



UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
One Lafayette Centre
1120 20th Street, N.W. — 9th Floor
Washington, DC 20036-3419

PHONE:
COM (202) 606-6100
FTS (202) 606-6100

FAX:
COM (202) 606-6000
FTS (202) 606-6000

SECRETARY OF LABOR
Complainant,
v.
WEST TEXAS WAREHOUSE COMPANY
Respondent.

OSHRC DOCKET
NO. 92-3886

**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 February 25, 1994. The decision of the Judge will become a final order of the Commission on March 28, 1994 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 March 17, 1994 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
1120 20th St. N.W., Suite 980
Washington, D.C. 20036-3419

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) 606-5400.

FOR THE COMMISSION

Ray H. Darling, Jr.

Ray H. Darling, Jr.
Executive Secretary

Date: February 25, 1994

DOCKET NO. 92-3886

NOTICE IS GIVEN TO THE FOLLOWING:

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

James E. White, Esq.
Regional Solicitor
Office of the Solicitor, U.S. DOL
525 Griffin Square Bldg., Suite 501
Griffin & Young Streets
Dallas, TX 75202

Don Graf, Esq.
McCleskey, Harriger, Brazill & Graf
P.O. Box 6170
Lubbock, TX 79493

Stanley M. Schwartz
Administrative Law Judge
Occupational Safety and Health
Review Commission
Federal Building, Room 7B11
1100 Commerce Street
Dallas, TX 75242 0791

00107406829:06

Respondent owns approximately 852,000 square feet of warehouse space in a warehouse district in Lubbock, Texas; the company uses about a fourth of the space for its own warehousing operation and leases the rest. In the early morning of June 9, 1992, some batteries stored in a section of one of the leased warehouses ignited; the warehouse consisted of several separate sections, each with its own individual door, and only Lack Transfer & Storage ("Lack"), the lessee, had a key to the section where the fire occurred. The City Fire Department responded to the fire and gained access to the building after Carlos Flores, a Lack employee, arrived; Raymond Marmolejo, one of Respondent's supervisors, had arrived earlier. (Tr. 17-21; 38-39; 55-59; 88-89; 92-93; 107-09; 112-13).

The warehouse sprinkler system had controlled the fire, and after ventilating the building firemen in protective gear went in. There were a number of pallets with batteries in cardboard boxes on them, eight to ten of which had been involved in the fire; these pallets were separate from the rest and had hazardous waste labels on them, as did most of the boxes stored in the space. The Fire Department and Flores removed the pallets which had been involved in the fire and placed them in a dirt lane outside the warehouse; they were removed with a forklift belonging to Respondent with the permission of Rusty Vernon, a manager with the company. Also present by this time were representatives of the Fire Marshal's office and the Texas Water Commission ("TWC").² These representatives as well as Fire Department officials were present throughout the day, and Respondent posted a guard at the warehouse that evening in case a fire recurred.³ (Tr. 21-30; 33-37; 42-50; 73-74; 103-04; C-1-2).

TWC and the Fire Department were concerned that it might rain and that the batteries could reignite if left outside, and on June 10, since Lack was unwilling to do anything about the situation, representatives of those agencies talked to Vernon about

²TWC's concern was the proper storage of the batteries and the disposal of the runoff water from the sprinkler system. (Tr. 51-54; 59-60).

³The guard remained posted on a twenty-four-hour basis for over a week until the Environmental Protection Agency took over and began cleaning up the site, and a small fire did, in fact, recur inside the warehouse on June 15. (Tr. 52-53; 97; 103-05).

moving the pallets back into the warehouse. Vernon had Marmolejo and several other employees, in the presence of a Fire Department official, attempt to put the batteries back inside; on the advice of the Fire Department, the employees wore gloves and rubber boots. Two or three intact pallets were replaced with a forklift without incident; however, some of the boxes had come apart, and as the employees were putting those batteries into metal barrels with shovels the batteries began smoking and the Fire Department official told the employees to stop. The pallets which had been replaced were removed again, and all the affected batteries were left outside covered with plastic purchased by Respondent. Respondent also paid to have the runoff water resulting from the sprinkler system cleaned up; a company named Bergstein Oil performed this work. (Tr. 52-56; 59-87; 90-91; 94-111; 146-47).

On June 11, an OSHA compliance officer ("CO") arrived at the site and conducted an inspection pursuant to a referral from a public employee. The CO spoke to TWC and Fire Department officials who were present, as well as Vernon and the other employees of Respondent who were at the site. The citation issued to Respondent as a result of the inspection, noted above, was based on the CO's determination that the employees involved in the June 10 cleanup effort had been exposed to hazardous chemicals and that the company did not comply with the requirements of 1910.120; specifically, the citation alleges that the company did not have a written program to provide for emergency response for hazardous waste operations, that appropriate personal protective equipment was not used, that employees were not informed of the risks involved and did not receive appropriate training, and that no decontamination procedure was developed or implemented. (Tr. 117-42).

Decision

The company's position is that the citation should be vacated because it is not in the business of handling hazardous waste and that it was merely responding to the instructions of public officials in an emergency situation. The Secretary, on the other hand, contends that the citation should be affirmed notwithstanding the foregoing because employees were

exposed to hazardous chemicals and there was no compliance with the subject standards.⁴ This contention is rejected. The un rebutted testimony of record shows that Respondent does not normally engage in hazardous waste operations and that it had no knowledge the batteries stored in its warehouse were hazardous, that Lack was unwilling to take responsibility for the situation, and that the company was, in fact, responding to what it considered an emergency at the direction of public officials. (Tr. 51-56; 70-71; 79-80; 84-85; 92-93; 96-111; 144-47). Under these circumstances, it is concluded that the company's actions were reasonable and that the citation was inappropriately issued; accordingly, all five items are vacated.

Conclusions of Law

1. Respondent, West Texas Warehouse Company, is engaged in a business affecting commerce and has employees within the meaning of section 3(5) of the Act. The Commission has jurisdiction of the parties and of the subject matter of the proceeding.

2. On June 10, 1992, Respondent was not in violation of 29 C.F.R. §§ 1910.120(b)(1)(i), 1910.120(c)(5)(i), 1910.120(c)(7), 1910.120(e)(1)(i) and 1910.120(k)(2)(i).

Order

On the basis of the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Items 1 through 5 of serious citation number 1 are VACATED.


Stanley M. Schwartz
Administrative Law Judge

Date: FEB 15 1994

⁴The Secretary has not filed a post-trial brief in this matter; however, his position was stated at the beginning of the hearing. (Tr. 4-7).