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

SECRETARY OF LABOR, Complainant, v. 21st CENTURY ROOFING SYSTEMS, INC., Respondent.	OSHRC Docket No. 10-1250

APPEARANCES:

Kevin E. Sullivan, Esquire, U.S. Department of Labor
Boston, Massachusetts
For the Complainant.

Mark A. Gibson, President
21st Century Roofing Systems, Inc.
Foxboro, Massachusetts 02035
For the Respondent, p*ro se.*

BEFORE: Dennis L. Phillips
Administrative Law Judge

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") under section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* ("the Act"). The Occupational Safety and Health Administration ("OSHA") inspected a work site of Respondent on December 1, 2009. The site was located in Taunton, Massachusetts, where 21st Century Roofing Systems, Inc. ("Respondent" or "21st Century") was engaged in roofing work. As a result

of the inspection, on June 1, 2010, OSHA issued to Respondent a one-item "serious" citation and a one-item "repeat" citation. The serious citation alleged a violation of 29 C.F.R. § 1926.502(f)(1)(i), for failure to erect a warning line at least 6 feet from the roof edge. The repeat citation alleged a violation of 29 C.F.R. § 1926.501(b)(10), for failure to protect employees engaged in roofing activities on a low-sloped roof from falls. Respondent contested the citations. The hearing in this matter took place in Providence, Rhode Island, on July 19, 2011.

Jurisdiction

In its answer, Respondent did not dispute the Secretary's allegations with respect to its being an employer under the Act and the Commission having jurisdiction. The Court finds, therefore, that Respondent is an employer within the meaning of sections 3(3) and 3(5) of the Act, 29 U.S.C. §§ 652(3) and (5). The Court further finds that the Commission has jurisdiction over the parties and the subject matter in this case.

Background

By letter dated June 3, 2010, Respondent's president, Mark A. Gibson ("Mr. Gibson"), filed Respondent's notice of contest with OSHA on company stationery bearing the address: P.O. Box 659, Foxboro, MA 02035 ("Respondent's address"). On June 28, 2010, the Secretary filed her complaint and served a copy of her complaint upon Mr. Gibson at Respondent's address.

On about July 8, 2010, the Commission mailed its Posting and Service Order, with postcard, to Mr. Gibson at Respondent's address. Mr. Gibson signed and returned the postcard dated July 7, 2010 to the Commission.

On August 10, 2010, the Court issued its Order to Show Cause why Notice of Contest Should not be Dismissed to Respondent ("Order to Show Cause"). Respondent was ordered to show cause by August 20, 2010, why it should not be declared in default for failure to timely file its answer. The Order to Show Cause was mailed Certified Mail, Return Receipt Requested, to Mr. Gibson at Respondent's address. The receipt indicated that the Order to Show Cause was received on August 12, 2010. On August 17, 2010, Respondent responded to the Order to Show Cause on company stationery reflecting Respondent's address. (CX-1).

On August 20, 2010, Mr. Gibson was advised that the case was assigned to the undersigned through written notice mailed to Respondent's address.

On August 27, 2010, Mr. Gibson was notified by the Court that a pre-hearing scheduling conference would be conducted in September, 2010 through a notice mailed to Respondent's address. On September 21, 2010, Mr. Gibson participated in the pre-hearing scheduling conference, where the Court advised Respondent that it had a right to retain legal counsel in the case.

By Notice of Hearing and Scheduling Order dated September 22, 2010 mailed to Mr. Gibson at Respondent's address, the parties were notified that a final pre-hearing conference was scheduled for January 14, 2011 and that the hearing in this case would commence on February 8, 2011 in Providence, Rhode Island.

During the January 14, 2011 final pre-hearing conference, Mr. Gibson was advised by the Court that the February 8, 2011 hearing date was changed to April 6, 2011 due to a conflict in the Court's scheduling. By Notice of New Hearing Date and

Scheduling Order, dated January 19, 2011, mailed to Mr. Gibson at Respondent's address, the parties were advised, in writing, of the new April 6, 2011 trial date.

Mr. Gibson participated in a status conference call conducted on March 31, 2011, during which the parties reached a settlement. The April 6, 2011 hearing was cancelled as a result of the reported settlement. By Order dated March 31, 2011, mailed to Mr. Gibson at Respondent's address, the parties were directed to submit their executed settlement agreement to the Court by April 30, 2011.

On April 13, 2011, the Secretary sent a settlement agreement to Mr. Gibson at Respondent's address with a copy of the cover letter to the Court. The Secretary asked Mr. Gibson to return the signed settlement agreement by April 21, 2011.

On April 20, 2011, the Secretary sent a settlement agreement a second time addressed to Mr. Gibson at the Bay Point Country Club, 19 Bay Point Drive, Onset, MA 02558 ("Bay Point Country Club") with a copy of the cover letter to the Court. The Secretary asked Mr. Gibson to return the signed settlement agreement by April 25, 2011.

On May 13, 2011, in the absence of the Court's receipt of a signed settlement agreement, the Court mailed its Notice of Hearing Date and Scheduling Order to the parties ("Hearing Date Order"), including Mr. Gibson at Respondent's address. The hearing was set for July 19, 2011, in Providence, Rhode Island. The Hearing Date Order also directed Respondent to file with the Court no later than June 24, 2011, its pre-trial statement containing an agreed statement of facts and issues. The Hearing Date Order required Respondent's pre-trial statement to: 1) set forth the factual basis of each affirmative defense as it relates to each specific item; and 2) include a list of all: a) lay witnesses who may be called at hearing, including a brief summary of testimony to be

elicited, b) 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, c) exhibits to be offered into evidence with notations of all objections thereto, and d) motions or other matters which require action by the Judge. Respondent was also required to make an estimate of time it needed to present its case.[1] Respondent failed to submit any pre-trial statement to the Court.

On July 6, 2011, the Court mailed its Notice of Location of Hearing ("Notice") to Mr. Gibson at Respondent's address. The notice stated that the July 19, 2011 trial would be held at U.S. District Court, 2 Exchange Terrace, Pastore Federal Building, 2nd Floor, Courtroom C, Providence, Rhode Island 02903.[2] The Court also sent a copy of the Notice by federal express addressed to Mr. Gibson at the Bay Point Country Club on July 6, 2011.[3]

On July 13, 2011, court personnel attempted to send another copy of the Notice by facsimile to Mr. Gibson and Mr. Gibson's brother, Glen Gibson, at facsimile no. (508) 698-4029.[4]

Later on that same date, court personnel sent a copy of the Notice by facsimile to Mr. Gibson and Glen Gibson at facsimile no. (508) 698-1738.[5]

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[1] The Hearing Date Order told Respondent 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."

[2] This first class mailing was returned to the Court after July 14, 2011 with the notation "Return to Sender Not Deliverable as Addressed Unable to Forward."

[3] This delivery was signed for at the Bay Point Country Club on July 11, 2011.

[4] Court personnel informed Glen Gibson that the Court wanted to send Mr. Gibson notice of the precise location of the hearing. Glen Gibson told court personnel to send the notice to facsimile no. (508) 698-4029 and he would give the notice to Mr. Gibson. The court's attempted transmission of the notice by facsimile to facsimile no. (508) 698-4029 failed.

[5] Court personnel identified a street address at 55 Leonard Street, P.O. Box 290, Foxboro, MA, 02035 and facsimile no. (508) 698-1738 for Respondent through the internet. Respondent's internet site indicated that

On July 14, 2011, the Court sent an additional copy of the Notice to Mr. Gibson at P.O. Box 290, 55 Leonard Street, Foxboro, Massachusetts 02035 by certified mail, return receipt requested.[6]

On July 18, 2011, the Court mailed its Order to Respondent to Comply with Commission Rules ("Order to Comply") to Mr. Gibson at Respondent's address, as well as by facsimile to Glen Gibson c/o Mark Gibson at facsimile no. (508) 698-1738. The Order to Comply ordered Respondent to comply with Commission Rule 35, 29 C.F.R. § 2200.35, and file its declaration listing all parents, subsidiaries, and affiliates, or stating it has none, by July 19, 2011.[7] The Order to Comply also indicated that the trial would commence at 9:00 a.m., E.D.T., July 19, 2011, at Courtroom C, 2nd Floor, 2 Exchange Terrace, Pastore Federal Building, Providence, Rhode Island. Respondent failed to comply with Commission Rule 35 when it filed its answer without an accompanying declaration. It also failed to comply with the Court's Order to Comply since it has not filed any declaration with the Court.

The hearing in this case was held as scheduled on July 19, 2011, in Providence, Rhode Island. No one appeared at the trial on behalf of Respondent. (Tr. 5). After putting on the Secretary's case, the Secretary's counsel gave a closing argument and then

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Respondent "has new owners and the name was changed to New Century Roofing, LLC. The Contact information [for both Respondent and New Century Roofing, LLC] is the same …"

[6] OSHA's Inspection Report, dated June 1, 2010, also showed Respondent's mailing address as 55 Leonard Street, Foxboro, MA 02035. (CX-4). This mailing was returned on or after July 20, 2011 to the Court with the notation "Return to Sender Unclaimed Unable to Forward." The envelope also contained a handwritten notation "No such person in # 290."

[7] Respondent was told that failure to timely comply with this order may result in Respondent being held in default, the dismissal of Respondent's notice of contest of the citations at issue, Respondent being unable to raise any affirmative defenses in this matter, and/or the assessment of costs incurred by the Commission and the other parties relating to this case.

moved for a directed verdict in favor of the Secretary.[8] (Tr. 30-33). The Court granted the motion since Respondent was in default and failed to follow Commission rules and Court orders to file a declaration and pre-trial statement, and appear at the hearing.[9] The Court affirmed the citations as issued. The Court also found the gravity-based penalties for the citations to be appropriate, without assessing any reduction for company size. A penalty of $2,500.00 was assessed for the serious violation, and a penalty of $14,000.00 was assessed for the repeat violation. (Tr. 33-34).

On August 10, 2011, Mr. Gibson requested by facsimile that the Court hold a conference call with the parties. By Notice of Telephone Post Hearing Conference, dated August 11, 2011, mailed to Mr. Gibson at P.O. Box 290, 55 Leonard Street, Foxboro, MA 02035, the Court notified the parties that a post-hearing conference would take place

[8] A motion for a directed verdict is now known as a motion for judgment as a matter of law. *See* Fed. R. Civ. P. 50*; Davet v. Maccarone, et al.*, 973 F.2d 22, 26 (1st Cir. 1992). In order to grant such a motion, "the evidence must be such that a reasonable person could be led to only one conclusion, that the moving party is entitled to judgment." *Id.* at 28; *U.S. v. Vahlco Corp.*, 720 F.2d 885, 889 (5th Cir. 1983) (trial court has the power to direct a verdict at any point in the trial when there is a complete absence of any question); Jack H. Friedenthal *et al.*, Civ. Proc. § 12.3 (4th ed. 2005) (motion for judgment as a matter of law may be made by either party); s*ee also CBI NA-CON, Inc.*, 18 BNA OSHC 1158, 1159 (No. 96-1258, 1997) (Commission treats motion for directed verdict as a motion for involuntary dismissal under Fed. R. Civ. P. 41(b), respondent may move to dismiss a claim when Secretary fails to prosecute or comply with rules or court orders). The Court finds that there is no issue in question in this case based upon the evidence presented by the Secretary at trial and Respondent essentially admitting all of the alleged violations by its default by not appearing at the hearing.

[9] Respondent failed to comply with Court orders to file a pre-trial statement with the Court by June 24, 2011, deliver its exhibits to the Court by July 12, 2011, file a Rule 35 declaration, and appear at the July 19, 2011 hearing. The Court finds that Respondent's non-compliance with Commission rules and Court orders to not be due to negligence, inadvertence, mistake or carelessness. The Court also finds that no "good cause" under 29 C.F.R. § 2200.64(c) has been shown to excuse Respondent's failure to appear at the hearing. *See Daak Corp*., 16 BNA OSHC 1385 (No. 92-0386, 1993). Instead, the Court finds that Respondent has engaged in contumacious conduct through a consistent pattern of failure to respond to Court orders. *See Sealtite Corp.*,15 BNA OSHC 1130 (No. 88-1431, 1991)(Respondent's failure to file pre-hearing statement and produce a document sufficient showing of contumacious conduct). Respondent was informed in the Hearing Date Order and Order to Comply that failure to comply with the Court's orders may result in sanctions. The Court finds that Mr. Gibson chose either to not appear at the July 19, 2011 hearing or to intentionally "bury his head in the sand" and consciously avoid Court notices. Either way, Respondent is responsible for its inaction and a default is warranted in this case. *See Philadelphia Constr. Equip., Inc.*, 16 BNA OSHC 1128, 1131 (No. 92-899, 1993) ("A judge has very broad discretion in imposing sanctions for noncompliance with Commission Rules of Procedure or the judge's orders.") (holding a *pro se* employer in default for failure to appear at the hearing appropriate where there is a pattern of disregard generally in the case.).

on August 19, 2011. By Notice of Rescheduled Telephone Post Hearing Conference, dated August 16, 2011, mailed to Mr. Gibson at P.O. Box 290, 55 Leonard Street, Foxboro, MA 02035, the Court notified the parties that the rescheduled post hearing conference would take place on August 18, 2011 at the Secretary's request. The Notice of Rescheduled Telephone Post Hearing Conference was also sent by facsimile to Mr. Gibson at facsimile no. (508) 698-1738.[10]

The Court held the conference with the parties, including Mr. Gibson, on August 18, 2011.[11] Mr. Gibson, appearing for Respondent, told the Court he had not received notice of the hearing until the day after it occurred through receipt of the Court's federal express mailing to the Bay Point Country Club. He stated that he had not had access to his office mailings as of June 22, 2011. The Secretary's counsel pointed out that the notice of the hearing was sent to the parties on May 13, 2011. The Secretary's counsel further pointed out that, under Commission Rule 6, 29 C.F.R. § 2200.6, Respondent was required to promptly notify the Court and any other party of any change in address and/or telephone number.[12] The Court reviewed with the parties the results of the hearing, *i.e.*, that the citations were affirmed and that penalties of $2,500 and $14,000, respectively, were assessed. The Court then read Commission Rule 64, 29 C.F.R. § 2200.64, entitled "Failure to Appear," to the parties in its entirety. The Court noted that Respondent had

[10] A copy of this notice was returned to the Court by facsimile dated August 16, 2011, along with a message from New Century Roofing, LLC, PO Box 290, 55 Leonard Street, Foxboro, MA 02035 that stated "21st Century Roofing is in Chapter 7 and is not operating from this phone number, fax number or PO Box 290. Mark Gibson does not work at New Century Roofing, LLC." The message also included the name, address and telephone numbers of the trustee for 21st Century Roofing.

[11] The Court memorialized the conference call in an order to the parties dated August 25, 2011.

[12] Commission Rule 6, Record of Address, 29 C.F.R. § 2200.6, states in relevant part that:

> Every pleading or document filed by any party … shall contain the name, current address and telephone number of his representative, … Any change in such information shall be communicated promptly in writing to the Judge, … A party … who fails to furnish such information shall be deemed to have waived his right to notice and service under these rules.

not filed a request for reinstatement and that it (the Court) did not consider the conference call to be such a request.[13]

The Court finds that Respondent's Mark Gibson received all mailings sent to Respondent's address prior to June 22, 2011; including the Hearing Date Order that stated that the hearing would commence at 9:00 a.m., E.D.T., July 19, 2011, in Providence, Rhode Island.[14] The Court further finds that Respondent received actual or constructive notice before July 19, 2011 of the designated courtroom and street address of the federal courthouse in Providence, RI, where the hearing was to be held by the Notice sent by the Court to Respondent by federal express on July 6, 2011 and by facsimile on July 13, 2011 to facsimile no. (508) 698-1738; as well as by Order to Comply sent by facsimile on July 18, 2011 to facsimile no. (508) 698-1738. The Court further finds that Respondent waived its right to any notice of the street address of the federal courthouse and courtroom designation by not promptly communicating any change in address to the Court pursuant to Commission Rule 6.

The Citation Items

As indicated above, Item 1of Serious Citation 1 alleged a violation of 29 C.F.R. § 1926.502(f)(1)(i). That standard provides as follows:

> When mechanical equipment is not being used, the warning line shall be erected not less than 6 feet (1.8 m) from the roof edge.

As also indicated above, Item 1 of Repeat Citation 2 alleged a violation of 29 C.F.R. § 1926.501(b)(10). That standard states, in relevant part, as follows:

[13] The Court also informed Mr. Gibson that Respondent would be formally advised of its appeal rights when the Court issued its written decision in this case. The Court again reminded Mr. Gibson that he could retain legal counsel in this matter.

[14] The Court finds Mark Gibson's August 18, 2011 oral assertion that he did not receive notice of the hearing until the day after the hearing to lack credibility.

> *Roofing work on Low-slope roofs*. Except as otherwise provided in paragraph (b) of this section, each employee engaged in roofing activities on low-slope roofs, with unprotected sides and edges 6 feet (1.8 m) or more above lower levels shall be protected from falling by guardrail systems, safety net systems, personal fall arrest systems, or a combination of warning line system and guardrail system, warning ling system and safety net system, or warning line system and personal fall arrest system, or warning line system and safety monitoring system….

The Secretary's Burden of Proof

Having established that OSHA had appropriate jurisdiction over the worksite at issue, the Court turns next to the violations alleged by the Secretary. To establish a violation of an OSHA standard, the Secretary must establish that: (1) the standard applies to the facts; (2) the employer failed to comply with the terms of that standard; (3) employees had access to the hazard covered by the standard, and (4) the employer knew or could have known of the existence of the hazard with the exercise of reasonable diligence. *Atl. Battery Co.*, 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

Relevant Testimony

1. Eric Q. Jones

Eric Jones testified that he has been an OSHA compliance officer ("CO") for 14 and ½ years. According to CO Jones, the inspection was initiated when OSHA received an anonymous complaint alleging fall hazards at Respondent's worksite at 225 John Hancock Road, Tauton, MA ("worksite").[15] Since OSHA has a local emphasis program on falls, whenever his office learns of fall-related allegations, it sends a CO out to inspect the worksite. (Tr. 9-10; CX-2, CX-4).

When he and a colleague, OSHA CO trainee McGrath, arrived at Respondent's worksite on December 1, 2009, he observed two of Respondent's workers in very close

[15] The worksite was a building addition to an Agar Supply Company warehouse. (CX-4).

proximity to the roof's edge, outside of the warning line system atop the roof. Other than the warning line system, CO Jones did not see any fall protection system in use at the worksite. CO Jones took several photographs at the worksite from the adjacent property and then entered the worksite. (CX-12 through CX-14). CO Jones and his colleague then introduced themselves to Mr. Olavi Wirkki, superintendent for the general contractor, Stahlman Group, at the worksite. With the superintendent's permission, CO Jones went on the roof and met with Respondent's foreman, Keith Landry. CO Jones took additional photographs while on the roof. He testified that all the workers shown in the photographs were Respondent's employees. (Tr. 8-13; CX-4, CX-7 through CX -11).

CO Jones testified that the rectangular roof was huge; at approximately 250 feet by 500 feet. It was greater than 50 feet in width. He found that Respondent had no monitoring system of any kind on the roof at the worksite. He said that "no one [was] watching these guys." The CO testified he observed two of Respondent's employees outside of the warning line and that photograph CX-7 showed another employee standing beyond the warning line. (Tr. 13-14; CX-7). CO Jones further testified that photograph CX-8 showed that the warning line was closer than 6 feet from the roof's edge. He observed that the warning lines varied anywhere from 2.5 feet to less than 4 feet from the roof's edge. He stated that no mechanical equipment was being used and that Respondent was violating 29 C.F.R. § 1926.502(f)(1)(i), Citation 1, Item 1, as the warning line was erected less than 6 feet from the roof's edge. (Tr. 14-15). CO Jones said that photograph CX-9 showed one of Respondent's employees working outside of the warning line, within a foot of the roof's edge, with no one monitoring him.[16] He also

[16] CO Jones testified that this man was also in the photographs that he had taken before entering the worksite. (Tr. 15; CX-12 through CX-14).

said that Respondent's employees working on the roof should have been using personal fall arrest systems and been tied off since an employer has to do more than just use a safety monitor when working on roofs over 50 feet wide. The CO noted that photographs CX-9 and CX-10 showed the same employee working outside the warning line without a safety monitor. He further noted that photograph CX-11 showed two employees working outside of the warning line; both were very close to the roof's edge, and there was no safety monitor watching them. (Tr. 15-17; CX-9 through CX-11).

CO Jones testified that the building's height was approximately 25 feet. He identified photograph CX-12 as a photograph that showed an employee exposed to fall hazards. He also identified photograph CX-13 as a photograph that showed an employee working at, and with his back toward, the roof's edge. The CO stated that photograph CX-14 showed two employees working outside the warning line without a safety monitor. (Tr. 17-18; CX-12 through CX-14).

CO Jones testified about how OSHA arrived at the proposed penalties. No reductions for good faith or history were given, as Respondent's safety program was not working and it had been cited before within the prior three years. The severity of both citation items was determined to be high, since an employee could have died from a fall. The probability as to Citation 1, Item 1, was lesser, since Respondent had at least erected a warning line. The probability as to Citation 2, Item 1, was determined to be greater, because three employees were working outside of the warning line; inches from the roof's edge. In regard to Citation 2, Item 1 being characterized as a repeat violation, CO Jones noted that OSHA had searched its database and found that Respondent had been

cited for the same standard within the past three years; *i.e.,* for a citation issued on April 24, 2008. (Tr. 19-22; CX-5 through CX-6).

OSHA's worksheets from the inspection identified three of the four employees of Respondent who were exposed to falls of approximately 30 feet while working on a roof where 60 feet of the warning line system had been erected less than four feet from the roof's edge in violation of 29 C.F.R. § 1926.502(f)(1)(i); *i.e.,* Roofers Bob Cavalieri, John Gil, and Alfredo Diaz. (CX-5). The worksheets also identified two employees of Respondent who were exposed to falls of approximately 25 feet while working on the roof beyond the warning line, where a fall protection system was not utilized in violation of 29 C.F.R. § 1926.501(b)(10); *i.e.*, Roofers Alfredo Diaz and Harold Sacet. (CX-6). The worksheets showed the gravity-based penalties to be as follows: $2,500 for Citation 1, Item 1, and $14,000 for Citation 2, Item 1.[17]

2. Robert J. Sestito

Robert J. Sestito testified that he was presently serving as the assistant area director ("AAD") for OHSA's Providence area office. He identified Exhibit CX-3 as a final Informal Settlement Agreement between OSHA and 21st Century, dated April 23, 2008; CX-3 shows Respondent accepted a citation that included a violation of 29 C.F.R. § 1926.501(b)(10), where an employee was exposed to a fall hazard because he was not provided with or using adequate fall protection systems. The Informal Settlement Agreement is signed by Messrs. Sestito and Gibson. (Tr. 27-29; CX-3).

[17] CO Jones testified that he proposed providing Respondent with a proposed adjusted penalty of 60% for company size (number of employees) based upon an unverified representation by Respondent's foreman at the worksite that 21st Century had around 25 employees. The CO testified he saw nine employees at the worksite. He agreed that Respondent could have had more than 25 employees. The Court has decided to make no adjustment to the gravity-based penalty because of company size. The Court is not convinced that Respondent is entitled to any reduction for size based upon the evidence before it. The record, including recent past violations, also shows a lack of concern for employee safety and health that justifies no reduction for size for these violations. (Tr. 22-25; CX-3, CX-5 through CX-6).

The Court found the testimony of CO Jones and AAD Sestito to be entirely credible. The Court also finds that their testimony is amply supported by documentary evidence, including photographs. (Tr. 8-30; CX-1 through CX-14).

Discussion

Here, the Secretary met her burden in proving that Respondent failed to comply with applicable standards and knew, through its foreman, of the existence of the hazards at issue. The Secretary also proved that Respondent's employees had access to the hazards covered by the standards. The Secretary has done so through the uncontested testimonial and documentary evidence presented at trial. At the hearing, the Court adopted as its findings of fact all of the allegations set out in the two citations in this matter. The Court also found that, in not appearing, Respondent had essentially admitted to the alleged violations. (Tr. 34). The alleged violations are accordingly affirmed as set out in the citations; except that the penalties are increased as set forth below.

Respondent was held in default for not appearing at the scheduled hearing. (Tr. 34). *See RWS Bldg. Co.*, No. 01-0376, 2001 WL 826756, at *2 (O.S.H.R.C.A.L.J., July 19, 2001) (Respondent's motion to vacate citation granted by the Court due to Secretary's failure to appear at the hearing pursuant to Commission Rule 64); *Talon Erectors Inc.*, 19 BNA OSHC 1398 (No. 00-1939, 2001) (Secretary's motion for a decision affirming citation on grounds company failed to appear at hearing granted).

Commission Rule 64 states that the failure of a party to appear at a hearing "may result in a decision against that party." [18] 29 C.F.R. § 2200.64(a). "A defaulting party 'is

[18] A failure to appear may be excused where good cause is shown, but a request for reinstatement must be made, in the absence of extraordinary circumstances, within five days of the hearing. 29 C.F.R. § 2200.64(b). Respondent has made no such request, even after being advised of its opportunity to do so on

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. Fonovisa*, 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). As a result of the default, the factual allegations of the complaint relating to liability are taken as true. *Dundee Cement Co. v. Howard Pipe & Concrete Prod.*, 722 F.2d 1319, 1323 (7th Cir. 1983); *Tower Painting Co.*, 22 BNA OSHC at 1375. When entering a default judgment, factual allegations set forth in a complaint are sufficient to establish a defendant's liability. *Trs. of the Iron Workers Dist. Council of Tenn. Valley and Vicinity Pension Fund et al. v. Charles Howell*, No. 1:07-cv-5, 2008 WL 2645504, at *6 (E.D. Tenn. July 2, 2008); *Nat'l Satellite Sports, Inc. v. Mosley Entm't, Inc.*, No. 01-CV-74510-DT, 2002 WL 1303039, at *3 (E.D. Mich. May 21, 2002); *Tower Painting Co.*, 22 BNA OSHC at 1375. The Court finds that the Secretary's Complaint and underlying citations sufficiently state the description of the alleged violations and a reference to the standards allegedly violated.[19] The Complainant has satisfied any burden of showing that she is entitled to an entry of judgment by default against Respondent.

The Court 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 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

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August 18, 2011. *See Martorell Constr. Co.*, 23 BNA OSHC 1081, 1082 (No. 09-1511, 2010)(Opportunity to request reinstatement beyond five days of scheduled hearing date).

[19] Section 9(a) of the Act, 29 C.F.R. § 658(a), provides that 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."

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. The citation items at issue are all affirmed as alleged by the Secretary; except that the penalties are increased as set forth below.

Penalty Assessment

The Commission has the discretion to assess the penalties it finds appropriate. In assessing penalties, the Commission gives due consideration to the gravity of the cited condition and to the employer's size, history and good faith. *See* section 17(j) of the Act, 29 C.F.R. § 666(j). The CO who conducted the inspection testified about the proposed penalties for the violations. He determined that both violations had high severity, in that falling from the roof would have resulted in serious injury or death. The serious violation had lesser probability, as there was a warning line erected on the roof. The repeat violation had greater probability, as several employees were working outside of the warning line and inches from the roof edge. OSHA applied a 60 percent reduction to the gravity-based penalties, due to the employer's size. No reductions were given for history or good faith. The employer had received a serious OSHA citation within the past three years, and its safety program was not being enforced at the site. (Tr. 19-21).

As set out *supra*, the Court assessed the gravity-based penalties without providing any reduction for company size. The Court finds a higher penalty is appropriate in light of the high severity of the violations and Respondent's overall lack of concern for employee safety and health evident by its recent past and current violations of the same standard.[20] It is well settled that the Commission has the authority to assess a higher

[20] The Court finds that a fall from the worksite's roof would result in serious injury or death.

penalty than that proposed by the Secretary.[21] *REA Express, Inc. v. Brennan & O.S.H.R.C.,* 495 F.2d 822 (2d Cir. 1974)*; Ho,* 20 BNA OSHC 1361, 1379 (No. 98-1645, 2003)(consolidated); *Hackensack Steel Corp.* 20 BNA OSHC 1387, 1395 n. 9 (No. 97-0755, 2003); *Chicago Bridge & Iron Co.*, 2 BNA OSHC 1388 (No. 609, 1974)("Commission has consistently recognized that the penalties that it finds appropriate may well exceed those initially proposed by the Secretary.") . When an employer contests the Secretary's proposed penalty, the Secretary's assessment becomes "purely advisory" and the judge is required to independently arrive at an appropriate penalty. *See Stoughton Body, Inc.*, 3 BNA OSHC 1359, 1361 (No. 935, 1975)("Judge may assess a penalty that is higher than the penalty originally proposed by the Secretary.").[22] Under the circumstances of this case and the Commission's precedent, the Court finds the gravity-based penalties appropriate. A penalty of $2,500 is therefore assessed for Item 1 of Citation 1, and a penalty of $14,000 is assessed for Item 1 of Citation 2.

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).

[21] At the hearing, the Secretary's counsel stated that the judge was not constrained by the penalty amounts proposed by the Secretary and not bound to provide Respondent with credit for size as the Secretary had done. The Secretary's counsel stated that "the judge has discretion to implement a penalty as they believe is appropriate and reasonable under the circumstances." (Tr. 32). The Court agrees with the Secretary's counsel in this regard.

[22] *See also Calif. Stevedore & Ballast Co. v. O.S.H.R.C.*, 517 F.2d 986, 988 (9th Cir. 1975)(Secretary's proposed penalty "only a proposal" and Commission determines penalty *de novo.); Del. and Hudson Ry. Co.*, 8 BNA OSHC 1252, 1256 (No. 76-787, 1980)("it is well settled that an administrative law judge … may assess a higher penalty than that proposed by the Secretary.").

ORDER

1. Item 1 of Serious Citation 1, alleging a violation of 29 C.F.R. § 1926.502(f)(1)(i), is AFFIRMED, and a penalty of $2,500 is assessed.

2. Item 1 of Repeat Citation 2, alleging a violation of 29 C.F.R. § 1926.501(b)(10), is AFFIRMED, and a penalty of $14,000 is assessed.

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

Date: October 28, 2011
Washington, D.C.