

FILE NAME: RT Vanderbilt (RTV)

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DOCUMENT DESCRIPTION: Wenczel Tile Co.; R.T. Vanderbilt Co. -
Occupational Safety and Health Review Commission

WENCZEL TILE COMPANY; R. T. VANDERBILT COMPANY
OSHRC Docket No. 77-2039
Occupational Safety and Health Review Commission
March 24, 1982

[*1]

Before ROWLAND, Chairman; CLEARY, Commissioner.

* Commissioner Cottine took no part in the consideration or decision of this case.

COUNSEL:

Office of the Solicitor, USDOL

Bobbie D. Spears, Regional Solicitor, U.S. Department of Labor

Arthur R. Wenczel, for the employer

Guy F. Driver, Jr. and Francis C. Clark, for the employer

Allen M. Harvey, Manager, Technical Development, R. T. Vanderbilt Company, Inc., for Intervenor

OPINION:

DECISION

BY THE COMMISSION:

The Secretary of Labor alleges that Wenczel Tile Company ("Wenczel") violated several provisions of the asbestos standard at 29 C.F.R. § 1910.1001. The Secretary contends that an industrial talc, NYTAL 99, produced by the Intervenor, R.T. Vanderbilt Company, and used by Wenczel, contains asbestos fibers and that Wenczel was therefore required to affix caution labels to containers of NYTAL 99, monitor its workplace for asbestos fibers, and provide medical examinations for its employees exposed to airborne asbestos fibers. Administrative Law Judge Paul L. Brady found that NYTAL 99 contains asbestos fibers, but he vacated the citation upon finding that Wenczel did not and could not, with reasonable diligence, have known of the presence [*2] of asbestos fibers in its workplace. The judge also found that the Secretary had not proven that Wenczel failed to monitor its workplace for asbestos fibers.

We adopt the judge's finding that asbestos fibers were present in the NYTAL 99 used by Wenczel. The judge properly weighed the evidence on this issue and his finding is supported by the preponderance of the evidence. We also conclude that the judge correctly found that Wenczel did not and could not, with reasonable diligence, know of the presence of asbestos in its workplace. We adopt the judge's reasoning on this issue. n1 We note that, since the judge issued his decision, the Commission has reaffirmed its precedents holding that a citation cannot be affirmed absent proof that the employer did not and could not, with reasonable diligence, know of a violation. Prestressed Systems, Inc., 81 OSAHRC 43/D5, 9 BNA OSHC 1864, 1981 CCH OSHD P25,358 (No. 16147, 1981); General Electric Co., 81 OSAHRC 42/A2, 9 BNA OSHC 1722, 1981 CCH OSHD P25,345 (No. 13732, 1981).

-----Footnotes-----

n1 One year before the alleged violations in this case occurred, Wenczel had received citations alleging violations of the asbestos standard in another area of its plant. The earlier citations also arose out of Wenczel's use of NYTAL 99. The earlier citations were resolved in a settlement agreement, in which the Secretary agreed to delete all allegations that Wenczel violated the asbestos standard and Wenczel agreed to an amendment of the citation to allege that it have violated a standard regulating "fibrous talc." There is no indication in the record, and the Secretary does not suggest, that anything in the settlement negotiations or anything that transpired between the settlement agreement and the alleged violations in this case put Wenczel on notice that the Secretary continued to believe that NYTAL 99 contained asbestos despite his agreement to delete the asbestos standard allegations in the earlier citations. Judge Brady concluded that Wenczel was justified in relying on the settlement agreement and could not be found to have actual or constructive knowledge that asbestos was present in its plant.

[*3]

-----End Footnotes-----

We do not rule on the Secretary's contention that the principle of collateral estoppel cannot justify the vacation of the citation. The judge did not rely on collateral estoppel, and the judge's basis for his disposition - that Wenczel did not and could not, with reasonable diligence, know of the presence of asbestos fibers - is factually correct and legally sufficient to support the judge's disposition. Additionally, because the citation is properly vacated on the knowledge issue, we need not decide whether the Secretary's evidence that Wenczel failed to monitor for asbestos fibers is sufficient.

Accordingly, the judge's decision is affirmed. SO ORDERED.