



UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1825 K STREET NW
4TH FLOOR
WASHINGTON, DC 20006-1246

FAX
COM (202) 634-4008
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SECRETARY OF LABOR
Complainant,
v.
W. KRAMER ASSOCIATES
Respondent.

OSHRC DOCKET
NO. 92-1391

NOTICE OF DOCKETING
OF ADMINISTRATIVE LAW JUDGE'S DECISION

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on January 14, 1993. The decision of the Judge will become a final order of the Commission on February 16, 1993 unless a Commission member directs review of the decision on or before that date. ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW. Any such petition should be received by the Executive Secretary on or before February 3, 1993 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary
Occupational Safety and Health
Review Commission
1825 K St. N.W., Room 401
Washington, D.C. 20006-1246

Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Avenue, N.W.
Washington, D.C. 20210

If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 634-7950.

FOR THE COMMISSION

Ray H. Darling, Jr.
Executive Secretary

Date: January 14, 1993

DOCKET NO. 92-1391

NOTICE IS GIVEN TO THE FOLLOWING:

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36 South 18th Street
Philadelphia, PA 19103

Michael H. Schoenfeld
Administrative Law Judge
Occupational Safety and Health
Review Commission
Room 417/C
1825 K Street, N.W.
Washington, DC 20006 1246

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SECRETARY OF LABOR,

Complainant,

v.

W. KRAMER ASSOCIATES,

Respondent.

OSHRC Docket No. 92-1391

Appearances:

Michael H. Rosenthal, Esq.
 Office of the Solicitor of Labor
 U.S. Department of Labor
 For Complainant

James F. Sassaman
 General Building
 Contractor's Assn.
 For Respondent

Before: Administrative Law Judge Michael H. Schoenfeld,

DECISION AND ORDER

Background and Procedural History

This case arises under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651 - 678 (1970) ("the Act").

Having had its worksite inspected by a compliance officer of the Occupational Safety and Health Administration, W. Kramer Associates, ("Respondent") was issued one citation alleging a serious violation of the Act and one additional citation alleging two other-than-serious violations of the Act. Civil penalties totalling \$1575.00 were proposed. Following

the filing of a complaint and answer and pursuant to a notice of hearing, the case came on to be heard on October 22, 1992, in Philadelphia, Pennsylvania. No affected employees sought to assert party status. Both parties have filed post-hearing briefs.

Jurisdiction

Complainant alleges and Respondent does not deny that it is an employer engaged in heating, ventilation and air conditioning contracting. It is undisputed that at the time of this inspection Respondent had a work site at the Northeastern Pennsylvania Veterans Home construction project on Mulberry Street in Scranton, Pennsylvania. Respondent does not deny that it uses tools, equipment and supplies which have moved in interstate commerce. Based on these facts, I find that Respondent is engaged in a business affecting interstate commerce.

Based on the above finding, I conclude that Respondent is an employer within the meaning of § 3(5) of the Act.¹ Accordingly, the Commission has jurisdiction over the subject matter and the parties.

Discussion

The essential facts in this case are undisputed. Respondent was cited for its alleged failure to post a notice to employees informing them of the protection afforded them under the Act, as required by the Secretary's regulation at 29 C.F.R. § 1903.2(a)(1) (1990).² At

¹ Title 29 U.S.C. § 652(5).

² Other alleged violations of the Act have been settled. The terms of the settlement, which were made part of the record in this case (Tr. 3-5) are hereby approved and incorporated fully herein. The remaining standard at issue, 29 C.F.R. §1903.2(a)(1) requires that:

Each employer shall post and keep posted a notice or notices, to be furnished by Occupational Safety and Health Administration, U.S. Department of Labor, informing employees of the Act. . .Such notice or notices shall be posted in each establishment in a conspicuous place

the time of the inspection Respondent had only one employee at the work site who had begun work there about 1 hour before the inspection. (Tr. 33, 36, 37) Respondent had no other employees at the site until approximately six weeks later. (Tr. 62-3) At the time of the inspection and during that first six weeks on the job, there was a copy of the required poster located in a white trailer,³ inside the cover of a "gang box" containing tools and equipment used by the sole employee at the site. (Tr. 53-4, 56).⁴ Respondent's only employee at the inspected work site, even though not required to view the poster every day he was on the site, was nonetheless informed as required by the regulation. Accordingly, the alleged violation is VACATED.

FINDINGS OF FACT

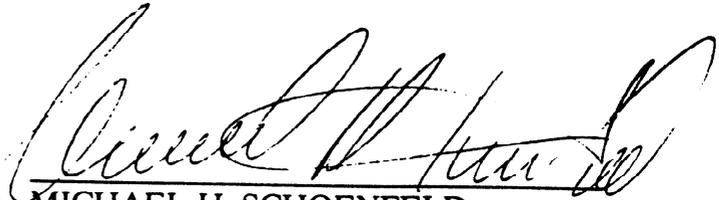
All findings of fact necessary for a determination of all relevant issues have been made above. Fed. R. Civ. P. 52(a). All proposed findings of fact and conclusions of law inconsistent with this decision are hereby denied.

³ The Secretary's contention that the white trailer did not arrive at the site until after March 1 is rejected. It is sheer speculation based solely on the Compliance Officer's statement that he knew of only one trailer present.

⁴ Respondent's sole employee at the site also knew of another poster which was located on the wall of an office inside Respondent's green trailer. (Tr. 46-7) Reliable, credible testimony established that such a poster was in that location when the trailer was locked up at a previous job site. (Tr. 35-6, 46-8, 50-3, 57) Respondent's sole employee at the inspected work site is the only one known to have a key to the green trailer. (Tr. 52) By the time Respondent had other employees at the site, some six weeks later, the materials in the green trailer had been removed to allow access for all to the office area of the trailer. (Tr. 53, 59, 63)

CONCLUSIONS OF LAW

1. Respondent was, at all times pertinent hereto, an employer within the meaning of § 3(5) of the Occupational Safety and Health Act of 1970, 29 U. S. C. § § 651 - 678 (1970).
2. The Occupational Safety and Health Review Commission has jurisdiction over the parties and the subject matter.
3. Respondent was not in violation of 29 C.F.R. § 1903.2(a)(1), as alleged.



MICHAEL H. SCHOENFELD
Judge, OSHRC

Dated: **JAN 12 1993**
 Washington, D.C.