



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.

STORMFORCE OF JACKSONVILLE, LLC,

Respondent.

OSHRC Docket No. 19-0593

BRIEFING NOTICE

The parties are requested to brief the following issues:

- (1) Did the judge err in concluding that the cited provision, 29 C.F.R. § 1926.501(b)(13), applies to the cited condition? In answering this question, the parties should address the judge's finding that 29 C.F.R. § 1926.501(b)(10) is "equally applicable" to the cited condition and whether a violation of that provision was tried by consent. *See McWilliams Forge Co.*, 11 BNA OSHC 2128, 2129 (No. 80-5868, 1984) ("[A]n amendment [of a citation] under . . . [Federal] Rule [of Civil Procedure] 15(b) is proper . . . if . . . the parties tried an unpleaded issue and . . . consented to do so.") (emphasis omitted).
- (2) Did the judge err in concluding that Respondent was a "controlling employer"? *See, e.g., McDevitt Street Bovis, Inc.*, 19 BNA OSHC 1108, 1109 (No. 97-1918, 2000) ("[A]n employer may be held responsible for the violations of other employers where it could reasonably be expected to prevent or detect and abate the violations due to its supervisory authority and control over the worksite.") (internal quotation marks and citation omitted).
- (3) If not, did the judge err in concluding that the Secretary established noncompliance on the part of Respondent? *See Summit Contractors, Inc.*, 22 BNA OSHC 1777, 1781 (No. 03-1622, 2009) ("Under [the Secretary's multi-employer citation] policy, a controlling employer 'must exercise reasonable care to prevent and detect violations on the site,' although the extent of measures a controlling employer must implement to satisfy [its] duty of reasonable care 'is less than what is required of an employer with respect to protecting its own employees.' ") (quoting OSHA Instruction CPL 02-00-124 § X.E.2 (Dec. 10, 1999)).
- (4) Did the judge err in concluding that the Secretary established Respondent's actual knowledge of the violative condition? If so, does the record show Respondent had

constructive knowledge?

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 93.¹ 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 accordance with Commission Rule 93. The time for filing any responsive briefs (or letters filed in lieu of briefs) shall commence on the date of service.

BY DIRECTION OF THE COMMISSION

Dated: July 28, 2020

/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, 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.