



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.

DANA CONTAINER, INC.,

Respondent.

OSHRC Docket No. 09-1184

BRIEFING NOTICE

The Commission requests that the parties brief the following issues relating to the alleged violations of the permit-required confined spaces standard:

- (1) With respect to Serious Citation 1, Item 13 and Willful Citation 2, Items 2 and 3:
 - a. Did the judge err by imputing to Respondent the knowledge of its supervisor? In addressing this question, the parties are asked to discuss *Otis Elevator Co.*, 21 BNA OSHC 2204, 2007 CCH OSHD ¶ 32,920 (No. 03-1344, 2007).
 - b. Did the judge err in rejecting Respondent's unpreventable employee misconduct defense?
 - c. If the judge properly affirmed Citation 2, Items 2 and 3, did she err in characterizing the violations as willful?
- (2) Did the judge err in vacating Serious Citation 1, Items 10, 11a, and 11b and Willful Citation 2, Item 1b based on her finding that Respondent complied with the alternate procedures specified in 29 C.F.R. § 1910.146(c)(5)? The parties are also asked to discuss the merits and characterization of these four citation items.

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 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

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

Dated: April 25, 2012

/s/

John X. Cervený
Deputy 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.