

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF LABOR AND INDUSTRY
OCCUPATIONAL SAFETY AND HEALTH DIVISION

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

Complainant,

vs.

**ORDER ON
CROSS MOTIONS
FOR SUMMARY DISPOSITION**

W.B. Duluth Storage, LLC, n/k/a
Riverland Ag,

Respondent.

This matter came before Administrative Law Judge Manuel J. Cervantes on cross motions for summary disposition. The ALJ heard oral argument on the motions on January 26, 2012, and the motion record closed on January 30, 2012, with the filing of the Marine Terminal provisions at 29 C.F.R. 1917.

Rory Foley and Jackson Evans, Assistant Attorneys General, appeared on behalf of the Commissioner of Labor and Industry, Occupational Safety and Health Administration (Department or MnOSHA). John Polley and Anne Zorn, Attorneys at Law, Faegre Baker Daniels, LLP, appeared on behalf of W.B. Duluth Storage, LLC, n/k/a Riverland Ag (Respondent or Riverland Ag).

Based on the all of the files, records, and proceedings herein, and for the reasons set forth in the accompanying Memorandum, the Administrative Law Judge makes the following:

ORDER

IT IS HEREBY ORDERED that:

1. Riverland Ag's Motion for Summary Disposition is GRANTED;
2. MnOSHA's Motion for Summary Disposition is DENIED; and

3. The Citation issued by MnOSHA to Respondent on October 16, 2009, for alleged violations of 29 C.F.R § 1910 be VACATED and the penalties assessed by MnOSHA under the Citation be DISMISSED.

Dated: February 24, 2012

/s/ Manuel J. Cervantes
MANUEL J. CERVATES
Administrative Law Judge

NOTICE

Pursuant to Minn. Stat. § 182.661, subd. 3, this Order is the final decision in this case. Under Minn. Stat. §§ 182.661, subd. 3, and 182.664, subd. 5, the decision may be appealed to the Minnesota Occupational Safety and Health Review Board by the employer, employee, their authorized representatives, or any party, within 30 days following the service by mail of this decision and Order. The procedures for appeal are set out at Minn. Rules Ch. 5215.

MEMORANDUM

This is an appeal of a Citation issued to Riverland Ag by MnOSHA for violating standards set forth at 29 C.F.R. § 1910. The Citation alleges several violations, including failure to have fall protection for employees walking on top of railcars at Riverland Ag's Duluth Harbor elevator facility. Riverland Ag maintains that its facility is a "marine terminal" for purposes of OSHA regulations and, as such, is governed exclusively by the standards set forth in 29 C.F.R. § 1917. It asserts that MnOSHA issued the § 1910 violations in error and that the Citation must be dismissed.

The Department contends that the Respondent's facility does not meet the definition of a marine terminal and that the standards contained in Part 1910 do apply to its worksite operations. The Department asserts that the Citation was properly issued and that this matter should proceed to a hearing on the merits. Both parties have moved for summary disposition.

Background Facts

Riverland Ag is a grain company that operates a grain elevator facility located on a peninsula in the Duluth Harbor of Lake Superior.¹ The Duluth Harbor elevator receives, handles, stores and ships grain via railcars and maritime vessels that pass

¹ Affidavit of Craig Reiners at ¶¶ 3 and 4.

through the St. Lawrence Seaway on their way to and from Duluth.² The number of vessels that are loaded or unloaded at the Duluth Harbor elevator varies from year to year depending on grain prices, customer demand, and other market conditions.³

The facility has two docks, one on either side of the peninsula, and a circular rail yard in between the two docks with three or four complete tracks.⁴ One dock is equipped with two large gantry cranes that are used to load grain onto vessels. Each gantry crane can load approximately 400,000 bushels of grain. The average capacity of vessels that make a port of call at the Duluth Harbor elevator is over 600,000 bushels of grain, the equivalent of 180 railcars of grain.⁵ The other dock is equipped with a receiving hopper to receive grain that is unloaded from vessels with self-unloading conveyors.⁶ The average capacity of vessels unloaded at the Duluth Harbor elevator is over 900,000 bushels of grain, the equivalent of about 270 railcars of grain.⁷ The facility does not have any manufacturing or production operations associated with it. It only ships, receives, and stores grain.⁸

In 2009, due to a decline in grain prices and other market conditions, the Duluth Harbor facility did not load or unload any marine vessels at the port.⁹ All of the grain that was loaded and unloaded at the facility in 2009 was brought in by railcars.¹⁰ Riverland Ag continued to employ approximately 11 people in 2009 to maintain the facility's equipment and load and unload the railcars.¹¹

MnOSHA inspected the Duluth Harbor Elevator on September 9 and 10, 2009. On October 16, 2009, MnOSHA issued Riverland Ag a Citation consisting of six "Items," arising primarily out of conditions in the rail yard at the Duluth Harbor Elevator.¹² Four of the Items concern alleged violations by Riverland Ag of OSHA General Industry Standards set forth in 29 C.F.R 1910.¹³ In particular, MnOSHA alleges that Riverland Ag violated 29 C.F.R § 1910.132(a) by "failing to provide fall protection for employees walking on top of railcars in the yard."¹⁴ This section requires employers to provide employees with personal protective equipment whenever necessary due to workplace hazards. There is no dispute that Respondent's employees did not have fall protection equipment when they worked on top of the rail cars in the facility.

² Reiners Aff. at ¶ 3.

³ Reiners Aff. at ¶ 9.

⁴ Deposition of Gary Pearson at 6-8, Exhibits 1 and 2; Reiners Aff. at ¶ 6.

⁵ Reiners Aff. at ¶ 7.

⁶ Pearson Depo. at 10 and 15; Deposition of Mike Wallace at 6-7; Reiners Aff. at ¶¶ 7-8.

⁷ Reiners Aff. at ¶ 8.

⁸ Pearson Depo. at 7-9, and 15.

⁹ Pearson Depo. at 9; Wallace Depo. at 5.

¹⁰ Pearson Depo. at 9.

¹¹ Pearson Depo. at 9-13.

¹² Reiners Aff., Ex. B.

¹³ The four Part 1910 Items are: Items 001, 002, 001, and 004 of Citation 01.

¹⁴ Reiners Aff. Ex. B (Citation 01, Item 002).

Motion Standard

Both the Department and Riverland Ag have moved for summary disposition. Summary disposition is the administrative equivalent of summary judgment.¹⁵ Summary disposition is appropriate when there is no genuine dispute about the material facts, and one party is entitled to judgment as a matter of law.¹⁶ When considering a motion for summary disposition the decision maker must view the facts in the light most favorable to the non-moving party.¹⁷ The moving party carries the burden of proof and persuasion to establish that no genuine issues of material fact exist.¹⁸ The non-moving party cannot rely upon general statement or allegations, but must show the existence of specific material facts which create a genuine issue.¹⁹

In this instance, where there are cross-motions for summary disposition, the same standards apply, and summary disposition should be granted only where there are no material facts in dispute.²⁰

Governing Regulations

The OSHA General Industry Standards at 29 C.F.R. § 1910 (Part 1910) define “Marine Terminal” as:

Wharves, bulkheads, quays, piers, docks and other berthing locations and adjacent areas and structures associated with the primary movements of cargo or materials from vessel to shore or shore to vessel including structures which are devoted to receiving, handling, holding, consolidating and loading or delivery of waterborne shipments or passengers, including areas devoted to the maintenance of the terminal or equipment. The term does not include production or manufacturing areas nor does the term include storage facilities directly associated with those production or manufacturing areas.²¹

Workplace safety in “marine terminals” is regulated by the OSHA Marine Terminals Standards set forth at 29 C.F.R. § 1917 (Part 1917), not by Part 1910. Part 1917 provides the same definition “marine terminal” at § 1917.2, and defines the scope of the Marine Terminal Standards as follows:

The regulations of this part apply to employment within a marine terminal as defined in § 1917.2, including the loading, unloading, movement or other handling of cargo, ship’s stores or gear within the terminal or into or

¹⁵ *Pietsch v. Mn. Bd. of Chiropractic Examiners*, 683 N.W.2d 303, 306 (Minn. 2004).

¹⁶ *Sauter v. Sauter*, 70 N.W. 2d 351, 353 (Minn. 1955); *Louwagie v. Witco Chemical Corp.*, 378 N.W.2d 63, 66 (Minn. App. 1985); Minn. R. Civ. P. 56.03.

¹⁷ *Ostendorf v. Kenyon*, 347 N.W.2d 834 (Minn. App. 1984); *Carlisle v. City of Minneapolis*, 437 N.W.2d 712, 715 (Minn. App. 1988).

¹⁸ *Theile v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988).

¹⁹ *Murphy v. Country House, Inc.*, 307 Minn. 344, 351-52, 240 N.W.2d 507, 512 (Minn. 1976).

²⁰ See *Wightman v. Springfield Terminal Ry. Co.*, 100 F. 3d 228, 230 (1st Cir. 1996).

²¹ 29 C.F.R. 1910.16(c)(4). The nearly identical definition can be found at 29 C.F.R. § 1917.2.

out of any land carrier, holding or consolidation area, any other activity within and associated with the overall operation and functions of the terminal, such as the use and routine maintenance of facilities and equipment. All cargo transfer accomplished with the use of shore-based material handling devices shall be regulated by this part.²²

Part 1917 provides that “Part 1910 of this chapter does not apply to marine terminals . . . ,” except for those provisions of Part 1910 that Part 1917 explicitly incorporates by reference.²³ One such general industry standard incorporated by reference into Part 1917 is § 1910.272, which governs “grain handling facilities” and contains requirements for the control of dust fires, explosions and other certain hazards associated with grain handling facilities. MnOSHA did not allege that Riverland Ag violated this standard. Rather, the four standards under Part 1910 that MnOSHA alleges Riverland Ag violated are not incorporated into Part 1917.

Section 1917.17 explicitly regulates railroad facilities within marine terminals. Item (e) of § 1917.17 requires that precautions or “positive means” be taken when employees are working “in, on, or under a railcar,” to protect them from “exposure to impact from moving railcars.” There is no explicit requirement in Part 1917 that fall protection be provided to employees working on a railcar.

Pursuant to Part 1910.5(c)(1), if a particular standard is specifically applicable to a condition, practice, operation, or process, that standard prevails over any different general standard under Part 1910 that might otherwise be applicable.²⁴ The subpart notes, as an example, that § 1915.23(c)(3) prescribes personal protective equipment for certain ship repair work, and states that this standard shall apply and not be deemed modified or superseded by any different general standard (in Part 1910) whose provisions might otherwise be applicable.

MnOSHA has jurisdiction to enforce the standards under both 29 C.F.R. § 1910 and 29 C.F.R. § 1917.²⁵

Argument of the Parties

Riverland Ag contends that the standards under Part 1910 do not apply to its Duluth Harbor facility because the facility meets the definition of a marine terminal. The Respondent notes that the Duluth Harbor elevator receives and loads cargo in the form of grain and handles and holds the grain in grain elevators. In addition, because the scope of Part 1917 states that it regulates *all* employment within a marine terminal, “including the loading and unloading, movement or other handling of cargo,” “any other activity within and associated with the overall operation and functions of the terminal,” and “all cargo transfer accomplished with the use of shore-based material handling devices,” the entire Duluth Harbor elevator facility, including the rail yard, is a marine

²² 29 C.F.R. 1917.1(a).

²³ Section 1917.1(a)(2).

²⁴ 29 C.F.R. § 1910.5(c)(1).

²⁵ See, Minn. Rule 5205.0010, subps. 2 and 4.

terminal under § 1917, not just the portions of the facility used to load vessels. Riverland Ag asserts that the rail yard is involved in the “movement and other handling of cargo,” “the overall operation and functions of the terminal,” and “cargo transfer” by “shore-based handling devices.” Riverland Ag maintains that that MnOSHA ignored the clear applicability of Part 1917 and cited it for violations of Part 1910 standards that do not apply and must be dismissed.

The Department argues that the “marine terminal” exemption from the General Industry Standards set forth in Part 1910 is limited to those port facility activities specifically relating to servicing maritime vessels and not to work performed on railcars involving transporting grain to the facility. According to the Department, by its definition, the marine terminal exemption is limited to work activity associated with moving cargo from “vessel to shore or shore to vessel,” not to moving cargo from rail car to grain terminal (shore to shore). The Department contends that land-based activity involving employees standing on railcars is unrelated to the loading or unloading of ships and is not within the “marine terminal” exemption. Moreover, given that no ships loaded or unloaded cargo at the Duluth Harbor port in 2009, the Department asserts that any work conducted at the facility in 2009 fell outside of the “marine terminal” exemption.

Analysis

The Duluth Harbor elevator is a structure adjacent to docks that is associated with the movement of cargo from vessel to shore or shore to vessel, by virtue of its receipt and storage of cargo from waterborne vessels and railcars.²⁶ By its functions and location, the facility meets the definition of a “marine terminal.”

In *Empire Company, Inc. v. Occupational Safety and Health Review Commission*,²⁷ the First Circuit held that a separately-owned equipment rental and repair company that primarily rented and maintained shipping containers and lifts used by maritime industry clients, was subject to the marine terminal provisions of Part 1917 even though the company was located one-half mile north of the Port Authority’s wharves. After a hearing, the administrative law judge found that the company’s maintenance of equipment used in maritime cargo handling and its sale of fuel to the Port Authority met the definitional requirement of performing functions associated with the movement of cargo – specifically, “maintenance of the terminal or equipment.” The administrative law judge also found the company’s operations took place sufficiently close to the wharves to be deemed “contiguous,” a requirement in the predecessor definition of “marine terminal” at § 1917.2²⁸

In addition, when the definition of “marine terminal” is read in connection with Part 1917’s “scope” provision, it is clear the Duluth Harbor elevator facility’s rail yard is part of the “marine terminal.” Part 1917 defines the “scope and applicability” of the Marine Terminals Standards very broadly to include the “movement or other handling of

²⁶ 29 C.F.R. § 1910.16 (c)(4) and 29 C.F.R. § 1917.2(u).

²⁷ 136 F.3d 873 (1st Cir. 1998).

²⁸ *Id.* (Instead of the phrase “contiguous areas and structures,” the current definition of “marine terminal” at § 1917.2 uses the phrase “adjacent areas and structures.”)

cargo” within the terminal or “into or out of any land carrier” or “any other activity within and associated with the overall operation and functions of the terminal ...”²⁹ Part 1917, therefore, governs the movement of grain into and out of rail cars within a marine terminal. To underscore that point, § 1917.17 explicitly regulates railroad facilities within marine terminals. The Administrative Law Judge concludes that Part 1917 explicitly contemplates the inclusion of grain elevators and rail facilities within marine terminals.

Moreover, the OSHA instructional guide governing OSHA’s authority over vessels and facilities on or adjacent to U.S. navigable waters,³⁰ states that “cargo transfer accomplished with the use of shore-based material handling devices is covered by OSHA’s 29 C.F.R. Part 1917, Marine Terminals Standards” and directs readers to questions and answers contained in Appendix G. In response to a question regarding the scope of Part 1917, the guideline states that Part 1917 standards may apply to adjacent areas and structures associated with the movement of cargo from vessel to shore, or shore to vessel, including structures devoted to the receiving and holding of waterborne shipments.³¹ The Duluth Harbor facility typically receives, loads, and unloads shipments of grain from maritime vessels and railcars. Part 1917 standards apply to the railyard and functions of the Duluth Harbor facility.

Finally, the Administrative Law Judge finds the Department’s argument that the marine terminal exemption to Part 1910 did not apply in this case because no ships loaded or unloaded cargo at the Duluth Harbor facility in 2009 to be unpersuasive. The frequency of marine traffic does not determine whether a facility is a marine terminal, and the definition of “marine terminal” makes no mention of the amount of ships that come and go from the docks. Moreover, it would be unworkable and cause uncertainty for regulated entities to maintain that the designation of a facility and the corresponding application of particular OSHA standards will depend on yearly maritime traffic.

Because the Duluth Harbor elevator facility meets the definition of a “marine terminal,” the standards under Part 1910 do not apply except for those explicitly incorporated into Part 1917. The Part 1910 standards that MnOSHA alleges Riverland Ag violated are not incorporated into Part 1917, and must be dismissed.

Therefore, the Respondent’s motion for summary disposition is granted and MnOSHA’s motion for summary disposition is denied. The four Items issued to Riverland Ag under 29 C.F.R. Part 1910 (Citation Items 001, 002, 003 and 004) and the corresponding penalties are dismissed.

M.J.C.

²⁹ 29 C.F.R. § 1917.1(a).

³⁰ Complainant’s Ex. C (Directive Number CPL 02-01-047, effective date 2/22/2010).

³¹ *Id.* at Appendix G-8. (The OSHA instructional guide also makes reference to *OSHA’s Longshoring and Marine Terminals “Tool Shed” Directive* which states, in response to a question, that vehicles used to push or pull train cars along the tracks in marine terminals are covered by § 1917.43. This section applies to powered industrial trucks use for material and equipment handling in marine terminals. (See, Complainant’s Ex. C at 7, referencing Directive Number CPL 02-00-139, effective date 5/23/06 at 19.))