

United States of America  
**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**  
1120 20<sup>th</sup> Street, N.W., Ninth Floor  
Washington, D.C. 20036-3457

Secretary of Labor,  
Complainant,  
SIMPLIFIED PROCEEDING

v.

OSHRC Docket No. 12-1328

Twin Pines Construction, Inc./Teles  
Construction,  
Respondent.

**APPEARANCES:**

Celeste C. Moran, Esquire, U.S. Department of Labor, Boston, Massachusetts  
For the Complainant.

Juliano Fernandes, Twin Pines Construction, Inc./Teles Construction, Everett,  
Massachusetts  
*Pro se*, for the Respondent.

BEFORE: Dennis L. Phillips  
Administrative Law Judge

**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). From January 18 through January 20, 2012, the Occupational Safety and Health Administration (OSHA) inspected the work site at 100 Fisher Avenue, Brookline, Massachusetts 02445 of Respondent, Twin Pines Construction, Inc./Teles Construction (Respondent or Twin Pines Construction). As a result of the inspection, on May 31, 2012, OSHA issued a two-item serious citation and a four-item other citation. On about June 13, 2012, Respondent contested the citation (*sic*)

and proposed penalty. The Secretary filed her complaint on July 10, 2012. On July 20, 2012, the Chief Judge assigned the case for Simplified Proceedings. The pleading requirements were suspended and no answer has been filed.

By Court Order dated July 27, 2012 the parties were informed that on August 17, 2012 at 10:30 a.m., E.D.T., the Court would hold a telephone pre-hearing conference with the parties pursuant to Commission Rule of Procedure (CRP) Rule 207, 29 C.F.R. § 2200.207(2007). The Order stated that:

The following matters will be addressed during the telephone conference: settlement of the case; the narrowing of issues; an agreed statement of issues and facts; defenses; witnesses and exhibits; motions; case consolidation; and any other pertinent matter. **NOTE THAT Except under extraordinary circumstances, any affirmative defenses not raised at the pre-hearing scheduling conference may not be raised later.**

On August 7, 2012, Complainant mailed the OSHA 1A and 1B forms in the investigative file to Respondent.

The pre-hearing scheduling conference was conducted on August 17, 2012 pursuant to the Court's Order dated July 27, 2012. Respondent inexplicably failed to participate in the pre-hearing scheduling conference call.<sup>1</sup>

By the Court's Notice of Hearing and Scheduling Order dated August 17, 2012 (Scheduling Order), the parties were advised that the hearing would commence at 9:00 a.m., E.D.T., on October 16, 2012 at Boston, Massachusetts.<sup>2</sup> Respondent was also ordered to disclose to Complainant all documents relevant to any defense(s) to any specific item where Respondent admits that a violation has occurred, but offers excuse(s),

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<sup>1</sup> The Court's legal assistant contacted Mr. Fernandez's assistant at the time of the conference call in an unsuccessful attempt to include Mr. Fernandez in the prehearing scheduling conference call.

<sup>2</sup> The Scheduling Order noted that Respondent failed to participate in the August 17, 2012 pre-hearing scheduling conference call and Respondent was advised that continued failure to comply with Court orders may result in sanctions, including the dismissal of its notice of contest.

no later than 30 days before the commencement of the hearing. Respondent was further ordered to disclose to Complainant no later than 30 days before the commencement of the hearing such documents that are relevant to any affirmative defense(s) timely raised by Respondent. The parties were also ordered to exchange all documents or physical evidence intended for introduction at the hearing no later than 30 days before the commencement of the hearing.

In preparation for the hearing, the parties were directed to file with the Judge no later than 25 days before the commencement of the hearing, a joint pre-trial statement containing an agreed statement of facts and issues, where the Respondent shall set forth the factual basis of each affirmative defense as it relates to each specific item, a list of all lay witnesses who may be called at hearing, including a brief summary of testimony to be elicited; a list of all expert witnesses including, as to each expert witness, a statement of subject matter and a summary of the substance of the testimony with respect to each item; a list of exhibits to be offered into evidence with notations of all objections thereto, a list of all motions or other matters which require action by the Judge, an estimate of time each counsel [party] anticipates will be needed to present its case, and the signatures, telephone numbers, and email addresses of counsel [or representative] for all parties.

The parties were further informed that they were required to participate in the final pre-hearing conference to be conducted by telephone on September 28, 2012 at 9:30, a.m., E.D.T. The parties were directed to be prepared to discuss during the final pre-hearing conference the: 1) status of any settlement, 2) compliance with the Scheduling Order, and 3) General Procedures and Practices in Hearings, including intention to use any automated equipment in the courtroom.

A copy of the General Procedures and Practice for the Hearing in cases that have been designated for disposition by Simplified Proceedings was attached to the Scheduling Order. In accordance with these procedures, the parties were directed to deliver one set of trial exhibits in three ring binders, with an index, to the judge's chambers at One Lafayette Centre – South, 1120 20<sup>th</sup> St., N.W., Ste 996, Washington, D.C. 20036-3457 no later than seven days before the start of the hearing.

The parties were also warned in the Scheduling Order that “Failure to comply with all parts of this order may result in sanctions, including the dismissal of claim(s) or defense(s), as well as the assessment of costs incurred by the Commission and the other parties.”

On August 20, 2012, Complainant mailed photographs from the investigative file to Respondent.

On September 14, 2012, Complainant sent a cover letter and draft Joint Prehearing Statement to Respondent by facsimile, e-mail, and first-class mail. In her cover letter, Complainant asked Respondent to immediately contact Complainant to discuss the draft Joint Prehearing Statement. Respondent failed to contact Complainant.

Complainant filed her Prehearing Statement on September 21, 2012. Complainant stated that her attempt to contact Respondent to confer and prepare a joint prehearing statement was unsuccessful.

On September 21, 2012, Complainant filed her Motion for Default and Dismissal of Respondent's Notice of Contest (Motion for Default).<sup>3</sup> She asserts that Respondent has been inattentive and unresponsive to the case and has repeatedly ignored Court

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<sup>3</sup> Complainant's counsel certified that her September 19, 2012 attempt to contact Respondent regarding her Motion for Default was unsuccessful.

orders. The Secretary asserts that Respondent has an extensive history where it has consistently disregarded Commission Rules of Procedure and judge's orders in this and other cases.<sup>4</sup> She asserts that Complainant has been prejudiced in preparing for trial because she has been unable to ascertain: 1) the facts and issues in dispute, 2) any defenses that Respondent intends to assert, 3) who Respondent intends to call as witnesses, and 4) what exhibits Respondent intends to introduce at trial. She states that Respondent has not provided any documents to the Secretary. She asserts that "permitting a Respondent to consistently ignore the Commission's Rules of Procedures and judge's orders would make a mockery of the Commission and on the Occupational Safety and Health Act enforcement actions the Commission was created to adjudicate." The Secretary requests that the Court default Respondent, dismiss its notice of contest and affirm the Citations and proposed penalties.

A final pre-hearing conference was conducted on September 28, 2012 pursuant to the Court's Order of August 17, 2012. Respondent also inexplicably failed to participate in the September 28, 2012 final prehearing conference call.<sup>5</sup>

Respondent did not file a response to the Complainant's Motion for Default.

Respondent did not file any trial exhibits with the Court by October 9, 2012.

Respondent has also not filed a declaration listing all Respondent's parents, subsidiaries, and affiliates, or stating that it has none pursuant to 29 C.F.R. § 2200.35(a).

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<sup>4</sup> The Secretary alludes to several cases where judges issued default orders in matters involving Mr. Fernandes for failing to respond to Show Cause orders and/or treating the Commission's Rules of Procedure with disdain. See *Twin Pines Construction, Inc.*, No. 11-0236, slip op. at 1 (OSHRC July 8, 2011); *Teles Construction, Inc.* No. 11-1130, slip op. at 1 (OSHRC Sept. 22, 2011); *Twin Pines Construction, Inc./Teles Construction, Inc.*, No. 12-0406, slip op. at 1 (OSHRC May 25, 2012).

<sup>5</sup> The Court's legal assistant contacted Mr. Fernandez's assistant at the time of the conference call in an unsuccessful attempt to include Mr. Fernandez in the final prehearing conference call.

A hearing in this case is scheduled to commence on October 16, 2012 at Boston, Massachusetts.

**The Cited Standards**

Citation 1, Item 1, alleged that the means of egress on a metal deck between the main building and the guest house (6-8 Olmsted Road) was not maintained free of all obstructions or impediments to full instant use in the case of fire or emergency in that a thin layer of snow on the metal deck made it a very slippery walking-working surface in violation of 29 C.F.R. § 1926.34(c). Citation 1, Item 2, alleged that a Gradall forklift operator had not received training in the safe operation of powered industrial trucks that meets OSHA requirements and that refresher training was required in violation of 29 C.F.R. § 1910.178(l)(4)(ii). Citation 2, Item 1, alleged that Respondent did not complete an OSHA 301 Incident Report form, or equivalent form, for each recordable injury or illness entered on the OSHA 300 log in that Respondent did not maintain a copy of injury and illness Incident Reports for 2011 in violation of 29 C.F.R. § 1904.29(b)(2). Citation 2, Item 2, alleged that Respondent did not create an annual summary of injuries and illnesses recorded on the OSHA 300 log at the end of each calendar year and that Respondent did not maintain injury and illness log summaries (OSHA form 300As), including a summary for 2011, in violation of 29 C.F.R. § 1904.32(a)(2). Citation 2, Item 3, alleged that Respondent did not provide injury and illness logs required to be kept under Part 1904 to an authorized OSHA government representative within four business hours upon request in violation of 29 C.F.R. § 1904.40(a). Citation 2, Item 4, alleged that Respondent did not certify that the Gradall forklift operator had been trained and evaluated as required by, and in violation of, 29 C.F.R. § 1910.178(l)(6).

The proposed penalty for serious Citation 1, Item 1, is \$4,620. The proposed penalty for serious Citation 1, Item 2, is \$5,390. There is no proposed penalty for the second other citation. The total proposed penalties for the two citations amount to \$10,010.

### **Jurisdiction**

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

### **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 Pharmaceutical Prod.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981).

### **Complainant's Motion to Default**

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.

Commission judges have the discretion to impose sanctions on parties who violate their orders. *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."),<sup>6</sup> permits the Court on its

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<sup>6</sup> Rule 16(f), Fed. R. Civ. P. states:  
(f) Sanctions.

own initiative to order just sanctions if a party fails to obey a scheduling or pretrial order.<sup>7</sup> 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,<sup>8</sup> 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*

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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:

- (A) fails to appear at a scheduling or other pretrial conference;
- (B) is substantially unprepared to participate--or does not participate in good faith--in the conference; or
- (C) fails to obey a scheduling or other pretrial order.

(2) *Imposing Fees and Costs*. Instead of or in addition to any other sanction, the court must order the party, its attorney, or both to pay the reasonable expenses--including attorney's fees--incurred because of any noncompliance with this rule, unless the noncompliance was substantially justified or other circumstances make an award of expenses unjust.

<sup>7</sup>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), see also *Williams Enterprises* 4 BNA OSHC 1663, 1665 n.2 (No. 4533, 1976).

<sup>8</sup> 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. General Dynamics Corp.*, 957 F.2d 555 (8<sup>th</sup> Cir. 1992). In this instance, the Secretary has been clearly prejudiced by Respondent’s failure to comply with the Court’s Scheduling Order by failing to participate in conference calls, disclose documents, exchange exhibits, identify witnesses, and meet and confer in advance of the hearing.



*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. The Court finds that Respondent has abandoned its case pending before the Commission. Respondent did not participate in either the Court ordered pre-hearing scheduling conference or final pre-hearing conference. No explanation for its absences was tendered. Respondent failed to comply with the Court's Scheduling order to disclose documents, exchange exhibits, identify witnesses, and meet and confer. Respondent failed to file any pre-hearing statement. Respondent failed to respond to the Secretary's Motion to Default. Again, no explanations for these failings were offered. 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, 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 hearing when there is no basis to believe that Respondent will appear.<sup>9</sup>

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 (9<sup>th</sup> Cir. 1965). The Court finds that the Commission has conveyed due notice to Respondent of its

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<sup>9</sup> The failure of a party to appear at a hearing may result in a decision against that party. *See* 29 C.F.R. § 2200.64.

procedural rights and provided ample warning that its failure to comply with Court orders may result in the dismissal of its notice of contest. At every instance, Respondent has failed to take advantage of the opportunity to advise the Court that it has not abandoned its case before the Commission. Every indication before the Court is that Respondent has walked away from its 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 (1<sup>st</sup> Cir. 2002)(quoting *Franco v. Selective Ins. Co.*, 184 F.3d 4, 9 n.3 (1<sup>st</sup> Cir. 1999)), *Tower Painting Co.*, 22 BNA OSHC 1368, 1375 (No. 07-0585, 2008). As a result of the 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 (7<sup>th</sup> 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).

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.<sup>10</sup>

The Court further 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

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<sup>10</sup> § 9(a) of the Act (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.”).

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 of the Citation Items at issue are affirmed in their entirety as alleged by the Secretary.

### **Penalties**

The Secretary has proposed a total penalty of \$10,010 for all of 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 proposal. The Court finds the total proposed penalty of \$10,010, along with the classification of the violations as alleged by the Secretary, for all of the Citation Items at issue to be appropriate, and the proposed penalties are assessed as proposed by the Secretary.

### **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, 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;<sup>11</sup> 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 serious violation of 29 C.F.R. § 1926.34(c) and a penalty of \$4,620 is assessed.
2. Item 2 of Citation 1 is affirmed as a serious violation of 29 C.F.R. § 1910.178(l)(4)(ii) and a penalty of \$5,390 is assessed.
3. Item 1 of Citation 2 is affirmed as an other violation of 29 C.F.R. § 1904.29(b)(2). No financial penalty is assessed.
4. Item 2 of Citation 2, is affirmed as an other violation of 29 C.F.R. § 1904.32(a)(2). No financial penalty is assessed.
5. Item 3 of Citation 2, is affirmed as an other violation of 29 C.F.R. § 1904.40(a). No financial penalty is assessed.

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<sup>11</sup> The hearing scheduled for October 16, 2012 at Boston, Massachusetts is cancelled.

6. Item 4 of Citation 2, is affirmed as an other violation of 29 C.F.R. §  
1910.178(l)(6). No financial penalty is assessed.

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

Date: October 23, 2012  
Washington, D.C.