



United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3419

Phone: (202) 606-5400
Fax: (202) 606-5050

SECRETARY OF LABOR
Complainant,

v.

PAK NATION CONSTRUCTION COMPANY, INC
Respondent.

OSHRC DOCKET
NO. 93-2765

**NOTICE OF DOCKETING
OF ADMINISTRATIVE LAW JUDGE'S DECISION**

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on August 24, 1995. The decision of the Judge will become a final order of the Commission on September 25, 1995 unless a Commission member directs review of the decision on or before that date. **ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW.** Any such petition should be received by the Executive Secretary on or before September 13, 1995 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary
Occupational Safety and Health
Review Commission
1120 20th St. N.W., Suite 980
Washington, D.C. 20036-3419

Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Avenue, N.W.
Washington, D.C. 20210

If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 606-5400.

FOR THE COMMISSION

Ray H. Darling, Jr.
Executive Secretary

Date: August 24, 1995

DOCKET NO. 93-2765

NOTICE IS GIVEN TO THE FOLLOWING:

Patricia Rodenhausen, Esq.
Regional Solicitor
Office of the Solicitor, U.S. DOL
201 Varick, Room 707
New York, NY 10014

Melvin M. Reiss, Esquire
277 Broadway
New York, NY 10007

Richard DeBenedetto
Administrative Law Judge
Occupational Safety and Health
Review Commission
McCormack Post Office and
Courthouse, Room 420
Boston, MA 02109 4501

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UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR :
:
Complainant :
: OSHRC DOCKET NO. 93-2765
v. :
:
PAK NATION CONSTRUCTION CO., INC. :
:
Respondent :

Appearances:

Luis A. Micheli, Esq.
Office of the Solicitor
U. S. Department of Labor
For Complainant

Melvin M. Reiss, Esq.
New York, New York
For Respondent

Before: Administrative Law Judge Richard DeBenedetto

DECISION AND ORDER

PAK NATION CONSTRUCTION CO., INC. (Pak Nation), was cited on September 15, 1993, for alleged serious (citation number 1) and repeat (citation number 2) violations of various safety and health standards for construction. The Secretary proposes that penalties totaling \$10,400 be assessed for both citations. Respondent contested the matter.

At the onset of the hearing, Pak Nation stipulated to the existence of the violations (Tr. 4-5), and based its defense upon the contention that it was not an employer within the meaning of section 3(5) of the OSHA Act;¹ Pak Nation claims, in substance, that all persons associated with the name Pak Nation at the construction site were working for another employer, not Pak Nation.

¹Section 3(5), 29 U.S.C. § 652(5), defines "employer" as "a person [or any associations or corporations] engaged in a business affecting commerce who has employees."

The OSHA compliance officer testified that when she and her supervisor arrived at the construction site in May 1993, before proceeding with a physical inspection, they presented themselves to the supervisor of the general contractor and asked him to contact the representatives of all subcontractors or other contractors at the site and ask them to assemble for an opening conference. The compliance officer stated that among the several representatives at the opening conference was Maznor Hussain who identified himself as the foreman of Pak Nation (Tr. 11,13,17,18,53). It was one of four contractors engaged in the restoration of a building in the Bronx, New York.

During the course of the inspection, the compliance officer encountered a person working on a scaffold. When she questioned the worker, it became apparent that he did not understand the English language. She then spoke to foreman Hussain who informed the compliance officer that the worker was employed by Pak Nation (Tr. 21). In her discussions with Hussain, the compliance officer was told that a Mr. Khan was president of Pak Nation, and was given Pak Nation's telephone number. The compliance officer testified that she made a number of telephone calls to Pak Nation's office and left "numerous messages" with the "brother" of Mr. Khan, but the calls were never returned (Tr. 58, 60-61).

As his second witness, the Secretary called the OSHA area office supervisor who testified that since 1990, Pak Nation has been the subject of seven OSHA inspections, that citations were issued in six out of the seven inspections, and that the only time Pak Nation ever contested a citation was in the present case. The OSHA supervisor testified that when Pak Nation received a citation in 1993, it responded by requesting an informal conference which ultimately resulted in an agreement to settle the case for a reduction in penalties. Pak Nation has failed to pay any of the outstanding penalties including those owed in connection with the 1993 settlement agreement (Tr. 78, 81-84).

Pak Nation called Adalat Khan as its only witness. Khan testified that he was president of Pak Nation and maintained his office at his home in Brooklyn. While admitting to "having a job" at the construction site in question, he denied that Hussain had any connection with Pak Nation (Tr. 91-96,114). Khan testified that he became involved with the construction project when he received a telephone call from a man named "Steve" who asked him to come to work and to bring four or five others to work with him on the project. He stated that he thereupon enlisted his

“cousins” to participate. He denied knowing Steve’s last name or the company he worked for. He did not enter into a written agreement to perform the work and he did not have any knowledge as to the ownership of the building under construction (Tr. 94-95, 102). At one point Khan even denied that Pak Nation was a corporation (Tr. 137).

Pak Nation’s case is riddled with inconsistencies and points of incredibility. The notice of contest was filed by Pak Nation’s attorney who identified himself as “the attorney representing the above captioned *employer*” (emphasis added). In Paragraph II of the complaint, the Secretary alleged the following:

The respondent, Pak Nation Construction Co., Inc., a corporation organized under the laws of the State of New York and doing business in the State of New York, maintaining its principal office and place of business at 611 Dahill Rd. Brooklyn, New York, is and at all times hereinafter mentioned was engaged in masonry contracting.

Pak Nation denied Paragraph II “insofar as it infers [sic] that respondent is at all times engaged in ‘masonry contracting’.” As an affirmative defense, it was averred that “respondent was neither in charge of nor in control of the construction worksite and was not responsible for any of the conditions alleged in the complaint.” Nowhere in the pleadings does Pak Nation allege that it was not an employer within the meaning of section 3(5) of the Act.

At one point during the hearing, Pak Nation’s counsel stated that there was no dispute as to Pak Nation’s status as a corporate entity (Tr. 105). When the implications of that status were explored in the context of Khan’s manifest implausible testimony, Pak Nation’s counsel argued it was not a corporation but then claimed he did not know whether it was or not (Tr. 138-140).

When asked to explain Pak Nation’s history of having been cited by OSHA on six separate occasions since 1990, including a time in 1993 when Pak Nation entered into an informal settlement agreement with OSHA, Pak Nation’s counsel portrayed his client as a victim of promises made over the years by various contractors who hired Khan and his cousins and gave assurances that the citations would be “taken care of” and should not be a concern of Pak Nation. (Tr. 123-27).

Mr. Khan’s testimony lacks the credible force necessary to undermine the informed testimony of the compliance officer who conducted the inspection and interviewed the personnel at the construction site. The information acquired from the workers on the job led directly and

promptly to Pak Nation's base of operations. One additional and vital matter requires comment. When questioned as to how he and his cousins were paid their wages, Khan testified that all funds paid by the contracting principal were included in a single check made payable to Pak Nation. Mr. Khan deposited the check in a bank account and disbursed the funds for food and rent which he shared with his cousins. Whatever funds were left after paying the living expenses were shared by all the workers (Tr.. 150-156). While such an arrangement is not typical of an employer - employee relationship, it is consistent with the information obtained by the OSHA compliance officer at the construction site in response to her inquiries to determine who employed the workers.

Based upon the foregoing findings and conclusions, it is **ORDERED** that the citations issued to Pak Nation are affirmed and penalties in the total amount of \$10,400 are assessed.


RICHARD DeBENEDETTO
Judge, OSHRC

Dated: August 16, 1995
Boston, Massachusetts



UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
JOHN W. McCORMACK POST OFFICE AND COURTHOUSE
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BOSTON, MASSACHUSETTS 02109-4501

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NOTICE OF DECISION

IN REFERENCE TO:

Secretary of Labor v. PAK NATION CONSTRUCTION CO., INC.
OSHRC DOCKET NO. 93-2765

1. Enclosed is a copy of my decision. It will be submitted to the Commission's Executive Secretary on August 16, 1995.
The decision will become the final order of the Commission at the expiration of thirty (30) days from the date of docketing by the Executive Secretary, unless within that time a Member of the Commission directs that it be reviewed. All parties will be notified by the Executive Secretary of the date of docketing.
2. Any party adversely affected or aggrieved by the decision may file a petition for discretionary review by the Review Commission. A petition may be filed with this Judge within twenty (20) days from the date of this notice. Thereafter, any petition must be filed with the Review Commission's Executive Secretary within twenty (20) days from the date of the Executive Secretary's notice of docketing. See paragraph No. 1. The Executive Secretary's address is as follows:

Executive Secretary
Occupational Safety and Health Review Commission
One Lafayette Centre
1120 20th Street, N.W. — 9th Floor
Washington, D.C. 20036-3419

3. The full text of the rule governing the filing of a petition for discretionary review is 29 C.F.R. § 2200.91. (Part of Rule 91 is attached hereto).


RICHARD DeBENEDETTO
Judge, OSHRC

Dated: July 26, 1995
Boston, Massachusetts

PAK NATION CONSTRUCTION CO., INC.

DOCKET NO. 93-2765

Melvin M. Reiss, Esq.
277 Broadway
New York, New York 10007

I hereby certify that a copy of the decision in this case has been served by First Class Priority Mail upon the parties whose names and addresses appear on this notice.

Boston, Joyce Marie Reynolds
July 26, 1995

Patricia M. Rodenhausen, Esq.
Regional Solicitor
U. S. Department of Labor
201 Varick Street, Room 707
New York, New York 10014
Attn: Luis A. Micheli, Esq.

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