

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 01-1519

September Term, 2002

Filed On: December 16, 2002 [720216]

CBI Services, Inc.,

Petitioner

v.

Secretary of Labor and
Occupational Safety and Health Review Commission,

Respondents

On Petition for Review of an Order of the Occupational
Safety and Health Review Commission

Before: EDWARDS, HENDERSON and RANDOLPH, *Circuit Judges*.

J U D G M E N T

This cause was heard on the record from the Occupational Safety and Health Review Commission and on the briefs and arguments of counsel. It is

ORDERED that the petition for review be denied. The Commission reasonably determined, based on substantial evidence in the record, to affirm the citation issued by the Secretary of Labor to CBI for willful violation of 29 C.F.R. § 1926.550(b)(2). 29 U.S.C. § 660(a); *S.G. Loewendick & Sons, Inc. v. Reich*, 70 F.3d 1291, 1294 (D.C. Cir. 1995). CBI failed to establish the affirmative defense of unpreventable employee misconduct, *see Nat'l Realty & Constr. Co. v. OSHRC*, 489 F.2d 1257, 1267 n.38 (D.C. Cir. 1973); *P. Gioioso & Sons, Inc. v. OSHRC*, 115 F.3d 100, 109 (1st Cir. 1997), and substantial evidence supports the Commission's affirmance of the administrative law judge's conclusion that the violation was willful. *See Conie Constr., Inc. v. Reich*, 73 F.3d 382, 384 (D.C. Cir. 1995). Accordingly, we deny CBI's petition for review of the Commission's decision and order.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or rehearing en banc. *See* Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

For the Court:

Mark J. Langer, Clerk