



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.

WAL-MART STORES, INC.,

Respondent.

OSHRC Docket No. 09-1013

BRIEFING NOTICE

The Commission requests that the parties brief whether the judge erred in affirming Item 1 of Citation 1. Issues of particular interest to the Commission include:

1. Is the judge's decision regarding the alleged hazard supported by the case record and consistent with Review Commission precedent?
2. Did the judge err in finding that Respondent recognized the hazard? Is it significant if certain events, which Respondent claims contributed to the creation of the hazard, had not occurred at previous Blitz Day events?
3. Did the judge err in finding a recognized hazard in view of Respondent's claim that there was no recognition of the hazard in the "broader retail industry"?
4. Did the judge err in finding that a feasible means of abatement was shown by Respondent having "virtually eliminated the situation that had occurred in 2008" through measures "adopted pursuant to its settlement agreement with Nassau County"?
5. Did the judge err in dismissing Respondent's Second (greater hazard), Sixth (technological infeasibility), Eighth (that Respondent took reasonable precautions to protect employees), Ninth (that Respondent engaged in good faith efforts to comply with the Act), Tenth (statute of limitations), and

Eleventh (inconsistency with prior enforcement actions and decisions) Affirmative Defenses?

6. Did the judge err in rejecting Respondent's Fifth Affirmative Defense (that the citation is directed to an issue of public safety not within OSHA's jurisdiction) based on her finding that "the settlement agreement between Respondent and Nassau County provided for a reasonable and effective means, without the assistance of police, of abating the hazards associated with an out-of-control crowd attempting to enter the store"?

The parties are advised that when the merits or characterization of an item are before the Commission for review, the appropriateness of the penalty is also 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 93,¹ *subject to the following exceptions*: (1) The first brief is to be filed within 60 days of this notice, and the second brief is to be filed within 45 days after the first brief is served. Any reply brief shall be filed within 25 days after the second brief is served; and (2) The parties' opening briefs may not exceed 60 pages, and any reply brief may not exceed 35 pages. The length of the briefs is not subject to further increase.

A party who does not intend to file a brief must notify the Commission in writing setting forth the reason therefor 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

Dated: April 19, 2011

/s/

Ray H. Darling, Jr.
Executive Secretary

¹ The Commission requests that all briefs include an alphabetical table of authorities with references to the pages on which they are cited, and that an asterisk be placed in the left-hand 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.