



United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3419

Phone: (202) 606-5400
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SECRETARY OF LABOR
Complainant,

v.

MOBILE RIVER TERMINAL CO.
Respondent.

OSHRC DOCKET
NO. 95-0099

**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 August 18, 1995. The decision of the Judge will become a final order of the Commission on September 18, 1995 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 September 7, 1995 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:

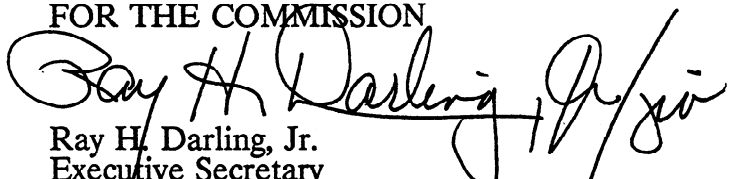
Executive Secretary
Occupational Safety and Health
Review Commission
1120 20th St. N.W., Suite 980
Washington, D.C. 20036-3419

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.
Executive Secretary

Date: August 18, 1995

DOCKET NO. 95-0099

NOTICE IS GIVEN TO THE FOLLOWING:

Associate Regional Solicitor
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SECRETARY OF LABOR,
Complainant,

v.

MOBILE RIVER TERMINAL CO., INC.,
Respondent.

OSHRC Docket No. 95-99

APPEARANCES:

Cynthia Welch-Brown, Esquire
Office of the Solicitor
U. S. Department of Labor
Birmingham, Alabama
For Complainant

David R. Peeler, Esquire
McRight, Jackson, Dorman, Myrick & Moore
Mobile, Alabama
For Respondent

DECISION AND ORDER

Mobile River Terminal Co., Inc. (MRT), owns and operates a marine terminal in Mobile Bay, Alabama. On September 27 and 28, 1994, Occupational Safety and Health Administration (OSHA) Compliance Officer John Thomas Burroughs inspected MRT's facilities. As a result of Burroughs' inspection, the Secretary issued a citation to MRT on December 9, 1994. The citation contains one item alleging that MRT committed a serious violation of § 1918.21(d) which requires that the space between a ship's gangway and the apron be bridged by a walkway if the foot of the gangway is more than one foot from the edge of the apron.

On September 27, 1994, Burroughs arrived at MRT's terminal as part of a programmed planned inspection (Tr. 5). Burroughs met with James Oberkirch, MRT's terminal manager (Tr. 7, 54). At that time, no work activity was being performed. Oberkirch and Burroughs arranged for Burroughs to return the following morning when a ship, the *Machados de Assis*, would be unloaded (Tr. 8, 55).¹

Burroughs arrived at MRT's terminal the following morning. Burroughs observed an MRT crane operator using a land-based crane to unload the ship's cargo. No MRT employees boarded the ship, except when Oberkirch accompanied Burroughs on his walkaround inspection (Tr. 56). MRT had contracted with Strachen Shipping, a stevedoring company whose employees were doing the actual unloading and clean-up of the ship (Exh. R-1; Tr. 58).

The gangway of the ship was positioned next to the ship's hull and parallel to the apron (Exh. C-1). The edge of the gangway closest to the edge of the apron overlapped the edge of the apron by 2 or 3 inches (Tr. 31, 36). Burroughs did not measure the width of the gangway (Tr. 33).

The Secretary alleges that MRT violated § 1918.21(d), which provides:

If the foot of the gangway is more than one foot away from the edge of the apron, the space between them shall be bridged by a firm walkway equipped with railings with a minimum height of approximately 33 inches with mid-rails on both sides.

MRT raises a number of defenses to this charge, including challenges to the applicability of the standard to marine terminals and the multi-employer doctrine. It is not necessary to address these defenses, however, because the Secretary failed to carry his burden of proof.

To establish a violation of a standard, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies, (2) its terms were not met, (3) employees had access to the violative condition, and (4) the employer knew or could have known of it with the exercise of reasonable diligence. *Seibel Modern Mfg. & Welding Corp.*, 15 BNA OSHC 1218, 1221 (No. 88-821, 1991).

¹ Although there is conflicting testimony whether the ship was being loaded or unloaded, the Secretary concedes it was being unloaded.

The Secretary has failed to establish that § 1918.21(d) applies or that its terms were not met. The standard applies only in cases where the foot of the gangway is “more than one foot away from the edge of the apron.” That is clearly not the situation in the present case. The compliance officer testified that the edge of the gangway overlapped the apron by 2 or 3 inches (Tr. 36). Exhibit C-1 shows the gangway overhanging the apron.²

The Secretary interprets the standard to mean that if *any part* of the foot of the gangway is more than a foot away from the edge of the apron, then the space must be bridged. But this is not what the standard says, and it is not a reasonable interpretation of the standard. The most logical interpretation of the standard is: If the *closest surface* of the foot of the gangway is more than a foot away from the edge of the apron, then the space must be bridged. “Bridging” implies that there is some gap that needs to be closed. The standard requires that “the space between the foot of the gangway and the edge of the apron be bridged.” There is no space to be bridged in the configuration in the present case. An employee could walk from the apron to the foot of the gangway without stepping over a gap. Under the Secretary's interpretation, “the whole gangway has to be less than a foot away” because so much of the gangway remained over water” (Tr. 31).

The Secretary has failed to establish that the foot of the gangway was more than a foot from the edge of the apron. MRT did not violate § 1918.21(d).

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

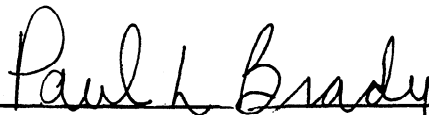
The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Federal Rule of Civil Procedure 52(a).

² The parties both interpret the standard as addressing horizontal, and not vertical, distance. Burroughs measured only the horizontal distance between the apron and the ship's hull (Tr. 12).

ORDER

Based upon the foregoing decision, it is ORDERED:

That the citation alleging a violation of § 1918.21(d) is vacated, and no penalty is assessed.



PAUL L. BRADY
Judge