



UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR
Complainant,
v.
A. R. CONTRACTORS, INC.
Respondent.

OSHRC DOCKET
NO. 91-2277

**NOTICE OF DOCKETING
OF ADMINISTRATIVE LAW JUDGE'S DECISION**

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on May 7, 1993. The decision of the Judge will become a final order of the Commission on June 7, 1993 unless a Commission member directs review of the decision on or before that date. **ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW.** Any such petition should be received by the Executive Secretary on or before May 27, 1993 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary
Occupational Safety and Health
Review Commission
1825 K St. N.W., Room 401
Washington, D.C. 20006-1246

Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Avenue, N.W.
Washington, D.C. 20210

If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 634-7950.

FOR THE COMMISSION

Ray H. Darling, Jr.
Executive Secretary

Date: May 7, 1993

DOCKET NO. 91-2277

NOTICE IS GIVEN TO THE FOLLOWING:

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SECRETARY OF LABOR,
 Complainant,

v.

A. R. CONTRACTORS, INC.,
 Respondent.

OSHRC Docket No.: 91-2277

Appearances:

Leslie John Rodriguez, Esquire
 Office of the Solicitor
 U. S. Department of Labor
 Atlanta, Georgia
 For Complainant

Ronald M. Gaswirth, Esquire
 Lori M. McNally, Esquire
 Gardere & Wynne
 For Respondent

Before: Administrative Law Judge Paul L. Brady

DECISION AND ORDER

This proceeding is brought pursuant to Section 10 of the Occupational Safety and Health Act of 1970 (Act) to contest a citation and proposed penalty issued by the Secretary of Labor (Secretary). Respondent, A. R. Contractors, Inc. (AR) is alleged to have violated the standard at 29 C.F.R. § 1910.110(d)(10) during construction of a building in Jacksonville, Florida.

The basic facts are not in dispute that AR was a roofing contractor in construction of a commercial building in the Avenue Mall in Jacksonville. Also, that two 250-gallon liquid petroleum (LP) gas tanks were located in front of the rear wheels of two tanker trailers as depicted in Exhibits C-3 and C-4. There were "propane gas" and "no smoking" decals on the tanks.

The Alleged Violation of 29 C.F.R. § 1910.110(d)(10)

The standard which pertains to the storage and handling of LP gases states as follows:

When damage to LP-Gas systems from vehicular traffic is a possibility, precautions against such damage shall be taken.

29 C.F.R. § 1910.110(d)(1) provides in pertinent part as follows:

This paragraph applies specifically to systems utilizing storage containers other than those constructed in accordance with DOT specifications
...

Systems is defined in 1910.100(A)(11) as:

[A]n assembly of equipment consisting essentially of the container or containers, major devices such as vaporizers, safety relief valves, excess flow valves, regulators, and piping connecting such parts.

The citation alleges that precautions were not taken to prevent damage to LP gas systems from vehicular traffic: Two 500-gallon LP-gas tanks alongside the roadway at the north end of the building.

Compliance officer John Ruggles conducted the inspection that gave rise to issuance of the citation. He testified that the LP-gas system consisted of the two trailers that held hot tar and the two LP-gas tanks that were fueling them. The hot tar was pumped to the roof of the building for the roofers (Tr. 60). He stated the tanks had a capacity of 250-gallons and not 500-gallons (Tr. 126).

The Secretary concedes the tanks were located in a fenced-off area restricted to construction traffic, and some colored flags were strung between the trailers.

Ruggles stated, however, that the LP-gas tanks were located on the roadway side of the trailers without protection from vehicular traffic (Tr. 61, 62, 126; Exhs. C-3, C-4). He observed vehicular traffic within 3 to 4 feet of the tanks traveling 5 to 10 miles per hour. Three to five vehicles passed the tanks during the inspection. The roadway was approximate 20 feet wide (Tr. 63-65).

Mr. Harold Blanton, the Secretary's expert, testified that barriers should have been present to prevent vehicle damage to the tanks (Tr. 183, 184). He also stated that stringing colored flags in front of the tanks was not a precaution because of the vehicular traffic that was present (Tr. 193-195).

In order to establish a violation of the standard, the Secretary must show by a preponderance of the evidence that (1) the cited standard applied, (2) its terms were not met, (3) employees had access to the violative condition, and (4) the employer knew or could have know of the violation with the exercise of reasonable diligence. *Seibel Modern Mfg. & Welding Corp.*, 15 BNA OSHC 1218, 1991 CCH OSHD ¶ 29,442, p. 39,678 (No. 88-821, 1991).

AR contends the standard does not apply because of its vagueness thus violating the due process clause of the fifth amendment. It is argued that the standard is void since persons "of common intelligence must guess at its meaning and differ as to its application." *Connelly v. General Constr. Co.*, 269 U.S. 385, 391 (1926).

AR points out that the term "precautions" is not defined by the standard. As a result, the Secretary's position is based solely on the subjective interpretations of the inspecting officers.

While the testimony of the compliance officer and expert does indicate that the precaution to be taken are essentially left up to an inspector, the standard is not impermissibly vague. The standard does set forth a "comprehensible course of conduct" that satisfies due process requirements, i.e., that employers are to protect LP-gas systems from vehicular traffic.

The fact that Congress might, without difficulty, have chosen "[c]learer and more precise language equally capable of achieving the end which it sought does not mean that the statute which it in fact drafted is unconstitutionally vague. *United States v. Powell*, 423 U.S. 98,96 S.Ct. 316 (1975).

Although a definition for precautions is not provided, its general definition would include measures taken in advance to protect against danger. The standard is not unconstitutionally vague to apply in this case and AR's motion for summary judgment is denied.

AR also contends that the evidence does not establish the violation. It is first asserted that the tanks in question were not shown to be "other than DOT containers."

There is considerable evidence and discussion in the record regarding specific identification of the tanks shown in Exhibits C-3 and C-4. The testimony of two witnesses, however, adequately establishes they were "other than D.O.T. containers."

Mr. Joseph Hollingsworth, records custodian for Griffith Gas Company, testified his company leased the tanks in question to AR (Tr. 29-32, 37). Hollingsworth has 20 years experience with the propane gas industry, from home delivery to basic service and installation (Tr. 28). Based on his 20 years experience it was his opinion that the tanks were ASME (American Society of Mechanical Engineers) tanks and not D.O.T. (Tr. 37, 39-40).

Harold Blanton, the Secretary's expert, identified the tanks as "non-D.O.T." but ASME (Tr. 174, 197). There was no evidence offered to refute the foregoing statements. The tanks, therefore, were "other than DOT containers."

The testimony of the inspector is not disputed regarding AR's LP gas system at the site (Tr. 60-61). Therefore, an LP gas system was present within the context of the standard.

The central issue regarding the alleged violation relates to the extent of the measures required to be taken by an employer under the standard. Clearly, the employer has a duty to act where there is a possibility of damage to the system by vehicular traffic. "Possibility" is used in the standard without qualification, which implies even the slightest chance of damage. The testimony is undisputed that there was vehicular traffic traveling at speeds of 5 to 10 miles per hour within 3 to 8 feet of tanks. Under these circumstances, damage to the gas system could be deemed a possibility. The standard also does not provide any indication as to type of precautions necessary to comply. Consideration, therefore, must be given to measures which are barely sufficient to protect against damage.

Mr. Blanton testified that in this case a barricade or barrier between the tanks and traffic would be required. It is argued that such requirement is reasonable in light of other provisions of 29 C.F.R. § 1910.110. These provisions relate to precautions against vehicular damage to LP gas tanks at gas service stations. 29 C.F.R. § 1910.110(b)(6)(ii)(b) provides that above ground containers must be "protected by crash rails or guards to prevent physical damage unless they are protected by virtue of their location." Under 29 C.F.R. § 1910.110(b)(6)(iii)(c), "[i]f the location is subjected to vehicular traffic, containers shall be

protected by a concrete slab or other cover adequate to prevent the weight of a loaded vehicle imposing concentrated loads on the container shell.”

The Commission has held that broad terms in a standard can acquire meaning when read together with other standards. See *Secretary v. Gold Kist, Inc.*, 7 BNA OSHC 1855, 1861, 1980 CCH OSHD ¶ 24,205, p. 29,444 (No. 76-2049, 1979). Since barriers and barricades are not listed as precautions under the instant standard and there is no reason to conclude such installation would be required. Clearly, if such measures were intended the standard would so specify as set forth in the aforementioned standards. The principal consideration, therefore, is what precautions AR did take.

Mr. Duane Hughey, AR foreman, testified he was in charge of safety at the worksite. He stated different precautions are taken at each worksite depending on the circumstances and conditions. Based upon the conditions at this site, he took the following precautions (Exhs. C-3, C-4; Tr. 260-263):

- (1) The stringing of colored pennant flags between the tanker trailers,
- (2) Fencing off the area and restricting it to construction traffic,
- (3) Placing decals on the tanks which read, “Propane Gas” and “No Smoking,”
- (4) Positioning the tanks in front of the rear wheels of the tankers,
- (5) Fire extinguishes were placed beside each tank, and
- (6) Stationing a man to guard the tanks at all times.

While some of the measures may be seen as having minimal effect, when coupled with the presence of an employee to guard the tanks full time, which is not refuted, compliance with the standard cannot be denied. The standard was not violated as alleged.

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 on the foregoing decision, it is ordered that the citation is vacated.

/s/ Paul L. Brady
PAUL L. BRADY
Judge

Date: April 29, 1993