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OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR
Complainant,
v.
CLEVELAND CONSTRUCTION , INC.
Respondent.

OSHRC DOCKET
NO. 92-0351

# 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 April 2, 1993. The decision of the Judge will become a final order of the Commission on May 3, 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 April 22, 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
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Review Commission
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Petitioning parties shall also mail a copy to:

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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. SKW

Date: April 2, 1993

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 92-0351

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SECRETARY OF LABOR,
Complainant,

v.

CLEVELAND CONSTRUCTION, INC.,
Respondent.

OSHRC Docket No. 92-0351

APPEARANCES:

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U.S. Department of Labor, Cleveland, Ohio

Mark A. Ziccarelli, Esq., Gibson, Brelo, Ziccarelli & Martello,
Mentor, Ohio

Before: Administrative Law Judge James A. Cronin, Jr.

## DECISION AND ORDER

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C. Section 651 et seq.; hereafter called the "Act").

Respondent, Cleveland Construction, Inc. (Cleveland), at all times relevant to this matter, maintained a workplace at 2100 Joseph Lloyd Parkway, Willoughby, Ohio, where it was engaged in construction. Cleveland admits it employs workers in a business affecting commerce, and is an employer subject to the Act.

On December 30, 1991, as a result of its December 12-13 inspection of Cleveland's Willoughby worksite, the Occupational Safety and Health Administration

(OSHA) issued citations alleging violations of the Act together with proposed penalties (Tr. 13, 80). Cleveland was cited for "serious" violations of §§1926.152(g)(9) and (11) and for an "other than serious" violation of §1926.59(e)(2).

By filing a timely notice of contest, Cleveland brought this proceeding before the Occupational Safety and Health Review Commission (Commission). On December 1, 1992, a hearing was held in Cleveland, Ohio. The parties have submitted briefs on the contested issues and the matter is ready for decision.

Alleged Violation

Serious citation 1 alleges:

1a
29 CFR 1926.152(g)(9): Conspicuous and legible signs prohibiting smoking were not posted in service and refueling areas:

On the ground diesel fuel tank used for refueling construction vehicles. The tank was located on the southeast quadrant of the site.

1b
29 CFR 1926.152(g)(11): Each service or refueling area was not provided with at least one fire extinguisher having a rating of not less than 20 B:C located so that an extinguisher would be within 75' of each pump, dispenser, underground fill pipe opening, or lubrication or service area:

Above ground diesel fuel tank used for refueling construction vehicles. The tank was located on the southeast quadrant of the site.

Section 1926.152 provides:

**Flammable and combustible liquids.**

* * *

(g) *Service and refueling areas.*

* * *

(9) Conspicuous and legible signs prohibiting smoking shall be posted.

* * *

(11) Each service or fueling area shall be provided with at least one fire extinguisher having a rating of not less than 20-B:C located so that an extinguisher will be within 75 feet of each pump, dispenser, underground fill pipe opening, and lubrication or service area.

Other than serious citation 2 alleges:

1
29 CFR 1926.59(e)(2): The employer's written hazard communication program did not include, the methods the employer will use to provide and inform other employers of material safety data sheets, labeling system, and precautionary measures to be taken to protect employees from chemical hazards:

Chemicals on site include, but are not limited to diesel fuel, gypsum, plaster, and joint compound.

Section 1926.59(e)(2) provides:

(e) *Written hazard communication program.*

* * *

(2) *Multi-employer workplaces.* Employers who produce, use, or store hazardous chemicals at a workplace in such a way that the employees of other employer(s) may be exposed (for example, employees of a construction contractor working on-site) shall additionally ensure that the hazard communication programs developed and implemented under this paragraph (e) include the following:

(i) The methods the employer will use to provide the other employer(s) with a copy of the material safety data sheet, or to make it available at a central location in the workplace, for each hazardous chemical the other employer(s)' employees may be exposed to while working;

(ii) The methods the employer will use to inform the other employer(s) of any precautionary measures that need to be taken to protect employees during the workplace's normal operating conditions and in foreseeable emergencies;

(iii) The methods the employer will use to inform the other employer(s) of the labeling system used in the workplace.

Issues

1. Whether the Secretary established, by a preponderance of the evidence, that Cleveland had actual or constructive knowledge of the absence of a "no smoking" sign on its diesel fuel tank?

2. Whether the Secretary established, by a preponderance of the evidence, that Cleveland violated §1926.152(g)(9) on December 12, 1992?

a) Whether Cleveland established that locating a fire extinguisher within 75 feet of its diesel fuel tank was infeasible?

b) Whether Cleveland established the affirmative "greater hazard" defense to the alleged violation?

c) Whether Cleveland may substitute alternative protective measures for those required by the cited standard?

3. Whether the Secretary established, by a preponderance of the evidence, that Cleveland's hazard communication standard was in violation of §1926.59(e)(2)?

Alleged Violation of §1926.152(g)(9)61.5

The cited standard requires that signs prohibiting smoking be posted in service and refueling areas. Cleveland concedes that there was no "no smoking" sign on its above-ground diesel fuel storage tank on December 12, 1991 (Tr. 45; Written Argument of Employer/Respondent, p. 1), but argues that it was without knowledge of the violative condition.

Both Mark Small, Cleveland's Senior Vice-President, and Roger Riachi, Cleveland's Safety Coordinator, testified that they first became aware the "no smoking" sign was missing from the diesel fuel tank during the course of the OSHA inspection (Tr. 122, 159). Riachi testified that the tank was originally delivered with a "no smoking" sign, which was put up on the tank (Tr. 114). Riachi saw the sign on the tank during his last weekly site inspection, approximately a week before OSHA's arrival (Tr. 118-19). Small stated that he had seen the sign on the tank the day before the OSHA inspection (Tr. 153). Neither he nor any other supervisory personnel had noticed its absence when passing the tank on their way to Cleveland's trailer the morning of December 12 (Tr. 161, 165). The tank had not been in use for more than a week preceding the inspection (Tr. 162), so no supervisory personnel had any reason to "focus in on that tank" (Tr. 166). Both Riachi and Small stated that there had been problems with vandalism on the site (Tr. 120, 156-58).

Discussion

In order to prove a violation of section 5(a)(2) of the Act, the Secretary must show by a preponderance of the evidence that the cited employer either knew or

could have known of the violative condition with the exercise of reasonable diligence. *See, e.g., Walker Towing Corp.*, 14 BNA OSHC 2072, 2074, 1991 CCH OSHD ¶29,239, p. 39,157 (No. 87-1359, 1991). There is no evidence that any supervisory personnel had actual knowledge that the "no smoking" sign was missing on December 12. Small's uncontradicted testimony establishes that the sign was in place the day before the OSHA inspection. Because the fuel tank was not in use, no supervisory personnel had any reason to examine it that morning.

The Secretary failed to establish that Cleveland failed to exercise due diligence in inspecting its worksite, or that Cleveland had constructive knowledge of the cited violation. Thus, "Serious" citation 1, item 1a must be vacated.

Alleged Violation of §1926.152(g)(11)

Subsection (g)(11) requires that at least one fire extinguisher with a rating of at least 20-B:C be located within 75 feet of each fuel dispenser or service area.

CO Andris Pratins testified that he found Cleveland's fire extinguisher inside Cleveland's job trailer (Tr. 20). Pratins paced off the distance between the fuel tank and the trailer at 110 feet (Tr. 21, 23). Cleveland's extinguisher was rated 10-B:C (Tr. 20).

Cleveland does not dispute the CO's testimony, or its failure to comply with the cited standard. Cleveland maintains that three or four additional fire extinguishers also were located in its job trailer (Tr. 123, 130, 167); however, none of the extinguishers were rated higher than 10-B:C, or were located closer than 110 feet from the fuel tank (Tr. 124, 130).

Infeasibility

Cleveland argues that literal compliance with the distance requirement of the cited standard was impractical (Tr. 124, 137, 169; Written Argument of Employer/Respondent, p. 2). Riachi testified that the handle and pin on the extinguisher could freeze if wet, rendering the extinguisher inoperative (Tr. 125-26). There were four days in December 1991 on which both precipitation and below freezing temperatures were recorded (Tr. 128).

CO Pratins admitted that water freezing in the extinguisher's trigger could impair its operation (Tr. 61). Pratins stated, however, that Cleveland could have protected against the weather by constructing a wooden shelter to house the extinguisher (Tr. 60).

In order to establish the affirmative defense of infeasibility, an employer must show that there is no way to use the measures prescribed under the cited standard without unreasonably disrupting the employer's work activities. *Seibel Modern Mfg. & Welding Corp*, 15 BNA OSHC 1218, 1228, 1991 CCH OSHD ¶29,442, p. 39,685 (No. 88-821, 1991). Cleveland failed to demonstrate the infeasibility of constructing a shelter to protect its fire extinguisher from the elements, while keeping the extinguisher within the prescribed distance. Therefore, it has failed to make out the affirmative defense of infeasibility.

Greater Hazard

Cleveland also argues that compliance with the standard would have resulted in a greater hazard to employees (Tr. 124, 137, 169; Written Argument of Employer/Respondent, p.2).

In order to establish the affirmative defense of a greater hazard, the employer must show, *inter alia*, that an application for a variance from the standard's requirements would be inappropriate. *See Walker Towing Corp.*, 14 BNA OSHC 2072, 2078, 1991 CCH OSHD ¶29,239, p. 39,161 (No. 87-1359, 1991). Cleveland failed to introduce any evidence showing that a variance would have been inappropriate. Rather, it is clear from the evidence that Cleveland never considered applying for a variance, because neither Small nor Riachi were aware of the requirement that an extinguisher be maintained within 75 feet of a fueling area (Tr. 138, 169).

Alternative Protection

Cleveland also argues that it provided alternative protection equal to the 20-B:C rated extinguisher required by the standard by making available multiple extinguishers rated at 10-B:C. An employer may substitute an alternative form of protection for that required by a §5(a)(2) standard, however, only if literal compliance is

excused under a recognized affirmative defense. *Wander Iron Works, Inc.*, 8 BNA OSHC 1354, 1355, 1980 CCH OSHD ¶24,457, p. 29,859 (No. 76-3105, 1980). Because Cleveland failed to make out either of its affirmative defenses, it may not argue that alternative methods of protection were equivalent to those required under §1926.152(g)(11).

Penalty

The cited violation is characterized as "serious." According to §17k of the Act, a violation is considered serious if the violative condition or practice gives rise to a "substantial probability" that death or serious physical harm would result if an accident were to occur. *Whiting-Turner Contracting, Co.*, 13 BNA OSHC 2155, 2157, 1987-90 CCH OSHD ¶28,501, p. 37,772 (No. 87-1238, 1989). In this case, were a fire to occur, fire extinguishers were available 25 feet further than the 75 feet dictated by the standard. Riachi testified, without contradiction, that Cleveland employees were instructed as to the location of the extinguishers, and that the four or five extinguishers in the trailer would cover twice as much area as the 20-B:C extinguisher required. The record does not support a finding that the cited violation was serious, and the cited violation will be affirmed as "other than serious."

The Secretary has proposed a penalty of $1,625.00. The alleged violations of §1926.152(g)(9) and (11) were grouped and characterized as "serious," because the two violations involved "related hazards that may increase the potential for injury resulting from an accident." Because the alleged violation of §1926.152(g)(9) will be vacated, and the remaining citation found "other than serious," the proposed penalty is deemed excessive.

Cleveland is a medium sized employer, with 200 employees at the Willoughby site. No evidence of a history of OSHA violations, or of bad faith on the part of Cleveland, was adduced at the hearing. The gravity of the violation is low, because means of controlling fire hazards, though insufficient to comply with the cited standard, were available at Cleveland's worksite.

Taking into consideration the relevant factors, a penalty of $500.00 is deemed appropriate.

## Alleged Violation of §1926.59(e)(2)

The cited standard requires that employers who use or store hazardous chemicals at their workplace in such a way that the employees of other employers may be exposed (such as contractors at multi-employer worksites), include in their written hazard communication program the methods the employer will use to: make material safety data sheets available; inform other employers of any precautionary measures that need to be taken to protect their employees,and inform other employers of the labeling system used in the workplace.

It is undisputed that Cleveland was the general contractor on the Willoughby site (Tr. 37). Cleveland's Safety Coordinator admits that its written hazard communication program did not include the methods it would use to provide the required information (Tr. 144-147).

Therefore, the cited violation will be affirmed.

## Conclusions of Law

1. The Secretary failed to establish that Cleveland had either actual or constructive knowledge of the absence of the "no smoking" sign on its diesel fuel tank.
2. Cleveland failed to establish that housing a properly rated fire extinguisher within 75 feet of its diesel fuel tank was infeasible.
3. Cleveland failed to establish the affirmative defense of "greater hazard."
4. Cleveland was in violation of §1926.152(g)(11) on December 12, 1991.
5. Cleveland was in violation of §1926.59(e)(2) on December 12, 1991.

## Findings of Fact

All findings of fact relevant and necessary to a determination of the contested issues have been found specially and appear in the decision above. See Rule 52(a) of the Federal Rules of Civil Procedure. Proposed Findings of Fact that are inconsistent with this decision are denied.

## ORDER

1. "Serious" citation 1, item 1a, alleging violation of §1926.152(g(9), is VACATED.

2. "Serious" citation 1, item 1b, alleging violation of §1926.152(g)(11), is AFFIRMED as an "other than serious" violation, and a penalty of $500.00 is ASSESSED.

3. "Other than serious" citation 2, alleging violation of §1926.59(e)(2) is AFFIRMED without penalty.

James A. Cronin, Jr.
Judge, OSHRC

Dated: March 26, 1993