

STATE OF MINNESOTA
OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD

Ken Peterson, Commissioner,
Department of Labor and Industry,
State of Minnesota,

Complainant,

v.

Ever Cat Fuels, LLC,

Respondent.

DECISION

OAH Docket No. 8-1901-31230

The above-entitled matter came before the Minnesota Occupational Safety and Health Review Board (“the Board”) on June 3, 2015. Assistant Attorney General Eric J. Beecher, Esq., 445 Minnesota Street, Suite 900, St. Paul, Minnesota, appeared for and on behalf of the Commissioner of the Department of Labor and Industry (“Commissioner”). Attorney Sarah E. Bushnell, Esq., Arthur, Chapman, Kettering, Smetak & Pikala, P.A., 81 South Ninth Street, Suite 500, Minneapolis, Minnesota, appeared for and on behalf of Respondent Ever Cat Fuels, LLC. (“Ever Cat”). Assistant Attorney General Erik M. Johnson, Esq., 445 Minnesota Street, Suite 1800, St. Paul, Minnesota 55101-2127 was present as legal advisor to the Board.

PROCEDURAL HISTORY

On September 27, 2013, the Commissioner cited Ever Cat for 11 violations.

On October 17, 2013, Ever Cat filed a notice of contest.

On December 7, 2013, the Commissioner filed its Notice and Complaint to Ever Cat.

On December 27, 2013, Ever Cat filed its Answer to the Complaint.

On February 12, 2014, the Commissioner filed a Notice and Order for Hearing and Prehearing Conference related to Ever Cat’s contest of the citation.

On September 30, 2014, the parties filed a Pre-Trial Stipulation, pursuant to which the parties agreed to classifications and penalties for, and Ever Cat withdrew its Notice of Contest as to, items 1, 8, 9, 10 and 11.

On October 7, 2014, the matter came before the ALJ for a contested case hearing.

On December 26, 2014, the ALJ issued Findings of Fact, Conclusions of Law, and Order, affirming the citation and affirming the penalties as to items 2, 3, 4, 5, 6 and 7, and, as to items 1, 8, 9, 10 and 11, affirming the penalties as amended by the stipulation.

Ever Cat filed a timely Notice of Appeal of the ALJ Order with the Board.

ISSUES BEFORE THE ALJ

1. Whether the liquid methanol contained in tank 407 (T-407) at Ever Cat's biodiesel plant qualifies for the exception from the Process Safety Management requirements in 29 CFR § 1910.119 for "flammable liquids . . . stored in atmospheric tanks or transferred"?¹

The ALJ held that the liquid methanol was not "stored" or "transferred" and so did not qualify for the exemption.²

2. Whether Ever Cat preserved the issue as to whether 29 CFR § 1910.119 violates the Constitution as impermissibly vague as applied to Ever Cat?³

The ALJ held that the issue was not before him.⁴

ISSUES BEFORE THE BOARD⁵

1. Whether the Board should reverse the ALJ determination that the liquid methanol contained in tank 407 (T-407) at Ever Cat's biodiesel plant does not qualify for the exemption

¹ See ALJ Order of Dec. 26, 2014, at 1.

² See ALJ Order of Dec. 26, 2014, at 5, conclusion 9.

³ See ALJ Order of Dec. 26, 2014, at 9 n.37.

⁴ See ALJ Order of Dec. 26, 2014, at 9 n.37.

⁵ See Resp.'s Not. Of Appeal at 2; Resp.'s Br. at 10.

from the Process Safety Management requirements of 29 CFR § 1910.119 for “flammable liquids stored in atmospheric tanks or transferred”?

2. Whether the Board should reverse the ALJ determination that the issue as to whether 29 CFR § 1910.119 violates the Constitution as impermissibly vague as applied to Ever Cat was not before the ALJ?

STANDARD OF REVIEW

The Board has the authority to “revise, confirm, or reverse the decision and order” of an administrative law judge. Minn. Stat. § 182.664, subd. 5 (2014). “The board is limited in its review of an administrative law judge’s decision and order to matters preserved in the record.”

Minn. R. 5215.5210, subpt. 1. The Board:

may revise or reverse the administrative law judge’s decisions and orders if substantial rights of the petitioner . . . may have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- A. in violation of constitutional provisions;
- B. in excess of statutory authority or jurisdiction of the agency;
- C. made upon unlawful procedure;
- D. affected by other error of law;
- E. unsupported by substantial evidence in view of the entire record as submitted; or
- F. arbitrary or capricious.

Id., subpt. 2.

“Agencies may utilize their experience, technical competence, and specialized knowledge in the evaluation of the evidence in the hearing record.” Minn. Stat. § 14.60, subd. 4 (2014).

Based on the files, records, and proceedings herein, the Board has made an independent decision based on the record and hereby makes the following:

FINDINGS OF FACT

1. Ever Cat did not dispute any of the ALJ's findings of fact and so the ALJ's findings are incorporated herein by reference.

CONCLUSIONS OF LAW

1. Ever Cat has not established any of the bases set forth in Minn. R. 5215.5210, subpt. 1, for this Board to revise or reverse the ALJ's order.

2. The ALJ's conclusion that the liquid methanol contained in tank 407 (T-407) at Ever Cat's biodiesel plant does not qualify fall within the exception in 29 CFR § 1910.119 for "flammable liquids . . . stored in atmospheric tanks or transferred" was not an error of law.

3. In a contested matter before and ALJ, with regard to a contesting party's Answer to a Complaint from the Commissioner, "any affirmative defense not asserted is deemed waived." Minn. R. 5210.0570, subp. 4.

4. By stipulating to a "sole" issue as to whether tank T-407 "meets the exception contained in 29 CFR § 1910.119(a)(1)(ii)(B)," Ever Cat confirmed that that was only issue before the ALJ, and that there was not a second issue as to whether 29 CFR § 1910.119 violates the Constitution as impermissibly vague as applied to Ever Cat.

5. Having waived the affirmative defense by not asserting it in its Answer to the Commissioner's Complaint, and then confirming by pre-hearing stipulation that only issue before the ALJ was whether tank T-407 "meets the exception contained in 29 CFR § 1910.119(a)(1)(ii)(B)," Ever Cat was not entitled to raise it during opening statements to the ALJ or to include it in written post-hearing submissions to the ALJ.

6. The ALJ's conclusion that the issue as to whether 29 CFR § 1910.119 violates the Constitution as impermissibly vague as applied to Ever Cat was not before the ALJ was not an error of law.

ORDER

IT IS HEREBY ORDERED:

1. The Commissioner's Citation to Ever Cat Fuels, LLC, is **AFFIRMED IN ALL RESPECTS.**
2. The attached Memorandum is incorporated as if fully set forth herein.

Dated this 31st day of July, 2015



Leonard Price, Board Chair
Minnesota Occupational Safety and Health
Review Board

MEMORANDUM

I. 29 CFR § 1910.119 Exemption.

The parties agree that Ever Cat violated items 2 through 7 of the citation unless the exception from the Process Safety Management requirements in 29 CFR § 1910.119 for “flammable liquids . . . stored in atmospheric tanks or transferred” applies to the flammable liquid (here liquid methanol) at Ever Cat’s facility.

The parties do not dispute facts about the T-407 tank and that it is used to mix a combination of newly-delivered methanol with reclaimed methanol. The issue is whether the methanol in the T-407 tank fits within the meaning of “stored” or “transferred” as those terms are used in 29 CFR § 1910.119(a)(1)(ii)(B). As the ALJ noted, neither “stored” or “transferred” is among the terms defined in 29 CFR § 1910.119.

The Board has reviewed the ALJ’s analysis in light of the arguments made by the parties in their briefs and oral argument. The Board does not find any error in the ALJ’s analysis. The ALJ’s analysis of “stored” or “transferred” as those terms are used in 29 CFR § 1910.119(a)(1)(ii)(B) and the ALJ’s resulting conclusion that the liquid methanol in the T-407 tank does not fit within the meaning of “stored” or “transferred” as those terms are used in 29 CFR § 1910.119(a)(1)(ii)(B) are therefore adopted and incorporated herein by reference. ALJ Order of Dec. 26, 2014, at 14-17.

II. Ever Cat Waived the Affirmative Defense that 29 CFR § 1910.119 is Void for Vagueness.

With regard to a contesting party’s Answer to a Complaint from the Commissioner, “any affirmative defense not asserted is deemed waived.” Minn. R. 5210.0570, subp. 4. Ever Cat did not assert as an affirmative defense the argument that 29 CFR § 1910.119, as applied to Ever Cat, violates the Constitution as impermissibly vague. As a consequence, that issue was waived.

Whether 29 CFR § 1910.119, as applied to Ever Cat, violates the Constitution as impermissibly vague is a separate issue, having separate analysis, from the issue of whether the liquid methanol contained in tank 407 (T-407) at Ever Cat's biodiesel plant is "stored" or "transferred" as those terms are used in 29 CFR § 1910.119. And so when Ever Cat entered into a pre-hearing stipulation that the "sole" issue for the ALF was whether tank T-407 "meets the exception contained in 29 CFR § 1910.119(a)(1)(ii)(B)," Ever Cat confirmed that the only issue before the ALJ was whether the methanol was "stored" or "transferred," and that there was not a second issue as to whether 29 CFR § 1910.119 violates the Constitution as impermissibly vague as applied to Ever Cat.

When Ever Cat attempted to assert the constitutionally-vague issue during the hearing to the ALJ, it was too late: the issue had already been waived. Ever Cat has not demonstrated that the ALJ's decision in this regard was erroneous.

This Board has authority to review the ALJ's decisions. Minn. R. 5215.5210, subpt. 2. The ALJ decided only that the constitutionally-vague issue had been waived and did not consider the issue on the merits. Because the ALJ did not address the merits of the constitutionally-vague issue, there is no decision on the merits of that issue for this Board to review. This Board will not address the merits of that issue for the first time.



August 5, 2015

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RE: Commissioner, et al. v. Ever Cat Fuels, LLC
OAH Docket No. 8-1901-31230

Dear Parties:

Enclosed please find, and served upon you by United State Mail, is a copy of the Decision and Affidavit of Service in the above-referenced matter.

Sincerely,

A handwritten signature in blue ink that reads 'Debra Jevne'. The signature is fluid and cursive, written over a light blue horizontal line.

Debra K. Jevne
Executive Secretary
Occupational Safety and Health Review Board

Enclosures

cc: Erik Johnson (via email)
Ev Kuehl (via email)
James Krueger (via email)