

U.S. Department of Labor

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Issue Date: 09 October 2020

CASE NO.: 2020-CLA-00002

In the Matter of

**ADMINISTRATOR, WAGE & HOUR
DIVISION, U.S. DEPARTMENT OF LABOR,**
Plaintiff,

v.

**MARIA V. CONTRACTING, INC. D/B/A
MARIA V. CONTRACTING, a corporation, and
DENNY VILLEGAS, individually,**
Respondents.

**DECISION AND ORDER STRIKING AND
DISMISSING RESPONDENTS' REQUEST FOR HEARING**

This case arises under the child labor provisions of the Fair Labor Standards Act, 29 U.S.C. § 216(e), and its implementing regulations at 29 C.F.R. Parts 579 and 580. After investigation, Plaintiff found that Respondents had employed a minor in violation of the Act, 29 U.S.C. § 201, and its implementing regulations at 29 C.F.R. Part 570. Plaintiff alleges the minor was seriously injured when he attempted to cut live electrical wires at a demolition site, was electrocuted, and fell approximately 15 feet from an excavator bucket.

In a determination issued on August 5, 2019, Plaintiff found violations of the Act and assessed a total civil money penalty of \$63,814.00. On August 12, 2019, Respondent Denny Villegas timely requested a hearing before an administrative law judge. Mr. Villegas wrote that the Company is small, had a net income of only \$9,020, and that "paying a fine of \$63,814.00 would be devastating to our business." He acknowledged that "we made an error and understand the reason for the fine." He asked that the Department reconsider its decision "and help us continue running our small business" as a "source of income for other people." The matter was transferred to this Office for the hearing Respondents requested.

Having initiated these proceedings, Respondents have done nothing to take discovery, respond to discovery, comply with orders of the ALJ, or otherwise meet their obligations as litigating parties. By the close of discovery, Respondents had failed to make the initial disclosures and failed to respond to any of the discovery Plaintiff propounded. Respondents did this despite orders of the ALJ requiring them to comply with these obligations and explaining what they needed to do to comply.

When Plaintiff moved for a terminating sanction, I issued an order to show cause to Respondents. I explained the procedural posture of the case and what Respondents needed to do to answer the order

to show cause. I warned that, if they failed to answer timely and sufficiently, I likely would grant Plaintiff's motion, dismiss their request for a hearing, and decide the case in favor of Plaintiff and against them.

Neither Respondent filed any form of answer to the order to show cause. I will now grant Plaintiff's motion.

Procedural History

After the Administrator referred the file to this Office for adjudication, the case was assigned to the undersigned administrative law judge on March 10, 2020. On March 13, 2020, I noticed a hearing to be held on October 23, 2020. The Notice directed the parties to the applicable procedures in the implementing regulations: 29 C.F.R. §§ 580.1-580.13. Notice of Hearing at 1. Consistent with 29 C.F.R. § 580.7, the Notice recited that, unless they conflict with the implementing regulations for the Act, this Office's generally applicable procedures will apply and may be found at 29 C.F.R. Part 18, subpart A.¹ *Id.*

The Notice of Hearing includes a "Pre-Trial Order." The Pre-Trial Order reminded the parties that, "In every case, including cases where a party does not have an attorney, the [initial] disclosures required by 29 C.F.R. § 18.50(c) must be made." Pre-Trial Order at 2. The Pre-Trial Order required that, if the parties had not yet made initial disclosures, they must do so within 14 days (*i.e.*, by March 27, 2020) *Id.* The Pre-Trial Order also directed the parties to 29 C.F.R. § 18.50-18.57 for the generally applicable rules pertaining to discovery. *Id.* at 2-3. The Order imposed a discovery cut-off date 30 days before the hearing, which here ran on September 23, 2020. *Id.* at 3-4.

The Pre-Trial order warned the parties about sanctions, stating: "Unless good cause is shown, parties will not be permitted to litigate issues, call witnesses, or introduce evidence they fail to disclose at the times and in the ways this order requires. Failure to comply with this Order subjects the offending party to sanctions. *See generally* 29 C.F.R. §§ 18.12(b), 18.35(c), 18.50(d)(2)&(3), 18.52, 18.57, 18.87." *Id.* at 4-5.

On July 15, 2020, Plaintiff moved to deem admitted the requests for admission Plaintiff had pounded to each Respondent as well as for an order compelling each Respondent to respond to Plaintiff's interrogatories and requests for admission. Respondent's opposition to the motion was due on file on or before July 29, 2020. *See* 29 C.F.R. § 1833(d) (opposition to pre-hearing motion due within 14 days after motion is served). Respondents filed nothing.

I could have granted the motion as unopposed. But, given that each Respondent essentially was self-represented, I directed my staff to contact and ask when they would be available for a phone conference. Plaintiff's counsel and Maria Villegas (on behalf of Maria V Contracting, Inc.) agreed they'd be available on August 21, 2020.² I therefore, on August 13, 2020, noticed a telephone conference for that date. The purpose of the conference was to be certain Respondents understood their obligations to make disclosures and answer discovery, to issue an order requiring compliance with those obligations, to discuss how the corporate Respondent was being represented, to discuss

¹ I also stated that the applicable rules of evidence could be found at 29 C.F.R. Part 18, subpart B. *See* 29 C.F.R. § 580.7.

² My staff could not reach Denny Villegas.

the benefit of obtaining an attorney for representation, and generally to discuss the status of the case. I stated in the Notice:

Every party must be present through his, her, or its representative, or if self-represented, the party must be present personally. The administrative law judge might issue orders at the conference. The conference will be taken down for the record by a court reporter. Any party who fails to appear at the conference will be waiving the right to attend and be heard.

At the appointed time for the conference, the Solicitor appeared for Plaintiff. No one appeared for either Respondent. I stated for the record my conclusion that Respondents had waived their right to be present and be heard. I questioned the Solicitor about Plaintiff's motion. I granted the motion and followed up with a written order. *See* "Order Deeming Admitted Plaintiff's Requests for Admission and Compelling Discovery Disclosures" (Aug. 21, 2020).

In the order, I found that Respondents had failed to make any of the required initial disclosures, failed to respond timely or at all to Plaintiff's requests for admission, failed to serve answers or objections timely or at all to any of Plaintiff's interrogatories or requests for production, and failed to appear at a noticed hearing on Plaintiff's motion to compel. Because of the coronavirus pandemic, Respondents had been given many weeks of additional time to make the initial disclosures and respond to Plaintiff's discovery,³ and Plaintiff had extended even more time for Respondents to meet their obligations. Yet each of the Respondents failed altogether in meeting those obligations.

I ordered that, within 14 days, Respondents, and each of them, serve the initial disclosures. I specified in detail exactly what each Respondent had include in the disclosures.⁴ I held that Plaintiff's requests for admission were deemed admitted by operation of law. *See* 29 C.F.R. § 18.63(a)(3). I also held that, by failing to object timely, each Respondent had waived his or its objections to Plaintiff's discovery. I ordered that each Respondent within 14 days must serve on Plaintiff written answers under oath and in writing to each interrogatory and written answers to the requests for production. Within the same time, each Respondent was required to serve on Plaintiff copies of each and every document in its or his possession, custody, or control if the document was responsive to any of the requests for production.

In the written order, I warned Respondents about sanctions that might be imposed if they failed to comply with the order. As I stated:

Failure to obey a discovery order. RESPONDENTS MUST TAKE NOTICE that a failure to comply with a discovery order such as those above can result in the imposition of sanctions, including an order:

- (i) Directing that the matters embraced in the order or other designated facts be taken as established for purposes of the proceeding, as the prevailing party claims;

³ By order of the Chief ALJ, all procedural deadlines were suspended from March 23, 2020, through June 1, 2020. This had the effect of extending Respondents' time on the initial disclosures and discovery responses by ten weeks.

⁴ I quoted the text of the relevant regulation: 29 C.F.R. § 18.50(c)(1)(A)&(B).

- (ii) Prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;
- (iii) Striking claims or defenses in whole or in part;
- (iv) Staying further proceedings until the order is obeyed;
- (v) Dismissing the proceeding in whole or in part; or
- (vi) Rendering a default decision and order against the disobedient party.

29 C.F.R. § 18.57(b)(1). The same kinds of sanctions may be imposed for a complete failure to serve answers to interrogatories or to requests for production. 29 C.F.R. § 18.57(d)(3).

Order (Aug. 21, 2020) at 4-5.

On September 22, 2020, Plaintiff filed a motion for a default decision in favor of Plaintiff and against each Respondent. The time for each Respondent to comply with the Order of August 21, 2020, had run on September 4, 2020. Plaintiff stated in the motion that neither Respondent had complied with any portion of the Order of August 21, 2020. Neither had served initial disclosures or answers to the interrogatories or to the requests for production. Neither had served any documents responsive to the requests for production.

On the same day, September 22, 2020, I issued an order to show cause, which was directed to Respondents. The Order explained that, with discovery closing on the next day, “it appears that Respondents’ recalcitrance has prevented Plaintiff from obtaining any of the discovery Plaintiff has propounded . . . [and that] Respondents have failed to make initial disclosures intended to streamline the discovery process.” Continuing, the Order gave each Respondent 14 days (until October 6, 2020) to file a written answer, showing why I should not grant Plaintiff’s motion for a default decision. I explained in detail what was required for a sufficient answer. Finally, I warned Respondents as follows:

If either Respondent fails to answer this Order to Show Cause sufficiently and timely . . . , I likely will grant Plaintiff’s motion as to that Respondent and issue a Decision and Order in favor of Plaintiff and against that Respondent.

“Order Vacating Pre-Hearing Conference and Order to Show Cause” (Sept. 22, 2020) at 3.

Their time having run, neither Respondent filed an answer to the order to show cause.

Discussion

When a party fails to comply with an administrative law judge’s orders and fails to show good cause for such failure, the judge has discretion to dismiss the case. 29 C.F.R. §§ 18.12(b)(7),

18.57(b)(1)(iii), (v).⁵ “If an ALJ is to have any authority to enforce prehearing orders, and so to deter others from disregarding these orders, sanctions such as dismissal or default judgments must be available when parties flagrantly fail to comply.” *Matthews v. Labarge, Inc.*, ARB No. 08-038 (ARB Nov. 26, 2008), slip op. at 2 (affirming dismissal when complainant failed to comply with order compelling discovery and with order requiring pre-hearing submission), quoting *Yarborough v. U.S. Dep’t of the Army*, ARB No. 05-117, slip op. at 6 (ARB Aug. 30, 2007) and citing cases at fn. 7.⁶ “ALJs have ‘inherent authority’ to ‘manage their own affairs so as to achieve the orderly and expeditious disposition of cases.’” *Walia v. The Veritas Healthcare Solutions, LLC*, ARB No. 14-002 (ARB Feb. 27, 2015) (affirming dismissal after Prosecuting Party failed to comply with order compelling discovery and requiring attendance at a deposition and, despite warnings of sanctions including dismissal, failed to respond to an order to show cause), quoting *Newport v. Fla. Power & Light, Co.*, ARB No. 06-110, slip op. at 4 (ARB Feb. 29, 2008); see also, *Butler v. Anadarko Petroleum Corp.*, ARB No. 12-041 (ARB June 15, 2012), slip op. at 3 (affirming dismissal based on Complainant’s repeated and contumacious failure to appear for her own deposition); *In re Supervan, Inc.*, ARB No. 00-0008, (ARB Sept. 30, 2002), slip op. at 7 (affirming default judgment against self-represented party for failure to comply with two orders compelling discovery).⁷

The facts here are very similar to those in *Matthews*, *Walia*, and *Supervan, supra*. Respondents were required to make their initial disclosures in July 2020. In an order compelling them to make those disclosures, I explained exactly what was required. They did nothing to comply with the order. Respondents were required to serve answers and objections to requests for admission. They failed to do so. When Plaintiff moved to have the requests deemed conclusively admitted, Respondents did nothing to oppose. I deemed the requests admitted. Respondents failed to serve answers or objections to Plaintiff’s interrogatories and requests for production. When Plaintiff filed a motion to compel, Respondents did nothing to oppose the motion. I ordered Respondents to serve answers to the discovery and to produce the requested documents. Respondents did nothing to comply. Plaintiff moved for a dismissal sanction. I issued an order to show cause, explaining in detail what Respondents needed to do to oppose the motion. Respondents did nothing. Finally, the discovery cut-off date ran and now the hearing date is approaching. Plaintiff has not received any of the discovery requested or the initial disclosures, all of which I had ordered Respondents to serve. I warned Respondents about their failure to answer the order to show cause concerning the motion for a dismissal sanction. I stated that, if they failed to answer the order to show cause timely and sufficiently, I likely would find for the Plaintiff and against them. Respondents did nothing to answer the order to show cause.

⁵ As discussed above, I also stated in the pre-trial order that I might impose sanctions for failure to comply with the pre-trial order, which includes failures to make disclosures as required.

⁶ See *Mathews v. Labarge, Inc.*, ARB No. 08-038 (ARB Nov. 26, 2008) slip op. at 3 (Sarbanes-Oxley Act); *Zahara v. SLM Corp.*, ARB No. 08-020 (March 7, 2008) slip op. at 3 (Civil Service Reform Act of 1978); *Anderson v. Grayhound Trash Removal*, ARB No. 2007-STA-024 (Surface Transportation Assistance Act) (Feb. 27, 2009), 2009 WL 564759; *Canterbury v. Administrator, Wage and Hour Div.*, ARB No. 03-135, ALJ No. 2002-SCA-00011 (ARB Dec. 29, 2004).

⁷ As the Seventh Circuit, controlling on this Illinois-based case, observed generally when affirming a dismissal sanction: “The whole system would collapse if parties could always disregard orders they disagree with.” *Mac Naughton v. Harmelech*, 932 F.3d 558, 566 (7th Cir. 2019), citing *In re Mann*, 311 F.3d 788, 789 (7th Cir. 2002).

Although a corporation generally requires an attorney to represent it, this Office permits non-attorneys to represent parties. *See* 29 C.F.R. § 18.22(b)(2). But it requires the non-attorney to obtain the ALJ's approval to act as a representative for the party. *Id.* No one requested the ALJ's approval to represent Maria V. Contracting, Inc. Assuming, however, that Maria Villegas was the corporation's representative, it could conceivably be said that both Respondents have been and are self-represented; Denny Villegas certainly is.

But ““a pro se litigant’ cannot generally be permitted to shift the burden of litigating his case to the courts, nor avoid the risks of failure that attend his decision to forego expert assistance.”” *Witbeck v. CH2M Hill Ltd.*, ARB No. 15-077 (Mar. 15, 2017), slip op. at 6, quoting *Pik v. Credit Suisse AG*, ARB No. 11 -034, slip op. at 4-5 (May 31, 2012). “Thus, although an ALJ has some duty to assist pro se litigants, a judge also has a duty of impartiality and must refrain from becoming an advocate for the pro se litigant. In the end, pro se litigants have the same burdens of proving the necessary elements of their cases as litigants represented by counsel.” *Id.* Thus, a self-represented party is entitled to some leeway but still bears the same burdens as represented parties. *See, e.g., Pik* at 3, citing *Young v. Schlumberger Oil Field Serv.*, ARB No. 00-075 (ARB Feb. 28, 2003), slip op. at 10.

Here, Respondents’ failures cannot be addressed through “some leeway.” Had Respondents produced the disclosures and discovery in a simplified or substitute format, I could construe the production as sufficient. Had the production been incomplete, I could give them some leeway in curing the defect. But Respondents failed to produce anything in any form despite Plaintiff’s many informal efforts, Plaintiff’s repeated motions, and my repeated orders, detailed explanations of what was required, and warnings.

Asking Plaintiff to go to trial without initial disclosures or any responses to any of its document requests or interrogatories precludes the due process that our rules extend to litigants before this Office. Our applicable procedures and my orders are designed to allow parties to elicit relevant evidence needed for a fair hearing and informed decision and to avoid trial by ambush. The requirements to exchange information before the hearing also facilitate voluntary settlement; often settlement is achievable only when the parties understand the evidence that they will have to confront at the hearing.

At best, Respondents have acted in conscious disregard of their obligations. If Respondents did not fully understand the Pre-Trial Order, they should have learned more through their numerous discussions with the Solicitor about the initial disclosures and discovery obligations. Failing that, they were required to appreciate their obligations after I explained those obligations in the orders and warnings described above. Those orders and warnings extended both to the initial disclosures and the discovery.

Given an opportunity to explain in an answer to the order to show cause, Respondents chose not to file any answer. Their failures throughout the litigation thus go unexplained and unexcused. The failures prevented Plaintiff from preparing for the hearing; they amount to “flagrant, repeated, and prejudicial” dilatory action. *See Butler*, ARB No. 12-041, *supra*, slip op. at 3.

Lesser sanctions. A dismissal or an order striking the request for hearing is a severe sanction. Our rules allow a judge discretion to impose other and lesser sanctions. *See* 29 C.F.R. § 18.57(b)(1). These are:

- Directing that the matters embraced in the order or other designated facts be taken as established for purposes of the proceeding, as the prevailing party claims;
- Prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence; [or]
- Staying further proceedings until the order is obeyed.

29 C.F.R. § 18.57(b)(1)(i), (ii), (iv). If a lesser sanction would be adequate to assure Respondents' future compliance and deter non-compliance, it must be considered. I conclude, however, that no less severe alternative would be adequate here.

The difficulty is that the other sanctions (except a stay) likely would have the same result as a dismissal. The scope of Respondents' failures is so broad that an order directing that the facts to which the disclosures relate be taken as established favorably to Plaintiff could only lead to a decision on the merits favoring Plaintiff. The same result will occur if I exclude all documentary evidence that Respondents might offer and all witnesses whom they might call (because they did not identify witnesses and produce relevant documents as required in the initial disclosures or in discovery). Without witness testimony or documentary exhibits, Respondents would have no ability to oppose the information Plaintiff gathered in the investigation leading to Plaintiff's determination that Respondent violated the child labor provisions in the Fair Labor Standards Act.

That leaves only a stay until Complainant has complied with all requirements. A stay would be worse than pointless: It would reward Respondent's recalcitrance. Respondents' purpose in requesting a hearing before the ALJ is to avoid paying the civil money penalty that Wage and Hour imposed. Once Respondents timely requested a hearing, the Administrator's determination became "inoperative unless and until the case is dismissed or the Administrative Law Judge issues a decision affirming the determination." 29 C.F.R. § 580.6(a). A permanent stay of this proceeding would effectively decide the case in favor of Respondents: They could wait forever to comply with their obligations and thereby avoid paying the civil money penalty. Moreover, because Respondents have not complied with *any* of their obligations, there is no reason to think that, if only everyone does nothing but wait, Respondents' behavior suddenly will change.

Conclusion. I conclude that this is a classic case in which a terminating sanction is required. Respondents have failed to comply with regulatory requirements, Plaintiff's proper discovery requests, and the ALJ's orders. There is no obligation with which either Respondent has complied after timely filing the request for hearing.

Order

For the foregoing reasons, Respondents' request for a hearing before an administrative law judge is STICKEN and DISMISSED. 29 C.F.R. § 18.57(b)(1)(iii), (v). Plaintiff's determination that

Respondents violated the Act and must pay a civil money penalty of \$63,814.00 is operative as if no request for hearing had been filed. In effect, the Administrator's determination is AFFIRMED.

SO ORDERED.

STEVEN B. BERLIN
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: If you are dissatisfied with the administrative law judge's decision, you may file an appeal with the Administrative Review Board (§Board§). To be timely, your appeal must be filed with the Board within thirty (30) days of the date of issuance of the administrative law judge's decision. *See* 29 C.F.R. § 580.13. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: <https://dol-appeals.entellitrak.com>. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

At the time you file the appeal with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8001. *See* 29 C.F.R. § 580.13.

If filing paper copies, you must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board an original and four copies of a supporting legal

brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review. If you e-File your petition and opening brief, only one copy need be uploaded.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and may include an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies. If you e-File your responsive brief, only one copy need be uploaded.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board. If you e-File your reply brief, only one copy need be uploaded.

If no appeal is timely filed, then the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. § 580.12(e).