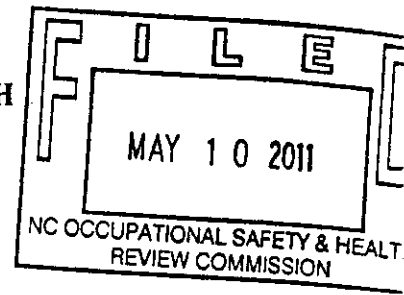


**BEFORE THE OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION OF NORTH CAROLINA**



COMMISSIONER OF LABOR OF
THE STATE OF NORTH CAROLINA,

COMPLAINANT,

DOCKET NO. OSHANC 2009-4855
OSHA INSPECTION NO. 312306566
CSHO ID NO. Z6819

v.

HOBBS WESTPORT MARINA, LLC.
and its successors

ORDER OF THE COMMISSIONERS

RESPONDENT.

DECISION OF THE REVIEW BOARD

This appeal was heard at or about 10:00 A.M. on the 1st day of February 2011, First Floor Board Room, North Carolina Medical Society Building, 222 North Person Street, Raleigh, North Carolina by Oscar A. Keller, Jr., Chairman, Dr. Richard G. Pearson and Janice Smith Gerald, Members of the North Carolina Occupational Safety and Health Review Commission.

APPEARANCES

Complainant: Daniel D. Addison, Special Deputy Attorney General; North Carolina Department of Justice, Raleigh, North Carolina.

Respondent: Phillip M. Van Hoy; Van Hoy, Reutlinger, Adams & Dunn, Charlotte, North Carolina.

The undersigned have reviewed the prior Order based upon the record of the proceedings before the Hearing Examiner and the briefs and arguments of the parties.

The Commission affirms with modifications the Order of Hearing Examiner Tuttle.

DATABASE
5-10-11
CB

ISSUES PRESENTED

1. Whether Hobbs Westport Marina had knowledge of the violation?
2. Whether the Hearing Examiner was in error in rejecting the Respondent's defense of impossibility of compliance?

SAFETY STANDARDS AND/OR STATUTES AT ISSUE

29 CFR 1910.106(g)(4)(i)(c) Dispensing nozzles shall be automatic-closing without a hold- open latch.

Note: This subpart is speaking only about marine service stations.

FINDINGS OF FACT

1. This case was initiated by a notice of contest which followed citations issued to the Respondent to enforce the Occupational Safety and Health Act of North Carolina (OSHANC or Act), N.C. Gen. Stat. §§ 95-126 et seq.
2. The Commissioner of Labor (Complainant) is responsible for enforcing OSHANC (N.C. Gen. Stat § 95-133).
3. The Respondent is an employer within the meaning of N.C. Gen. Stat § 95-127 and is subject to the Act N.C. Gen. Stat § 95-128.
4. The undersigned have jurisdiction over this case pursuant to N.C. Gen Stat. § 95-125.
5. On November 25, 2009, as a result of the inspection, Complainant issued to Respondent several citations including the only one at issue in this decision:

Citation 1, Item 1, alleging a serious violation of 29 CFR 1910.106(g)(4)(i)(c), with a proposed adjusted penalty of \$700.00.
6. Between June 11, 2008 and November 24, 2008, Rebecca Warr, Safety Compliance Officer (SCO), and Robert Kastenhuber, Safety Compliance Officer (SCO), employed by the

North Carolina Department of Labor, inspected Respondent's work site located at 7879 Water Oaks Drive, Denver, North Carolina, hereinafter referred to as "the site." Officers Warr and Kastenhuber properly entered onto Respondent's site and properly conducted the inspection in response to a fatal accident report.

7. Prior to beginning their inspection, SCO Warr and Kastenhuber conducted an opening conference with Lowry Hobbs, president and manager of Respondent, and Anne Hobbs, office manager of Respondent. Permission was granted to conduct an OSH inspection.

8. During the inspection, SCO Warr and Kastenhuber took and collected photographs, interviewed witnesses, and made notes.

9. Respondent operated a marina on Lake Norman. The marina put boats and personal water craft into the water and took them out of the water, provided docking, sold sundries, and maintained a fueling station for boats where Respondent's dock hands pumped gasoline into boats docked at the marina.

10. The accident that prompted the inspection occurred at Respondent's marina on June 10, 2008. An 80 foot long, three level, gasoline powered motorized yacht had returned from a day cruise and was docked at the marina. A worker was refueling the yacht. The worker was regularly employed by Respondent as a deck hand. However, on the day of the accident, the worker was employed for the day by the owner of the yacht as a crew member. Prior to the accident, the worker took a gasoline hose and nozzle from one of the marina's four gasoline dispensers to one of the gasoline fueling ports at the stern of the yacht. While the fuel was being pumped into the yacht, the worker did other chores on and about the boat. When the worker then returned to the area of the yacht's fuel port, a gasoline vapor explosion occurred there. The explosion caused concrete tile on the deck of the marina's dock to fly into the air and break apart. The fire burned the gasoline dispenser on the dock from which the gasoline was flowing to the yacht. The yacht caught on fire and eventually sank. Emergency services were summoned. After the fire was extinguished, the boat was raised, and the worker was found in the back of the boat in the area of the fuel port. The worker had died from injuries sustained in the explosion.

11. 29 CFR 1910.106 (g)(4)(i)(c) requires that gasoline dispenser nozzles at marine service stations be automatic closing without hold-open latches.

12. All of the nozzles on the fuel hoses of the Respondent's gasoline dispensers were automatic closing with hold-open latches. The automatic closing devices on the nozzles were designed to stop the flow of gasoline automatically when a boat's fuel tank was full and gasoline backed up in the boat's fuel port, covering the nozzle. The hold-open latches were spring-loaded devices that were locked into place manually, allowing the fuel levers of the fuel nozzles to be held open without the person doing the fueling having to squeeze the levers continuously. The hold-open latches permitted persons doing the fueling to do other things besides squeezing the levers on the fuel nozzles while the boats were being fueled.

13. If a hold-open latch is engaged while a boat is being fueled, and if the automatic closing device does not properly stop the flow of fuel when the boat's fuel tank is full, the flow of gasoline can continue and the gasoline can overflow the fuel tank.

14. A gas tank overflow may result in gasoline getting into the passenger area and electrical equipment which could create fire hazards including an explosion.

15. Waves may cause boat movement which could possibility result in a gasoline fuel nozzle coming out of the fuel port and falling into the boat. If the hold-open latch is engaged when this happens, fuel can continue to be pumped directly into the boat until someone disengages the hold-open latch. SCO Warr testified that this happened before at Respondent's marina.

16. Lowry Hobbs testified that he was not aware that hold-open latches on marine gasoline nozzles violated an OSHA standard. However, he was aware that the gasoline nozzles at the marina had hold-open latches. Lowry Hobbs and his son Alan Hobbs trained their dock employees to use the hold-open latch when they were trained on fueling.

17. Lowry Hobbs testified that the hold-open latches were on the fuel nozzles when the marina was purchased in 2004.

18. Respondent's employees worked on and about the dock while hold-open latches on the fuel nozzles were engaged. The employees were exposed to the hazards of fire and explosion that could occur if gasoline overflowed from the boat fuel tanks.

19. It is substantially probable that employees would be burned or killed from a gasoline vapor fire explosion occurring from gasoline overflow from a boat's gasoline tank.

20. Complainant assessed a proposed adjusted penalty of \$700.00 for the violation cited in Citation 1, Item 1. This penalty was calculated in accordance with the Department of Labor's field operation manual and is appropriate.

21. Respondent asserted a defense of impossibility to comply with the standard. Lowry Hobbs testified that after the 2008 explosion and fire, he had explored the possibility of either removing the hold-open latches on his gasoline dispenser nozzles, or obtaining new nozzles without such latches, and that he has not found a way to do so. Mr. Hobbs acknowledged that he searched on the Internet and found nozzles that comply with the standard. He said he had not yet found a supplier for those nozzles.

22. SCO Warr testified that the gasoline dispenser nozzles at Midtown Marina, another marine service station on Lake Norman, did not have hold-open latches. The Lincoln County Fire Marshal, whom Respondent called as its own witness at the hearing, testified that he was aware that Midtown Marina was able to comply with the OSHANC standard and had come into compliance after the 2008 explosion and fire at Respondent's marina.

23. SCO Warr testified that she spoke with Chris and Arthur Wilson of Petroleum Equipment and Supply, the company that supplied nozzles at Respondent's marina. They told SCO Warr that they supplied Sunoco stations with nozzles that did not have hold-open latches. They told SCO Warr that they could take off the hold-open latches if the customer requested it.

24. Mr. Hobbs admitted at the hearing that the president of Husky (the company that manufactured some or all of Respondent's nozzles) came to Respondent's marina during Complainant's inspection, and left word that Husky would provide written documentation for how to remove the hold-open latches because the nozzles have to also be UL approved.

25. The evidence does not support Respondent's claim that it was impossible for Respondent to obtain gasoline dispenser nozzles without hold-open latches or to modify its existing nozzles so they did not have hold-open latches.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the Commission concludes as a matter of law as follows:

1. The foregoing findings of fact are incorporated as conclusions of law to the extent necessary to give effect to the provisions of this Order.
2. The Commission has jurisdiction of this cause, and the parties are properly before this Commission.
3. The Respondent is an employer within the meaning of N.C. Gen. Stat § 95-127 and is subject to the Act N.C. Gen. Stat § 95-128.
4. Respondent has committed a serious violation of 29 CFR 1910.106(g)(4)(i)(c), in that the gasoline dispenser nozzles at Respondent's marine service station had hold-open latches. The penalty of \$700.00 is appropriate.
5. Respondent has raised the defense of impossibility of compliance, which is an affirmative defense. Respondent has failed to prove impossibility of compliance by a preponderance of the evidence. To establish the defense, the employer must establish either that compliance with the standard would preclude performance of the required work or that compliance would be functionally impossible. The employer must also show that alternative means of protection were unavailable. Brooks v. Austin Berryhill Fabricators, Inc., 102, N.C. App. 212, 401 S.E.2d 795 (1981). Respondent failed to present convincing evidence that it made actual attempts at compliance since it argued that, in fact, it had no knowledge of the standard.

DISCUSSION

The Respondent, Hobbs Westport Marina, did not challenge the Hearing Examiner's findings of fact that all of the nozzles on the fuel hoses at the marina had hold-open latches as prohibited by the standard. Nor did they dispute the finding that Lowry Hobbs and others knew that the marina gas tanks had hold-open latches. The Respondent only contended that they did not know of the existence of the prohibition on hold-open latches found in 29 CFR 1910.106(g)(4)(i)(c). This poses the question: **Did the employer have to know of the standard in order to be held responsible for violating the standard?** **No.** It is not necessary that an employer have knowledge of the standard. Ignorance of the law is not an excuse. Finding to the contrary would undermine the very purpose of OSHA standards, which is to keep NC workers safe. If this were not enforced, employers could purposefully maintain a lack of knowledge about OSHA standards. We want employers to seek to educate themselves about the standards and how they can keep their employees safe. The Occupational Safety and Health Division of the North Carolina Department of Labor provides many free resources available to employers to help them in their endeavors to create and maintain a safe workplace including a large lending library which has videos and books available through the mail, classes offered by NC Department of Labor Bureau of Education, Training, & Technical Assistance, and consultative visits which an employer may request from Consultative Services.

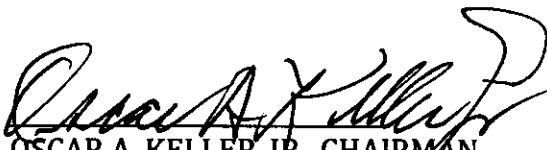
Another point to consider in the case is that **we are looking at a specific OSHA standard as opposed to something under the general duty clause.** The standard set forth in 29 CFR § 1910.106(g)(4)(i)(c) requires that gasoline dispenser nozzles at marine service stations be automatic closing without hold-open latches. The employer had hold-open latches. The employer knew that he had hold-open latches. Where violation of a specific standard is alleged, the issue of employer knowledge speaks only to the existence of the violative condition.

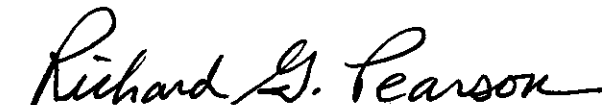
Respondent's affirmative defense of impossibility to comply is found to be without merit. Impossibility of compliance is an affirmative defense, and the Respondent has the burden of proving it by a preponderance of the evidence. *Brooks v. Berryhill Fabricators, Inc.*, 102 N.C. App. 212, 216, 401 S.E.2d 795, 798 (1991). Credible evidence was presented at hearing that nozzles in compliance with the standard were available. Lincoln County Fire Marshall Mike Futrell testified that another marina on Lake Norman has come into compliance since the incident. Mr. Futrell also testified that as newer marine service stations are built, they are in compliance with the NC Fire Code's prohibition on hold-open latches. In addition, the Respondent has consistently argued that it had no knowledge of the standard, therefore it could not have made actual attempts at compliance before the incident occurred which led to the citation.


ORDER

For the reason stated herein, the Review Commission hereby **ORDERS** that the Hearing Examiner's June 22, 2010, Order in this cause be, and hereby is, **AFFIRMED**, to the extent that it is not inconsistent with this opinion; and Respondent is found to have committed a serious violation of 29 CFR § 1910.106(g)(4)(i)(c). Respondent is further **ORDERED** to abate the violations and to pay the assessed penalty of \$700.00 within 30 days of the filing date of this Order.

This the 10th day of May, 2011.


OSCAR A. KELLER, JR., CHAIRMAN


RICHARD G. PEARSON, Ph.D, MEMBER


JANICE SMITH GERALD, MEMBER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this date served a copy of the foregoing ORDER OF THE COMMISSIONERS, upon:

PHILIP M VAN HOY
VAN HOY REUTLINGER ADAMS & DUNN
737 EAST BOULEVARD
CHARLOTTE NC 28203

by depositing same the United States Mail, Certified Mail, postage prepaid, at Raleigh, North Carolina, and upon:

DANIEL ADDISON
NC DEPARTMENT OF JUSTICE
LABOR SECTION
P O BOX 629
RALEIGH NC 27602-0629

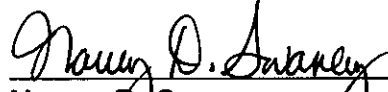
by depositing a copy of the same in the United States Mail, First Class;

NC DEPARTMENT OF LABOR
LEGAL AFFAIRS DIVISION
1101 MAIL SERVICE CENTER
RALEIGH NC 27699-1101

by depositing a copy of the same in the NCDOL Interoffice Mail.

THIS THE 11th DAY OF May 2011.

OSCAR A. KELLER, JR.
CHAIRMAN


Nancy D. Swaney

Docket and Office Administrator
NC Occupational Safety & Health Review Commission
1101 Mail Service Center
Raleigh, NC 27699-1101
TEL.: (919) 733-3589
FAX: (919) 733-3020