



UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

One Lafayette Centre
1120 20th Street, N.W. — 9th Floor
Washington, DC 20036-3419

PHONE:
COM (202) 606-5100
FTS (202) 606-5100

FAX:
COM (202) 606-5050
FTS (202) 606-5050

SECRETARY OF LABOR
Complainant,

v.

E. SMALIS PAINTING CO., INC.
Respondent.

OSHRC DOCKET
NO. 93-0260

**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 September 17, 1993. The decision of the Judge will become a final order of the Commission on October 18, 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 October 7, 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
1120 20th St. N.W., Suite 980
Washington, D.C. 20036-3419

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) 606-5400.

FOR THE COMMISSION

Ray H. Darling, Jr.
Executive Secretary

Date: September 17, 1993

DOCKET NO. 93-0260

NOTICE IS GIVEN TO THE FOLLOWING:

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

Marshall H. Harris, Esq.
Regional Solicitor
Office of the Solicitor, U.S. DOL
14480 Gateway Building
3535 Market Street
Philadelphia, PA 19104

Sanford A. Middleman, Esquire
Middleman & Middleman
517 Frick Building
Pittsburgh, PA 15219 6003

Michael H. Schoenfeld
Administrative Law Judge
Occupational Safety and Health
Review Commission
One Lafayette Centre
1120 20th St. N.W., Suite 990
Washington, DC 20036 3419

00116040866:03



UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
 One Lafayette Centre
 1120 20th Street, N.W. — 9th Floor
 Washington, DC 20036-3419

FAX:
 COM (202) 606-5050
 FTS (202) 606-5050

SECRETARY OF LABOR,

 Complainant,

 v.

 E. SMALIS PAINTING CO., INC.,

 Respondent.

OSHRC Docket No. 93-0260

Appearances:

Anthony G. O'Malley, Jr., Esq.
 Office of the Solicitor
 U.S. Department of Labor
 For Complainant

Sanford A. Middleman, Esq.
 Middleman & Middleman
 Pittsburgh, Pennsylvania
 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, at which it was repainting a bridge, inspected by a compliance officer of the Occupational Safety and Health Administration, E. Smalis Painting Company, Inc. ("Respondent") was issued three citations alleging a total of one willful, nine serious and two other than serious violations of the Act. A penalties of \$35,000, \$38,000 and \$2,000 were proposed for the willful, serious and other than serious violations, respectively. Respondent timely contested. Following the filing of a complaint and answer and pursuant

to a notice of hearing, the case came on to be heard on August 9, 1993. No affected employees sought to assert party status.

Jurisdiction

Complainant alleges and Respondent does not deny that it is an employer engaged in bridge painting contracting. It is undisputed that at the time of this inspection Respondent was engaged in repainting the Tarentum Bridge on Route 366 in Tarentum, Pennsylvania. Respondent does not deny that it uses tools, equipment and supplies which have moved in interstate commerce. 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

Based upon the agreement of the parties (Tr. 71-72) all necessary findings of fact and conclusions of law can be reached. The parties agreed that Respondent would withdraw its notice of contest as to all of the alleged violations and pay an agreed upon total penalty of \$50,000. As part of the agreement, Respondent presented to the Secretary's counsel, and counsel acknowledged the receipt of a certified check made payable to OSHA in the amount of \$50,000 (Tr. 73).

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.

¹ Title 29 U.S.C. § 652(5).

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. The alleged willful violation of § 5(a)(1) of the Act is **AFFIRMED**.

4. The alleged serious violation of § 5(a)(1) of the Act is **AFFIRMED**.

5. The alleged serious violation of 29 C.F.R. § 1926.55(a) is **AFFIRMED**.

6. The alleged serious violation of 29 C.F.R. § 1926.55(b) is **AFFIRMED**.

7. The alleged serious violation of 29 C.F.R. § 1926.134(b)(2) is **AFFIRMED**.

8. The alleged serious violation of 29 C.F.R. § 1926.134(b)(3) is **AFFIRMED**.

9. The alleged serious violation of 29 C.F.R. § 1926.134(e)(5) is **AFFIRMED**.

10. The alleged serious violation of 29 C.F.R. § 1926.21(b)(3) is **AFFIRMED**.

11. The alleged serious violation of 29 C.F.R. § 1926.28(a) is **AFFIRMED**.

12. The alleged serious violation of 29 C.F.R. § 1926.50(a) is **AFFIRMED**.

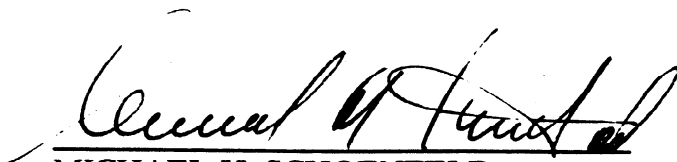
13. The alleged other than serious violation of 29 C.F.R. § 1926.134(b)(1) is **AFFIRMED**.

14. The alleged other than serious violation of 29 C.F.R. § 1926.134(b)(2) is **AFFIRMED**.

15. An aggregate penalty of \$50,000.00 is appropriate for the above violations.

ORDER

1. Each of the citations issued to Respondent on December 17, 1992, are affirmed.
2. An aggregate penalty in the amount of \$50,000.00 is assessed therefor. The penalty has been paid in full.
3. Respondent shall provide suitable and appropriate training for its affected employees. Such training shall be provided by any certified source to be selected at the sole discretion of Respondent.



MICHAEL H. SCHOENFELD
Judge, OSHRC

Dated: SEP 17 1993
Washington, D.C.