



UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR
Complainant,
v.

CONTAINER CORPORATION OF AMERICA
Respondent.

OSHRC DOCKET
NO. 92-1310

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 November 10, 1993. The decision of the Judge will become a final order of the Commission on December 10, 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 November 30, 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) 606-5400.

FOR THE COMMISSION

Ray H. Darling, Jr.
Executive Secretary

Date: November 10, 1993

DOCKET NO. 92-1310

NOTICE IS GIVEN TO THE FOLLOWING:

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SECRETARY OF LABOR,	:	
Complainant,	:	
 v.	:	OSHRC Docket No. 92-1310
 CONTAINER CORPORATION OF	:	
AMERICA,	:	
Respondent.	:	

Appearances:

Rafael Batine, Esq.
Office of the Solicitor
U. S. Department of Labor
Atlanta, Georgia
For Complainant

Robert A. Dimling, Esq.
Frost & Jacobs
Cincinnati, Ohio
For Respondent

Before: Administrative Law Judge Paul L. Brady

DECISION AND ORDER

This proceeding is brought pursuant to § 10 of the Occupational Safety and Health Act of 1970 (Act) to contest one citation and proposed penalty issued by the Secretary of Labor (Secretary) pursuant to § 9(a) of the Act. Prior to the hearing in this cause, the parties resolved all of the issues involved except the alleged violations contained in Items 8, 12 and 19 of the citation.¹

Respondent, Container Corporation of America (Container), operated a paper manufacturing facility in Fernandina Beach, Florida, at all times pertinent hereto. Three

¹ A duly executed settlement agreement was filed which has become part of the record.

large paper machines were operated 24 hours per day, seven days a week. The alleged violations were associated with the machines and the paper making process.

Alleged Violation of 29 C.F.R. § 1910.261(a)(3)(xviii)

This standard incorporates the Requirements for Sanitation in Places of Employment. USAS Z4.1-1968. Section 3.1.2 of the requirements states:

The floor of every workroom shall be maintained in a clean and, so far as possible, a dry condition. Where wet processes are used, drainage shall be maintained, and false floors, platforms, mats, or other dry standing places should be provided where practicable.

The alleged violation is described in the citation as follows:

The floor of every workroom maintained was not in a clean and so far as possible a dry condition. Where wet processes were used, drainage was not maintained, and false floors, platforms, mats, or other dry standing places were not provided where practical:

- a. Basement level: Paper machines three and four; oil, water pulp were on the floor on the east and west sides of each paper machine.
- b. Ground level: North section of the main passageway; water was on the floor.
- c. Operations level: Paper machine #2, North section; water was on the floor.

Mr. Anthony Will, occupational safety and health specialist, conducted the inspection that resulted in issuance of the citation. He testified that there was water and an oily, greasy substance on the floor under machines 3 and 4, where an employee was working (Exh. C-4; Tr. 15-18).

Mr. Charles Johnson, mechanic and president of the local employee's union, testified about disclosure of his safety concerns to Container. He related that on April 10, 1991, he presented a document to the safety director containing safety items to be addressed. Items listed included the presence of oil and wet and slippery floors. These conditions were brought to the attention of management again on July 11 and September 15, 1991, noting the oil in the basement was "untouched" (Exh. C-25; Tr. 39-40).

Mr. Michael Holden, machine manager for Container, testified about the machinery and paper making process. He explained that the number 3 machine, for example, was about 20 feet wide, over 400 feet long and occupied two floor levels at nearly 70 feet high (Tr. 66-67). The process begins with a mixture of ½% fiber and 99½% water, with the water being removed at about 40,000 gallons per minute. The mixture leaves the first process about 27% fiber and 63% water and moves to the press section. With a combination of belts and rolls, it exits the press section 47% paper and 53% water and enters the dryer section, where it wraps around steel cans filled with steam. Considered paper upon leaving the dryers, it contains about 6% water. The paper goes through an ironing out process and is then wrapped on spools (Tr. 69-70).

Mr. Holden further explained about the system for draining the water. In the initial process, a large catch basin about the size of an olympic swimming pool carried the water from the area. In the press section, water is pumped to another catch basin in the machine. Also, there are drains that run the length of the machine on both sides.

Mr. Holden noted that the many rotating parts with bearings and gears require a large amount of lubrication. He stated that, "we try to keep the operating floor cleaned once a day," and the basement level is washed down with water hoses "probably two to three times a week" (Tr. 72-74). A degreaser is used on a routine basis to clean the floors and accumulations of dust are removed in the dryer section on a weekly basis (Tr. 75-76). He maintained that because of the water involved in the process, platforms, applications of surface compounds and other alternatives are not feasible to alleviate the wet conditions (Tr. 77-78).

The Commission has held that in order to establish a violation, 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 known 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).

Container first contends that the cited standard does not apply in this case because § 1.2 of the Sanitation Requirements states:

The purpose of this standard is to prescribe minimum sanitary requirements for the protection of the health of employees covered by this standard.

It is, therefore, argued that these requirements are directed toward maintaining the workplace in a sanitary condition, which is defined at § 2 as follows:

Sanitary Condition. Within the meaning of the code, that physical condition of working quarters which will tend to prevent the incidence and spread of disease.

The requirements applicable in this case clearly pertain to measures designed to protect the health of employees. It is also clear that the evidence does not indicate employees were exposed to any specific health hazards, as the Secretary alleges the presence of water and oil created fall hazards.

The evidence of record shows there is merit to Container's contention that the standard does not apply in this case. The compliance officer agrees that the standard's purpose is to address sanitation. Therefore, a valid question remains as to whether a violation occurred on the basis of sanitation. The issue is whether the Secretary has established by a preponderance of evidence that the floors were "maintained in a clean and, so far as possible, a dry condition."

There is no dispute that Container operates a "wet process." The evidence also shows that drainage is maintained at both the operating and basement levels, and the basement level is sloped to facilitate drainage. It is indicated that because of the constant presence of water and steam, platforms or dry standing places are not practicable (Tr. 77).

The testimony regarding the presence of oil indicates it "apparently dropped down from the paper machines up above" (Tr. 18). With the need for lubrication of the numerous moving parts, it is reasonable to assume that some oil would drip to the floor. Routine cleaning, as explained by Container's witnesses, shows the floors were adequately maintained. Although mechanic Johnson stated oil remained "untouched" over a period of time, it is not indicated it was the same oil. In light of the undisputed evidence of routine cleaning, it must be concluded that the same oil did not remain in place beyond a short period of time. The evidence does not show that more drainage, better platforms, or other dry standing places would be more effective.

There is no question in this case regarding the difficulty in maintaining clean and dry floors, due to the nature of the work. The conditions existing at Container's plant were shown to be consistent with those in other plants involved in the paper making process (Tr. 77-78). The Secretary did not establish by a preponderance of the evidence that Container failed to comply with the terms of the standard.

Alleged Violation of 29 C.F.R. § 1910.261(b)(2)

The standard requires in pertinent part as follows:

Foot protection, shinguards, hard hats, noise attenuation devices, or other personal protective clothing and equipment shall be worn when the extent of the hazard is such as to warrant their use.

The citation alleges that "aprons, welding jackets and/or sleeves were not provided to workers performing welding operations under pipes, exposing employees to a fire hazard." The compliance officer testified that welders were not provided with aprons, welding jackets and sleeves. He stated he discussed the matter with the safety director, who revealed Container did not have this protective equipment for its welders (Tr. 21-22).

Container's stock issue clerk testified that aprons and jackets are not kept for use as protective equipment. He indicated, however, that protective equipment is issued to employees, "Whatever that they need" (Tr. 57). Welders are obviously included as employees.

The cited standard does not specify what type of protective clothing and equipment must be worn when a hazard "warrants their use." In this case, the inspecting officer did not observe the welding operation (Tr. 21). Also, the record does not show by a preponderance of evidence that the alleged hazard existed or of employee exposure thereto. It is not established that more protective clothing and equipment was necessary than that provided by Container.

The standard was not violated as alleged.

Alleged Violation of 29 C.F.R. § 1910.261(k)(11)

The standard which pertains to steam and hot-water pipes states as follows:

All exposed steam and hot-water pipes within 7 feet of the floor or working platform or within 15 inches measured horizontally from stairways, ramps, or fixed ladders shall be covered with an insulating material, or guarded in such manner as to prevent contact.

The citation alleges that in the paper mill, "the steam piping on paper machines three and four was not fully insulated, nor quartered, exposing employees to the hazards of burns." The compliance officer testified that during his inspection, he observed numerous steam pipes that were not insulated (Exhs. C-19, C-20; Tr. 23). The pipes were in use and he could see some steam (Tr. 26, 27).

Ms. Nellie Jubito, an oiler on number 4 paper machine, testified that in performing her work, she got "within two to three feet" of several uninsulated pipes (Tr. 52, 53). Mr. Johnson stated that on several occasions, Container was informed in writing of this condition (Tr. 44).

A review of the record discloses a lack of evidence that steam pipes "within seven feet of the floor or a working platform or within 15 inches measured horizontally from stairways, ramps, or fixed ladders" were uninsulated. The Secretary's witnesses and evidence fails to show that uninsulated pipe was within the specified dimensions or in a location that would violate the standard. Container's motion to dismiss that part of the citation alleging violation of 29 C.F.R. § 1910.261(k)(11) is granted.

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

1. The agreements of the parties, both written and oral as stated in the record, are approved and incorporated as part of this decision.

2. Citation No. 1, alleging violations of 29 C.F.R. § 1910.261(a)(3)(xviii), 29 C.F.R. § 1910.261(b)(2), and 29 C.F.R. § 1920.261(k)(11) are hereby vacated.

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

Date: November 2, 1993