a fall protection training program to all of their employees who were exposed or who may have been exposed to fall hazards, including the following employees: Arthur Maycontonio, Bill Blackla, Jerome Ingram, Tom Elchner, and Charles Hollis. Admission No. 9.

10. On May 13, 2003, Charles Hollis, an employee of Carson and/or Carco, utilized a Bosch chipping gun to chip excess cement from interior walls at the worksite and was not provided with eye or face protection to protect against potential injuries to his eyes or face. Admission No. 10.

11. On May 13, 2003, Jim Nelson, an employee of Carson and/or Carco, stood on the top step of a Green Bull step ladder while installing a ring on a vacuum. Admission No. 11.

12. On May 12, 2003, Carson and/or Carco did not keep all employees clear of suspended loads as two bundles of steel braces (multi props) were lifted over the employees working on the 20th floor. Admission No. 12 .

13. On May 12, 2003, Carson and/or Carco did not ensure that the attachment point of body harnesses were located in the center of the wearer's back near shoulder level as Bill Blackla, an employee of either Carson and/or Carco, utilized a Miller personal fall arrest system with the self-retracting life line attached to his side belt harness. Admission No. 13.

14. On May 12, 2003, Carson and/or Carco did not inspect the Miller personal fall arrest system for damage prior to employee Bill Blackla utilizing the fall arrest system on that day. Admission No. 14.

15. On May 13, 2003, Tom Elchner, an employee of Carson and/or Carco, utilized the cross bracing of the PERI system, which is incapable of withstanding 5,000 pounds, as an anchorage point while installing a toeboard on the 20th floor. Admission No. 15.

16. On May 13, 2003, toeboards or equivalent protection were not provided at the edge of a platform on the 20th floor where employees on the 19th floor were exposed to objects such as wood, concrete, and nails falling from above. Admission No. 16.

17. On May 13, 2003, toeboards or equivalent protection were not provided on the floor edges of both the east side and west side of the 20th floor and employees working below the 20th floor were exposed to falling debris. Admission No. 17.

18. On May 12, 2003, employees of Carson and/or Carco were exposed to two unprotected floor holes, measuring 33 inches by 14 inches and 31 inches by 14 inches respectively, adjacent to the automatic climbing jacks on the 20th floor. Admission No. 18.

19. On May 13, 2003, employees of Carson and/or Carco were exposed to an unprotected floor hole, measuring 33 inches by 27 inches, adjacent to the automatic climbing jack on the west side of the 20th floor. Admission No. 19.

20. On May 12, 2003, Carson and/or Carco utilized nylon slings with broken and worn stitches to lift a bundle of steel bracing (multi-props) on the 20th floor. Admission No. 20.

21. On May 12, 2003, Carson and/or Carco utilized nylon slings to lift a bundle of steel bracing (multi-props) on the 20th floor which were not marked with the name or trademark of the manufacturer or the rated capacities for the type of hitch and the type of sling material. Admission No. 21.

22. On May 12, 2003, Carson and/or Carco utilized nylon slings with broken and worn stitches to lift a bundle of steel web bracing (MRK frames) on the 18th floor. Admission No. 22.

23. On May 12, 2003, Carson and/or Carco utilized nylon slings to lift a bundle of steel web bracing (MRK frames) on the 18th floor which were not marked with the name or trademark of the manufacturer or with the rated capacities for the type of hitch and the type of sling material. Admission No. 23.

24. On May 12, 2003, Carson and/or Carco did not have a competent person inspect for damage or defects to the nylon slings that were used to lift a bundle of steel web bracing (MRK frames) on the 18th floor and the bundle of steel bracing (multi-props) on the 20th floor. Admission No. 24.

Discussion

Denial of Respondents' Motion for Continuance

The Commission's rules regarding postponements of hearings are found at 29 C.F.R. § 2200.62. Specifically, Rules 62(a) and 62(c) provide as follows:

> (a) *Motion to postpone*. A hearing may be postponed by the Judge on his own initiative or for good cause shown upon the motion of a party. A motion for postponement shall state the position of the other parties, either by a joint motion or by a representation of the moving party. The filing of a motion for postponement does not automatically postpone a hearing. (Emphasis added).
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> (c) *When motion must be received*. A motion to postpone a hearing must be received at least seven days prior to the hearing. A motion for postponement received less than seven days prior to the hearing will generally be denied unless good cause is shown for late filing.

Respondents' motion for a continuance clearly did not meet the seven-day filing requirement set out in Rule 62(c) above. Further, Respondents did not demonstrate good cause either for the late filing under Rule 62(c) or for the postponement under Rule 62(a).[5] The November 16, 2004 hearing date was established on June 29, 2004 and affirmed on July 26, 2004. As set out *supra*, I credited Mr. Sassaman's testimony that he kept Mr. Samango informed about the case, sent him copies of the Complainant's Requests for Admission, and, prior to April 4, 2004, discussed the proposed responses with him. Yet Mr. Samango waited until the Friday before the Tuesday scheduled for the hearing to attempt to replace his representative and to disavow the responses to Complainant's Requests for Admission. His claim that he did not see the responses until November 5, 2004 is simply not credible. In addition, the Secretary had prepared her case in reliance upon the October 5, 2004 order conclusively establishing Carson's Responses to the Complainant's Requests for Admission, and witnesses had been subpoenaed and were present for the November 16, 2004 hearing. Mr. Samango's disavowal of the admissions would require the Secretary to prepare for trial on issues she justifiably believed were no longer a part of the case. Granting Respondents' motion for a continuance would necessitate additional discovery and would unduly delay the

[5]The reason for seeking a continuance was for Respondents to obtain a new counsel and to also give the new counsel time to become familiar with the case and prepare for the hearing. However, for the reasons set out *infra*, allowing Mr. Sassaman to withdraw at the last minute and granting a continuance would have been improper. Specifically, it would have unduly delayed the hearing, and it had the potential for prejudicing the Secretary's case. *See* 29 C.F.R. § 2200.23 (b).

hearing in this case; granting the motion also had the potential of prejudicing the Secretary's case.[6] For these reasons, I denied Respondents' motion during the telephone conference held on November 12, 2004, and I denied Respondents' motion for reconsideration at the hearing.

Vacation of the Notice of Contest

Following Respondents' refusal to proceed after the denial of the motion for reconsideration of the motion for a continuance, Complainant moved to dismiss the Notice of Contest pursuant to 29 C.F.R. § 2200.41. Commission Rule 41(a) states:

> (a) *Sanctions.* When any party has failed to plead or otherwise proceed as provided by these rules or as required by the Commission or Judge, he may be declared to be in default either: (1) on the initiative of the Commission or Judge, after having been afforded an opportunity to show cause why he should not be declared to be in default; or (2) on the motion of a party. Thereafter, the Commission or Judge, in their discretion, may enter a decision against the defaulting party or strike any pleading or document not filed in accordance with these rules.

Respondents have "failed ... to proceed ... as required by the ... Judge." While extreme, the sanction of vacating the Notice of Contest and entering a default judgment is appropriate under the circumstances of this case. Two interests must be balanced. A party has a strong interest in adjudicating its case on the merits. As a result, defaults are generally disfavored. However, the Commission also has a "strong interest in preserving the integrity of its orders as well as deterring future misconduct." *Trinity Indus., Inc.*, 15 BNA OSHC 1579, 1583 n.6 (Nos. 88-1545 & 88-1547, 1991) (citing *Pittsburg Forging Co.*, 10 BNA OSHC at 1514). To make a sufficient showing to overcome the first interest, the Commission has required a demonstration of either prejudice or contumacious conduct. *See, e.g., Samsonite Corp.*, 10 BNA OSHA 1583, 1587 (No. 79-5649, 1982); *Duquesne Light Co.*, 8 BNA OSHC 1218 (No. 78-5034, 1980); *Boardman Co.*, 9 BNA OSHC 1163 (No. 80-75, 1980). *See Pittsburgh*

[6]While I do not find actual prejudice, delaying the hearing clearly has the potential of prejudicing the Secretary's case. The OSHA compliance officer, a key witness, faces back surgery, and at this time it is not possible to count on his availability.

Forgings Co., supra (Cottine, Commissioner, dissenting); *TRG Drilling Corp.*, 10 BNA OSHC 1268 (No. 80-6008, 1981) (Cottine, Commissioner, dissenting).

I conclude that Respondents' belated request for a continuance was contumacious. Prior to April 4,2004, Mr. Samango was aware of the strategy to limit Carson's defense to the claim that employees of Carco rather than Carson were exposed to the hazards identified in the citations. The November 16, 2004 hearing date was established on June 29, 2004, and that date was affirmed on July 26, 2004. Claiming that he did not learn of the nature of Carson's defense until November 5, 2004, he waited until November 12, 2004, to disavow it. I find his testimony in this regard to lack credibility and to constitute an expression of contempt for this process. I further find that, under the circumstances of this case, granting Respondents' request would: 1) unjustifiably reward the Respondents; 2) inappropriately require the Secretary to expend additional time and resources in the litigation of this matter; 3) compromise the integrity of the Commission's orders; and 4) encourage future misconduct. I accordingly granted Complainant's motion to dismiss the Notice of Contest at the hearing.

ORDER

1. Serious Citation 1, Items 1a, 1b and 1c, alleging violations of 29 C.F.R. §§ 1926.251(a)(6), 1926.251(e)(1) and 1926.251(e)(8)(iv), respectively, are AFFIRMED, and a total penalty of $1,600.00 is assessed.

2. Serious Citation 1, Item 2, alleging a violation of 29 C.F.R. § 1926.501(b)(4)(ii), is AFFIRMED, and a penalty of $2,800.00 is assessed.

3. Serious Citation 1, Item 3, alleging a violation of 29 C.F.R. § 1926.501(c)(1), is AFFIRMED, and a penalty of $1,600.00 is assessed.

4. Serious Citation 1, Item 4, alleging a violation of 29 C.F.R. § 1926.502(d)(15), is AFFIRMED, and a penalty of $1,200.00 is assessed.

5. Serious Citation 1, Items 5a and 5b, alleging violations of 29 C.F.R. §§ 1926.502(d)(17) and 1926.502(d)(21), respectively, are AFFIRMED, and a total penalty of $1,600.00 is assessed.

6. Serious Citation 1, Item 6, alleging a violation of 29 C.F.R. § 1926.550(a)(19), is AFFIRMED, and a penalty of $4,000.00 is assessed.

7. Serious Citation 1, Item 7, alleging a violation of 29 C.F.R. § 1926.1053(b)(13), is AFFIRMED, and a penalty of $1,600.00 is assessed.

8. Willful Citation 2, Item 1, alleging a violation of 29 C.F.R. § 1926.501(b)(1), is AFFIRMED, and a penalty of $56,000.00 is assessed.

9. Willful Citation 2, Items 2a and 2b, alleging violations of 29 C.F.R. §§ 1926.501(b)(2)(i) and 1926.501(b)(2)(ii), respectively, are AFFIRMED, and a total penalty of $44,000.00 is assessed.

10. Willful Citation 2, Item 3, alleging a violation of 29 C.F.R. § 1926.503(a)(1), is AFFIRMED, and a penalty of $56,000.00 is assessed.

11. Repeat Citation 3, Item 1, alleging a violation of 29 C.F.R. § 1926.102(a)(1), is AFFIRMED, and a penalty of $5,600.00 is assessed.

/s/
WILLIAM C. CREGAR
Judge, OSHRC

Dated: January 14, 2005
Washington, D.C.