



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. 07-0252

PRIME ROOFING CORPORATION,

Respondent.

APPEARANCES:

Lee Grabel, Attorney; Jonathan L. Snare, Acting Solicitor of Labor; U.S. Department of Labor, Washington, DC

For the Complainant

William A. Seppala, *pro se*, Prime Roofing Corporation; New Ipswich, NH

For the Respondent

DIRECTION FOR REVIEW AND REMAND ORDER

Before: THOMPSON, Chairman; ROGERS, Commissioner.

BY THE COMMISSION:

On January 17, 2007, the Occupational Safety and Health Administration (“OSHA”) issued Prime Roofing Corporation (“PRC”) a citation alleging a repeat violation of 29 C.F.R. § 1926.501(b)(1). After holding a hearing on the matter on June 26, 2007, Administrative Law Judge Covette Rooney sent her decision and order vacating the citation to the parties on September 18, 2007. On September 27, 2007, the Secretary filed a Motion to Amend Pleadings with the judge based upon Federal Rule of Civil Procedure 15(b), in which she moves to amend her complaint to allege, in the alternative, a violation of 29 C.F.R. § 1926.501(b)(10). Without ruling on the Secretary’s motion, the judge submitted her decision to the Executive Secretary for docketing on September 28, 2007. On this same date, PRC, appearing *pro se*, filed a letter with the judge

requesting that she deny the Secretary's motion to amend. Subsequently, on October 9, 2007, the Secretary filed with the Commission the same motion she sent to the judge along with an accompanying cover letter, requesting that the Commission consider the two documents as her Petition for Discretionary Review. On October 29, 2007, the Commission received a Statement in Opposition to Petition from PRC requesting the Commission deny the Secretary's motion to amend.

Under Commission Rule of Procedure 90(b)(2), the judge first sends a copy of his or her decision to each party and subsequently files the decision with the Executive Secretary for docketing. 29 C.F.R. § 2200.90(b)(2). Here, the judge did not receive the Secretary's motion to amend until the day before she filed the decision with the Executive Secretary for docketing, and she received PRC's response to the motion the following day. As the judge's decision was filed with the Executive Secretary the day after the judge received the Secretary's motion, the judge did not have a full opportunity to pass upon the motion or PRC's opposition filing. Further, Commission Rule of Procedure 92(c) provides that "[t]he Commission will ordinarily not review issues that the [j]udge did not have the opportunity to pass upon." 29 C.F.R. § 2200.92(c); *accord Saipan-Koreana Hotel*, 21 BNA OSHC 1403, 1405 (No. 02-2129, 2006) (remanding case because judge did not have the opportunity to pass upon certain issues).

Accordingly, we direct this case for review and remand the matter to the judge to allow for full consideration of the Secretary's motion to amend.

SO ORDERED.

BY DIRECTION OF THE COMMISSION

Date: October 31, 2007

Ray H. Darling, Jr.
Executive Secretary