

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.

**EUROPEAN CRAFT CONSTRUCTION,
INC.,**

Respondent.

OSHRC DOCKET NO. 01-2203

DECISION AND ORDER OF DEFAULT

Factual Background

This proceeding arises under the Occupational Safety and Health Act of 1970, 29 U.S.C. §651, *et. seq.* From October 30 to November 7, 2001, the Occupational Safety and Health Administration conducted a safety inspection at Respondent's workplace located at 7701 Reynolds Road, Mentor, OH. As a result of that inspection, on November 14, 2001, Respondent was issued one serious citation, consisting of three items, with a total proposed penalty in the amount of \$4,000.00. In a letter dated December 3, 2001, Respondent's President, John Tampa, contested the penalty. The letter was forwarded to the Review Commission, and docketed on December 26, 2001. On January 11, 2002, the Chief Judge assigned this matter to the undersigned for E-Z Trial. On January 15, 2002, the undersigned issued an E-Z Trial Notice and Scheduling Order which scheduled a telephonic pre-hearing conference for Friday, February 22, 2002 at 10:30 am.

On February 22, 2002, the undersigned held a telephonic conference call with the parties. Respondent was on a jobsite and took the call via his cell phone. During the course of that conference call, counsel for Complainant represented that he had forwarded to Respondent the mandated OSHA Forms 1-A and 1-B. Mr. Tampa responded that he had not received the forms, and also clarified that his street address was 486 Winder Road instead of 486 Highway 81.

Counsel for Complainant stated that he would again forward the forms, as well as photographs to Respondent at this new address. Accordingly, the conference call was rescheduled for March 8, 2002. The parties were instructed by the undersigned to be prepared to discuss the issues pursuant to my original order. The Respondent advised that he could be reached on his cell phone (678-296-8316). On March 8, 2002, my administrative assistant, Georgiana Jones, called Respondent's cell number. At that time Ms. Jones received no answer. She also called the telephone number which appeared upon the letterhead of his December 3, 2001, Notice of Contest, and received no answer. She left a message on the voice mail message, wherein she requested that Respondent to call the undersigned's office. On this same day, Complainant's counsel also attempted to contact Respondent. He also left a message on Respondent's voice mail to call so that they could discuss settlement. On March 8, 2002, the undersigned issued an EZ Trial Notice scheduling this matter for April 19, 2002. On April 3, 2002, Ms Jones called Respondent. At that time, Respondent's voice mail message stated that it was "March 11th", and to leave a message. Ms. Jones left a message advising Respondent to call the Commission regarding the scheduled hearing.

On April 10, 2002, counsel for Complainant filed a Motion to Dismiss for failure to comply with court orders, and failure to negotiate in good faith.¹ Counsel's Motion set forth that he had called Respondent subsequent to March 8, 2002, to discuss settlement and had received no response. He again called Respondent on April 10, 2002, to discuss preparation of a joint prehearing statement. Respondent again did not return counsel's call. In view Respondent's failure to participate in the rescheduled pre-trial conference call and order to participate in the filing of a joint pretrial statement, or return calls to discuss settlement Complainant requests that Respondent's Notice of Contest be dismissed. On April 11, 2002, the undersigned issued an Order To Show Cause directing Respondent to show cause within 5 days of receipt this Order why he did not comply with this Court's March 8, 2002 Order, and should not be declared in default. Respondent was advised that failure to respond to this Order would indicate a lack of interest in pursuing its notice of contest. Respondent was further advised that failure to comply with this order would result in the dismissal of its notice of contest, the citation affirmed, and the

¹ On April 11, 2002, Complainant's counsel, Paul Spanos, advised Ms Jones that he had also faxed this Motion to Respondent on April 11, 2002.

penalties assessed. This Order was faxed to both parties. The transmittal notice indicated that both parties had received said fax. Respondent's Order was faxed to the telephone number which appeared upon the letterhead of his December 3, 2001, Notice of Contest.

Discussion

Rule 41(a) of the Commission's Rules of Practice, 29 C.F.R. §2200.41(a), in pertinent part provides:

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

Thereafter, ... Judge, in [her] discretion, may enter a decision against the defaulting party . . .

There is no evidence in the record that indicates that Respondent has not received any of the Commission's or Complainant's prior mailings, or faxes, or the voice mail messages. A judge has very broad discretion in imposing sanctions for noncompliance with Commission Rules of Procedure or the judge's orders. *See Sealite Corp.*, 15 OSHC BNA 11130, 1134 (No. 8801431, 1991). In view of the record before me, the undersigned finds that the Respondent has received all documents forwarded to him in this matter, and that Respondent has been given due notice and an opportunity to respond to my Order to Show Cause. The undersigned further finds that Respondent has failed to respond to her April 11, 2002, Order to Show Cause. Respondent has not responded, and has offered no reason for not complying.

Findings of Fact and Conclusions of Law

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

ORDER

Based on the foregoing decision, Respondent is declared in DEFAULT, and his notice of contest is DISMISSED, and the citation issued in this matter is AFFIRMED.

Serious Citation 1, Item 1, 29 C.F.R. §1926.100(a) is AFFIRMED, and a penalty of \$1,200.00 is assessed.

Serious Citation 1, Item 2, §1926.102(a)(1) is AFFIRMED, and a penalty of \$1,200.00 is assessed .

Serious Citation 1, Item 3, §1926.453(b)(2)(v) is AFFIRMED, and a penalty of \$1,600.00 is assessed .

SO ORDERED.

Dated: April 29, 2002

Washington, DC.

/s/

COVETTE ROONEY

Judge, OSHRC