



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.

SCIENCE APPLICATIONS
INTERNATIONAL CORP., dba SAIC,

Respondent.

OSHRC Docket No. 14-1668

BRIEFING NOTICE

Chair Attwood requests that the parties brief the issue raised in Respondent's petition:

Did the judge err in concluding that the Secretary established Respondent's recognition of the hazard, given what Respondent contends is its 50-year fatality-free history?

Commissioner MacDougall requests that the parties brief the following issues:

- (1) Did the Secretary exceed his authority in issuing the citation? In answering this question, the parties may address whether:
 - (a) Congress intended, in enacting the OSH Act, to authorize the Secretary to regulate the cited activity via the general duty clause, 29 U.S.C. § 654(a)(1); and/or
 - (b) the Secretary's decision to issue Citation 1, Item 1, was arbitrary and capricious.
- (2) Did the judge err in concluding that the Secretary established Respondent's recognition of the hazard? In answering this question, the parties may address whether:
 - (a) some activities, though dangerous, are among the "normal activities" intrinsic to an industry, such that they cannot be regulated under the general duty clause; and/or
 - (b) the judge's finding of hazard recognition "eliminate[d] . . . the Secretary's burden of proof and, in fact, almost . . . prove[d] the Secretary's case by definition, since under such a formula the employer can never free the workplace of inherent risks incident to the business," such as Respondent's swimming operations. *See Pelron Corp.*, 12 BNA OSHC 1833, 1835 (No. 82-388, 1986).
- (3) Did the judge err in concluding that the Secretary established that the incidence of the hazard would be materially reduced by requiring that "[w]hen a single swimmer is deployed, a dedicated person must maintain contact with the swimmer at all times"?

- (4) Was the Secretary required to establish that a reasonably prudent employer in the industry would have known that this proposed abatement method was required? If so, did the Secretary make this showing here?

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

Dated: October 31, 2016

/s/ _____
John X. Cerveny
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.