

2. Please list every individual tool and/or equipment owned or leased by Ray Wentzel d/b/a N.E.E.T. Builders and for each list the name of the manufacturer and the State where such tool or equipment was manufactured.

No tools or equipment owned or leased[;] out of business because of this mess!

3. Please describe, if any, any and all training given to employees of Ray Wentzel d/b/a N.E.E.T. Builders by the Respondent prior to June 8, 1992, and if such training was given, state the dates of such training, the employees being trained on each date of training and the specific content of training on every date listed.

[T]raining was given every day by me and talked about safety ways every day.

4. Please describe in detail any measurements or tests performed by the Respondent on June 8, 1992 examining the excavation located at Castle Drive and its atmosphere.

[W]hen test was done air was OK.

5. Please state how many years the Respondent has been engaged in the construction business.

[A]lmost 15 years.

6. Please list the names, titles, addresses and telephone numbers of all employees who worked for Ray Wentzel d/b/a N.E.E.T. Builders on June 8, 1992 at the Castle Drive worksite.

[A]ll worker[s] were part time and don't know where you can find anyone.

The Secretary also requested the employer to produce the following five documents, to which the employer made the following replies:

1. Any Ray Wentzel d/b/a N.E.E.T. Builders written Hazard Communication Programs, which existed on June 8, 1992.

[A]ll safety & Hazard Communication programs [were] in trailer and now gone. [Unintelligible on copy forwarded by the Secretary] all papers going to Neet or sent to him from Department of Labor and others.

2. Any and all documents relating to the training of Ray Wentzel d/b/a N.E.E.T. Builders' employees prior to June 8, 1992.

[A]ll training was done by Ray Wentzel in person and show all employees safety papers in trailer.

3. Any **and** all bills of purchase for equipment, tools, and/or materials to be used by **Ray Wentzel** d/b/a N.E.E.T. Builders during the period from January 1, 1990 to present.

[C]an't find papers & not necessary for this action.

4. Any and all Material Safety Data Sheets present at the Castle Drive worksite on June 8, 1992.

[A]ll paper [were] in trailer, trailer gone!

5. Any and all documentation, if existing, of any measurements or tests performed by the Respondent on June 8, 1992 in examining the excavation located at Castle Drive and its atmosphere.

[A]ll test was done June 8-92 by Waste, Inc. I have no cop[ies].

Based upon these communications, the Secretary filed a motion asking the judge to compel the employer to supply more complete answers in certain respects:

Specifically, in response to Number 1 and 2 of the Interrogatories propounded by the Secretary, the Respondent stated he had no business, tools or equipment. On March 22, 1993, a call was made to the number advertised [in the yellow pages] and information was obtained that N.E.E.T. Builders is still in business as advertised. Based on this information the Secretary asserts that the Respondent did not provide a sufficient answer to Interrogatories 1 and 2 propounded by the Secretary.

In addition, the Respondent did not answer Interrogatories 3, 4 and 6 "in good faith and as completely as the answering party's information will permit" as required by Section 2200.55 of the Rules of Procedure.

In regard to the Secretary's Request for Production of Documents, it appears that the Respondent objects to Request Number 3. The inspection of those documents is imperative to the Secretary's case, as the Respondent has denied [interstate commerce] coverage in its Answer to the Secretary's complaint.

(References to motion exhibits omitted.) The Secretary also asked the judge to issue the following ruling: "[T]hat the Respondent be denied permission to submit at a hearing on this matter any of the documents requested by the Secretary, if the Respondent does not produce these documents within [a specified time period]." A proposed order that the Secretary submitted with the motion asserted that the employer "must provide all other documents requested by the Secretary."

Responding to the Secretary's motion, Judge DeBenedetto issued an order requiring the employer to supply the requested information within a stated time period or "be in default." When the employer did not file a response, the Secretary filed another motion asking that the employer be declared in default. The judge thereafter issued another order giving the employer "one last opportunity" to supply the requested information within a second time period. The order further stated that the employer's notice of contest "shall be dismissed" if he fails to respond in a timely fashion. When the requested information was still not forthcoming, the judge issued his order dismissing the employer's notice of contest.

Analysis

A *pro se* employer is required to exercise reasonable diligence in the legal proceedings over which an administrative law judge presides; a *pro se* employer must follow the rules and file responses to a judge's orders, or suffer the consequences, which can include dismissal of the notice of contest. See, e.g., *Imageries*, 15 BNA OSHC 1545, 1547, 1992 CCH OSHD ¶ 29,639, p. 40,131 (No. 90-378, 1992). Nonetheless, a *pro se* employer can often be genuinely confused by legal terminology and the technicalities of judicial procedure; that is, even while trying to exercise reasonable diligence, a *pro se* employer can fail to grasp exactly what he is being asked to do. See, e.g., *Action Group, Inc.*, 14 BNA OSHC 1934, 1935, 1987-90 CCH OSHD ¶ 29,166, p. 39,018 (No. 88-2058, 1990). We have also recognized that, where an employer has a substantial reason for having failed to comply with a discovery order, and where the employer's conduct also does not indicate disrespect toward the judge, the failure to comply should not be used against the employer as an indication of bad faith or contumacious conduct. See *Trinity Indus., Inc.*, 15 BNA OSHC 1579, 1583, 1992 CCH OSHD ¶ 29,662, p. 40,185 (No. 88-1545, 1992), *petition for review filed*, No. 92-2559 (11th Cir. June 18, 1992).

In the case now before us, the employer states in his petition for review of the judge's dismissal order that "I responded by answering all that I could" and "I will apologize to the court for any improper [E]nglish or procedure or anything I may have done wrong" Although this *pro se* employer's replies to the Secretary's discovery requests do lack the precision and detail that the Secretary would expect of an attorney, the replies, taken as a

whole, do ~~assert~~ the following: (1) that the employer is now out of business; (2) that the tools and equipment in use during the inspection are no longer in the employer's possession; (3) that no more detail can be provided regarding the identity of employees, their attendance at safety training sessions, the content of those sessions, and any atmospheric measurements at the excavation because the employer either handled everything verbally without making records or has disposed of the records; and (4) that any documents pertinent to this proceeding no longer exist, because they were stored in a trailer that the employer no longer owns.


These assertions, combined with the Secretary's motion to compel greater detail, implicitly raised before Judge DeBenedetto the issue of whether the *pro se* employer's responses had been *as complete as possible*. If so, the information, limited though it was, would have fully answered the Secretary's interrogatories and document requests, in the sense that the Secretary must accept that the employer lacks the additional information that the Secretary requested. As we have already noted, the employer asserts in his petition for review that "I responded by answering all that I could and was able to do," and the employer points out that he has already "made it known to the court I needed help to answer this paperwork." Accordingly, in this instance, we believe that the judge should have taken and should now take additional steps to determine the validity of the assertions made by the employer and the extent to which the employer is capable of providing more information in response to the Secretary's discovery requests.

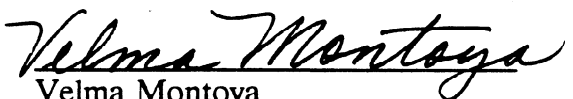
For example, our rules provide for prehearing conferences to be convened by a judge "upon his own initiative," including conferences "conducted by telephone conference call," during which the judge and the parties may together consider the factual issues that remain in dispute, the evidence to be presented, whether any facts may be stipulated, and "any other matter that may expedite the hearing." 29 C.F.R. § 2200.51. Such a prehearing conference can be particularly useful under the facts of this case. By thus conferring with the parties, the judge can determine whether this case can proceed to a hearing on the limited basis that all evidence capable of being introduced by the employer in his defense has already been disclosed in discovery. That is, after the prehearing conference, the employer would be precluded from introducing evidence not previously disclosed in discovery

or at the conference. The issue of interstate commerce jurisdiction, which is part of the Secretary's case, can also be explored between the parties at the prehearing conference. Although a Commission judge obviously cannot act as an advocate for either party, the judge can "explain the terms and language" of the legal proceedings and issues to a *pro se* employer. See *Sealtite Corp.*, 15 BNA OSHC 1130, 1133-34, 1991 CCH OSHD ¶ 29,398, pp. 39,581-82 (No. 88-1431, 1991); see generally 29 C.F.R. § 2200.67 (duties and powers of judges). The judge can also evaluate the substance and genuineness of the assertions being made by the respective parties. Thereby, the judge can facilitate the case coming to hearing and being resolved on the merits.

Order

Accordingly, we set aside the judge's order, reinstate the employer's notice of contest, and remand the case for further proceedings consistent with our order in this case. SO ORDERED.


Edwin G. Foulke, Jr.
Chairman


Velma Montoya
Commissioner

DATED: 11/19/93



UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
 One Lafayette Centre
 1120 20th Street, N.W. — 9th Floor
 Washington, DC 20036-3419

FAX:
 COM (202) 606-5050
 FTS (202) 606-5050

SECRETARY OF LABOR,

Complainant,

v.

RAY WENTZELL, d/b/a
 N.E.E.T. BUILDERS,

Respondent.

Docket No. 92-2996

NOTICE OF REMAND ORDER

The attached Order of Remand by the Occupational Safety and Health Review Commission was issued on November 19, 1993.

FOR THE COMMISSION

November 19, 1993
 Date

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

NOTICE IS GIVEN TO THE FOLLOWING:

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

Albert H. Ross, Esq.
Regional Solicitor
Office of the Solicitor, U.S. DOL
11th Floor
One Congress Street
Boston, MA 02114

Ray Wentzell
Ray Wentzell, d/b/a N.E.E.T. Builders
PO Box 596
Newport, NH 03773

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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OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
One Lafayette Centre
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Washington, DC 20036-3419

FAX:
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FTS (202) 606-5060

SECRETARY OF LABOR
Complainant,
v.
N.E.E.T. BUILDERS
Respondent.

OSHRC DOCKET
NO. 92-2696

**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 May 13, 1993. The decision of the Judge will become a final order of the Commission on June 14, 1993 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 June 2, 1993 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) 634-7950.

FOR THE COMMISSION

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

Date: May 13, 1993

DOCKET NO. 92-2696

NOTICE IS GIVEN TO THE FOLLOWING:

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

Albert H. Ross, Esq.
Regional Solicitor
Office of the Solicitor, U.S. DOL
One Congress Street, 11th Floor
P.O. Box 8396
Boston, MA 02114

Ray Wentzell
N.E.E.T. Builders
PO Box 596
Newport, NH 03773

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,

v.

RAY WENTZELL d/b/a N.E.E.T. BUILDERS
Respondent

OSHRC
Docket No. 92-2696

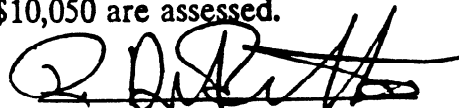
ORDER

On April 20, 1993, an order was entered directing respondent to respond to the Secretary's interrogatories and request to produce documents by April 28, 1993. Respondent was also informed that failure to comply by the April 28 deadline would result in dismissal of respondent's notice of contest.

On April 23, 1993, this office received respondent's cross-motion for judgment by default grounded upon the Secretary's alleged failure to provide respondent with "all records, pictures, film and all information." (Emphasis in original.) There is no procedural basis for respondent's motion for sanctions either under the Commission's procedural rules or the Federal Rules of Civil Procedure.

Respondent's response to the April 20, 1993, discovery order is unacceptable. Accordingly, it is

ORDERED that respondent's notice of contest is dismissed, the July 9, 1992, citation is affirmed and penalties totaling \$10,050 are assessed.


RICHARD DeBENEDETTO
Judge, OSHRC

Dated: May 4, 1993
Boston, Massachusetts