

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1924 Building - Room 2R90, 100 Alabama Street, S.W.
Atlanta, Georgia 30303-3104

Secretary of Labor,
Complainant

v.

Brocato Construction, Inc.,
Respondent.

OSHRC Docket Nos. **12-2057 & 12-2058**

Appearances:

Monica R. Moukalif, Esquire, Office of the Solicitor, U.S. Department of Labor, Atlanta, Georgia
For the Complainant

Chris Brocato, President, *pro se*, Brocato Construction Co., Inc., Batesville, Mississippi
For the Respondent

Before: Administrative Law Judge Sharon D. Calhoun

DECISION AND ORDER OF DEFAULT

These matters arise under the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651, *et. seq.* These cases were designated for the Commission's Conventional Proceedings. For the reasons that follow, Brocato Construction, Inc. (Brocato) is declared in default and its notices of contest are dismissed. The citation issued in this matter for OSHRC Docket No. 12-2057 is affirmed as willful and a penalty of \$56,000.00 is assessed. Citation 1 issued in OSHRC Docket No. 12-2058 is affirmed as serious and a penalty of \$5,600.00 is assessed; and Citation 2 issued in OSHRC Docket No. 12-2058 is affirmed as willful and a penalty of \$56,000.00 is assessed.

Factual Background

OSHRC Docket No. 12-2057

During the period April 12, 2012 - May 1, 2012, the Occupational Safety and Health Administration conducted a safety inspection at Brocato's worksite located at Highland Street at Cockrum Road in Olive Branch, Mississippi. As a result of that inspection, on October 1, 2012, Brocato was issued one willful citation with a total proposed penalty in the amount of \$56,000.00, alleging that on or about April 12, 2012, an employee was working in an excavation which was 8 feet deep, with type C soil, and was not protected from the hazard of a cave in by a

trench shield, protective system or sloping and benching systems (Citation and Notification of Penalty).

OSHRC Docket No. 12-2058

During the period April 12, 2012 - May 1, 2012, the Occupational Safety and Health Administration conducted a safety inspection at Brocato's worksite located at College Street at Cockrum Road in Olive Branch, Mississippi. As a result of that inspection, on October 1, 2012, Brocato was issued one serious citation with a proposed penalty in the amount of \$5,600.00, alleging that on or about April 12, 2012, employees worked in an excavation which was 5 feet 6 inches deep without a safe means of egress; and one willful citation with a proposed penalty in the amount of \$56,000.00, alleging that on or about April 12, 2012, employees were working in an excavation which was 5 feet 6 inches deep, with type B soil, and were not protected from the hazard of a cave in by a trench shield protective system or sloping and benching systems (Citation and Notification of Penalty).

Procedural Background

The procedural background for both of these matters is identical. In a letter dated October 2, 2012, Chris Brocato, owner, notified the OSHA Area Office that it contested the citations. The letter was forwarded to the Review Commission and was received and docketed by the Commission on October 17, 2012. Thereafter, on November 14, 2012, both matters were assigned to be heard by the undersigned. On November 16, 2012, the undersigned issued an Order Scheduling Hearing and Prehearing Order in the above-captioned cases setting the hearings in these matters for February 12, 2013, in Memphis, Tennessee. By order dated December 21, 2012, the hearings were rescheduled for March 21 and 22, 2013, based upon the Secretary's unopposed motion for continuance.

On December 12, 2012, the Secretary served his first set of interrogatories, requests for admissions and requests for production of documents on Brocato. Brocato's responses were due on January 14, 2013, however it failed to respond to the discovery requests. Consequently, the Secretary filed a motion to compel on the basis that Brocato failed to respond to the Secretary's First Set of Interrogatories and First Request for Production of Documents. The Secretary also filed a Motion to Deem Admissions admitted, due to Brocato's failure to answer the requests for admissions. Brocato failed to file a response to the Secretary's motion to compel, and failed to respond to the Secretary's discovery requests within the required time period.

Prior to ruling on the Secretary's motions, the Court scheduled a conference call for February 1, 2013, to address the discovery motions. Respondent failed to appear, therefore the telephone conference was rescheduled for February 4, 2013. Notice of the February 1, 2013, conference call was provided telephonically by the Court's assistant, Ruth Wynn, to Chris Brocato on January 31, 2013, at which time Mr. Brocato confirmed his availability for the scheduled conference call. In addition, notification was provided to Mr. Brocato by email at brocatocontr@att.net on January 31, 2013, and again on February 1, 2013, when Brocato failed to appear at the initially scheduled conference call. Legal Assistant Ruth Wynn made repeated, unsuccessful attempts to contact Brocato on February 4, 2013, to no avail. Therefore, on February 5, 2013, the Court issued to Brocato an Order to Show Cause by February 14, 2013, why it failed to appear at the two telephone conferences ordered by the Court. In that Order, the Court notified Brocato that failure to respond would result in sanctions as follows:

Failure to comply with this Order will be deemed to indicate a lack of interest by Respondent in pursuing the notice of contest filed by it in this matter, and will result in the imposition of sanctions which could include all violations being affirmed as issued and all proposed penalties being assessed against Respondent without a hearing.

Brocato failed to respond to the Court's Order to Show Cause.

The Order to show cause was served on Brocato by certified mail returned receipt. The unopened letter was returned to the Atlanta Regional OSHRC Office on March 18, 2013, as unclaimed by recipient. The unopened letter reflects two separate Post Office delivery notifications to Brocato for failure to claim and unable to forward. The address on the certified letter was the same as that provided initially by Brocato in its notice of contest letter. The Order to show cause also was sent to Brocato by email on February 5, 2013, and the electronic transmission report shows that it was read on the same date. The undersigned has received no communications from Brocato since the Order to Show Cause was issued.

On February 25, 2013, the Court granted the Secretary's motion to compel, and ordered Brocato to respond by March 4, 2013, to the discovery requests, including Requests for Admissions. The Court again provided the above-referenced notification that the aforementioned sanctions would be imposed should Brocato not respond to the Court's Order. Nonetheless, Brocato has not complied with the Court's Order to respond to the Secretary's discovery requests.

The Court granted the Secretary's Motion to Deem the Admissions Admitted on March 5, 2013.

Discussion

Rule 101(a) of the Commission's Rules of Procedure, 29 C.F.R. § 2200.101(a), in pertinent part provides:

Sanctions: When any party has failed to plead or otherwise proceed as provided by these rules or as required by the . . . Judge, he may be declared in default . . . (1) on the initiative of the . . . Judge, after having been afforded an opportunity to show cause why he should not be declared in default . . . thereafter, ... Judge, in [her] discretion, may enter a decision against the defaulting party . . .

A judge has very broad discretion in imposing sanctions for noncompliance with Commission Rules of Procedure or the judge's orders. *See Sealite Corp.*, 15 OSHC BNA 11130, 1134 (No. 8801431, 1991). The Commission, however, has long 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 disregard for Commission proceedings. *See Architectural Glass & Metal Co.*, 19 BNA OSHC 1546, 1547 (No. 00-389, 2001).

There is no evidence in the record that Brocato has not received any of the Commission's previous mailings in this matter. Further, in the absence of evidence to the contrary it is reasonable to presume that the Postal Service officials have properly discharged their duties. *See Powell v. Commissioner*, 958 F.2d 53, 54 (4th Cir. 1992). Thus, it is reasonable to conclude here that Brocato either did not pick up the certified mailing from the Post Office or that it has moved and left no forwarding address. Commission Rule 6, 29 C.F.R. § 2200.6 requires that a change of address "be communicated promptly in writing to the Judge." A party who fails to do so "shall be deemed to have waived his right to notice and service under these rules." Despite several attempts telephonically, by regular mail and by email, neither counsel for the Secretary, nor the undersigned have been able to get a response from Brocato.

In view of the record before me, the court finds Brocato's conduct here to be contumacious in that, as set out above, it either failed to pick up the certified mailing from the Post Office or it failed to provide the Commission with a change of address as required by Commission Rule 6. The Court also finds that Brocato's conduct has prejudiced the Secretary by impeding his ability to proceed in this matter. The Court has given Brocato several opportunities

to demonstrate that it was interested in proceeding with this litigation. However, it has made no effort to communicate with the Court or to respond to the Court's orders in these matters. Therefore, the Court further finds that Brocato's actions reflect a pattern of disregard for Commission proceedings. Brocato's actions unequivocally show that Brocato has abandoned the litigation of this matter and indicate a lack of interest by Brocato in pursuing the notice of contest filed by it in these matters. Therefore, the Court finds Brocato in DEFAULT. Its notices of contest are DISMISSED. All violations are affirmed as issued, and all proposed penalties are assessed as issued.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Federal Rule of Civil Procedure 52(a).

ORDER

Based on the foregoing decision, Respondent is declared in DEFAULT, and its notices of contest are DISMISSED, and the citations issued in this matter are AFFIRMED as follows:

OSHRC Docket No. 12-2057

1. Willful Citation 1, Item 1, § 1926.652(a)(1) is AFFIRMED, and a penalty of \$56,000.00 is assessed;

OSHRC Docket No. 12-2058

2. Serious Citation 1, Item 1, § 1926.651(c)(2) is AFFIRMED, and a penalty of \$5,600.00 is assessed; and
3. Willful Citation 1, Item 1, § 1926.652(a)(1) is AFFIRMED, and a penalty of \$56,000.00 is assessed.

SO ORDERED.

Date: **March 19, 2013**
Atlanta, Georgia

/s/
Sharon D. Calhoun
Administrative Law Judge