United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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Secretary of Labor, Complainant, v. Quick Transport of Arkansas, LLC, Respondent.	OSHRC Docket No. **14-0844**

Appearances:

Lindsay A. Wofford, Esquire, U.S. Department of Labor, Office of the Solicitor, Dallas, Texas
For the Secretary

George R. Carlton, Jr., Esquire, Godwin Lewis, P.C., Dallas, Texas
For the Respondent

BEFORE: Administrative Law Judge Heather A. Joys

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission pursuant to § 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651- 678 (2014) (the Act). Quick Transport of Arkansas, LLC (hereinafter QT) is a transportation company that services natural gas wells. Beginning on January 24, 2014, Occupational Safety and Health Administration Compliance Officer (CSHO) Michelle Martin conducted an inspection of QT at its Knoxville, Arkansas, truck yard following a fatal accident at that location that same day. Based upon CSHO Martin's inspection, the Secretary of Labor, on May 13, 2014, issued a Citation and Notification of Penalty alleging a serious violation of § 5(a)(1) the Act. The Secretary proposed a penalty of $7,000.00 for the Citation. QT timely contested the Citation. Both the Citation and penalty are at issue.

The Citation alleges QT violated the general duty clause set out at § 5(a)(1) of the Act by allowing employees to use propane torches to thaw frozen valves on vacuum trucks potentially containing hydrocarbons or toxic and/or flammable gases or vapors thereby exposing employees to an explosion hazard. The Secretary proposed as a feasible means of abatement that frozen valves be thawed using methods other than potential ignition sources such as by bringing the trucks into a heated facility.

QT timely contested the citation. It contends the Secretary did not meet his burden of proof for the alleged general duty clause violation. QT contends the Secretary failed to establish either it or the industry recognized the potential for empty vacuum trucks, previously used for hauling produced water, to contain hydrocarbons or toxic and/or flammable gases or vapors. QT argues the industry does not recognize any hazard associated with use of ignition sources near empty vacuum trucks, or the need to test the contents of vacuum trucks used in the transport of produced water.

I held a hearing in this matter on February 10, 2015, in Little Rock, Arkansas. The parties filed post-hearing briefs on May 7, 2015.[1]

For the reasons discussed below, the citation is VACATED.

Jurisdiction

At the hearing, the parties stipulated jurisdiction of this action is conferred upon the Commission pursuant to § 10(c) of the Act (Tr. 6). The parties also stipulated at the hearing that at all times relevant to this action, QT was an employer engaged in a business affecting interstate commerce within the meaning of § 3(5) of the Act, 29 U.S.C. § 652(5) (Tr. 6).

Background

QT's Operations

QT is engaged in the business of servicing gas and oil producers. According to Richard Bittle, the Secretary/Treasurer for QT and several other commonly held companies, QT is considered part of the natural gas industry (Tr. 179). The company's main function is the hauling of "produced water" for natural gas producers in the State of Arkansas (Tr. 179). Its

[1] To the extent either party failed to raise any other arguments in its post-hearing brief, such arguments are deemed abandoned.

trucks are permitted by the Arkansas Oil and Gas Commission solely for this purpose (Tr. 179). The fatality that prompted the OSHA inspection in this matter occurred at QT's Knoxville yard where it stores and services its trucks.

"Produced water," also called production water, salt water, brine, or formation water, is a byproduct of the extraction of natural gas using the fracturing process (Tr. 15, 83, 125, 181). Water is injected into a natural gas well during drilling to help "fracture the formation" or to cause the natural gas to flow out of the well (Tr. 197-98). A variety of chemicals may also be used in this process along with the water such as biocides and anti-friction chemicals (Tr. 182-84). The water that is injected into the wells during this process comes out with these chemicals and the natural gas (Tr. 125, 184-87). The natural gas is separated from the water and is sent to a pipeline or stored; the water is sent to a holding tank (Tr. 27, 187). It is from these holding tanks at the well site that QT drivers pick up the produced water to be transported (Tr. 27).

The trucks used by QT drivers are vacuum trucks. These trucks consist of a tractor and a tanker equipped with a self-loading system (Tr. 17). This system allows material to be either blown out of or drawn into the tanker (Tr. 18). The back of the tanker, depicted in Exhibit C-1 pp. 5, 9, 10, 20, 21 and 22, has two valves that are part of the vacuum system used for this purpose and a larger hatch. QT's Knoxville yard manager assigns the driver his tractor and tanker (Tr. 18). The dispatcher assigns the driver the loads to be picked up, transported, and delivered (Tr. 20).

The driver records each load on a load ticket, carried in a book in the tractor's cab (Tr. 20; Exh. C-2). Each load ticket identifies the tractor and tanker by number, the amount of produced water picked up and delivered, the location of the well, and the location of the storage facility to which the load is delivered, among other information (Tr. 22-27; Exh. C-2).

QT drivers pick up produced water from various locations, but all of QT's customers are natural gas producers (Tr. 127). The produced water is drawn into the tanker by vacuum. This is accomplished by connecting hoses to the valves and engaging the vacuum system. The produced water is delivered to both disposal wells, where it is disposed back into the ground, and facilities that recycle the water for use it in other drilling operations (Tr. 128-29). The only difference is the manner in which the produced water is off-loaded from the tanker (Tr. 39, 49, 75, 90). The produced water is drained from the tanker into disposal tanks by gravity; it is blown into the

recycling tanks with air (Tr. 39-40, 75, 90). The driver considers the tanker empty when no water continues to flow out (Tr. 40). He may also check the level visually by using a sight tube (Tr. 89). The Knoxville Yard Manager[2] testified the tankers contain no residue from production water (Tr. 170). Employee A, a driver with QT, testified the tankers contain no residual produced water after they are drained (Tr. 76), but admitted he has never checked (Tr. 53). Employee B, another QT driver, testified the valves could retain small amounts of moisture (Tr. 92).

Drivers take certain measures when loading and off-loading produced water. When at a natural gas well site, no open flames are allowed to be present (Tr. 86). During the process of loading the tanker, the tractor must be grounded (Tr. 70-71, 77, 84). When produced water is being pumped into or out of the tanker, a bucket is placed under the valves to ensure no produced water spills onto the ground (Tr. 30, 39, 84). Drivers are required to wear flame retardant clothing (Tr. 77).

Each tanker is required to be permitted by the Arkansas Oil and Gas Commission (Tr. 88, 131, 133-34). These permits read:

EXPLORATION AND PRODUCTION
FLUID TRANSPORTATION

(Exh. C-1 p. 13). The tankers do not have permits to transport any hazardous or toxic materials (Tr. 72, 180). Nor do the drivers carry any special licenses to haul hazardous materials. Other than a general understanding the water has been used in the natural gas extraction process, drivers are not provided with information about the contents of produced water (Tr. 31-32, 84). QT does no testing of the produced water (Tr. 35, 76, 149-50). Nor does QT test the atmosphere in the tanks (Tr. 52, 149-50). Tanks are not routinely cleaned for residual water or any other chemicals (Tr. 53, 145).[3]

The Accident

[2] Names have not been used to protect the privacy of the individuals testifying in this matter.

[3] QT does have the tanker cleaned when it is to be used to haul clean city water (Tr. 145). Cleaning is performed by a contractor because QT does not have the necessary "wash out" permit issued by the Arkansas Department of Environmental Quality (Tr. 146).

On January 24, 2014, Employee A arrived at work at QT's Knoxville yard in the morning and began his pre-trip inspection of his tractor and tanker (Tr. 55). The temperature had dropped well below freezing the night before and Employee A found the valves on the tanker had frozen shut (Tr. 55). Employee B, who was more experienced than Employee A, was inspecting his truck and found the valves on his tanker frozen shut as well (Tr. 56). Both drivers had left the valves on their tankers closed the night before, which both testified was common practice (Tr. 58). Employee B went to the shop and returned with a propane tank and wand (Tr. 57). He proceeded to thaw both tankers' valves with the flame of the wand connected to the propane tank (Tr. 57-60). The process took only a moment (Tr. 57).

Once both tankers' valves were thawed, Employee B gave the propane tank and wand to a third driver who had also found the valves to his tanker frozen shut (Tr. 60). This third driver - the deceased - walked out of Employee A's and Employee B's sight to the back of his tanker. A few moments later, Employee A and Employee B heard an explosion and saw two "plumes" or "vapors" rising from the tanker (Tr. 61-62, 99). Employee B ran toward the shop but was intercepted by other employees coming out of the shop (Tr. 63). Someone called 911 (Tr. 63).

Upon hearing the explosion, Employee B ran toward it, thinking it was a tire blow-out (Tr. 99). He testified he saw two tank lids flying through the air (Tr. 99). Employee B, the only witness who saw the deceased immediately following the explosion described the scene. He testified the deceased was lying on the ground 5 feet behind the truck (Tr. 100-01). He was non-responsive (Tr. 101). The front of the deceased's flame retardant shirt had been "blown off" and he had blood coming from his nose and ear (Tr. 110-13). Employee B unsuccessfully attempted CPR until emergency responders arrived about 5 minutes later (Tr. 114). The deceased was never revived and succumbed to his injuries.

Both Employee A and Employee B testified they observed no indication of fire immediately following the explosion.[4] Employee B testified he did not smell gas, oil, or any other odor indicative of burning hydrocarbons (Tr. 107-09). He observed no burns on the

[4] The undersigned observed the demeanor of both Employee A and Employee B and found both to be credible witnesses. Their answers were straightforward and consistent. The Yard Manager also testified about the conditions following the accident. Unlike Employee A and Employee B, the Yard Manager was a reluctant and evasive witness. On examination by the Secretary's counsel he repeated questions back and feigned a lack of understanding of unambiguous questions. In contrast, his answers to counsel for QT's questions were concise and appeared rehearsed. To the extent it is not otherwise corroborated, the undersigned gives the Yard Manager's testimony little weight.

deceased's body (Tr. 112). Employee A testified he did not observe the deceased at the time of the accident and only observed the tanker several days later (Tr. 65, 78). He saw no signs of fire in or around the tanker.

Following the accident, QT changed its procedures for thawing valves (Tr. 150). Drivers are now to ventilate the tanker thoroughly (Tr. 68-69). No open flames are to be used around tankers (Tr. 87). QT instituted a policy to leave valves open at the end of a day if there is a possibility of freezing temperatures (Tr. 153). If a tanker's valves do become frozen shut, the driver is to be bring the tanker into the shop and thaw the valves using a small heater (Tr. 94; Exh. C-1 p. 26).

The Inspection

OSHA was informed of the explosion on the same day it occurred. CSHO Martin was assigned to conduct an investigation and went to QT's Knoxville yard that afternoon (Tr. 208-10). CSHO Martin was accompanied by CSHO John Wolfe (Tr. 209). While at the site, CSHO Martin and CSHO Wolfe observed and photographed the area in which the explosion had occurred (Tr. 212; Exh. C-1). CSHO Martin was informed by QT management nothing at the site had been moved, other than the deceased's body (Tr. 213). CSHO Martin observed the hatch cover of the tanker had blown off (Tr. 214-15). She photographed the area near the valves and observed some liquid below the valves (Tr. 216, 219; Exh. C-1 pp. 10, 20). She also saw the propane tank and wand in the immediate area (Tr. 218; Exh. C-1 p. 18).

Based upon her investigation, CSHO Martin recommended a citation alleging a general duty clause violation be issued to QT. She concluded the explosion had been the result of the deceased's use of a flame to thaw the valves on the tanker which, she opined, may have contained residual hydrocarbons (Tr. 223-24). CSHO Martin did no testing of the contents of the tanker or the atmosphere inside the tanker during her investigation. In the citation, the Secretary alleges QT exposed its employees to an explosion hazard by not ensuring tankers contain no residual flammable or combustible materials prior to allowing introduction of an ignition source. CSHO Martin testified use of insulation around the valves to prevent freezing or thawing frozen valves by moving the tanker into the shop were feasible means to abate the hazard (Tr. 248).

QT timely contested the citation. QT contends the cause of the explosion is not known and the Secretary failed to establish it was the result of the use of a propane torch on a tanker containing residual hydrocarbons. QT further contends there is no potential for produced water from natural gas wells to contain residual flammable or combustible vapors or gasses. Therefore, neither it nor the natural gas industry recognize an explosion hazard should an ignition source be used near tankers used to haul produced water.

The Citation

The citation alleges a serious violation of the general duty clause, § 5(a)(1) of the Act. Section 5(a)(1) requires each employer to "furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." 29 U.S.C. § 654(a)(1). The citation alleges a violation of § 5(a)(1) as follows:

> The employer does not ensure ignition sources are not present when employees attempt to thaw valves on vacuum truck trailers. This violation most recently occurred on January 24, 2014 on the north side of the truck parking lot at 601 Ash Street in Knoxville, Arkansas, where employee(s) used a propane torch to thaw frozen valves on vacuum truck trailers and did not ensure hydrocarbons, toxic and/or flammable gases or vapors were present.[5] This practice exposed employees to an explosion hazard.

The citation itself did not identify a feasible means of abatement.[6] CSHO Martin testified feasible means of abatement would include insulating the tanker valves or thawing frozen valves by bringing the tankers into the shop. The Secretary argued in his post-hearing brief abatement would involve ensuring ignition sources are not used to thaw frozen valves (Sec'y's Brief at p. 3).

DISCUSSION

Elements of a § 5(a)(1) Violation

[5] As QT points out in its brief, the Citation is unartfully drafted. QT has not argued the Citation was vague. Its brief makes clear QT understood the alleged violation to be the failure to ensure the absence of hydrocarbons or flammable or combustible gases or vapors within the tankers prior to introducing an ignition source. The Court finds the parties tried this issue by consent.

[6] QT did not raise a defense of lack of fair notice in response to this omission and the Court finds it unnecessary to address the issue.

To establish a violation of the general duty clause, the Secretary must show that: (1) a condition or activity in the workplace presented a hazard; (2) the employer or its industry recognized the hazard; (3) the hazard was likely to cause death or serious physical harm; and (4) a feasible means existed to eliminate or materially reduce the hazard. *Pegasus Tower,* 21 BNA OSHC 1190, 1191 (No. 01-0547, 2005). In addition to the above-quoted elements of a § 5(a)(1) violation, the Secretary must also establish the employer had either actual or constructive knowledge of the hazardous condition. *Deep South Crane & Rigging Co.,* 23 BNA OSHC 2099 (No. 09-0240, 2012), *aff'd Deep South Crane & Rigging Co. v. Seth D. Harris,* 535 Fed. Appx. 386 (5th Cir. 2013).

Whether an Activity or Condition at the Site Constituted a Hazard

The Commission has held that as part of his burden of proving a § 5(a)(1) violation, the Secretary "must define the cited hazard in a manner that gives the employer fair notice of its obligations under the Act by specifying conditions or practices over which the employer can reasonably be expected to exercise control." *Otis Elevator Co.*, 21 BNA OSHC 2205, 2206 (No. 03-1344, 2007). The Commission has held the Secretary has the obligation to define the hazard in terms of the preventable consequences of the work operation, not by the method of abatement. *Otis Elevator*, 21 BNA OSHC at 2208, *citing Morrison-Knudsen Co./Yonkers Contracting Co.*, 16 BNA OSHC 1105, 1121-22 (No. 88-572, 1993); *see also Arcadian Corporation*, 20 BNA OSHC 2001, 2009 (No. 93-0628, 2004). Put another way, the Secretary must define the hazard "in terms of **the physical agents that could injure employees** rather than the means of abatement." *Arcadian Corporation*, 20 BNA OSHC at 2009, *quoting Chevron Oil Co.*, 11 BNA OSHC 1329, 1331 n. 6 (No. 10799, 1983) (emphasis added).

The Secretary defined the hazard in this case as an explosion hazard resulting from the use of an ignition source to thaw valves on tankers without ensuring the absence of hydrocarbons or toxic and/or flammable gases or vapors within the tankers (Sec'y's Brief at p. 4). Having defined the hazard, the Secretary must also show the existence of the hazard at the worksite. To do so, the Secretary must show the tankers at QT's worksite contained hydrocarbons or toxic and/or flammable or combustible gases or vapors that could explode when in contact with an ignition source. In his brief, the Secretary points only to evidence in the record establishing QT

drivers used propane torches as standard practice to thaw frozen valves without conducting any testing of the contests of the tanker (Sec'y's Brief at p. 4). The Secretary's error is one of conceptualization, i.e. he has conflated the hazard and the abatement method. *Morrison-Knudsen Co./Yonkers Contracting Co.*, 16 BNA OSHC at 1121-22 (holding the hazard was exposure to excessive levels of airborne lead, not absence of protective clothing); *See also Bunge Corp*., 7 BNA OSHC 1654 (No. 78-1881, 1979) (distinguishing evidence of feasible means of abatement by compliance with NFPA code and proof of the hazard).[7] Although the Secretary is correct the record establishes QT drivers engaged in a practice of using an ignition source to thaw frozen valves without testing the contents of the tanker, the Secretary has not established this practice exposed employees to the explosion hazard alleged in the Citation.

The Secretary presented no expert testimony or other scientific evidence establishing the chemical components of the produced water hauled by QT drivers from natural gas wells. CSHO Martin did not sample or test the water she observed near the valves of the tanker. She did not test the atmosphere in any of the tankers in QT's Knoxville yard. The record contains no testimony from representatives of or experts in the natural gas industry regarding the potential for produced water from natural gas wells to contain flammable or combustible gases or vapors. Rather, the Secretary relies on statements contained on the Environmental Protection Agency's (EPA) website and in a document published by the American Petroleum Association (API). The Court finds this evidence insufficient.

According to the excerpt from the EPA's website relied upon by the Secretary, produced water "may contain chemicals, naturally-occurring substances, hydrocarbons and potential reaction and degradation products." (Exh. C-10, p. 2). This broadly worded statement, taken from a 2012 progress report on the EPA's study of the impact of fracturing on drinking water resources, establishes only the potential for *some* produced water to contain hydrocarbons in some unspecified quantities. It is insufficient to establish hydrocarbons and/or flammable or combustible gases were present in QT's tankers in sufficient concentrations to pose an explosion hazard.

[7] Although *Bunge* is an unreveiwed ALJ decision without precedential value, the undersigned finds the ALJ's analysis instructive.

The Secretary also relies on the API recommended practices for operation of vacuum trucks entitled "Safe Operation of Vacuum Trucks in Petroleum Service" to establish the existence of an explosion hazard (Exh. C-19). The safe operating procedures for vacuum trucks recommended by the API specifically apply to "vacuum trucks, skids and trailers used in flammable and combustible liquid service" and to "movement of liquid mixtures (such as 'produced water', BS&W or tank bottoms) that may contain sufficient hydrocarbon material to present comparable hazards" (Exh. C-19 pp. iii, 1). Many of the advisory provisions of the API recommended practices are directed specifically at the handling of hazardous materials (Exh. C-19 pp. 4-5). Others address safe handling procedures for vacuum trucks hauling non-petroleum products such as produced water (Exh. C-19 p. 13). Although these recommended practices put drivers on notice of the potential for trucks hauling produced water to contain "trace amounts of flammable liquids, hydrogen sulfide and other toxic substances" or "trace amounts of hydrocarbon condensates or hydrogen sulfide" and set forth means by which drivers can protect themselves from such hazards, they do not establish QT's tankers contained such substances at levels sufficient to pose an explosion hazard. *See Dayton Walther Corp*., 13 BNA OSHC 1966 (No. 87-1383, 1988) (generalized statements in safety publications that moisture and molten metal can pose a danger of explosion is insufficient to establish hazard existed at the worksite; expert testimony that the conditions at the worksite created that hazard was needed).[8]

A thorough reading of the API document makes clear vacuum trucks are used for a variety of purposes in the oil and gas industry ("Vacuum trucks are used in all segments of the petroleum industry with varied applications." Exh. C-19 p. 1). The document makes numerous references to the use of vacuum trucks for removal of flammable and combustible or hazardous materials from tanks, the transfer of such products, as well as use of vacuum trucks for clean-up of hydrocarbon spills (Exh. C-19 pp. 1, 4, 6, 18, 22, 25, and 33). QT drivers transport produced water from natural gas producers exclusively. Neither XTO nor any of QT's other customers notified QT the produced water was hazardous (Tr. 31-32, 73). QT's tankers are not permitted to carry flammable, combustible, or other hazardous materials. QT drivers are not required to hold licenses to transport such materials. There was no evidence presented establishing QT was

[8] *Dayton Walther Corp*. is an unreviewed ALJ decisions without precedential value. Like *Bunge*, the undersigned finds the reasoning of the ALJ instructive.

required to comply with U.S. Department of Transportation regulations applicable to operation of vehicles transporting hazardous material. *See* 49 C.F.R. §178. Given these facts, the Court is unable to find the API recommended practices necessarily apply to QT's operations or to conditions at QT's Knoxville yard.[9]

Although the API recommended practices do refer to the potential for "waste products" or produced water to contain hydrocarbons, the Court finds these references too non-specific given the broad scope of the document. Moreover, many of the recommended practices are for the loading and off-loading process. Without testimony or other elucidating evidence, the Court is left to speculate whether the hazards associated with loading and off-loading produced water are present at QT's Knoxville yard, where no loading or off-loading takes place.

The Secretary's case relies heavily on circumstantial evidence and speculation as to the cause of the fatal accident. CSHO Martin testified she concluded the accident was the result of an explosion caused by ignition of flammable or combustible gases or vapors. It was uncontroverted there was no sign of fire, including no burns to the deceased's body, at the accident scene.[10] There was no eye-witness testimony to establish the deceased lit the propane torch. CSHO Martin's conclusions are based on the assumption that because the deceased had a propane torch prior to the explosion, the deceased must have lit the torch and the flame must have come in contact with the flammable or combustible gases or vapors, causing the explosion. CSHO Martin testified:

> I concluded as a result of flame being introduced to the actual tank itself that that *may* have created and caused an explosion because there *may* have been some residual toxic substances or hydrocarbons or things of that that were in the tank.

[9] Although QT drivers take certain precautions at the natural gas well, such precautions are not required elsewhere. For example, tankers are not grounded when off-loading at disposal wells (Tr. 71). No other location frequented by QT drivers was shown to have a prohibition against open flames. The fact drivers are required to take certain precautions while loading produced water establishes an explosion hazard at the natural gas well, not within the tankers or at QT's Knoxville yard.

[10] The Secretary argues in his brief the absence of burn marks on either the deceased or the truck does not disprove his theory of the accident because the deceased had on flame retardant clothing which would have protected his skin and the truck was dark gray in color which would have masked scorch marks. The Secretary presented no forensic or physical evidence of a fire. Thus, discounting the evidence of an absence of burn or scorch marks simply leaves the record devoid of evidence, it does not prove the fact of a fire.

(Tr. 223-24) (emphasis added). Rather than proving the existence of the hazardous conditions necessary to cause the explosion were present, the Secretary's theory presumes those conditions were present.

The record contains evidence upon which to base another explanation for the accident. Mr. Bittle testified the hatch may have been blown off by pressure built up in the tanker, rather than an explosion resulting from ignition of hydrocarbons. The record contains evidence, similar to the Secretary's evidence, suggesting hazardous levels of pressure could build-up in the tankers. The hatch to the deceased's tanker contained a warning label reading:

RELIEVE ALL TANK
PRESSURE BEFORE
OPENING COVER
15 P.S.I. MAX.
PRESSURE

(Exh. C-1 pp. 6, 17). Another tanker's hatch contained a label reading:

WARNING
RELIEVE ALL PRESSURE BEFORE OPENING COVER
COVER MAY FREEZE OR STICK TO NECK
DO NOT REMOVE SWING BOLTS UNTIL COVER IS FREE

(Exh. C-1 p. 23). In addition, the API recommended practices refer to hazards associated with over-pressurizing and under-pressurizing vacuum trucks (Exh. C-19, section 5.8, p. 12). Load tickets for the tanker used by the deceased show it had been off-loaded under pressure the day prior (Exh. C-2, pp. 80-84). The Court finds the record evidence is such that either theory of causation is equally plausible and equally speculative.[11]

Considering the record as a whole, the Secretary has not met his burden to establish by a preponderance of the evidence the existence of flammable or combustible gases or vapors in sufficient quantities to pose an explosion hazard at QT's Knoxville yard.[12] In so finding, the

[11] Nor does the undersigned find the examples of similar accidents presented by the Secretary in Exhibit C-19 at p. 42 and Exhibit C-17 supportive of a finding of an explosion hazard at QT's Knoxville yard. The Secretary did not present sufficient evidence of the circumstances of either accident to determine whether they were caused by similar conditions.

[12] Even if the Secretary had established the existence of an explosion hazard, he did not present sufficient evidence QT or the industry recognized the hazard. A recognized hazard is a practice, procedure or condition under the

Court is not insensitive to the fact a tragic accident occurred which may have been preventable had precautionary measures been taken. However, the Court's decision must be limited to the allegations contained in the Citation. The Secretary's evidence is insufficient to establish the violation as alleged. Item 1, Citation 1 is vacated.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

ORDER

Based upon the foregoing decision, it is ORDERED that:

Item 1, Citation 1, alleging a violation of § 5(a)(1) of the Act, is vacated.

SO ORDERED.

/s/ *Heather Joys*

HEATHER A. JOYS
Administrative Law Judge
Atlanta, Georgia

Date: June 1, 2015

employer's control that is known to be hazardous by the cited employer or the employer's industry. *Pelron Corp.*, 12 BNA OSHC 1833, 1835 (No. 82-388, 1986). In his brief, the Secretary argues only industry recognition of the hazard and relies almost exclusively on the API recommended practices (Sec'y's Brief at pp. 4-7). For the reasons discussed in detailed above, the Court does not find this document provides sufficient evidence of recognition of an explosion hazard in the tankers or at QT's Knoxville yard.