



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.

OSHRC Docket No. 04-0970

JIMERSON UNDERGROUND, INC.,

Respondent.

APPEARANCES:

Eve Marie Stocker, Attorney, Charles F. James, Counsel for Appellate Litigation; Daniel J. Mick, Counsel for Regional Trial Litigation; Joseph M. Woodward, Associate Solicitor; Howard M. Radzely, Solicitor; Department of Labor, Washington, DC
For the Complainant

C. Thomas Behrman, Esq.; Robin N. Blanchette, Esq; Simon W. Hendershot, III, Esq.;
Kerr & Hendershot, P.C., Houston, TX
For the Respondent

DIRECTION FOR REVIEW AND REMAND ORDER

Before: RAILTON, Chairman; ROGERS and THOMPSON, Commissioners.

BY THE COMMISSION:

Pursuant to the Commission's March 3, 2006 decision remanding this case, Administrative Law Judge Robert A. Yetman issued a decision on remand that was docketed with the Executive Secretary on January 10, 2007.¹ As the Commission requested, the judge clarified in his decision on remand that—during a pre-hearing telephone conference with the parties on February 11, 2005—he had indeed granted the Secretary's motion to amend her citations and complaint to include alternative allegations. Having already addressed the Secretary's motion that was, in part, the basis

¹ Judge Yetman has since retired from the agency.

for the Commission’s remand, Judge Yetman returned this case to the Commission “for action it deems appropriate.” For the following reasons, we, *sua sponte*, direct this case for review and remand it to the Chief Administrative Law Judge for reassignment.

Background

These proceedings arose from a fatal manhole accident involving several employees of Jimerson Under-Ground, Inc. (“Jimerson”) and its subcontractor. Subsequent inspections conducted by the Occupational Safety and Health Administration (OSHA) resulted in OSHA issuing two citations to Jimerson on May 7, 2004, for alleged violations of various general industry standards. Jimerson timely contested these citations.

On July 21, 2004, the Secretary filed her complaint, and on August 9, 2004, Jimerson filed its answer that—in addition to other averments—denied the applicability of the cited general industry standards to its activities. The matter was then assigned to Judge Yetman, who subsequently received various pleadings and motions from the parties. On February 10, 2005, five days before the start of the hearing, the Secretary filed her Third Motion to Amend the Complaint and Citations. The Secretary sought to allege, in the alternative, violations of several construction standards, as well as section 5(a)(1) of the Occupational Safety and Health Act (“the Act”), 29 U.S.C. §§ 651-678.

On February 11, 2005, a pre-hearing telephone conference took place between the parties and the judge during which the Secretary’s motion to amend was discussed. However, the record did not memorialize Judge Yetman’s ruling—made, according to his January 10, 2007 decision on remand, during this telephone conference—that the Secretary’s Third Motion to Amend Complaint and Citations was granted. On August 8, 2005, Judge Yetman issued a decision and order affirming the citations as alleged under the general industry standards.

On September 9, 2005, this case was directed for review and came before the Commission for the first time. In our decision dated March 6, 2006, we found that: (1) Jimerson’s activities constituted “construction work” and therefore, were governed by the construction standards; and (2) “nothing in the record [] show[ed] that the judge ever ruled on the Secretary’s motion to amend” her complaint and citations to allege, in the alternative, that Jimerson violated provisions of the construction standards and section

5(a)(1) of the Act. *Jimerson Under-Ground, Inc.*, 21 BNA OSHC 1459 (No. 04-0970, 2006). Thus, we remanded the case to the judge to rule on the Secretary's motion to amend and to conduct any further proceedings as necessary.

Discussion

Upon consideration of the judge's January 10, 2007, decision on remand, we conclude that this matter is not ripe for review by the Commission. Whenever a judge files a decision with the Executive Secretary for docketing, Commission Rule 90(a) requires, in relevant part, the following:

The decision shall . . . include findings of fact, conclusions of law, and the reasons or bases for them, on all material issues of fact, law or discretion presented on the record. The decision shall include an order affirming, modifying or vacating each contested item and each proposed penalty, or directing other appropriate relief.

29 C.F.R. § 2200.90(a). While Judge Yetman's remand decision clarified that he had in fact ruled on the Secretary's motion to amend, it nonetheless failed to resolve *all* the issues the Commission placed before the judge on remand.

Specifically, the judge's decision and order neither addressed nor analyzed the Secretary's alternative allegations under the construction standards, as well as section 5(a)(1) of the Act, in view of our holding that the originally cited general industry standards did not apply to the cited conditions because Jimerson was engaged in "construction work." We, thus, have little choice but to determine that the judge's decision on remand fails to satisfy the requirements for a decision as set forth in Commission Rule 90(a). *See Pettey Oil Fields Serv., Inc.*, 21 BNA OSHC 1638, 1639 (No. 05-1039, 2006). Therefore, the judge's decision should not have been filed for docketing with the Executive Secretary.

Accordingly, we direct review of this case and remand the matter to the Chief Administrative Law Judge for assignment and resolution of the outstanding issues consistent with this opinion.

SO ORDERED.

_____/s/_____
W. Scott Railton
Chairman

_____/s/_____
Thomasina V. Rogers
Commissioner

_____/s/_____
Horace A. Thompson III
Commissioner

Dated: February 8, 2007



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SECRETARY OF LABOR,

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v.

JIMERSON UNDERGROUND, INC.,
and its successors,

Respondent.

OSHRC DOCKET NO. 04-0970

DECISION AND ORDER

The Commission has remanded this matter to the undersigned for a ruling on Complainant's motion to amend the citation and complaint filed on February 10, 2005; five days prior to the hearing scheduled to commence on February 15, 2005. On Friday, February 11, 2005, a telephone conference was held between the parties and the undersigned (TR 12) at which time arguments were heard from both parties with respect to the motion to amend. The motion was granted at that time and Respondent filed a written amended answer to the amended complaint on February 14, 2005. (TR 10, 19, Exhibit J-29). Respondent denied the allegations contained in the amended complaint. Thus, the Commission now seeks a ruling which was made prior to the hearing and known by both parties prior to the commencement of the hearing.¹ Moreover, both parties presented their respective cases based upon the knowledge that Complainant's motion to amend the citation and complaint had been granted. Indeed, the Commission, in its briefing order issued pursuant to the notice of direction for review, raised as an issue to be discussed by the parties,

¹The discussion between the parties and the undersigned at the beginning of the hearing related to Respondent's motion for a continuance; not Complainant's motion to amend.

whether Respondent was engaged in construction; the issue which was included in the motion to amend as an alternative pleading to the general industry allegation. Since the motion was granted on February 11, 2005, the file is returned to the Commission for action it deems appropriate.²

SO ORDERED.

/s/

Robert A. Yetman
Judge, OSHRC

Date: January 10, 2007

²Since this is my last decision before retiring after over forty years of government service, including twelve years of military service, I wish to acknowledge the military personnel and civilian employees I have had the pleasure to associate with during my career. With only minor exceptions not worthy of elaboration, the military personnel and civilians I have known displayed a competency and professionalism with which this country and its legal profession may be proud. I am particularly proud of my tenure as an administrative law judge with the Review Commission. Over the years political appointees with varying degrees of competency came and left; however, the professionalism and integrity of the Commission were consistently maintained at a high level by Chief Judge Sommer and former General Counsel Earl Ohman. I cannot adequately express my esteem for my fellow ALJ's at the Commission. I am indeed honored and privileged to have had such a challenging and rewarding career.