



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.

MANSFIELD INDUSTRIAL, INC.,

Respondent.

OSHRC Docket No. 17-1214

BRIEFING NOTICE

The parties are requested to brief the following issues:

(1) Did the judge err in declining to address Respondent’s argument that the Process Safety Management provision cited in Citation 1, Item 1a, 29 C.F.R. § 1910.119(h)(3)(ii) (contract employer responsibilities), preempts the Hazard Communication provision cited in Citation 1, Item 1b, 29 C.F.R. § 1910.1200(h)(1) (employee information and training)?

(a) In briefing this issue, the parties should address whether the Commission should revisit its caselaw holding that regulatory preemption pursuant to 29 C.F.R. § 1910.5(c)(1) is an affirmative defense. *See Spirit Aerosystems, Inc.*, 25 BNA OSHC 1093, 1097 n.7 (No. 10-1697, 2014) (“[P]reemption by a more specifically applicable standard is an affirmative defense which the respondent must raise in its answer.”). Specifically, should the Commission find that regulatory preemption is similar to statutory preemption under section 4(b)(1) of the Occupational Safety and Health Act, which some U.S. Courts of Appeals have held is a jurisdictional issue. *See, e.g., U.S. Air, Inc. v. OSHRC*, 689 F.2d 1191, 1193 (4th Cir. 1982) (“[P]reemption [under section 4(b)(1)] . . . is not a matter of affirmative defense but is jurisdictional, properly raisable . . . without regard to whether it was suggested at the administrative hearing on the citation.”); *Columbia Gas of Pa., Inc. v. Marshall*, 636 F.2d 913, 918 (3d Cir. 1980) (“[A section 4(b)(1) preemption] claim can be raised initially on appeal or by the court sua sponte.”).¹

(b) The parties should also address the merits of the preemption issue.

¹ Commissioner Attwood concludes there is no basis upon which to rule—contrary to well-settled precedent—that the affirmative defense that another OSHA standard more specifically applies is “similar to” a jurisdictional question that can be raised at any time in a proceeding. She therefore does not join her colleagues in requesting briefing on this issue.

(2) Did the judge err in affirming Citation 1, Item 2, which alleges a violation of 29 C.F.R. § 1910.132(d)(1) (hazard assessment and equipment selection)? Specifically, did the judge err in concluding that Respondent failed to “conduct an assessment to determine if hazards are present or are likely to be present which necessitate the use of personal protective equipment,” particularly in light of Exhibit C-15, which was admitted into evidence at the hearing?

The parties are advised that when a case is directed for review to consider either the merits or characterization of an item, 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 93.² The first brief is to be filed within 40 days of this notice. A party not intending to file a brief shall notify the Commission in writing 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

JOHN X. CERVENY
EXECUTIVE SECRETARY

Dated: January 3, 2019

/s/ _____
Susan M. Chagrin
Deputy Executive Secretary

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, regulations, 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.