



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.

CAGLE'S, INC.

Respondent.

OSHRC Docket No. 98-0485

APPEARANCES:

Scott Glabman, Senior Appellate Attorney; Charles F. James, Counsel for Appellate Litigation; Joseph M. Woodward, Associate Solicitor; Gregory F. Jacob, Solicitor; U.S. Department of Labor, Washington, DC

For the Complainant

J. Larry Stine, Esq. and Elizabeth K. Dorminey, Esq.; Wimberly, Lawson, Steckel, Schneider & Stine, Atlanta, GA

For the Respondent

DECISION

Before: THOMPSON, Chairman; ROGERS, Commissioner.

BY THE COMMISSION:

STATEMENT OF THE CASE

This case is before the Commission for the third time. In our initial decision, a Commission majority vacated an alleged violation of 29 C.F.R. § 1910.146(c)(2)—a provision of the permit-required confined space standard, finding the cited standard inapplicable. *Cagle's, Inc.*, 21 BNA OSHC 1738, 2006 CCH OSHD ¶ 32,846 (No. 98-0485, 2006). On review of that decision, the United States Court of Appeals for the Eleventh Circuit vacated the holding and remanded the case to the Commission for further proceedings. *Chao v. Occupational Safety & Health Review Comm'n*, 238 F. App'x 575, 577 (11th Cir. 2007) (unpublished). By Order dated

September 28, 2007, we remanded the matter back to the judge for further proceedings consistent with the court's opinion. On remand, Administrative Law Judge Ken S. Welsch again found the cited standard inapplicable and vacated the citation item. The Secretary subsequently filed a Petition for Discretionary Review of the judge's decision, which was directed for review on April 1, 2008. For the following reasons, we now reverse the judge and affirm the citation item.¹

ISSUE ON REVIEW

At issue before the Commission is whether a waste breeding trailer located in a plant operated by Cagle's, Inc. ("Cagle's") had "limited or restricted means for entry or exit" as prescribed by the OSHA confined space standard, 29 C.F.R. 1910.146(b).

PRINCIPLES OF LAW

Cagle's processes poultry products at its Collinsville, Alabama plant where, on March 2, 1998, two of its employees died of asphyxiation inside a trailer containing carbon dioxide-treated waste breeding. Following an inspection, OSHA issued Cagle's a number of citations alleging numerous violations of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-78 ("the Act"). The only item remaining at issue is the alleged violation of paragraph (c)(2) of the permit-required confined space standard, which states:

If the workplace contains permit spaces, the employer shall inform exposed employees, by posting danger signs or by any other equally effective means, of the existence and location of and the danger posed by the permit spaces.

29 C.F.R. § 1910.146(c)(2).

In order to satisfy the standard's requirement that the cited condition constitutes a "permit space," the Secretary must first show that the space is a "confined space." The standard defines a confined space as a space that:

- (1) Is large enough and so configured that an employee can bodily enter and perform assigned work; and
- (2) Has limited or restricted means for entry or exit (for example, tanks, vessels, silos, storage bins, hoppers, vaults, and pits are spaces that may have limited means of entry); and
- (3) Is not designed for continuous employee occupancy.

29 C.F.R. § 1910.146(b).

¹ We have thoroughly reviewed the file in this matter as well as the parties' previous briefs. Although the Commission "ordinarily" will request that parties file briefs on review, the filing of briefs is within the Commission's discretion. Commission Rule of Procedure 93(a), 29 C.F.R. § 2200.93(a). Here, we find further briefs unnecessary on the sole legal question before us, as the parties have already fully briefed this issue before the judge.

Following the court’s remand order, the parties entered into a stipulation resolving a number of issues regarding the standard’s applicability and elements of the Secretary’s burden of proof. With respect to applicability, the parties stipulated that “[t]he [Eleventh C]ircuit has conclusively decided that part 1 of the confined space definition has been met in this case”—that is, the breading trailer “is large enough and so configured that an employee can bodily enter and perform assigned work.” The parties further stipulated the trailer meets the third element of the definition—that it “is not designed for continuous employee occupancy,” and that “[i]f the waste breading trailer is a confined space, then it is a ‘permit required confined space’.” With respect to the remaining elements of a violation, the parties agreed that the Secretary demonstrated employee exposure to the cited condition as well as employer knowledge thereof, and that Cagle’s did not comply with the requirements of the cited provision.

ANALYSIS

As the judge recognized in his decision on remand, the only issue remaining before us is whether the breading trailer “has limited or restricted means for entry or exit,” as prescribed in the second element of the confined space definition. In determining that the trailer did not satisfy this element, the judge reasoned that because “Cagle’s employees were never expected to enter the waste breading trailer[, and] [n]either the roof openings nor the rear doors were contemplated as a means of entry or exit[, the] space cannot have a ‘limited or restricted means for entry or exit.’” However, whether employees were “expected to enter” the trailer does not relate to the element of the confined space definition at issue.

Whether the breading trailer “has limited use or restricted means of entry or exit” refers exclusively to the physical configuration of the space at issue, not to its intended use. *See Consumer Prod. Safety Comm’n v. GTE*, 447 U.S. 102, 108 (1980) (“[T]he starting point for interpreting a statute is the language of the statute itself . . . [which,] absent a clearly expressed legislative intention to the contrary, . . . must ordinarily be regarded as conclusive.”). Indeed, we have previously held that a space with restricted egress and unintended for employee entry under specified circumstances constituted a confined space where, under those circumstances, an employee nonetheless entered the space. *Mobile Premix Concrete, Inc.*, 18 BNA OSHC 1010, 1011-12, 1995-97 CCH OSHD ¶ 31,416, p. 44,404 (No. 95-1192, 1997) (holding that “[i]f an employee was inside a hopper when the pile was live [containing material and the gates are open], that person would be unable to gain footing, creating a limited or restricted means of

exit[,]” despite “an unwritten safety policy that required employees to ‘lock out’ [live] piles before stepping onto them”).

Here, the breeding trailer was equipped with three five-foot square openings cut into its roof seven and a half feet above the trailer floor, and closed rear doors with pin latches only on the outside. Despite Cagle’s characterization of the rear doors as “unobstructed” and “unlocked,” it admits the doors “were kept closed . . . and *could not be opened from the inside.*” (Emphasis added.) In these circumstances, we reject Cagle’s contention that the trailer was not a confined space, as an employee of average height located inside a space of these dimensions would clearly have a “limited or restricted” means of exit.

Accordingly, we conclude the breeding trailer met the confined space standard’s definition and that the standard, therefore, applied to the cited condition. As the remaining elements of the violation are not at issue on review, we vacate the judge’s decision and affirm a violation of § 1910.146(c)(2), as alleged in Citation 1, Item 2.

PENALTY

The Secretary proposed a penalty of \$5,000 for this citation item, arguing that such an amount is warranted based on Cagle’s large size, recent violation history at another facility, and the fact that the trailer doors were unable to be unlocked from the inside, and the accident resulted in two fatalities. *See* section 17(j) of the Act, 29 U.S.C. § 666(j) (setting forth statutory penalty factors). Cagle’s disputes the proposed penalty amount, claiming that this “posting violation” has “no direct relation” to the safety and health of its employees, particularly because they were instructed not to enter the trailer.

As noted in our earlier decision, Cagle’s has approximately 900 workers at the cited facility and a history of violations at another plant. 21 BNA OSHC at 1746, 2006 CCH OSHD at p. 52,849. Applying the section 17(j) penalty factors, we conclude that a penalty of \$5,000 is appropriate. The parties have stipulated that, if affirmed, this violation is “serious” which implies that it poses a substantial probability of death or serious physical harm. Section 17(k) of the Act, 29 U.S.C. § 666(k). Cagle’s does not argue for a good faith reduction in penalty amounts. Therefore, after having considered the gravity factors set out in *Caterpillar, Inc.*, along with history and size, we conclude that a penalty of \$5,000 is appropriate. *Caterpillar, Inc.*, 15 BNA OSHC 2153, 2178, 1993 CCH OSHD ¶ 29,962, p. 41,012 (No. 87-0922, 1993).

CONCLUSIONS OF LAW

Based on the foregoing analysis, we conclude that Cagle's waste breeding trailer had limited or restricted means for entry or exit, as prescribed by 29 C.F.R. § 1910.146(b). Accordingly, in view of the parties' stipulations concerning the remaining elements of the alleged violation of 29 C.F.R. § 1910.146(c)(2), we conclude that Cagle's violated the cited provision of the confined space standard.

ORDER

We affirm Citation 1, Item 2 for Cagle's violation of 29 C.F.R. § 1910.146(c)(2), and assess a penalty of \$5,000.

SO ORDERED.

_ /s/ _____
Horace A. Thompson III
Chairman

_ /s/ _____
Thomasina V. Rogers
Commissioner

Dated: April 11, 2008

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

Secretary of Labor,

Complainant

v.

Cagle's, Inc.,

Respondent.

OSHRC Docket No. **98-0485**

Remand

Appearances:

Channah S. Broyde, Esquire, Office of the Solicitor, U.S. Department of Labor, Atlanta, Georgia
For Complainant

J. Larry Stine, Esquire, Wimberly, Lawson, Steckel, Nelson & Schneider, Atlanta, Georgia
For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER ON REMAND

Cagle's, Inc., produces poultry products. On March 2, 1998, two of its employees were asphyxiated after entering a trailer containing waste breeding contaminated with carbon dioxide at Cagle's Collinsville, Alabama, plant. Employees at the plant disposed of waste breeding collected in cardboard boxes by climbing an exterior ladder to the top of the trailer and dumping containers through one of three roof openings. They were not required to physically enter the trailer. Following an inspection by the Occupational Safety and Health Administration (OSHA), the Secretary issued three citations alleging violations of a total of fifteen OSHA standards to Cagle's. This court held a hearing in this matter in September and October, 1998.

On August 13, 1999, this court issued a decision and order in *Cagle's, Inc.* (No. 98-0485, 1999). Among various other rulings, the court vacated item 2 of citation no. 1, which alleged a

serious violation of 29 C.F.R. § 1910.146(c)(2), a subsection of the permit-required confined space standard. The decision became a final order on September 2, 1999.

In a decision issued on September 29, 1999, the Commission affirmed, on different grounds than those relied upon by this court, the vacation of item 2 of citation no. 1. The Secretary appealed the Commission's decision and, on August 3, 2007, in an unpublished opinion, the U. S. Court of Appeals for the Eleventh Circuit vacated the Commission's decision. It remanded the case to the Commission, who, in turn, remanded it to this court on September 28, 2007, "for further proceedings consistent with the [Eleventh Circuit's] opinion."

The Permit-Required Confined Space Standard

Section 1910.146(c)(2) provides:

If the workplace contains permit spaces, the employer shall inform exposed employees, by posting danger signs or by any other equally effective means of the existence and location of and the danger posed by the permit spaces.

This standard applies only if a permit-required confined space exists. Before establishing whether a space is permit-required, it must first be demonstrated that it meets the definition of a "confined space." Section 1910.146(b) defines a "confined space" as one that:

- (1) Is large enough and so configured that an employee can bodily enter and perform assigned work; and
- (2) Has limited or restricted means for entry or exit (for example, tanks, vessels, silos, storage bins, hoppers, vaults, and pits are spaces that may have limited means of entry); and
- (3) Is not designed for continuous employee occupancy.

The definition is written using the conjunctive "and." All three of the listed conditions must be met for a space to qualify as a confined space. In its original decision, the court held the waste breasting trailer was not a confined space because it did not meet the requirement of condition (1), in that employees were not required to "bodily enter and perform assigned work." The Commission also found the waste breasting trailer was not a confined space, but it reached this conclusion based on its finding that "employees must have current assignments that they could perform inside the space." *Chao v. Cagle's, Inc.*, 21 BNA OSHC 2121 (11th Cir. 2007). The Eleventh Circuit disagreed with the Commission's interpretation, holding that "entry" into the waste breasting trailer occurs when any part of an employee's body "breaks the plane of an opening into a space." *Id.* Because it is reasonably foreseeable that Cagle's employees could pass their hands through the roof

openings of the trailer while dumping the waste, the Eleventh Circuit found that condition (1) of the confined space definition was met.

Stipulations

The parties stipulate the following (Secretary's brief. p.3):

(1) The Eleventh Circuit has concluded condition (1) of the confined space definition has been met in this case;

(2) Condition (3) of the confined space definition has been met;

(3) If the waste breeding trailer is a confined space, then it is a "permit-required confined space";

(4) The Secretary has established exposure to the cited conditions;

(5) Cagle's knew the trailer was not marked or labeled as a permit-required confined space;

(6) Cagle's did not advise employees the trailer was a permit-required confined space; and

(7) If a violation is found, it is appropriately categorized as "serious."

Limited or Restricted Means for Entry or Exit

The issue before the court, then, is whether condition (2) of the confined space definition has been met. Did the waste breeding trailer have "limited or restricted means for entry or exit"?

The waste breeding trailer is 40 feet long, 7½ feet wide, and 7½ feet high from the floor of the trailer to the roof (Tr. 732-733). Three openings, each measuring 5 feet by 5 feet, are cut into the roof of the trailer. The trailer has two rear doors. The doors are kept closed with latches (or pins) that are easily opened from the outside. The doors cannot be opened from the inside if the latches are engaged (Tr. 293, 739-741).

In its first preamble to the permit-required confined space standard, OSHA's position was straightforward regarding whether doors could be considered limited or restricted means for entry or exit (58 Fed. Reg. 4462, 4477-4478 (January 14, 1993)):

[D]oorways and other portals through which a person can walk are not to be considered limited means of entry and exit.

In 1994, OSHA modified its statement regarding doorways, saying it (59 Fed. Reg. 55208-55209 (November 4, 1994)):

was intended to limit the application of the definition of confined spaces to those areas where an employee would be forced to enter or exit in a posture that might slow self-rescue, or make rescue more difficult. These spaces warrant additional consideration as to whether they pose a hazard to entrants and would, therefore, be regulated as permit-required confined spaces (permit spaces). For example, even if the door or portal of a space is of sufficient size, obstructions could make entry into or exit from the space difficult. The Agency intended that spaces which otherwise meet the definition of confined spaces, and which have obstructed entry or exits even though the portal is a standard size doorway, be classified as confined spaces. OSHA acknowledges that the preamble to the final rule did not clearly express that intent.

The Secretary argues that this acknowledgment, along with a Standard Interpretation issued by OSHA on October 23, 1995, proves the waste breeding trailer is considered a confined space under the standard. In the Standard Interpretation, OSHA specifically addressed the classification of a typical tractor/trailer (Exhibit D of Secretary's brief):

Question 3 Truck Trailer: This is a typical tractor/trailer configuration: The trailer used by our company is 40 ft. length x 8 ft. width x 8 ft. height and is equipped with two doors at the rear of the unit.

Response: A typical tractor/trailer of the type described above with the doors in the open position would not be considered a confined space. When the doors are in the (secured) closed position, it would be considered a confined space since the doors of the trailer typically cannot be opened from the inside.

Standard Interpretations and other OSHA directives are not binding on the Commission. *Drexel Chemical Co.*, 17 BNA OSHC 1908, 1910, footnote 3 (No. 94-1460, 1997). The waste breeding trailer at issue is distinguishable from the "typical tractor/trailer configuration" posited by the Standard Interpretation. The waste breeding trailer is modified from a typical configuration by cutting three 5 x 5 foot openings in the roof. Cagle's employees are not required to bodily enter the trailer, either through the roof openings or through the rear doors. In a typical situation, employers require employees to enter and exit a tractor/trailer for purposes of loading, unloading, cleaning, etc. Cagle's use of the tractor/trailer presents an atypical situation where bodily entry (as opposed to an employee's hand inadvertently dipping below the plane of the roof opening) is not required or anticipated. The confined space definition encompasses spaces where employee occupancy is not

routine, but is expected from time to time. Cagle's employees were never expected to enter the waste breeding trailer. Neither the roof openings nor the rear doors were contemplated as means of entry or exit. A space cannot have a "limited or restricted means for entry or exit" if its openings are not intended for entry or exit. The fact that a space may contain a hazardous atmosphere is immaterial to the determination of whether it is a confined space (58 Fed. Reg. 4462 at 4477 (January 14, 1993)): "OSHA realizes that an employee may still be injured or killed as a result of some atmospheric hazard within such an enclosed area; however, this standard is not intended to address all locations that pose atmospheric hazards."

The record does not establish the waste breeding trailer "has limited or restricted means for entry or exit." The trailer does not meet the requirements of condition (2) of the confined space definition. Therefore, § 1910.146(c)(2) is not applicable to the cited conditions. Item 2 of Citation no. 1 is vacated.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Federal Rule of Civil Procedure 52(a).

ORDER

Based upon the foregoing decision, it is hereby ORDERED that:

Item 2 of Citation no.1, alleging a serious violation of § 1910.146(c)(2), is vacated and no penalty is assessed.

\S\ Ken S. Welsch

KEN S. WELSCH
Judge

Date: February 27, 2008