



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.

LAKE ERIE CONSTRUCTION CO.,

Respondent,

OSHRC Docket No. 11-0146

BRIEFING NOTICE

The Commission requests that the parties brief the issues presented in the Respondent's Petition for Discretionary Review.¹ In discussing these issues, the parties should address the effect, if any, of the Occupational Safety and Health Administration Standard Interpretation Letter, Motor Vehicle Requirements for a Re-Paving Project (July 3, 2007).

All briefs are to be filed in accordance with Commission Rule 93.² 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

¹ 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.

² 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

Dated: May 24, 2012

/s/

Ray H. Darling, Jr.
Executive Secretary

**UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

HILDA L. SOLIS, SECRETARY OF
LABOR, UNITED STATES
DEPARTMENT OF LABOR,

Complainant,

v.

LAKE ERIE CONSTRUCTION CO.,

Respondent.

OSHRC Docket No. 11-0146

**RESPONDENT'S PETITION FOR
DISCRETIONARY REVIEW**

Now Comes Respondent, Lake Erie Construction Company ("Lake Erie"), being aggrieved by the Decision and Order of the Administration Law Judge in the above-captioned matter, and hereby submits its petition for discretionary review pursuant to 29 C.F.R. §2200.91- Rule 91, Rules of Procedure of the Occupational Safety and Health Review Commission.

Statement of Portions of the Decision and Order to Which Exception is Taken

1. Lake Erie takes exception to that portion of the Decision and Order wherein the Administrative Law Judge held that Lake Erie violated §1926.600(a)(6) as alleged in Citation 1, Item 1, in finding that:

- Lake Erie's equipment, a combination drill/driver attached to a truck cab and chassis (the "pounder truck"), was a motor vehicle as defined in §1926.601(a) (Decision at 7-8);
- Standards §1926.600(a)(6) and §1926.550(a)(15) applied to Lake Erie's pounder truck (Decision at 6-9); and

- Lake Erie had fair notice that §1926.600(a)(6), §1926.601(a), and §1926.550(a)(15) applied to the pounder truck. (Decision at 9).

2. Lake Erie takes exception to that portion of the Decision and Order pertaining to Citation 1, Item 1, wherein the Administrative Law Judge held that Lake Erie's violation of §1926.600(a)(6) was "willful." (Decision at 11-13).

Statement of Reasons for Which Exceptions are Taken

1. The Judge's holding that Lake Erie's pounder truck was a motor vehicle as defined in §1926.601(a) is contrary to existing law and not supported by a preponderance of the evidence. Standard §1926.601(a) defines a motor vehicle as a vehicle that operates "within an off-highway jobsite," but evidence at the hearing demonstrated that the pounder truck was operating *on the highway* when the accident at issue occurred. (Tr. 100-101).

2. The Judge's decision raises an important question of law about which the Commission's judges have rendered differing opinions. The Judge ruled that Lake Erie's pounder truck was a motor vehicle under §1926.601(a) because she was bound to follow the Commission's precedent in *Gerard Leone & Sons, Inc.*, 9 BNA OSHC 1819 (No. 76-4105, 1981). (Decision at 7-8). However, she commented that the majority opinion in *Gerard Leone & Sons* contained "obvious flaws" in its reasoning and the dissent was more persuasive. (Decision at 8). The decision in *Gerard Leone & Sons* was also criticized in *Anderson Columbia Co. Inc.*, 20 BNA OSHC 1125 (No. 01-2210, 2003)(noting the "obvious flaws" in the majority opinion and agreeing with the dissent). Granting Lake Erie's petition for discretionary review will give the Commission an opportunity to reexamine *Gerard Leone & Sons* and clarify its interpretation of §1926.601(a).

3. The Judge's holding that Lake Erie had fair notice that §1926.600(a)(6), §1926.601(a), and §1926.550(a)(15) applied to the pounder truck is contrary to existing law and not supported by a preponderance of the evidence. These standards did not provide Lake Erie with fair notice because they are impermissibly vague as applied to Lake Erie. Even the Secretary was unable to determine which OSHA standard, if any, applied to Lake Erie's pounder truck. She changed her position regarding the applicable standard three times during this case. During the investigation phase, the compliance officer proposed a general duty clause violation because he believed no direct OSHA standard applied. (Tr. 91). The compliance officer later changed his recommendation to a §1926.600(a)(6) violation because, in his opinion, the pounder truck was a pile driver. (Tr. 92-94). During the hearing, however, the compliance officer stated that §1926.600(a)(6) applied because the pounder truck was a motor vehicle. (Tr. 47-48). At the end of the hearing, the Secretary moved to amend her Citation back to a general duty clause violation. (Tr. 182).¹ The Secretary's constant flip-flopping regarding the applicable standard in this case is evidence Lake Erie did not have fair notice of its required conduct.

4. The Judge's holding that Lake Erie "willfully" violated §1926.600(a)(6) is contrary to existing law and not supported by a preponderance of the evidence. Lake Erie did not willfully violate §1926.600(a)(6) because it believed this standard applied to cranes (Tr. 106) and not the pounder truck. (Tr. 117). Further, Lake Erie's foreman warned the employees to stay away from the relevant hazard: overhead power lines. (Tr. 119-120). Lake Erie also had a comprehensive employee safety and health program in place when the accident at issue occurred. (Tr. 160-167).

¹ The Judge denied the motion. (Tr. 186-187).

For the reasons stated herein, Lake Erie Construction Company hereby submits that the Occupational Safety and Health Review Commission should direct review of the Decision and Order of the Administrative Law Judge.

Respectfully submitted,

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