UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR
Complainant,
v.
LANCASTER COLONY CORP., CANDLE LITE
Respondent.

OSHRC DOCKET
NO. 92-0958

NOTICE OF DOCKETING OF ADMINISTRATIVE LAW JUDGE'S DECISION

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on March 4, 1993. The decision of the Judge will become a final order of the Commission on April 5, 1993 unless a Commission member directs review of the decision on or before that date. ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW. Any such petition should be received by the Executive Secretary on or before March 24, 1993 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary
Occupational Safety and Health
Review Commission
1825 K St. N.W., Room 401
Washington, D.C. 20006-1246

Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Avenue, N.W.
Washington, D.C. 20210

If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 634-7950.

FOR THE COMMISSION

Ray H. Darling, Jr.

Date: March 4, 1993

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 92-0958

NOTICE IS GIVEN TO THE FOLLOWING:

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SECRETARY OF LABOR, Complainant, v. LANCASTER COLONY CORP., CANDLE-LITE DIVISION, Respondent.	OSHRC Docket No.: 92-958

Appearances:

Sandra B. Kramer, Esquire
Office of the Solicitor
U. S. Department of Labor
Cleveland, Ohio
For Complainant

Hugh W. Nelson, Esquire
Columbus, Ohio
For Respondent

Before: Administrative Law Judge Edwin G. Salyers

DECISION AND ORDER

Respondent, Lancaster Colony Corporation, Candle-Lite Division, is a corporation which operates a manufacturing facility in Leesburg, Ohio. It is there engaged in the production of candles for distribution throughout the United States. Respondent utilizes approximately 200 employees in its production process and related activities at its Leesburg plant.

On August 27, 1991, Lillian Faye Williams was injured while operating a forklift at respondent's plant and was immediately taken to a local hospital for emergency treatment. When the full extend of her injuries became known she was "life-flighted" for treatment at the University Hospital in Cincinnati, Ohio (Tr. 60, 61). She remained at this facility for approximately three days and was released on or about August 30, 1991, at which time she returned to her home to recuperate (Tr. 62, 63). An official of respondent visited Williams

in her home during the first week in September, was advised by Williams that she expected no complication in her recovery, and that she planned to return to work as soon as her condition improved (Tr. 64, 65). Williams died at her home on September 8, 1991, and respondent learned of her death on the following day (Tr. 69). Respondent's official notification of the cause of Williams death was contained in the coroner's death certificate dated October 14, 1991 (Exh. C-2), which was received by respondent on October 17, 1991[1] (Tr. 71). This certificate reflects the immediate cause of death as "Acute Pulmonary Thromboembolus" (bloodclotting) (C-2, ¶ 30). In paragraph 32 of the certificate the manner of death is attributed to an "accident" which occurred on August 27, 1991, at respondent's Leesburg plant (Exh. C-2, ¶ 32).

No action was taken by respondent to report Williams' death to officials of the Occupational Safety and Health Administration either at the time of her death or at the time respondent received the coroner's death certificate. This incident was subsequently reported to the agency by letter dated February 12, 1992, (Exh. C-1) as a result of respondent's annual recordkeeping review by an independent auditor (Tr. 81-83).

Upon receipt of respondent's letter compliance officer Dennis A. Collins was dispatched to conduct an investigation of the accident under the provisions of the Occupational Safety and Health Act (29 U.S.C. § 651, *et seq.*). Following this investigation respondent was issued serious citation No. 1 consisting of two items and "other" citation No. 2. The parties stipulated at the hearing their agreement that serious citation No. 1, item 1, charging a violation of 29 C.F.R. § 1910.178(m)(5)(iii) be affirmed with a penalty of $1,250.00 assessed and that serious citation No. 1, item 2, charging a violation of § 1910.178(q)(7) be affirmed as "other-than-serious" with a penalty of $500.00 assessed (Tr. 6). This agreement will be reflected in the order issued in this case.

The issues remaining for resolution are:

1. Did respondent violate 29 C.F.R. § 1904.8 by its failure to promptly report an accidental death?

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[1] Respondent also received an autopsy report on the same date. While this report contains detailed circumstances of the decedent's physical condition at the time of the examination, it has little, if any, significance or relevance to the crucial issues in this case since it does not state a specific cause of death.

2. Is the Secretary's proposed penalty of $5,000.00 appropriate under the circumstances of this case?

29 C. F.R. § 1904.8 provides:

> Within 48 hours after the occurrence of an employment accident which is fatal to one or more employees or which results in hospitalization of five or more employees, the employer of any employees so injured or killed shall report the accident either orally or in writing to the nearest office of the Area Director of the Occupational Safety and Health Administration, U. S. Department of Labor. The reporting may be by telephone or telegraph. The report shall relate the circumstances of the accident, the number of fatalities, and the extent of any injuries. The Area Director may require such additional reports, in writing or otherwise, as he deems necessary, concerning the accident.

Respondent advanced, but did not vigorously pursue, the theory that the accident was not the proximate cause of Williams' death. Respondent's counsel suggested the possibility of malpractice as an intervening cause of death during the course of the hearing (Tr. 34, 35) but appeared to vacillate when questioned by the court concerning this contention (Tr. 54, 55, 56). Since no evidence was provided by respondent to support possible malpractice and respondent did not address this matter in its post-hearing brief, the court presumes this contention has been abandoned. As the record stands, the only credible evidence regarding proximate cause is contained in the death certificate (Exh. C-2) which is sufficient to sustain a conclusion that the accident was the primary cause of death.

Respondent argues it lacked requisite knowledge that the accident bore a casual connection to the death of Williams. Any vitality this argument may have had in the period immediately following the death was laid to rest on October 17, 1991, upon respondent's receipt of the death certificate. John D. Joy, respondent's Human Resources Manager, testified upon learning of Williams' death the possible relationship between the death and the accident was a "question on everybody's mind" (Tr. 69, 70). He further testified that he received the death certificate on October 17th and noted that this document "listed an initial cause and a secondary cause and checked a column that said 'accident'" (Tr. 73). Joy was aware of the reporting requirement contained in the cited standard but "felt that, since the 48-hour window . . . had expired, that was really not the foremost thing in my mind" (*id*). He discussed this matter with the company attorney and they agreed "that we didn't have

any obligation at that time or reason to think that it should be reported" (Tr. 74). Instead, on December 5, 1991, Joy filed a notice of the fatality with the Ohio Bureau of Workmen's Compensation in which respondent's accepted the death as compensable and advised the Bureau it was "proceeding to pay the benefits to the family" (*id.;* Exh. R-1). This occurrence, while not determinative of respondent's obligations under the Occupational Safety and Health Act, constitutes some evidence that respondent recognized a casual connection between the accident and the resulting death. When considered in conjunction with the information contained in the death certificate it is reasonable to conclude that respondent either knew or should have known, with the exercise of due diligence, that the two events were connected.

Respondent contends that its compliance with the 48-hour reporting procedure required by the cited standard was not possible in this case due to the 12-day lapse between the accident and decedent's death. This contention fails to consider the continuing nature of an employer's obligation to report a fatality even though a time lapse may occur as an intervening event.

The Review Commission considered this question in *Yelvington Welding Service,* 6 BNA OSHC 2013, 1978 CCH OSHD ¶ 23,092 (No. 15958, 1978), in which the employer failed to report a fatal accident to the Secretary and the occurrence did not become known to the Secretary until it was reported by a state agency. The issue in the case was application of the six months statute of limitation imposed by the Act which precludes the Secretary from issuing citations after expiration of the specified period. In its discussion of the standard's design and purpose, however, the Commission made revealing comments concerning the continuing nature of an employers' obligation to report as follows:

> The reporting regulation requires an employer to report to the Area Director of the Occupational Safety and Health Administration within 48 hours after an accident that is fatal to at least one employee or causes the hospitalization of five or more employees. Respondent contends that the Act's limitation period begins to run immediately upon the passage of the 48th hour after an accident that is not reported because that is when a failure to report has occurred and is complete. The Secretary agrees that a failure to report within 48 hours is a violation, but he disputes the contention that the violative conduct is complete at the 48th hour. Rather, the Secretary interprets his reporting regulation to include a general obligation to report

that continues until a report is made, or the Secretary becomes aware of the accident. The additional requirements, such as when, to whom, and in what detail reports must be made, may be violated independently of, but do not derogate from, the general obligation. Under this interpretation of the regulation, the statute of limitations did not begin to run in this case until October 10, 1975, when the Secretary was notified of the accident by the State of Florida.

We believe that the Secretary's interpretation is correct. The Secretary has not created a new concept of continuing violation. Acts of omission have been held to be continuing in such diverse areas as labor law, tort law, and criminal law. The Secretary's interpretation is the one most consistent with the general purposes of assuring safe and healthful working conditions and, as will be discussed more fully below, the specific purpose of providing the Secretary with assistance in performing his enforcement duties (section[s] 8(c)(1) & (2) of the Act).

The reason for the 48-hour reporting requirement is to provide the Secretary with prompt notification of serious accidents so that he can take timely action to avoid further injuries. *F. F. Green Construction Co.*, 73 OSAHRC 54/F1, 1 BNA OSHC 1494, 1973-74 CCH OSHD ¶ 16,991 (No. 1015, 1973). Contrary to the assumption implicit in respondent's interpretation of the regulation, the Secretary's need for reports does not cease after 48 hours. *Cf. The Anderson Company*, 8 OSAHRC 675 (No. 5157, 1974) (ALJ) (Secretary conducted inspection after reading in newspaper about unreported fatal accident that had occurred one month earlier). Enforcement of the reporting regulation is especially important because reports reveal particularly hazardous working conditions that might otherwise continue unchecked, such as the conditions alleged in this case. We cannot read the reporting regulation to require the filing of a report within 48 hours after a fatality and, at the same time, deny the Secretary the ability to enforce the regulation effectively by requiring him to discover a failure to report within six months. We conclude, therefore, that the first citation was issued within the six month limitation period required by the Act. *id.* at 27,905-906

The continuing obligation of an employer to report a fatal accident despite a time lapse between the accident and death is also addressed in a publication issued by the Secretary entitled *Recordkeeping Guidelines for Occupational Injuries & Illnesses* (Sept. 1986), which is commonly distributed to employers (Tr. 17, 18). The relevant portion of this publication was received in evidence as Exh. C-4 and provides:

B-6. Q. Must all fatalities be reported to OSHA in accordance with the requirements of Part 1904.8?

A. Yes. All work-related accidents which result in death or the hospitalization of 5 or more employees must be reported in conformance with the 48-hour reporting requirement of part 1904.8. The 48-hour reporting requirement has been interpreted to mean that employers must make their report within 48 hours after the occurrence of the accident or within 48 hours after the occurrence of the fatality, regardless of the time lapse between the occurrence of the accident and the death of the employee. After receiving information that a fatality or multiple hospitalization has occurred, OSHA will evaluate the case to determine whether or not an inspection is warranted.

(Exh. C-4, pg. 55)

The foregoing constitutes the Secretary's interpretation of the requirements set forth in the cited standard and is, therefore, entitled to deference. *Dole v. OSHRC and CFI Steel Corp.*, 891 F.2d 1495 (CA 10th, 1991) *aff'd sub nom, Martin v. OSHRC*, 111 S.Ct. 1171.

Based upon the entire record, it is concluded that respondent violated the cited standard by its failure to notify the Secretary of an accident related fatality within 48 hours after receiving the coroner's death certificate pertaining to the death of its employee, Lillian Williams.

The remaining issue concerns a determination of an appropriate penalty to be assessed in the case. The Secretary proposed a penalty of $5,000.00. This figure is based upon a directive contained in OSHA Instruction CPL 2.45B CH-2, dated March 1, 1991 (Tr. 28; Exh. C-5) which recites:

> Reporting. Employers are required to report either orally or in writing to the nearest Area Office within 48 hours, any occurrence of an employment accident which is fatal to one or more employees or which results in the hospitalization of five or more employees.
>
> (a) An other-than-serious citation shall be issued for failure to report such an occurrence. The unadjusted penalty shall be $5,000.00.
>
> (b) If the Regional Administrator determines that it is appropriate to achieve the necessary deterrent effect, an unadjusted penalty of $7,000.00 may be assessed.

While the Secretary is initially charged with the responsibility for proposing a penalty in each case, the final determination of an "appropriate" penalty reposes in the Review

Commission. *Secretary of Labor v. OSHRC and Interstate Glass Co.*, 487 F.2d 438 (8th Cir. 1973). In making this determination, the Commission must give "due consideration" to the factors specified in Section 17 (j) of the Act which includes an assessment of the employers' "good faith."

There is no suggestion in the record of this case that respondent's failure to promptly report the fatality to the Secretary resulted from a deliberate intention to evade the mandate of the cited standard. While this court has determined that respondent's receipt of the death certificate was legally sufficient to place respondent on notice the accident was a proximate cause of Williams death, it does not necessarily follow that respondent's failure to report this incident resulted from respondent's intent to conceal this information from the Secretary. Indeed, Williams injury was appropriately recorded as such on respondent's 200 Log (injuries and illnesses) at the time of the accident (Tr. 81, 86).

In addition, respondent acted promptly after Williams death to report this matter to the Bureau of Worker's Compensation and fulfill its financial obligations to decedent's estate (Tr. 89, 92, 93). It is also significant to note that respondent employs an outside consultant to make an annual review of its compliance with the Act's recordkeeping requirements. It was during this annual review in February 1992, that respondent's failure to report the fatality was discovered by the consultant and reported to respondent (Tr. 81). When this discrepancy was called to respondent's attention immediate steps were taken to properly record the fatality and report this occurrence to the Secretary (Tr. 85). Respondent's failure to report the incident sooner is properly characterized as an oversight and not an overt act instigated by respondent to thwart the purpose of the standard.

The cited standard is designed to provide the Secretary with prompt notification of serious accidents so that timely action can be instituted to avoid further injuries resulting from unsafe conditions. It is, without question, an important tool in the Secretary's overall program to effectuate the purposes of the Act. In those cases where the evidence reflects a deliberate attempt to conceal such information from the Secretary a severe penalty is appropriate to deter such conduct. In the case at bar, however, mitigating circumstances justify a reduction of the Secretary's proposal. A civil penalty of $1,000.00 is considered appropriate in this case and this amount will be assessed.

The foregoing will constitute the court's findings of fact and conclusions of law as required by Rule 52, Federal Rules of Civil Procedure.

It is hereby ORDERED:

1. By agreement of the parties, serious citation No. 1, item 1, is affirmed with a penalty of $1,250.00 assessed;

2. By agreement of the parties, serious citation No. 2, item 2, is affirmed as an "other" violation with a penalty of $500.00 assessed; and

3. "Other" citation No. 2 is affirmed with a penalty of $1,000.00 assessed.

/s/ Edwin G. Salyers
EDWIN G. SALYERS
Judge

Date: February 22, 1993