



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

SECRETARY OF LABOR,  
Complainant,

v.

AVCON, INC., VASILIOS N. SAITES, and  
NICHOLAS SAITES,

Respondent.

OSHRC Docket Nos. 98-0755 & 98-1168

**BRIEFING NOTICE**

Briefs are requested with respect to the following issues:

(1) Did the judge err in affirming the alleged violations in Docket Nos. 98-0755 and 98-1168 with respect to the two individual Respondents, Vasilios N. Saites and Nicholas Saites?

(a) Did the judge err in denying the Respondents' March 23, 1999 Motion to Dismiss Claims Against Vasilios N. Saites and Nicholas Saites? In particular, did the judge err in failing to sustain the Respondents' contentions that the Secretary of Labor's amendment of her complaint to allege violations on the part of the individual Respondents was (i) barred under section 9(c) of the Occupational Safety and Health Act of 1970 ("the OSH Act"), 29 U.S.C. § 658(c), and (ii) *not* permissible under Fed. R. Civ. P. 15(c)(3)?

(b) Did the judge err in finding that Vasilios and Nicholas Saites were "employer[s]" of the affected employees under the statutory definition set forth at section 3(5) of the OSH Act, 29 U.S.C. § 652(5)?

(2) In Docket No. 98-0755, did the judge commit any of the following errors in affirming item 9 of citation 1 and items 2a - 2c of citation 2 (failure to provide

protection against falls from the unprotected sides and edges of walking/working surfaces):

(a) Did the judge err in rejecting the Respondents' contention that the cited conditions were governed by 29 C.F.R. §§ 1926.501(b)(2) & 1926.502(k), rather than the cited standard, 29 C.F.R. § 1926.501(b)(1), because each of the affected employees was "constructing a leading edge" or working in an area "where leading edges [were] under construction" within the meaning of §§ 1926.501(b)(2)(i) & (ii)?

(b) Did the judge err in denying *both* (i) the Respondents' pre-testimonial requests for discovery of the anticipated "rebuttal" testimony of the Secretary's expert witnesses (Burkart and Paine) and (ii) the Respondents' post-testimonial request for an opportunity to rebut that expert testimony through the testimony of their own expert "surrebuttal" witness?

(c) Did the judge err in concluding that the Respondents had failed to establish their affirmative defense of infeasibility?

(d) Did the judge err in classifying the violations alleged in items 2a, 2b and 2c of citation 2 as willful?

(3) In Docket No. 98-0755, did the judge err in:

(a) concluding that the Secretary met her burden of proving the inadequacy of the Respondents' hazard communication program, as alleged in items 1a and 1b of citation 1;

(b) concluding that the Secretary met her burden of proving the inadequacy of the Respondents' accident prevention program, as alleged in item 2 of citation 1; and/or

(c) affirming the alleged scaffolding violations set forth in items 8a & 8b of citation 1.

The parties are advised that, when the merits or characterization of an item are before the Commission for review, the appropriateness of the penalty also is subject to review. Accordingly, the parties may address the amount of the penalty if they so choose. All briefs

are to be filed in accordance with Commission Rule 93.<sup>1</sup> The first brief is to be filed within 40 days of the date of this notice.

A party who does not intend to file a brief must notify the Commission in writing setting forth the reason therefore within the applicable time for filing briefs, and shall serve a copy on all other parties. The time for filing briefs (or similar notices of intent) of opposing parties shall commence on the date of service.

BY DIRECTION OF THE COMMISSION

Date: November 29, 2000

151  
Ray H. Darling, Jr.  
Executive Secretary

---

<sup>1</sup>The Commission requests that all briefs include an alphabetical table of authorities with references to the pages on which the authorities are cited, and that an asterisk be placed in the lefthand margin of the table to indicate those authorities on which the brief principally relies. The Commission also requests that copies of cited authority other than statutes, case law, law journal articles and legal treatises, be provided to the Commission and to the opposing party. Parties should be cautioned that these materials will be considered only if appropriate.