



On May 6, 1996, Mr. Jeff Beatty filed a petition for discretionary review on behalf of Hudson Wood Recycling, Inc., claiming that “I have never had any employees.” The Respondent had raised this claim earlier in a hand-written letter sent to the Commission’s Executive Secretary following the notice of docketing of the case, in which Mr. Beatty stated that “Hudson Wood Recycling is not an operating business yet. I have never had any employees.”<sup>2</sup>

In alleging that it is not an employer because it has “never had any employees,” the Respondent raises a question of statutory jurisdiction, see sections 3(5) and 5(a) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 652(5) and 654(a). An issue of jurisdiction can be raised at any time during Commission proceedings. *See Willamette Iron & Steel Co.*, 9 BNA OSHC 1900, 1904, 1981 CCH OSHD ¶ 25,427, p. 31,699 (No. 76-1201, 1981); Fed. R. Civ. P. 12(h)(3). This does not mean that a party raising a jurisdictional question does not have to follow the applicable rules of procedure. For example, if a party raising the jurisdictional issue as a defense refuses to provide the information relevant to the Commission’s determination of the jurisdictional issue, it will be deemed to be in default on the issue. *Cf. Tropicana Products, Inc.*, 122 NLRB 121, 43 LRRM 1077 (1958) (National Labor Relations Board found jurisdiction where employer refused to cooperate in production of evidence on jurisdictional issue).

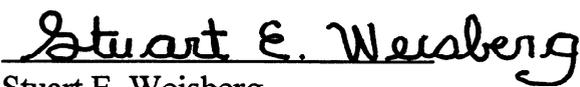
We do not condone Respondent’s failure to comply with the judge’s teleconference order and Commission Rule 6 or its failure to respond to the judge’s show cause order, and we find that by those failures the Respondent has waived its right to contest the merits of the citation. However, given that the Respondent is raising an issue of statutory jurisdiction, we are willing to give the Respondent yet another opportunity to present evidence on the jurisdictional question. Therefore, we remand this case to the judge to re-issue the show cause order. If the Respondent once again fails to respond to the order, it will be held in

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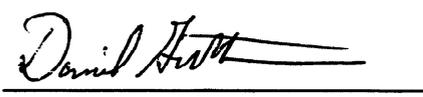
<sup>2</sup>The Secretary does not oppose the petition for review here.

default on the jurisdictional issue and the citation items affirmed and a \$1200 penalty assessed for each item. The Respondent will then have no further opportunity to challenge the jurisdiction in this case. *See Ins. Corp. of Ireland v. Compagnie des Bauxites*, 456 U.S. 694, 702 n.9 (1982) (decision on subject-matter jurisdiction will be *res judicata* on that issue in any further proceedings). If the judge deems there to be a sufficient reply to the show cause order, he will conduct further proceedings in the case, affording the parties an opportunity to introduce evidence on the jurisdictional issue and making the necessary findings of fact and conclusions of law on that issue.<sup>3</sup> If the judge finds that jurisdiction exists, then the citation items shall be affirmed because, as noted above, the Respondent has waived its right to contest the merits of the citation, based on the Respondent's failure to comply with the judge's teleconference order and Commission Rule 6 and its failure to respond to the judge's order to show cause issued on March 5, 1996.

It is so ordered.

  
Stuart E. Weisberg  
Chairman

  
Velma Montoya  
Commissioner

  
Daniel Guttman  
Commissioner

Date: June 6, 1996

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<sup>3</sup>Given the limitations on discovery under E-Z Trial, the judge may want to consider discontinuance of E-Z Trial in this particular case. See Commission Rule 204(a), 29 C.F.R. § 2200.204(a).



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

Office of  
 Executive Secretary

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

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SECRETARY OF LABOR,	:	
	:	
Complainant,	:	
	:	
v.	:	OSHRC Docket No. 95-1767
	:	
HUDSON WOOD RECYCLING, INC.,	:	
	:	
Respondent.	:	

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**NOTICE OF COMMISSION ORDER AND REMAND**

The attached order and remand by the Occupational Safety and Health Review Commission was issued on June 6, 1996.

FOR THE COMMISSION

Date: June 6, 1996

*Ray H. Darling, Jr.*  
 Ray H. Darling, Jr.  
 Executive Secretary

95-1767

NOTICE IS GIVEN TO THE FOLLOWING:

Daniel J. Mick  
Office of the Solicitor, U.S. DOL  
Room S4004  
200 Constitution Ave., N.W.  
Washington, D.C. 20210

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

Jeff Beatty  
Hudson Wood Recycling, Inc.  
147 Union Tpk.  
Hudson, NY 12534

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



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SECRETARY OF LABOR  
Complainant,  
v.  
HUDSON WOOD RECYCLING, INC.  
Respondent.

OSHRC DOCKET  
NO. 95-1767

**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 26, 1996. The decision of the Judge will become a final order of the Commission on May 28, 1996 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 16, 1996 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 26, 1996

DOCKET NO. 95-1767

NOTICE IS GIVEN TO THE FOLLOWING:

Patricia Rodenhausen, Esq.  
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147 Union Turnpike  
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Richard DeBenedetto  
Administrative Law Judge  
Occupational Safety and Health  
Review Commission  
McCormack Post Office and  
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Boston, MA 02109 4501

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**UNITED STATES OF AMERICA**  
**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

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SECRETARY OF LABOR	:	
	:	
Complainant	:	
	:	OSHRC DOCKET NO. 95-1767
v.	:	
	:	
	:	
HUDSON WOOD RECYCLING, INC.	:	
	:	
	:	
Respondent	:	
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**ORDER**

On March 5, 1996, an order was entered directing Hudson Wood Recycling, Inc. (Hudson) to show cause by March 22, 1996, why its notice of contest should not be dismissed for failure to comply with certain specified rules of procedures of the Commission.

The March 5, 1996, order was sent to Hudson by certified mail which was returned to this office by the postal service following three unsuccessful attempts by the postal service to accomplish delivery. Accordingly, it is **ORDERED** that the two-item citation issued on October 20, 1995, is affirmed and a penalty of \$1200 is assessed for each of the two items described in the citation.

  
**RICHARD DeBENEDETTO**  
Judge, OSHRC

Dated: **April 23, 1996**  
Boston, Massachusetts