



UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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 Washington, DC 20036-3419

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SECRETARY OF LABOR,

Complainant,

v.

OSHRC Docket No. 94-1973

RICHARD A. PULASKI
 CONSTRUCTION COMPANY, INC.,

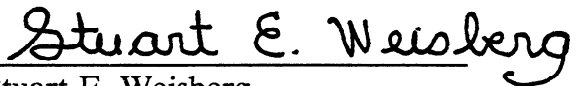
Respondent.


ORDER

On April 14, 1995, Administrative Law Judge Richard DeBenedetto issued a "Default Order" dismissing the notice of contest filed by Richard A. Pulaski Construction Company, Inc., for failure "to comply with the deadline for arranging a telephone prehearing conference, as directed by the order entered on April 11, 1995." The April 11 Order directed each party "to contact the office of the undersigned no later than 3:00 p.m., on Friday, April 14, 1995, to arrange for a prehearing telephone conference" Our review of the official file reveals, however, that very early in the proceedings, on July 15, 1994, Pulaski filed a prehearing statement listing a witness it wanted to call and that immediately after the judge's April 11 order, on April 12, 1995, Pulaski contacted the Commission's Boston office in an attempt to arrange a prehearing conference. Inasmuch as a conference call involving both parties could not be accomplished on April 12, the parties agreed that they would telephone the judge on the next day between 10:00 and 11:00 a.m. According to Judge DeBenedetto, Pulaski "failed to contact this office at any time since the April 12 communication." Pulaski states in his letter requesting relief, however, that he "did not understand the date of the call to be Thursday, 4-13-95," and that when he called on Friday,

April 14, "the [message] tape came on" and he interpreted this to mean that the office was closed because it was "a holiday [Good Friday]."

Under Commission Rule 41(a), 29 C.F.R. § 2200.41(a), before a judge may declare a party in default for failure to plead or otherwise proceed under the Commission's rules, the judge must ensure that the party was "afforded an opportunity to show cause why he should not be declared to be in default." We find nothing in the official file to indicate that Pulaski was given this opportunity. We also find that Pulaski's actions constitute sufficient reason for excusing the failure to meet the judge's deadline, particularly where there is no indication that the judge attempted to phone Pulaski on April 13 or any time prior to issuing a "Default Order" on April 14. We therefore set aside the judge's "Default Order" and remand the case for further proceedings consistent with the Commission's procedural rules.


Stuart E. Weisberg
Chairman


Velma Montoya
Commissioner

Dated: June 28, 1995

NOTICE OF ORDER AND REMAND

The attached Order Of Remand by the Occupational Safety and Health Review Commission was issued and served on the following on June 28, 1995.

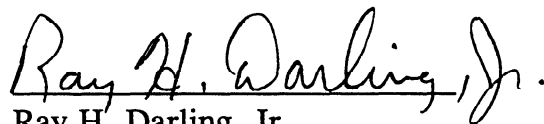
Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, USDOL
200 Constitution Ave., N.W. Room S4004
Washington, D.C. 20210

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

Richard A. Pulaski, President
Richard A. Pulaski Construction
Co., Inc.
436 Princeton Avenue
Mercervill, NJ 08619

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

FOR THE COMMISSION



Ray H. Darling, Jr.
Executive Secretary



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SECRETARY OF LABOR
Complainant,

v.

RICHARD A PULASKI CONSTRUCTION CO.
Respondent.

OSHRC DOCKET
NO. 94-1973

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 April 21, 1995. The decision of the Judge will become a final order of the Commission on May 22, 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 May 11, 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: April 21, 1995

DOCKET NO. 94-1973

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

Richard Pulaski, President
Richard A. Pulaski Construction
Co., Inc.
436 Princeton Avenue
Mercerville, NJ 08619

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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ORDERED that the June 2, 1994, contested citation is affirmed and a total penalty of \$975 is assessed.


RICHARD DeBENEDETTO
Judge, OSHRC

Dated: April 14, 1995
Boston, Massachusetts