



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.

MANSON CONSTRUCTION COMPANY,

Respondent.

OSHRC Docket No. 14-0816

BRIEFING NOTICE

With respect to Citation 1, Item 6, the Commission requests the parties to brief whether the judge erred in finding that Respondent failed to comply with 29 C.F.R. § 1926.1431(k)(3). In addressing this issue, the parties should address:

1. Whether the Secretary established that Respondent failed to secure the platform to the structure where the work was being performed, as required by 29 C.F.R § 1926.1431(k)?
2. Whether Respondent met the requirement(s) of the “greater hazard” exception in 29 C.F.R. § 1926.1431(k)(3) (“Before employees exit or enter a hoisted personnel platform that is not landed, the platform must be secured to the structure where the work is to be performed, *unless* the employer can demonstrate that securing to the structure would create a greater hazard”) (emphasis added)? *See Kaspar Electroplating Corp.*, 16 BNA OSHC 1517, 1522 (No. 90-2866, 1993) (“[T]he party claiming the benefit of an exception to the requirements of a standard has the burden of proof on its claim.”).

In addressing this question, the parties should address whether the judge erred in finding that the “greater hazard” exception in 29 C.F.R. § 1926.1431(k)(3) refers to the greater hazard affirmative defense, and therefore requires employers to establish all the elements of that defense? *See Dole v. Williams Enters., Inc.*, 876 F.2d 186, 188 (D.C. Cir. 1989) (quoting *Lauhoff Grain Co.*, 13 BNA OSHC 1084, 1088 (No. 81-0984, 1987) (Commission holding that to establish greater hazard defense, employer must show that “(1) the hazards of compliance with a standard are greater than the hazards of noncompliance, (2) alternative means of protection are unavailable, and (3) a variance was unavailable or inappropriate.”)).

All briefs are to be filed in accordance with Commission Rule 93.¹ The first brief is to be filed within 40 days of this notice. 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: February 2, 2017

/s/

John X. Cervený
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.

