

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR,

Complainant,

v.

Eric Dubois d/b/a PRECISION HOME
BUILDERS AND FINISH CARPENTRY,

Respondent.

OSHRC Docket No.06-1799

***CORRECTED ¹DECISION AND ORDER ON MOTION FOR DEFAULT AND TO DISMISS
RESPONDENT'S NOTICE OF CONTEST***

On December 19, 2006, the Secretary filed her Motion for Default and to Dismiss Respondent's Notice of Contest and supplemented by memorandum received on January 22, 2007, ("Motion"). A copy of the Motion was sent certified mail with a return receipt (Receipt Number 7005 0390 0006 4068 3711, ("Receipt Number"), through the U. S. Postal Service to the Respondent, Eric Dubois d/b/a Precision Home Builders and Finish Carpentry, ("Respondent"). No reply has been received from the Respondent.

The Secretary's Motion included (1) a copy of the U.S. Postal Service certified mail receipt showing that the Secretary's motion was mailed to the Respondent on December 19, 2006, and (2) a copy of the U.S. Postal Service Receipt Number stating that the Secretary's motion mailed certified to the Respondent remains "unclaimed" as of January 10, 2007. The Secretary also sent a copy of the Motion to the Respondent via first class mail.

¹The underlined portion of the first sentence on page 3 contains the corrected passage.

FACTS

The following are the relevant facts in this case.

A compliance officer of the Occupational Safety and Health Administration (“OSHA”) conducted an inspection of Respondent’s work-site, on August 30, 2006. On September 7, 2006, OSHA issued a nine-item citation. Thereafter, the Respondent filed a notice of contest which was received in the OSHA Hartford, Ct. Office on October 23, 2006.

On November 16, 2006, the Secretary filed her Complaint, and on December 1, 2006 this case was designed for disposition under the Simplified Proceedings.

On December 4, 2006, the undersigned issued his Notice of Pre-Trial Conference and Scheduling Order, (“Pre-trial Order”), which (1) required the Secretary to provide the Respondent with copies of OSHA Forms 1-A and 1-B on or before December 15, 2006, and scheduled a telephone conference call for December 19, 2006 at 9:45 a.m. EST. The Order encouraged the parties to confer prior to the conference call to discuss various issues to be discussed during the conference.

The Secretary’s counsel attempted to reach the Respondent on several occasions by telephone to discuss settlement and issues to be addressed during the conference call. No individual answered either of two telephone number proved by the Respondent despite numerous attempts.

DISCUSSION AND CONCLUSION

Rule 101 of the Commission’s Rules of Procedure, 29 C.F.R. 2200.101, (See *Federal Register*, May 3, 2005, p. 22790) provides that when any “party has failed to plead or otherwise proceed as * * * required by the * * * Judge, he [she] may be declared to be in default * * * either (1) on the initiative of the * * * Judge, after having been afforded an opportunity to show cause why he [she] should not be declared to be in default; or (2) on the motion of a party. Thereafter, the * * * Judge, in [his] discretion, may enter a decision against the defaulting party or strike any pleading or document not filed in accordance with these rules.”

The Commission, in determining whether a Judge's decision to sanction a party through dismissal, will consider eight criteria. *Duquesne Light Company*, 8 BNA OSHC 1218, 1222 (No. 78-5303, 1980). The Commission has considered two of the eight the most crucial in reversing or affirming a Judge's dismissal sanction, that is, prejudice to the party seeking discovery and contumacious conduct by the noncomplying party. However, the record need only support one of the two in order to affirm the Judge's decision. *Circle T Drilling Company*, 8 BNA OSHC 1681, 1682 (No. 79-2667, 1980); *Noranda Aluminum, Inc.*, 9 BNA OSHC 1187, 1189 (No. 79-1059, 1980); *Ford Development. Corp.*, 15 BNA OSHC 2003, 2005 (90-1505, 1992). The Commission has also affirmed a Judge's dismissal sanction where the defaulting party has "displayed a pattern of disregard" for the Commission's proceedings. *Architectural Glass & Metal Company*, 19 BNA OSHC 1546 1547 (No.00-0389, 2001).

In the present case, the Secretary has been prejudiced by the Respondent's (1) failure to discuss settlement of the case; the narrowing of issues; an agreed statement of issues and facts; defenses; witnesses and exhibits; motions; and any other pertinent matter as set forth in Pre-trial Order. Had the Secretary been successful, she could have prepared trial tactics and strategies regarding the issues in dispute for the administrative trial and with permission of the Court depose potential witnesses and obtain documentary evidence.

Additionally, the Respondent has "displayed a pattern of disregard" for the Commission's proceedings by (1) its failure to be available for the pre-trial telephone conference, (2) its failure to discuss the issues with the Secretary's counsel, and (3) its failure to provide the Secretary and the Commission with either a current telephone number or address. *Sealtite Corp.*, 15 BNA OSHC 1130, 1133-1135 (No. 88-1431, 1991). (A failure to comply with the Commission's rules and the Judge's orders which delays a proceeding constitutes contumacious behavior.).

ORDER

IT IS ORDERED THAT the Secretary's Motion for Default and to Dismiss Respondent's Notice of Contest is GRANTED.

IT IS FURTHER ORDERED THAT the Respondent is hereby declared in default for the reasons recited in the body of the decision.

IT IS FURTHER ORDERED THAT the Notice of Contest is hereby dismissed, and the Citation and Notification of Penalty issued on September 7, 2006 is hereby AFFIRMED as a final Order of the Commission.

Dated: February 12, 2007
Washington, D.C.

/s/ _____
G. Marvin Bober
Administrative Law Judge