



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.

UNITED CONTRACTORS MIDWEST, INC.  
d/b/a R.A. CULLINAN & SON,

Respondent.

OSHRC Docket No. 10-2096

### **BRIEFING NOTICE**

With respect to Citation 2, Item 1, which alleges a violation of 29 C.F.R. § 1926.652(a)(1) (protection of employees in excavations), the Commission requests that the parties brief the following issues:

- (1) Did the judge err in finding that United Contractors Midwest, Inc. failed to establish the unpreventable employee misconduct defense? In discussing this issue, the parties are asked to address each element of the defense.
- (2) Did the judge err in characterizing the alleged violation as willful?

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.<sup>1</sup> 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

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<sup>1</sup> 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.

intent) of opposing parties shall commence on the date of service.

BY DIRECTION OF THE COMMISSION

RAY H. DARLING, JR.  
EXECUTIVE SECRETARY

Dated: March 29, 2013

/s/ \_\_\_\_\_  
John X. Cervený  
Deputy Executive Secretary