

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

COMMISSIONER OF LABOR OF
THE STATE OF NORTH CAROLINA,

COMPLAINANT/PETITIONER,

v.

QUALITY OIL COMPANY LLC.
and its successors

RESPONDENT/CROSS-PETITIONER.

DOCKET NO. OSHANC 20135489
OSHA INSPECTION NO. 316741255
CSHO ID NO. U4169

ORDER OF THE COMMISSIONERS

DECISION OF THE REVIEW COMMISSION

This appeal was heard at or about 10:00 A.M. on the 21st day of April 2016, in the OAK Courtroom, Lee House, 422 North Blount Street, Raleigh, North Carolina, by Arlene K. Edwards, Chairman, Dr. Richard G. Pearson, and Frank P. Ward, Jr, Members of the North Carolina Occupational Safety and Health Review Commission.

APPEARANCES

Complainant: Larissa S. Williamson, Special Deputy Attorney General; North Carolina Department of Justice, Raleigh, North Carolina.

Respondent: John J. Doyle; Constangy, Brooks, & Smith, LLP Winston-Salem, North Carolina.

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

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DATABASE
PW

ISSUES PRESENTED

- I. **WHETHER THE SUMP PUMP WAS A PERMIT-REQUIRED CONFINED SPACE?**
- II. **WHETHER THE EMPLOYER HAD FAIR NOTICE REGARDING THE APPLICATION OF CONFINED SPACE STANDARD 29 CFR 1910.146?**
- III. **WHETHER THE DEPARTMENT OF LABOR PROVED A VIOLATION OF 29 CFR 1910.106(b)(6) CITATION 1 ITEM 1, AND IF SO, THEN DID THE HEARING EXAMINER HAVE EVIDENCE TO SUPPORT THE PENALTY REDUCTION OF CITATION 1 ITEM 1 WHICH DEALT WITH FLAMMABLE LIQUIDS?**
- IV. **WHETHER THE DEPARTMENT OF LABOR PROVED A VIOLATION OF CITATION I ITEM 3(a) 29 CFR 1910.1200(h)(1) HAZARD COMMUNICATION?**
- V. **WHETHER THE DEPARTMENT OF LABOR PROVED A VIOLATION OF CITATION 1 ITEM 3(b) 29 CFR 1910.1200 (e)(1)(i) HAZARD COMMUNICATION?**
- VI. **WHETHER THE DEPARTMENT OF LABOR PROVED A VIOLATION OF CITATION 2 ITEM 1 29 CFR 1904.39(a) REPORTING A FATALITY?**

SAFETY STANDARDS AND/OR STATUTES AT ISSUE

29 CFR 1910.106(b)(6) (Citation 1 Item 1)

In locations where flammable vapors may be present, precautions shall be taken to prevent ignition by eliminating or controlling sources of ignition. Sources of ignition may include open flames, lightning, smoking, cutting and welding, hot surfaces, frictional heat, sparks (static, electrical, and mechanical), spontaneous ignition, chemical and physical-chemical reactions, and radiant heat.

29 CFR 1910.146(c)(1) (Citation 1 Item 2a)

The employer shall evaluate the workplace to determine if any spaces are permit-required confined spaces.

29 CFR 1910.146(c)(2) (Citation 1 Item 2b)

If the workplace contains permit spaces, the employer shall inform exposed employees, by posting danger signs or by any other equally effective means, of the existence and location of and the danger posed by the permit spaces.

29 CFR 1910.146(c)(4) (Citation 1 Item 2c)

If the employer decides that its employees will enter permit spaces, the employer shall develop and implement a written permit space program that complies with this section. The written program shall be available for inspection by employees and their authorized representatives.

29 CFR 1910.146(g)(1) (Citation 1 Item 2d)

The employer shall provide training so that all employees whose work is regulated by this section acquire the understanding, knowledge, and skills necessary for the safe performance of the duties assigned under this section.

29 CFR 1910.1200(h)(1) (Citation 1 Item 3a)

Employers shall provide employees with effective information and training on hazardous chemicals in their work area at the time of their initial assignment, and whenever a new chemical hazard the employees have not previously been trained about is introduced into their work area. Information and training may be designed to cover categories of hazards (e.g. flammability, carcinogenicity) or specific chemicals. Chemical- related information must always be available through label and safety data sheets.

29 CFR 1910.1200 (e)(1)(i) (Citation 1 Item 3b)

A list of the hazardous chemicals known to be present using a product identifier that is referenced on the appropriate safety data sheet (the list may be compiled for the workplace as a whole or for individual work areas)

29 CFR 1904.39(a) (Citation 2 Item 1)

Within eight hours after the death of any employee from a work-related incident or the inpatient hospitalization of three or more employees as a result of a work-related incident, you must orally report the fatality or multiple hospitalizations by telephone or in person to the area office of the Occupational Safety and Health Administration, U.S. Department of Labor that is nearest to the site of the incident. You may also use the OSHA toll-free central telephone number, 1-800-321-OSHA *Id.*

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 January 22, 2013, Compliance Safety and Health Officer Hall (CSHO Hall) inspected Respondent's worksite, a gas service station, in Sylva, North Carolina after the death of an employee.
6. As a result of the recommendations of the compliance officer, on June 14, 2013, the Complainant issued two citations to the Respondent.
7. On July 22, 2013 Respondent submitted a timely notice of contest contesting all violations and proposed penalties.

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. Respondent Quality Oil 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. Complainant Commissioner of Labor established by the greater weight of the evidence that the sump fits the definition of a permit-required confined space.
5. Respondent violated 29 CFR 1910.106(b)(6) for not taking the appropriate measures to ensure that employees working in and around its UST containment sumps at the site used only non-sparking tools and a penalty of \$1,000 is appropriate.
6. Respondent violated 29 CFR 1910.146(c)(1) for not evaluating the workplace to determine if there were any permit-required confined spaces.
7. Respondent violated 29 CFR 1910.146(c)(2) for failure to inform employees of the existence, location, or dangers of permit-required confined spaces.
8. Respondent violated 29 CFR 1910.146(c)(4) because they did not develop and implement a written permit space program.
9. Respondent violated 29 CFR 1910.146(g)(1) because they did not provide training to employees that would enter permit required confined spaces such as the containment sump.
10. Respondent violated 29 CFR 1910.1200(h)(1) by failing to provide effective training on hazardous chemicals in their work area.
11. Respondent violated 29 CFR 1910.1200(e)(1)(i) by failing to provide a list of the hazardous chemicals that were present at the facility.
12. Respondent violated 29 CFR 1904.39(a) by failing to report the fatality of Mr. Brown within the required eight (8) hour time frame.

DISCUSSION

I. WHETHER THE SUMP PUMP WAS A PERMIT REQUIRED CONFINED SPACE?

Yes, the sump pump was a permit required confined space. The decision of the Hearing Examiner on this issue is AFFIRMED. First we must look at whether it meets the definition of a confined space, and then see if the space has one of the characteristics that makes it a permit-required confined space.

29 CFR 1910.146(b) defines a confined space as a space that:

- (1) Is large enough and so configured that an employee can bodily enter and perform assigned work; and
- (2) Has limited or restricted means for entry or exit (For example tanks, vessels, silos, storage bins, hoppers, vaults, and pits are spaces that may have limited means of entry); and
- (3) Is not designed for continuous employee occupancy.

The sump in question meets all of these requirements for a confined space. The sump is large enough and configured so that an employee can enter and perform assigned work. In fact, the Service Manager did enter the sump space to investigate the cause of an alarm which signaled a problem therein. The second element is met because the space had a limited means of entry and exit because an employee could not easily walk into or out of the sump due to the diameter, size, and configuration of the sump. The third element is met because the space was not designed for a person to be there for a continuous period. There was no doorway, lighting, ventilation, or anything else to suggest that it was designed for a person to work there for an extended period of time. The sump is a confined space. Now, was it a permit required confined space?

29 CFR 1910.146(b) defines a permit-required confined space as one with one or more of the following characteristics:

- (1) Contains or has a potential to contain a hazardous atmosphere,
- (2) Contains a material that has the potential for engulfing an entrant,

- (3) Has an internal configuration such that an entrant could be trapped or asphyxiated by inwardly converging walls or by a floor which slopes downward and tapers to a smaller cross-section, or
- (4) Contains any other recognized serious safety or health hazard.

Section 1 of that standard is met by the testimony of the CSHO (T p. 65) which established that the containment sump in question had the potential to contain a hazardous atmosphere due to the possibility of gasoline vapors and fumes. Respondent Quality Oil also admitted that sumps had the potential to contain gasoline vapors in paragraph 17 of their Answer. Testimony also established safety hazards from the potential of slips, trips, falls, and entanglements due to the amount of equipment in the space. It has been established that the sump was a permit-required confined space.

II. WHETHER THE EMPLOYER HAD FAIR NOTICE REGARDING THE APPLICATION OF CONFINED SPACE STANDARD 29 CFR 1910.146?

Yes, the Employer had fair notice and therefore the decision of the Hearing Examiner on this issue is REVERSED. The standard in question was properly promulgated on January 14, 1993. The Respondent argues that the Complainant, Department of Labor, did not provide notice that the permit-required confined space standard applied to gasoline station sumps because no other gas station employer had been cited for that violation. The issuance of citations to other employers is not the basis for determining whether an employer has knowledge of the application of a standard. In 2009 this court held that “it is not necessary that an employer have knowledge of the standard’ and that ignorance of the law is no excuse and “finding to the contrary would undermine the very purpose of OSHA standards, which is to keep North Carolina workers safe,” in Hobbs Westport Marina, LLC (OSHANC 2009-4855). Hearing Examiner Tuttle found that the sumps were permit-required confined spaces; therefore the condition cited in this specific standard did exist. Citations 1 items 2a, 2b, 2c, and 2d were grouped together with a penalty of \$6,300.

As a matter of law we find it necessary to rule that the employer had fair notice. Even when an employer finds it difficult to interpret OSHA law, it is still their responsibility to do so.

How does a gas station owner know that a particular UST containment sump is a permit required space? The standards in question have never been used in a citation to any of the thousands of North Carolina service stations in connection with a UST containment sump and OSHA has never promulgated any rule stating that UST containment sumps must be treated as permit required confined spaces. But this may be because UST containment sumps can be different sizes and configurations, therefore there cannot be a specific standard that covers them all. While it may be difficult, it is necessary for the employer to look at how OSHA regulations apply to their UST containment sump and determine whether they fall within the definition of a permit required confined space. If their UST containment sump does meet the requirements set forth in the standard then they must meet the specific safeguards set forth for such spaces in order to keep employees safe. The penalty of \$6,300 is in effect.

III. WHETHER THE DEPARTMENT OF LABOR PROVED A VIOLATION OF 29 CFR 1910.106(b)(6) CITATION 1 ITEM 1, AND IF SO, THEN DID THE HEARING EXAMINER HAVE EVIDENCE TO SUPPORT THE PENALTY REDUCTION OF CITATION 1 ITEM 1 WHICH DEALT WITH FLAMMABLE LIQUIDS?

Yes, the Hearing Examiner had sufficient evidence to support this citation and the decision of the Hearing examiner is AFFIRMED. Hearing Examiner Tuttle affirmed this citation but reduced the penalty. The CSHO testified that the sumps contained pieces of electrical equipment and piping, there was a potential for the sumps to contain gasoline, that employees' tools created a source of ignition, and that there was no policy or standard operating procedure in place to regulate the type of tools used inside the sump.

A Hearing Examiner's decision to reduce a penalty must stand absent a clear abuse of discretion. In the CSHO Hall's testimony she had acknowledged that Quality Oil had taken precautions to prevent a fire in the sump area and showed a good faith effort. Those efforts provide justification for the penalty reduction. The penalty of \$1,000 set forth by the Hearing Examiner stands.

IV. WHETHER THE DEPARTMENT OF LABOR PROVED A VIOLATION OF CITATION I ITEM 3(a) 29 CFR 1910.1200(h)(1) HAZARD COMMUNICATION?

Yes, the violation was proven and therefore the decision of the Hearing Examiner is REVERSED. Testimony at trial established that the Respondent's employees were routinely required to handle various chemicals such as gasoline, diesel, kerosene, and cleaning chemicals. The Respondent had a corporate hazard communication program, but the program required station managers to provide training to employees at their site location. Testimony from various employees established that the employees at that location did not receive any training and the Respondent did not provide any documentation of training. A penalty of \$2,500 is issued.

V. WHETHER THE DEPARTMENT OF LABOR PROVED A VIOLATION OF CITATION 1 ITEM 3(b) 29 CFR 1910.1200 (e)(1)(i) HAZARD COMMUNICATION?

Yes, the Department of Labor did prove a violation and the decision of the Hearing Examiner is AFFIRMED. Respondent failed to have a list or index of all hazardous chemicals at the site. The citation is reclassified to nonserious and the penalty is reduced to \$0.

VI. WHETHER THE DEPARTMENT OF LABOR PROVED A VIOLATION OF CITATION 2 ITEM 1 29 CFR 1904.39(a) REPORTING A FATALITY?

Yes, the Department of Labor did prove this violation of reporting a fatality. The decision of the Hearing Examiner is AFFIRMED but the penalty is reduced to \$0. The fatality clearly was not reported until three days later, far outside of the eight hour reporting requirement. However, the employer argues that the employee death was not in fact work related because a later autopsy result pointed to a heart attack. While we do acknowledge this thought process, we must look to the fact that there was every reason to believe that the

employee died of “respiratory failure and shock secondary to asphyxia from gasoline fumes” as stated in the discharge summary on the date of death and therefore should have been reported within eight hours. Regardless of whether the employee died from asphyxia or a heart attack, the death should have been reported. 29 CFR 1904.39(b)(5) provides the guidance that heart attacks which occur at work must be reported to OSHA and that the determination will then be made as to whether to investigate the death as work related based on the circumstances. The penalty is eliminated because the employer did eventually report the fatality in good faith and their error did not result in any harm.

ORDER

For the reasons stated herein, the Review Commission hereby **ORDERS** that the Hearing Examiner's December 17, 2014 Order in this case be, and hereby is, **AFFIRMED** in part and **REVERSED** in part, to the extent that it is not inconsistent with this opinion. Respondent is further **ORDERED** to pay the assessed penalty of \$9,800 within 30 days of the filing date of this Order.

This the 16th day of August 2016.


ARLENE K. EDWARDS, CHAIRMAN


RICHARD G. PEARSON, Ph.D., MEMBER


FRANK P. WARD, JR., MEMBER

CERTIFICATE OF SERVICE

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

JOHN J. DOYLE, JR.
CONSTANGY BROOKS & SMITH LLP
100 N. CHERRY ST.
SUITE 300
WINSTON-SALEM, NC 27101-4016

LARISSA WILLIAMSON
NC DEPARTMENT OF JUSTICE
LABOR SECTION
P O BOX 629
RALEIGH, NC 27602-0629

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

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 17 DAY OF August 2016.

ARLENE K. EDWARDS
CHAIRMAN


Karissa B. Sluss

Docket and Office Administrator
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