



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.

STARK EXCAVATING, INC.,

Respondent.

OSHRC Docket Nos. 09-0004 & 09-0005

BRIEFING NOTICE

The Commission requests that the parties brief the following issues.

Docket No. 09-0004

- (1) With respect to Serious Citation 1, Item 1b, did the judge err in finding that Respondent knew its employee did not wear required eye protection that complied with the specifications of 29 C.F.R. § 1926.102(a)(2)?
- (2) With respect to Willful Citation 2, Item 1, alleging that Respondent failed to provide adequate excavation protection in violation of 29 C.F.R. § 1926.652(a)(1):
 - (a) Did the judge err in rejecting Respondent's unpreventable employee misconduct ("UEM") defense?
 - (b) If the judge properly affirmed the alleged violation, did he err in recharacterizing it as serious?
- (3) With respect to Repeat Citation 3, Item 1, alleging that Respondent placed a spoil pile and equipment too close to the edge of an excavation in violation of 29 C.F.R. § 1926.651(j)(2), did the judge err in rejecting Respondent's UEM defense?

Docket No. 09-0005

- (1) With respect to Willful Citation 1, Item 2, alleging that Respondent failed to provide adequate excavation protection in violation of 29 C.F.R. § 1926.652(a)(1):
 - (a) Did the judge err in finding that Respondent failed to comply with the requirements of the cited provision and in rejecting Respondent's UEM

defense?

- (b) If the judge properly affirmed the alleged violation, did he err in recharacterizing it as serious?

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 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 therefore 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: June 28, 2010

/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.