



United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
 1120 20th Street, N.W., Ninth Floor
 Washington, DC 20036-3419

Office of
 Executive Secretary

Phone: (202) 606-5100
 Fax: (202) 606-5050

SECRETARY OF LABOR,

Complainant,

v.

ARCADIAN CORPORATION,

Respondent.

Docket No. 93-3270

NOTICE OF FINAL ORDER

The petition for discretionary review filed by the Secretary of Labor in the above cited action was received by the Commission on December 20, 1995. The case was not directed for review. Therefore, the decision of the Administrative Law Judge became a final order of the Commission on January 2, 1996. Commission Rule 90(d), 29 C.F.R. § 2200.90(d); Section 12(j) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 661(j).

ANY PERSON ADVERSELY AFFECTED OR AGGRIEVED WHO WISHES TO OBTAIN REVIEW OF THE DECISION OF THE ADMINISTRATIVE LAW JUDGE MUST FILE A NOTICE OF APPEAL WITH THE APPROPRIATE FEDERAL COURT OF APPEALS WITHIN 60 DAYS OF THE DATE OF THE ABOVE FINAL ORDER DATE. See Section 11 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 660.

FOR THE COMMISSION

Dated: January 11, 1996

Ray H. Darling, Jr.
 Ray H. Darling, Jr.
 Executive Secretary

Docket No. 93-3270

NOTICE IS GIVEN TO THE FOLLOWING:

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

James E. White
Office of the Solicitor, U.S. DOL
Suite 501
525 S. Griffin Street
Dallas, TX 75202

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

Stephen C. Yohay
McDermott, Will & Emery
1850 K Street, N.W., Suite 500
Washington, DC 20006

Robert P. Davis
Laurie R. Rubenstein
Mayer, Brown & Platt
2000 Pennsylvania Avenue
Washington, DC 20006-1882

Jeremiah A. Collins
Bredhoff & Kaiser
1000 Connecticut Avenue, N.W.
Washington, DC 20036

Stanley M. Schwartz
Administrative Law Judge
Occupational Safety and Health
Review Commission
Federal Building, Room 7B11
1100 Commerce Street
Dallas, TX 75242-0791

THE UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR,

Complainant,

v.

ARCADIAN CORPORATION,

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OSHRC DOCKET NO. 93-3270

DECISION AND ORDER

In my orders of September 22 and October 5, 1995, the Secretary was afforded the opportunity to amend his citation in this case to allege separate 5(a)(1) violations for separate hazards requiring different abatements, pursuant to the Commission's remand order of September 15, 1995. The parties were also advised that absent a motion to amend the undersigned would entertain a motion to re-sever Docket No. 93-3270 so that the legal issue, whether the Secretary in 5(a)(1) cases has the authority to cite each individual employee exposed to the same hazardous condition, could be resolved. Based on his response, the Secretary does not desire to amend the citation but does want the cases severed. Respondent Arcadian, on the other hand, objects to severance.

I have carefully reviewed Arcadian's arguments and find them imaginative and cogent. However, when I stand back from the issue and look at it, severance in my view will put the company in the position it requested in 1993. At that time Arcadian sought severance over the Secretary's objection, and the undersigned agreed with its desire to expedite the resolution of the legal issue in this case. The only reason I am faced with this question again is because the Commission majority gave the Secretary the opportunity to amend on remand. Had it not done so this issue would already be in the Court of Appeals. Regardless, severance at the present time will still provide an expedited path for the conclusion of the substantive issue in this case.

I do not share Arcadian's current concerns about piecemeal litigation and the conservation of resources. However, the company does point out that the Commission could direct review of this issue. As it states on page 3 of its opposition:

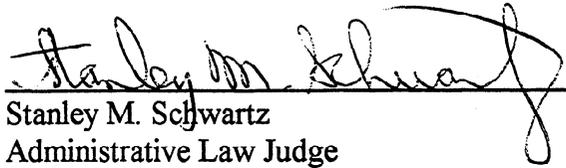
Finally, it is not at all clear that judicial review could even be sought in the near future. A Commission member might well direct review of any decision as to Items 2-87, either on the merits or on the validity of the prior Commission decision, an issue raised by Chairman Weisberg in his dissent. If such review is directed, the parties could then be drawn into further litigation before the Commission, and there could be a long delay before the entry of a judicially reviewable order. From Arcadian's perspective, this would trigger significant additional expense which, in the end, would do little to resolve the substantive issues.

Although this point is well taken, I have more faith in the Commission Members than Arcadian and would anticipate that since the Commission has already issued its decision in this case it would not again direct review. The Commission Members have fully stated their reasons and opinions, and, as I see it, would welcome a Court of Appeals decision rather than reviewing the case a second time. It would also appear that the Commission would not want to direct review and have the case languish pending the appointment of a third member. However, the undersigned is not so bold as to predict what the Commission might do and in fact has no knowledge in this regard. If review is directed, I would request that the case be immediately remanded so that a consolidated decision could be rendered. This approach would preclude the need for additional expense on the part of either party.

For the foregoing reasons, Docket No. 93-3270 is severed. The case will become a final order of the Commission thirty days from the date of docketing by the Executive Secretary unless review is directed by a Commission Member within that time. In order to expedite the resolution of this issue, the undersigned has designated this case for review under the procedures normally reserved for settlement agreements and other decisions where there is no objection filed. Stated another way, the undersigned has availed himself of the Notice of Decision format normally employed where the proposed decision is sent to the parties prior to its being filed with the Commission. Consequently, the parties should be aware that the decision in this matter is being sent by overnight mail today. It is assumed that it will be docketed and that the thirty-day period will begin to run tomorrow, December 1, 1995. The parties can obtain the exact date of docketing by phoning the Executive Secretary's office.

If the case becomes a final order, the Secretary will then have sixty days to decide whether he desires to pursue an appeal in Federal Court. He may very well decide to acquiesce in the

decision. Should he appeal, however, the briefs already filed by the parties will preclude the need for extensive additional briefing, and, appropriately formatted, will provide the Court of Appeals with all the information necessary to resolve this case. So ORDERED.


Stanley M. Schwartz
Administrative Law Judge

Date: NOV 30 1995.