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

SECRETARY OF LABOR, Complainant, v. G.A. DENISON & SONS, INC., Respondent.	OSHRC Docket No. 12-0140

APPEARANCES:

Kevin E. Sullivan, Attorney; Michael D. Felson, Regional Solicitor; M. Patricia Smith, Solicitor of Labor; U.S. Department of Labor, Boston, MA
For the Complainant

George Denison; G.A. Denison & Sons, Inc., New London, CT
For the Respondent

DIRECTION FOR REVIEW AND REMAND ORDER

Before: ROGERS, Chairman and ATTWOOD, Commissioner.

BY THE COMMISSION:

On July 30, 2012, Administrative Law Judge Dennis L. Phillips issued a Decision and Order dismissing the notice of contest filed by G.A. Denison & Sons, Inc. ("Denison") and affirming the two citations issued to Denison with proposed penalties totaling $110,000. The case had been assigned to the judge for mandatory settlement proceedings pursuant to Commission Rule 120(b), 29 C.F.R. § 2200.120(b), and those proceedings were underway at the time of the judge's dismissal. Denison, appearing *pro se*, has filed a petition for review of the judge's decision. For the following reasons, we direct the case for review, set aside the judge's order, and remand for further proceedings consistent with this opinion.

On July 11, 2012, the judge issued a show cause order, in which he gave Denison until July 23 to show why it should not be held in default for failing to file (1) a notice of appearance

as ordered by the judge on March 26, 2012; (2) a corporate disclosure declaration as required by Commission Rule 35(a), 29 C.F.R. § 2200.35(a); and (3) "a properly captioned, titled and signed answer." The show cause order was sent to Denison via certified mail, return receipt requested, as required by Commission Rule 101(d), 29 C.F.R. § 2200.101(d).

On July 30, the judge dismissed the notice of contest based on Denison's failure to comply with his orders throughout the settlement proceedings, including Denison's failure to respond to the July 11 show cause order. The judge relied on Commission Rule 101(a), which states that a party "may be declared to be in default . . . after having been afforded an opportunity to show cause why he should not be declared to be in default . . . ." 29 C.F.R. § 2200.101(a). However, the return receipt for the July 11 show cause order shows that Denison did not receive the order until July 30, seven days after the company was required to respond to the order and the same day that the judge issued his dismissal order. Because Denison was not afforded an opportunity to respond to the show cause order before being declared in default, as required by Rule 101(a), dismissal of its notice of contest was not appropriate. *See WR Exterior Design Constr. Inc.*, 22 BNA OSHC 1391, 1392, 2004-2009 CCH OSHD ¶ 33,006, p. 54,232 (No. 08-0474, 2008) (dismissal set aside where *pro se* respondent did not receive show cause order).

Accordingly, on remand, the judge is directed to provide Denison with an opportunity to respond to the show cause order and take any further action as appropriate.[1]

SO ORDERED.

/s/
Thomasina V. Rogers
Chairman

/s/
Cynthia L. Attwood
Commissioner

Dated: September 13, 2012

[1] Our decision rests solely on Denison's lack of opportunity to respond to the judge's show cause order. We note that although Denison apparently seeks only a penalty reduction, the judge found that Denison has not been diligent in participating in the mandatory settlement proceedings. In the event that those proceedings are resumed, we remind the parties that a failure to "comply with the orders of the Settlement Judge or the refusal to cooperate fully within the spirit of this [settlement] rule may result in the imposition of sanctions." Commission Rule 120(d)(2), 29 C.F.R. § 2200.120(d)(2).

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Secretary of Labor,	)	
	)	
Complainant,	)	
	)	
v.	)	OSHRC Docket No. 12-0140
	)	
G.A. Denison & Sons, Inc.,	)	
	)	
	)	
Respondent.	)	
	)	

DECISION AND ORDER

Background

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"). On June 8, 2011, the Occupational Safety and Health Administration ("OSHA") inspected the work site of Respondent, G. A. Denison & Sons, Inc. ("Respondent" or "Denison") at 69 Lyme Street, Old Lyme, Connecticut 06371. As a result of the inspection, on December 5, 2011, OSHA issued a seven item serious citation and a five item willful citation. The total proposed penalty for the citations items is $110,000.00.

By letter to OSHA dated December 23, 2011, Respondent contested the proposed penalties and violations.

On January 9, 2012, the Secretary filed her complaint. Respondent failed to file a timely answer.

On January 26, 2012, the case was designated for Mandatory Settlement Proceedings pursuant to Commission Rule 29 C.F.R. § 2200.120.

On February 9, 2012, Respondent was ordered to show cause by February 27, 2012 why it should not be held in default for failing to file an answer and comply with Commission Rule 35.[2] Respondent was duly warned that its failure to timely respond to the order to show cause may result in Respondent being held in default, the dismissal of Respondent's notice of contest of the citation(s) at issue, and/or the assessment of costs, including attorney's fees, incurred by the Commission and the other parties relating to this case.

During the pre-settlement conference telephone scheduling conference conducted on March 16, 2012, Respondent's George Denison identified Keith Stedman as Respondent's corporate representative.[3] During the conference, the Court orally instructed Respondent to file its answer and Rule 35 declaration, and to have its representative promptly file his appearance in accordance with 29 C.F.R. §§ 2200.22 and 2200.23.

The Court's Notice of Mandatory Settlement Conference and Order, dated March 26, 2012 (Scheduling Order), ordered Respondent to file its answer and Commission Rule 35(a) declaration by March 27, 2012.

The Scheduling Order also ordered and stated that "each party shall prepare and submit to me *ex parte* a confidential summary, which must be received in my office no later than July 18, 2012." The parties were told that the summary shall include a statement of:

> 1. the key issue(s) remaining in controversy;
> 2. its assessment of its own position, including the factual predicate for its position on each issue, and any other information the party believes would be helpful to understanding its position;
> 3. its assessment of the opposing party's position;
> 4. steps or concessions it will take, and would like to see the opposing party take toward resolution; and

[2] Commission Rule 35(a) requires an answer be accompanied by a separate declaration listing all Respondent's parents, subsidiaries, and affiliates, or stating that it has none (declaration). 29 C.F.R. § 2200.35(a). A party that fails to file an adequate declaration may be held in default after being given an opportunity to show cause why it should not be held in default. 29 C.F.R. § 2200.35(b).

[3] Mr. Stedman joined in the conference call.

5. the preceding settlement negotiations between the parties, including an identification of the latest settlement proposals made by each party.

By Discovery Scheduling Order dated March 26, 2012, since Respondent had made "ability to pay" the proposed penalties an issue at the Mandatory Settlement Conference ("MSC"), Respondent was directed to provide the Secretary of Labor's counsel no later than April 20, 2012: (1) United States Tax Returns, *e.g.*; Form 1040 (Individual U.S. Tax Return), Form 1120-W (Estimated Tax Corporations), and/or Form 1065 (U.S. Return of Partnership Income), as appropriate, for a period of two years preceding the MSC; (2) state income tax returns for a period of two years preceding the MSC, and (3) Respondent's financial statements and audits for 2010 and 2011 (and thereafter if they exist).[4]

Respondent filed an undated, untitled, and unsigned document that purported to agree to all allegations in the complaint, while asserting that Respondent could "not afford to pay the pine (sic) amount."[5] Respondent also indicated that it had asked for assistance from Keith Stedman.

On July 11, 2012, Respondent was ordered to show cause on or before July 23, 2012 why it should not be held in default for failing to: 1) file a declaration that complies with Commission Rule 35, 2) file a properly captioned, titled and signed answer,[6] and 3) comply with the Court's order dated March 26, 2012 by not filing a representative's notice of appearance.

Respondent was duly warned that its failure to timely respond to the order to show cause may result in Respondent being held in default, the dismissal of Respondent's notice of contest of the citation(s) at issue, and/or the assessment of costs, including attorney's fees, incurred by the Commission and the other parties relating to this case.

[4] Respondent consented and agreed to disclose this financial material during the conference.
[5] No separate declaration listing Respondent's parents, subsidiaries, and affiliates, or stating that it has none accompanied Respondent's document.
[6] *See* 29 C.F.R. § 2200.32 Signing of pleadings and motions.

Respondent has not filed: 1) a properly captioned, titled and signed answer, 2) its declaration, 3) its notice of appearance by a representative, or 4) any confidential summary with the Court. Respondent also did not provide to the Secretary the financial documents identified in the Court's Discovery Scheduling Order.

Respondent has also not filed a response to the Court's July 11, 2012 show cause order.

On July 26, 2012, the Court cancelled the MSC noting that Respondent had failed to: 1) submit designated financial information to the Complainant by April 20, 2012 in advance of the MSC, 2) submit its confidential statement to the Court by July 18, 2012, and 3) respond to the Court's Order to Show Cause by July 23, 2012; as well as file a: a) declaration that complies with Commission Rule 35, b) properly captioned, titled and signed answer, and c) representative's notice of appearance. The Court stated that it would issue a dispositive decision and order shortly.

Jurisdiction

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

Order to Show Cause

Commission judges have the discretion to impose sanctions on parties who violate their orders.[7] *See NL Industries, Inc.*, 11 BNA OSHC 2156, 2168 (No. 78-5204, 1984). Rule 16(f), Federal Rules of Civil Procedure ("Fed. R. Civ. P."),[8] also permits the Court on its own initiative

[7] *See* 29 C.F.R. § 2200.101 Failure to obey rules, which 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 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, …. Thereafter, the Commission or Judge, in their discretion, may enter a decision against the defaulting party ….

[8] Rule 16(f), Fed. R. Civ. P. states:
(f) Sanctions.

to order just sanctions if a party or party's attorney fails to obey a scheduling or pretrial order.[9] Rule 16(f) was added in 1983 to "reflect that existing practice [to enforce failures by appropriate sanctions] and to obviate dependence upon Rule 41(b) or the court's inherent power to regulate litigation." Notes of Advisory Committee on Rules, 1983 Amendment, Subdivision (f); Sanctions. Considerable discretion is vested in judges to decide whether to impose sanctions and what form they should take.

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 Company*, 8 BNA OSHC 1218, 1221 (No. 78-5303, 1980). Prejudice to the opposing party,[10] 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 take into account. Only one of these three criteria is needed to affirm the Judge's decision to render a judgment by default against a party. *Ford Development Corp.*, 15 BNA OSHC 2003, 2005 (No. 90-1505, 1992), *Circle T Drilling Company*, Inc., 8 BNA OSHC 1681, 1682 (No. 79-2667, 1980).

In this instance, there is a clear showing of willful default by Respondent. Respondent did not: 1) submit designated financial information to the Complainant by April 20, 2012 in advance of the MSC, 2) submit its confidential statement to the Court by July 18, 2012, 3) adequately respond to the Court's February 9, 2012 show cause order, and 4) respond to the Court's Order to Show Cause by July 23, 2012; as well as file a: a) declaration that complies

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(1) *In General.* On motion or on its own, the court may issue any just orders, including those authorized by Rule 37(b)(2)(A)(ii)-(vii), if a party or its attorney fails to obey a scheduling or other pretrial order

[9] Procedure before the Commission is in accordance with the Fed. R. Civ. P. in the absence of a specific provision in the Commission's own Rules of Procedure. Rule 2(b) of the CRP, 29 C.F.R. § 2200.2(b), s*ee also Williams Enterprises*, 4 BNA OSHC 1663, 1665 n.2 (No. 4533, 1976).

[10] A party is prejudiced if the failure to make required court ordered disclosures impairs the party's ability to adequately prepare, including receiving timely notice of the opponent's defense(s) or lack thereof. *See Avionic Co. v. General Dynamics Corp.*, 957 F.2d 555 (8th Cir. 1992). In this instance, the Secretary has been prejudiced by Respondent's failure to comply with the Court's Scheduling Order by failing to file a properly captioned, titled and signed answer and its required declaration.

with Commission Rule 35, b) properly captioned, titled and signed answer, and c) representative's notice of appearance. Respondent has failed to comply with the Judge's Orders throughout the proceeding including the Show Cause Order dated February 9, 2012, verbal March 16, 2012 order, Scheduling Order dated March 26, 2012, Discovery Scheduling Order dated March 26, 2012, and Show Cause Order dated July 11, 2012.

The document filed by Respondent purportedly as its answer does not contest the merits of the citations or their penalties. It is of questionable significance since it is unsigned and does not comport with the Commission rule 29 C.F.R. § 2200.32.[11]

No explanation for these failings has been tendered to the Court. 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 (Nos. 04-1734 and 04-1735, 2006). Having submitted its notice to contest the citations at issue in December, 2011, Respondent has shown little interest since then in moving this case forward. Under these circumstances, the Court sees no worthwhile purpose in allowing this case to proceed any further.

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). *Pro se* employers

[11] 29 C.F.R. § 2200.32 states:

Pleadings … shall be signed by the filing party or by the party's representative. The signature of a representative constitutes a representation by him that he is authorized to represent the party … on whose behalf the pleading is filed. The signature of a representative or party also constitutes a certificate by him that he has read the pleading, … that to the best of his knowledge information, and belief, formed after reasonable inquiry, it is by exiting law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase the cost of litigation. If a pleading … is signed in violation of this rule, such signing party or its representative shall be subject to the sanctions set forth in § 2200.101 or § 2200.104. A signature by a party representative constitutes a representation by him that he understands that the rules and orders of the Commission and its judges apply equally to attorney and non-attorney representatives.

are held to a standard of reasonable diligence. *See Manti d/b/a Mant Homes*, 16 BNA OSHC 1458, 1460 (No. 92-2222, 1993). There are limits to how liberally Commission judges can interpret the rules to assist the *pro se* employer. *Id.* at 1461. The Court finds that the Commission has conveyed due notice to Respondent of its procedural rights and provided ample warning that its failure to comply with Court orders may result in the dismissal of its notice of contest.

The Court finds Respondent to be in default. "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).[12]

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. The Court also finds that by Respondent's default the Secretary has adequately shown the applicability of the cited standards for each of the alleged violations and has sufficiently established that the terms of the cited standards were not met by Respondent in each of the alleged violations. By Respondent's default, the Court also finds that Respondent's employees had access to the cited conditions and that the Secretary has adequately proved that Respondent either knew or should have known of the cited conditions. Accordingly, the Court finds that the Citation Items at issue are all affirmed, in their entirety, as alleged by the Secretary.

[12] As a result of a default, the factual allegations of the underlying citation relating to liability are taken as true. *Dundee Cement Co. v. Howard Pipe & Concrete Products*, 722 F.2d 1319, 1323 (7th Cir. 1983). When entering a default judgment, factual allegations set forth in the complaint and underlying citations are sufficient to establish a defendant's liability. *Trustees of the Iron Workers District Council of Tennessee Valley and Vicinity Pension Fund et al. v. Charles Howell*, No. 1:07-cv-5, 2008 WL 2645504, * 6 (E.D. Tenn. July 2, 2008); *National Satellite Sports, Inc. v. Mosely Entertainment, Inc.*, No. 01-CV-74510-DT, 2002 WL 1303039, * 3 (E.D. Mich. May 21, 2002).

Penalties

The Secretary has proposed a total penalty of $110,000 for the Citation 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 her penalty proposals. The court finds the total proposed penalty of $110,000, along with the classification of the violations as alleged by the Secretary, for the Citation Items at issue to be appropriate, and the proposed penalties are assessed.

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).

Order

After considering the entire record of this case, including the July 11, 2012 Order to Show Cause and Respondent's lack of response thereto, the Court finds that 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; and

based upon the foregoing findings of fact and conclusions of law, IT IS FURTHER ORDERED that the seven item serious citation, five item willful citation, and proposed penalties for all of the items of the citations totaling $110,000.00 are AFFIRMED in all respects.

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

Date: August 13, 2012
Washington, D.C.