

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. XYZ CORP., Respondent.
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OSHRC DOCKET NO.

PETITION FOR DISCRETIONARY REVIEW

Pursuant to Commission Rule 91, 29 C.F.R. 2200.91, Respondent, XYZ Corp. petitions the Occupational Safety and Health Review Commission for review of the Administrative Law Judge's decision in this case.

Statement Of Portions Of The Decision And Order To Which Exception Is Taken

1. XYZ Corp. takes exception to that portion of the Decision and Order wherein the Administrative Law Judge held XYZ Corp. in serious violation of the standard published at 29 CFR 1926.28(a) as alleged in Serious Citation 1, Item 1, in finding that XYZ's employee John Jones was exposed to the alleged violation. (Judge's Decision at pp. 8 - 12.)
2. XYZ Corp. takes exception to that portion of the Decision and Order pertaining to Serious Citation 1, Item 1, wherein the Administrative Law Judge held that action of employee John Jones was not unpreventable employee misconduct. (Judge's Decision at pp. 13 - 17.)

Statement Of Reasons For Which Exceptions Are Taken

1. In the Decision, the Administrative Law Judge failed to follow the test set forth for the Fifth Circuit's Decision in Secretary of Labor v. RPQ Corp. for determining the existence of employee exposure. The testimony at transcript pages 25-45 clearly shows that John Jones was not in the zone of danger because he was on a work break and outside of the definition of the zone.
2. The evidence of record supports XYZ's position that the actions taken by employee John Jones were unpreventable. The Commission has set forth the test for determining unpreventable employee misconduct at Secretary of Labor v. ROM Corp. The testimony of XYZ's employees at transcript pp. 46-59 met all of the requirements of ROM Corp. to prove John Jones's actions were unpreventable.

For the reasons stated herein, XYZ Corp. submits that the Occupational Safety and Health Review Commission should direct review of the Decision and Order of the Administrative Law Judge.

Respectfully submitted,

By _____
Attorney for
XYZ Corp.
123 Street
City, State Zip Code
Tel. No. (999) 999-9999