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

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| SECRETARY OF LABOR, | : | |
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| Complainant, | : | |
| | : | |
| v. | : | OSHRC DOCKET NO. 08-1886 |
| | : | |
| INTERNATIONAL DIVING SERVICES, | : | |
| | : | |
| Respondent. | : | |

Appearances:

Lindsay A. Wofford, Esquire
Office of the Solicitor
U.S. Department of Labor
525 Griffin Street, Ste 501
Dallas, Texas 75202
For the Secretary.

McCord Wilson, Esquire
Rader & Campbell
Stemmons Place, Ste 1125
Dallas, Texas 75207
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"). Between May 13, 2008 and May 15, 2008, the Occupational Safety and Health Administration ("OSHA") inspected the work site(s) of Respondent, International Diving Services ("Respondent" or "IDS").[1] As a result of the inspection, on November 10, 2008

[1] Respondent is a privately held corporation. *See Declaration of Corporate Respondent,* dated December 29, 2008.

OSHA issued to IDS one serious citation containing three items and one willful citation containing two items. The total proposed penalty for the citation items is $64,400. On November 25, 2008, Respondent contested the citations and the penalties proposed therefor pursuant to § 10 (c) of the Act.

Citation 1, Item 1 alleged that on or about May 12, 2008, at the Water Treatment Facility located in Paris, Texas ("WTF"), an employee entered a permit-required confined space to inspect a 500,000 gallon in-ground water tank without a written confined space entry permit being conducted in advance. The employer allegedly did not verify that a Team Leader had certified that the confined space was safe for entry and that measures had been taken to ensure water extrusion pumps inside the tank did not engage during the diving operation. The proposed penalty for Citation 1, Item 1, is $2,800.

Citation 1, Item 2, alleged that on or about May 12, 2008, at the WTF, the employer did not ensure that the diving Team Leader had verified and checked the appropriate entries on the confined space permit. The proposed penalty for Citation 1, Item 2, is $2,800.

Citation 1, Item 3, alleged that on or about May 12, 2008, at the 500,000 gallon in-ground water tank located at the WTF a procedure was not developed, documented and utilized that employee(s) were protected by the use and application of energy control devices while engaged in a diving operation inside the tank. The proposed penalty for Citation 1, Item 3, is $2,800.

Citation 2, Item 1, alleged that on or about May 12, 2008, at the WTF, the employer did not plan a diving operation to include the hazard assessment of unsafe conditions created by the automatically engaging of three (3) water extrusion pump impellers (rotating vertical shafts).

Employees were allegedly exposed to contact with rotating equipment during a commercial diving operation. The proposed penalty for Citation 2, Item 1, is $28,000.

Citation 2, Item 2, alleged that on or about May 12, 2008, at the 500,000 gallon in-ground water tank located at the WTF dive team members were not briefed on the existence of three (3) water extrusion pumps' intake impellers which were not de-energized and exposed the diver to rotating equipment during the diving operation. The proposed penalty for Citation 2, Item 2, is $28,000.

Together Citation 1, Items 1 through 3, and Citation 2, Items 1 though 2, described herein are together referred to as the "Citation Items at issue."

On December 15, 2008, the Complainant filed her Complaint. The Complaint alleged that Respondent violated § 5(a) of the Act in the manner contained in the citations which were adopted by reference pursuant to 29 C.F.R. § 2200.30(d). The Complaint further alleged that the willful violations alleged in Citation 2 were also serious violations within the meaning of § 17(k) of the Act. The Complaint also alleged that in determining the amount of the proposed penalty, $64,400, due consideration was given to the size of the Respondent's business, the gravity of the violation, the good faith of the employer and the history of previous violations, as required under § 17(j) of the Act. *See* Complaint, at pp. 1-3.

On December 29, 2008, Respondent filed its Answer.[2] On December 29, 2008, Respondent also served upon the Secretary its Request for Production of Documents.[3]

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[2] In its answer, in addition to denying the alleged violations, Respondent asserted affirmative defenses that asserted that the violations were "isolated instances of employee misconduct of which Respondent had no knowledge and which Respondent could not have reasonably foreseen." *See* Answer at p. 2.

[3] During a conference call with the parties, the Secretary's counsel advised the Court that she had responded to Respondent's Request for Production of Documents.

On about March 11, 2009, the Secretary's served her First Set of Interrogatories,[4] Requests for Admissions[5] and [First] Requests for Production of Documents.[6] On March 27, 2009, she served her Second Request for Production of Documents[7] upon Respondent [together her First Set of Interrogatories, Requests for Admissions, [First] Requests for Production of

[4] Complainant propounded twenty-five interrogatories seeking, among other things, the identity of persons with knowledge of the alleged violations, facts relating to Respondent's defenses; Respondent's work rules, procedures and/or policies in effect at the worksite, including monitoring and compliance with such matters; Respondent's disciplinary record for the past years, dive team procedures in the in-ground tank, Respondent's assessment of underwater conditions and hazards of the in-ground water tanks, Respondent's communications with the dive team, the identification of dive team members who participated in the 2005 and 2006 inspections of the WTF, the basis for any denials of Complainant's requests for admissions; the identification of instances where Respondent took in-ground tanks out-of-service, along with the identification of dive team members involved in any such instance; the dive teams review of any blueprints, schematics, drawings and specifications for the in-ground tanks at the WTF, and the identification of the person(s) providing information relating to interrogatory responses.

[5] Complainant sought to have Respondent admit that on May 12, 2008: 1) Respondent's diving crew at the worksite did not bring with them lockout and/or tagout devices, 2) Othel D. Smith III's ("Mr. Smith") equipment became entangled in a water extrusion pump's impeller while he was working in an in-ground tank, and 3) the in-ground tank was not de-energized at the last in-ground tank that Mr. Smith entered. *See* Complainant's First Interrogatories, Requests for Admissions and Request for Production of Documents to Respondent, at pp. 11-12.

[6] Complainant propounded twenty-six request for production of documents seeking, among other things, statements of persons with knowledge of the facts of the case, documents supporting Respondent's responses relating to Complainant's First Set of Interrogatories, documents relating to Respondent's defenses; photographs, documents, records and writings relating to the alleged violations, videotapes of the worksite, documents relating to work rules or policies violated by Respondent's employees, records of disciplinary action beyond January, 2005, documents relating to steps taken by Respondent to ensure compliance with its procedures, policies, or work rules, the contract relating to work at the jobsite, documents relating to the dive teams assessment of underwater conditions and hazards of the in-ground water tanks, including communications and instructions to Respondent's employees relating to hazards; documents Respondent reviewed and/or provided to the dive team, documents relating too Respondent's assessment of the underwater conditions and hazards of the in-ground water tanks, including conversations with employees at the WTF; the blueprints, schematics, drawings, and specifications for the in-ground tanks at the WTF, documents relating to the strength of the pumps in the in-ground tanks at the WTF, documents relating to dive team members not getting ensnared/entangled in pumps within in-ground tanks, and documents relating to Respondent's 2005 and 2006 inspections of the WTF.

[7] Complainant propounded eleven additional document requests seeking blueprints, schematics, drawings and specifications for the pumps on the in-ground tanks and the size of the openings on pumps at the WTF, documents reflecting the gallons per minute for the normal operation of the pumps on the in-ground tanks at the WTF, documents relating to the calculations and/or testing of the entrance velocity for the pumps on the in-ground tanks and for the in-ground tanks at the WTF, documents reflecting the vicinity of the intake pump to the floor of the in-ground tanks, the production of a list reflecting all diving and safety-related equipment present at the jobsite, including the records and logs pertaining to any such equipment; documentation reflecting the person designated as the dive team supervisor, the dive plan for the jobsite, and documentation relating to the pre-dive briefing.

Documents, and Second Request for Production of Documents are hereinafter referred to collectively as "discovery requests"]. Respondent's answers to the Secretary's discovery requests were originally due in April, 2009. Respondent's counsel has advised the Secretary that he was unable to respond to her discovery requests because he has been unsuccessful in contacting his client about the matter.

A telephone conference call was held with the parties on July 15, 2009.[8]

On July 15, 2009, the Complainant served the Secretary's Motion to Compel and Memorandum in Support ("Motion to Compel") upon Respondent by facsimile and email. The Secretary sought an order from the Court directing Respondent to serve its answers to the discovery requests within five days of the date of any Court order, as well as deeming all her requests for admissions admitted.

By the Court's Scheduling Order dated January 29, 2009 and May 12, 2009, the parties were required to prepare and file by July 17, 2009 a Joint Pre-hearing Statement ("JPHS"). In the JPHS Respondent was required to, among other things, provide a list of all lay witnesses who may be called at hearing, including a brief summary of their testimony to be elicited. Respondent was also required to set forth the factual basis of each affirmative defense as it relates to each specific item. All discovery was also required to be completed and answered by July 17, 2009.

On July 17, 2009, the parties filed their JPHS. Instead of identifying its list of lay witnesses and providing a brief summary of their testimony, Respondent stated in the JPHS that "Respondent's counsel has not been able to make contact with his client and has no authority to

[8] During the July 15, 2009 conference call with the Court, Respondent's counsel indicated that he believed that Respondent's representatives had moved to an undisclosed location in Brazil.

designate witnesses at this time." Instead of providing a factual basis of each affirmative defense as it relates to each specific item, Respondent stated in the JPHS that "Respondent's counsel has not been able to make contact with client and has no authority to present affirmative defenses."

On July 17, 2009, Complainant separately filed her [First] Motion to Dismiss with the Court. The Secretary asserted that her [First] Motion to Dismiss was prospectively filed in anticipation of Respondent's inability to comply with any order compelling discovery. She asserted that she was prejudiced by Respondent's failure to respond to her discovery requests. She alleged that this was a complex case involving lockout/tagout and commercial diving standards. She further alleged that an employee of Respondent was killed when his oxygen line became entangled in an energized pump in the 500,000 gallon inground water tank that he was inspecting. The Secretary alleged that:

> Because [of] Respondent's position on the citations, it was vital for the prosecution of her case that Complainant obtain information and documents that Respondent alleged supported its position. Without the information requested in her discovery requests, Respondent stymied Complainant's preparation of her case in chief and her ability to defend the issued citations. As such, Respondent's refusal to respond to Complainant's discovery requests has prejudiced her to such an extent that dismissal of Respondent's Notice of Contest is warranted. *See* [First] Motion to Dismiss, at p. 3.

On July 21, 2009, Respondent filed its response to Motion to Compel and [First] Motion to Dismiss. Respondent's counsel confirmed that he had been unable to contact his client to discuss discovery and thus was not able, and had no authority, to respond to the discovery requests. Respondent "does not dispute the basic facts as set forth in the Motion to Compel or Motion to Dismiss, or that Complainant has been prejudiced." Respondent's counsel further asserted "that any contumacious conduct in this matter was not the fault of counsel." Respon-

dent agreed that the Secretary's Motion to Compel and [First] Motion to Dismiss were "ripe for ruling by this Court."

On July 23, 2009, the Court granted the Secretary's Motion to Compel[9] and directed that Respondent serve upon the Secretary complete and detailed answers (verified where required)[10] to the Secretary's First Set of Interrogatories; [First] Requests for Production of Documents, dated March 11, 2009; and Second Request for Production of Documents, by July 28, 2009.[11] The Court also ordered that the Secretary's Requests for Admissions were deemed admitted.[12] The Order also stated:

> If a Judge enters an order compelling discovery and there is a failure to comply with the Court's order, the Court may make such orders with regard to the failure as are just. Such order may include any sanction stated in Commission Rule 52 and/or Fed. R. Civ. P., Rule 37, including dismissal of Respondent's notice of contest.

On July 31, 2009, Complainant filed her Second Motion to Dismiss Respondent's Notice of Contest ("Second Motion to Dismiss"). The Secretary asserted that she had not timely received the compelled information. She argued that Commission Rule 52(f), 29 C.F.R. § 2200.52(f)(4) permitted the Court to render a default judgment against Respondent for failing to comply with an order compelling discovery. Citing to *St. Lawrence Food Corp. D/b/a/ (sic) Primo Foods*, 21 BNA OSHC 1467 (Nos. 04-1734 and 04-1735, 2006), she asserted that the Court may dismiss a matter when "the record shows contumacious conduct by the noncomplying

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[9] The Court's Order was served by facsimile upon Respondent's counsel on July 23, 2009 and also received at Respondent's counsel's office on July 27, 2009 by certified mail, return receipt requested.

[10] *See* Rule 33(b)(3)(5), Fed. R. Civ. P.

[11] The Court also authorized the Secretary to file a motion seeking sanctions, including dismissal of Respondent's notice of contest, if Respondent did not timely serve its discovery answers upon the Complainant.

[12] Pursuant to Rule 36(a)(3), Federal Rule of Civil Procedure (Fed. R. Civ. P.), a request for admission is deemed admitted unless within thirty days after being served the party to whom the request is directed serves on the requesting party a written answer or objection addressed to the matter.

party or prejudice to the opposing party." *Id.*, at 1472. She asserted that she had been prejudiced by Respondent's failure to respond to her discovery requests and that a default judgment was warranted.[13] She asks that the Court dismiss Respondent's Notice of Contest, and enter a final order sustaining the citations and penalty amounts set forth in the citations attached to the Complaint.

On July 31, 2009, Respondent filed its response to Second Motion to Dismiss Notice of Contest. Respondent's counsel once again confirmed that he had been unable to contact his client to discuss discovery and thus was not able, and had no authority, to respond to the discovery requests. Respondent again did not dispute the basic facts as set forth in the Second Motion to Dismiss, or that Complainant has been prejudiced. Respondent's counsel again asserted "that any contumacious conduct in this matter was not the fault of counsel." Respondent requested that the Secretary's Second Motion to Dismiss be "ruled on expeditiously by the Court."

The hearing in this matter is scheduled to be held at Dallas, Texas commencing on August 12, 2009.

***The Cited Standards***

Citation 1, Item 1, alleges a serious violation of 29 C.F.R. § 1910.146(c)(5)(ii)(H), which states that:

> (H) The employer shall verify that the space is safe for entry and that the pre-entry measures required by paragraph (c)(5)(ii) of this section have been taken, through a written certification that contains the date, the location of the space and the signature fo the person providing the certification. The certification shall be made before entry and shall be made available to each employee entering the space or that employee's authorized representative.

[13]She reiterated the basis of prejudice as previously described in her [First] Motion to Dismiss.

Citation 1, Item 2, alleges a serious violation of 29 C.F.R. § 1910.146(j)(2), which states that:

> (j) *Duties of entry supervisors.* The employer shall ensure that each entry supervisor:
>
> (2) Verifies, by checking that the appropriate entries have been made on the permit, that all tests specified by the permit have been conducted and that all procedures and equipment specified by the permit are in place before endorsing the permit and allowing entry to begin;

Citation 1, Item 3, alleges a serious violation of 29 C.F.R. § 1910.147(c)(4)(i), which states that:

> (4) *Energy Control Procedure*. (i) Procedures shall be developed, documented and utilized for the control of potentially hazardous energy when employees are engaged in the activities covered by this section.

Citation 2, Item 1, alleges a willful violation of 29 C.F.R. § 1910.421(d)(2), which states that:

> (d) *Planning and assessment.* Planning of a diving operation shall include an assessment of the safety and health aspects of the following:
>
> (2) Surface and underwater conditions and hazards;

Citation 2, Item 2, alleges a willful violation of 29 C.F.R. § 1910.421(f)(1)(iii), which states that:

> (f) *Employee briefing.* (1) Dive team members shall be briefed on:
>
> (iii) Any unusual hazards or environmental conditions likely to affect the safety of the diving operation;

## ***Jurisdiction***

Respondent admitted that the Commission has jurisdiction of this matter. Respondent also admitted that it was engaged in a business affecting commerce within the meaning of § 3(5) of the Act, and was an employer within the meaning of § 3(5) of the Act. *See* Answer of

IDS, dated December 29, 2008 at p. 1. I find, therefore, 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 Second Motion to Dismiss***

Commission Rule of Procedure 52(f) allows a party to make a motion seeking sanctions when a party fails to comply with a Court order compelling discovery. The Court may make such orders with regard to such a failure that are just. The orders may include any sanction stated in the Federal Rule of Civil Procedure 37, including an order dismissing the action or proceeding, or rendering a judgment by default against the disobedient party. *See* 29 C.F.R. § 2200.52(f).[14] Whether and to what extent discovery sanctions are warranted are for the court to decide in its discretion. *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 642 (1976), *NL Industries, Inc.*, 11 BNA OSHC 2156, 2168 (No. 78-5204, 1984)(when a party's failure to comply with a discovery order is either contumacious or acts to prejudice the opposing party, that party will profit from its own

[14] Respondent was duly warned in the Court's July 23, 2009 Order granting the Secretary's Motion to Compel that any sanction stated in Commission Rule 52 and/or Fed. R. Civ. P., Rule 37, including dismissal of Respondent's notice of contest, may be imposed in the event Respondent failed to timely comply with the Court's Order compelling discovery.

wrongdoing and gain an unfair advantage unrelated to the merits of their case).

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 party seeking discovery, 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 are 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).

A party is prejudiced if the failure to make discovery impairs the party's ability to determine the factual merits of the opponent's defense. *Avionic Co. v. General Dynamics Corp.*, 957 F.2d 555 (8th Cir. 1992). In this instance, the Secretary has been clearly prejudiced by Respondent's obstruction of discovery. She has served comprehensive discovery requests upon Respondent. The Court finds these discovery requests to be deserving of complete responses. Often times, the Complainant or plaintiff in an action needs to consider information that is solely within the purview of the opposing party when preparing its case for trial. Here, Respondent has totaling frustrated Complainant's discovery efforts with Respondent's counsel's discovery responses that he is unable to contact his client to discuss discovery and thus is not able, and has no authority, to respond to the discovery requests. Had Respondent provided complete responses to the Secretary's discovery requests, she could have conducted more informed depositions and better prepared trial tactics and

strategies regarding the issues in dispute for the upcoming trial. Respondent concedes that Complainant has been prejudiced by its responses to her discovery requests.

By making themselves totally unavailable to Respondent's counsel for consultation throughout the discovery process, Respondent's representatives have essentially made a showing of willful default. The Court also finds that Respondent has engaged in contumacious conduct by not complying with the Court's order compelling discovery.[15] Here again, Respondent's counsel does not dispute the basic facts underlying the Secretary's Second Motion to Dismiss.[16] Respondent has requested that the Secretary's Second Motion to Dismiss be "ruled on expeditiously by the Court." This, the Court has done.

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). 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 Products*, 722 F.2d 1319, 1323 (7th Cir. 1983).

[15] The Court also finds that Respondent has failed to comply with the Court's Scheduling Orders dated January 29, 2009 and May 12, 2009, which required Respondent to prepare and file by July 17, 2009 a JPHS that required Respondent to provide a list of all lay witnesses who may be called at hearing, including a brief summary of their testimony to be elicited and to set forth the factual basis of its affirmative defenses. Instead of identifying its list of lay witnesses and providing a brief summary of their testimony, Respondent stated in the JPHS that "Respondent's counsel has not been able to make contact with his client and has no authority to designate witnesses at this time." Instead of providing a factual basis of its affirmative defenses, Respondent stated in the JPHS that "Respondent's counsel has not been able to make contact with client and has no authority to present affirmative defenses." The Court finds that theses responses do not comply with the Court's orders.

[16] Respondent's counsel asserts "that any contumacious conduct in this matter was not the fault of counsel." The Court agrees with Respondent's counsel that the contumacious conduct in this matter is attributable to Respondent and not its legal counsel.

When entering a default judgment, factual allegations set forth in a complaint 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 Secretary's Complaint and underlying citations sufficiently state the description of the alleged violations and a reference to the standards allegedly violated.[17] The Complainant has satisfied any burden of showing that she is entitled to an entry of judgment by default against Respondent.

I find that the Secretary has adequately shown the applicability of the cited standards for each of the alleged violations. I further find that the Secretary has sufficiently established that the terms of the cited standards were not met by Respondent in each of the alleged violations. I also find 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. The Citation Items at issue are all affirmed, in their entirety, as alleged by the Secretary.

***Penalties***

The Secretary has proposed a total penalty of $64,400 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. §

[17] § 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.").

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, I find that the Secretary properly considered the statutory factors in her penalty proposals. I find the total proposed penalty of $64,400, 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 Complainant's Second Motion to Dismiss and Respondent's response thereto, the Court finds Complainant's Second Motion to Dismiss to be with merit and IT IS ORDERED THAT HER Second Motion to Dismiss is GRANTED in its entirety.[18]

IT IS FURTHER ORDERED 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

[18] The Court's ruling and order addressing the Complainant's Second Motion to Dismiss renders her First Motion to Dismiss moot.

DISMISSED.[19]

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. § 1910.146(c)(5)(ii)(H) and a penalty of $2,800 is assessed.

2. Item 2 of Citation 1 is affirmed as a serious violation of 29 C.F.R. § 1910.146(j)(2) and a penalty of $2,800 is assessed.

3. Item 3 of Citation 1 is affirmed as a serious violation of 29 C.F.R. § 1910.147(c)(4)(i) and a penalty of $2,800 is assessed.

4. Item 1 of Citation 2 is affirmed as a willful violation of 29 C.F.R. § 1910.421(d)(2) and a penalty of $28,000 is assessed.

5. Item 2 of Citation 2 is affirmed as a willful violation of 29 C.F.R. §1910.421(f)(1)(iii) and a penalty of $28,000 is assessed.

_/s/_____
Dennis L. Phillips
U.S. OSHRC Judge

Date: 15 August 2009
Washington, D.C.

[19] The hearing scheduled for August 12, 2009 at Dallas, Texas is cancelled.