CITED AUTHORITIES

49 CFR 180.415

This document is current through the June 6, 2018 issue of the Federal Register. Title 3 is current through June 1, 2018.

Code of Federal Regulations > TITLE 49 -- TRANSPORTATION > SUBTITLE B -- OTHER REGULATIONS RELATING TO TRANSPORTATION > CHAPTER I -- PIPELINE AND HAZARDOUS MATERIALS SAFETY ADMINISTRATION, DEPARTMENT OF TRANSPORTATION > SUBCHAPTER C -- HAZARDOUS MATERIALS REGULATIONS > PART 180 -- CONTINUING QUALIFICATION AND MAINTENANCE OF PACKAGINGS > SUBPART E -- QUALIFICATION AND MAINTENANCE OF CARGO TANKS

§ 180.415 Test and inspection markings.

(a) Each cargo tank successfully completing the test and inspection requirements contained in § 180.407 must be marked as specified in this section.

(b) Each cargo tank must be durably and legibly marked, in English, with the date (month and year) and the type of test or inspection performed, subject to the following provisions:

(1) The date must be readily identifiable with the applicable test or inspection.

(2) The markings must be in letters and numbers at least 32 mm (1.25 inches) high, near the specification plate or anywhere on the front head.

(3) The type of test or inspection may be abbreviated as follows:

(i)V for external visual inspection and test;

(ii)I for internal visual inspection;

(iii)P for pressure test;

(iv)L for lining inspection;

(v)T for thickness test; and

(vi)K for leakage test for a cargo tank tested under § 180.407, except § 180.407(h)(2); and

(vii)K-EPA27 for a cargo tank tested under § 180.407(h)(2) after October 1, 2004.

Examples to paragraph (b). The markings "10-99 P, V, L" represent that in October 1999 a cargo tank passed the prescribed pressure test, external visual inspection and test, and the lining inspection. The markings "2-00 K-EPA27" represent that in February 2000 a cargo tank passed the leakage test under § 180.407(h)(2). The markings "2-00 K, K-EPA27" represent that in February 2000 a cargo tank passed the leakage test under both § 180.407(h)(1) and under EPA Method 27 in § 180.407(h)(2).

(c) For a cargo tank motor vehicle composed of multiple cargo tanks constructed to the same specification, which are tested and inspected at the same time, one set of test and inspection markings may be used to satisfy the requirements of this section. For a cargo tank motor vehicle composed of multiple cargo tanks constructed to different specifications, which are tested and inspected at different intervals, the test and inspection markings must appear in the order of the cargo tank's corresponding location, from front to rear.

Statutory Authority

AUTHORITY NOTE APPLICABLE TO ENTIRE PART:

49 U.S.C. 5101-5128; *49 CFR 1.81* and *1.97*.

History

[56 FR 27879, June 17, 1991, as amended by *56 FR 66287,* Dec. 20, 1991; *57 FR 45466,* Oct. 1, 1992; *59 FR 49135,* Sept. 26, 1994; *61 FR 51334, 51342,* Oct. 1, 1996; *66 FR 45177, 45187,* Aug. 28, 2001; *68 FR 19258, 19290,* Apr. 18, 2003, as corrected at *68 FR 52363, 52372,* Sept. 3, 2003]

Annotations

Notes

[EFFECTIVE DATE NOTE:

68 FR 19258, 19290, Apr. 18, 2003, revised paragraph (b), effective Oct. 1, 2003. For compliance date information, see *68 FR 19258,* Apr. 18, 2003.]

Research References & Practice Aids

NOTES APPLICABLE TO ENTIRE CHAPTER:

[PUBLISHER'S NOTE: For Federal Register citations concerning Chapter I Advisory guidance, see *61 FR 30444,* June 14, 1996; *67 FR 31974,* May 13, 2002; *78 FR 41853,* July 12, 2013.]

NOTES APPLICABLE TO ENTIRE PART:

[PUBLISHER'S NOTE: For Federal Register citations concerning Part 180 Clarifications, see: *58 FR 53626,* Oct. 15, 1993.]

[PUBLISHER'S NOTE: For Federal Register citations concerning Part 180 Comment Period Extensions, see: *61 FR 24904,* May 17, 1996.]

[PUBLISHER'S NOTE: For Federal Register citations concerning Part 180 Notices, see: *76 FR 37661,* June 28, 2011.]

[PUBLISHER'S NOTE: For Federal Register citations concerning Part 180 Emergency Restrictionpara.rohibition Order, see: *79 FR 55403,* Sept. 16, 2014.]

End of Document

49 CFR 177.823

This document is current through the June 6, 2018 issue of the Federal Register. Title 3 is current through June 1, 2018.

Code of Federal Regulations > TITLE 49 -- TRANSPORTATION > SUBTITLE B -- OTHER REGULATIONS RELATING TO TRANSPORTATION > CHAPTER I -- PIPELINE AND HAZARDOUS MATERIALS SAFETY ADMINISTRATION, DEPARTMENT OF TRANSPORTATION > SUBCHAPTER C -- HAZARDOUS MATERIALS REGULATIONS > PART 177 -- CARRIAGE BY PUBLIC HIGHWAY > SUBPART A -- GENERAL INFORMATION AND REGULATIONS

§ 177.823 Movement of motor vehicles in emergency situations.

(a)A carrier may not move a transport vehicle containing a hazardous material unless the vehicle is marked and placarded in accordance with part 172 or as authorized in § 171.12a of this subchapter, or unless, in an emergency:

(1) The vehicle is escorted by a representative of a state or local government;

(2) The carrier has permission from the Department; or

(3) Movement of the transport vehicle is necessary to protect life or property.

(b) Disposition of contents of cargo tank when unsafe to continue. In the event of a leak in a cargo tank of such a character as to make further transportation unsafe, the leaking vehicle should be removed from the traveled portion of the highway and every available means employed for the safe disposal of the leaking material by preventing, so far as practicable, its spread over a wide area, such as by digging trenches to drain to a hole or depression in the ground, diverting the liquid away from streams or sewers if possible, or catching the liquid in containers if practicable. Smoking, and any other source of ignition, in the vicinity of a leaking cargo tank is not permitted.

(c) Movement of leaking cargo tanks. A leaking cargo tank may be transported only the minimum distance necessary to reach a place where the contents of the tank or compartment may be disposed of safely. Every available means must be utilized to prevent the leakage or spillage of the liquid upon the highway.

Statutory Authority

AUTHORITY NOTE APPLICABLE TO ENTIRE PART:

49 U.S.C. 5101-5128; sec. 112 of Pub. L. 103-311, *108 Stat. 1673, 1676 (1994);* sec. 32509 of Pub. L. 112-141, *126 Stat. 405, 805 (2012); 49 CFR 1.81* and *1.97.*]

History

[Amdt. 177-35, *41 FR 16130,* Apr. 15, 1976, as amended by Amdt. 177-67, *50 FR 41521,* Oct. 11, 1985; Doc. No. HM-222A, Amdt. No. 177-86, *61 FR 18926, 18933,* Apr. 29, 1996]

Annotations

Research References & Practice Aids

NOTES APPLICABLE TO ENTIRE CHAPTER:

[PUBLISHER'S NOTE: For Federal Register citations concerning Chapter I Advisory guidance, see *61 FR 30444,* June 14, 1996; *67 FR 31974,* May 13, 2002; *78 FR 41853,* July 12, 2013.]

NOTES APPLICABLE TO ENTIRE PART:

[PUBLISHER'S NOTE: For Federal Register citations concerning Part 177 Formal Interpretation of Regulations, see: *63 FR 30411,* June 4, 1998.]

[PUBLISHER'S NOTE: For Federal Register citations concerning Part 177 Petitions for Reconsideration, see: *63 FR 58323,* Oct. 30, 1998.]

[PUBLISHER'S NOTE: For Federal Register citations concerning Part 177 Emergency Restrictionpara.rohibition Order, see: *79 FR 55403,* Sept. 16, 2014.]

End of Document

OAC Ann. 4901:2-7-13

This document is current through the Ohio Register for the week of May 18, 2018

Ohio Administrative Code > 4901:2 Motor Carriers > Chapter 4901:2-7 Forfeitures and Compliance Orders

4901:2-7-13. Request for administrative hearing.

Within thirty days following service by the staff of a notice of preliminary determination in accordance with rule *4901:2-7-12 of the Administrative Code*, the respondent may file a "request for administrative hearing" with the commission's docketing division. The request for administrative hearing shall be in writing and shall contain the name, address, and telephone number of the respondent and the case number assigned to the matter by the staff. The request for administrative hearing shall be signed by the respondent or its authorized representative. A copy of the notice of preliminary determination served by the staff upon the respondent shall be attached to the request for administrative hearing.

Statutory Authority

Promulgated Under:

111.15.

Statutory Authority:

4905.81, 4923.04, 4923.99.

Rule Amplifies:

4905.81, 4923.04, 4923.99.

History

History:

Five Year Review (FYR) Dates: 04/29/2016 and 04/09/2021.

Prior Effective Dates:

12/14/95, 10/22/07, 9/5/11.

End of Document

OAC Ann. 4901:2-7-20

This document is current through the Ohio Register for the week of May 18, 2018

Ohio Administrative Code > 4901:2 Motor Carriers > Chapter 4901:2-7 Forfeitures and Compliance Orders

4901:2-7-20. Burden of proof.

(A)During the evidentiary hearing, the staff must prove the occurrence of a violation by a preponderance of the evidence.

(B)If staff is required to establish respondent's history of violations, prior reports of violation relied upon by staff to meet its burden shall constitute prima facie evidence of the occurrence of those violations. Additionally, the staff's reliance on any of the following shall conclusively establish the occurrence of a prior violation:

(1)Any final order concerning a prior violation rendered by the commission as the result of a hearing.

(2)Any final order concerning a prior violation rendered by the commission in accordance with paragraph (F) of rule *4901:2-7-14 of the Administrative Code*.

(C)Any instance for which staff has served a notice of apparent violation concerning a prior violation, and no request for conference has been served by respondent within the time provided in this chapter, or, for which staff has served a notice of preliminary determination concerning a prior violation, and no request for administrative hearing has been filed by respondent within the time provided in this rule.

Statutory Authority

Promulgated Under:

111.15.

Statutory Authority:

4905.81, 4923.04, 4923.99.

Rule Amplifies:

4905.81, 4923.04, 4923.99.

History

History:

Replaces: 4901:2-7-20.

Effective:

07/22/2016.

Five Year Review (FYR) Dates: 04/09/2021.

Prior Effective Dates:

9/28/88 (Emer.), 12/23/88, 12/14/95, 10/22/07, 9/5/11.

End of Document

Cawrse v. Allstate Ins. Co.

Court of Appeals of Ohio, First Appellate District, Hamilton County

June 12, 2009, Date of Judgment Entry

Case No. 09COA002

Reporter
2009-Ohio-2843 *; 2009 Ohio App. LEXIS 2397 **; 2009 WL 1677839

CHARLES R. CAWRSE, Plaintiff-Appellee -vs- ALLSTATE INSURANCE COMPANY, Defendant-Appellant

Prior History: [**1] CHARACTER OF PROCEEDING: Appeal from the Municipal Court, Case No. 08CV100778.

Disposition: Affirmed/Reversed in Part; Judgment Vacated; New Amount Entered.

Counsel: CHARLES R. CAWRSE, Plaintiff-Appellee, Pro se, Ashland, OH.

For Defendant-Appellant: JAMES W. LEWIS, JENIFER A. FRENCH, Columbus, OH.

Judges: Hon. Sheila G. Farmer, P.J., Hon. W. Scott Gwin, J., Hon. William B. Hoffman, J. Hoffman, J., concurs., Gwin, J., dissents.

Opinion by: Sheila G. Farmer

Opinion

Farmer, P.J.

[*P1] On May 22, 2008, appellee, Charles Cawrse, filed a small claims complaint against appellant, Allstate Insurance Company. Appellee alleged breach of contract regarding the denial of appellee's insurance claim for his covered vehicle. Appellee claimed he had loaned the vehicle to his estranged daughter and she abused the vehicle, thereby vandalizing it and causing damage to the vehicle.

[*P2] A hearing before a magistrate was held on June 18, 2008. The magistrate found appellant failed to investigate the claim, and awarded appellee $ 2,609.04 plus costs and interest. Appellant filed objections. By judgment order filed December 19, 2008, the trial court denied the objections and adopted the magistrate's decision.

[*P3] Appellant filed an appeal and this matter is now before this [**2] court for consideration. Assignments of error are as follows:

I

[*P4] "THE COURT ERRED IN FINDING THAT PLAINTIFF-APPELLEE'S CLAIM WAS IMPROPERLY DENIED."

II

[*P5] "THE COURT ERRED IN FINDING THAT DEFENDANT-APPELLANT ACTED WITH BAD FAITH IN THEIR INVESTIGATION AND DENIAL OF PLAINTIFF-APPELLEE'S CLAIM."

I

[*P6] Appellant claims the trial court erred in finding for appellee on his breach of contract claim. Specifically, appellant claims the trial court's conclusion, that appellee's claim of $ 2,609.04 for towing, mechanical work, and damage to his insured vehicle was covered under the insurance policy at issue, was against the manifest weight of the evidence. We agree in part.

[*P7] A judgment supported by some competent, credible evidence will not be reversed by a reviewing court as against the manifest weight of the evidence. *C.E. Morris Co. v. Foley Construction Co. (1978), 54 Ohio St.2d 279, 376 N.E.2d 578.* A reviewing court must not substitute its judgment for that of the trial court where there exists some competent and credible evidence supporting the judgment rendered by the trial court. *Myers v. Garson, 66 Ohio St.3d 610, 1993 Ohio 9, 614 N.E.2d 742.*

[*P8] The policy sub judice covers "Property Damage Liability" as follows:

[*P9] "General Statement [**3] of Coverage

[*P10] "If a premium is shown on the Policy Declarations for Bodily Injury Liability Coverage and Property Damage Liability Coverage, Allstate will pay damages which an insured person is legally obligated to pay because of:

[*P11] "1. Bodily injury sustained by any person, and

[*P12] "2. damage to, or destruction of, property.

[*P13] "Under these coverages, your policy protects an insured person from liability for damages arising out of the ownership, maintenance or operation, loading or unloading of an insured auto." See, Defendant's Exhibit D at Part 1.

[*P14] In the magistrate's decision of November 13, 2008, adopted by the trial court via judgment order filed December 19, 2008, the following reasons were given for granting an award to appellee:

[*P15] "In sum, Allstate never investigated the issue of vandalism as reported by Cawrse, despite evidence that this possibility existed. Cawrse and his daughter's mother were prepared to provide statements to this effect. There was evidence the vehicle problems arose when it was in the possession of Cawrse's estranged daughter and that in all probability the worsened condition resulted while in her possession. There was also evidence that Cawrse had difficulty obtaining [**4] possession of the car from his daughter and the problems arose immediately after he succeeded in doing so. He at all times suspected vandalism by his daughter and reported the claim as such. Allstate did nothing to investigate this possibility. It is not disputed that vandalism is a covered loss under the policy's comprehensive provisions. Further, Cawrse was forced to pay a tow charge and mechanical fee authorized by Allstate, not Cawrse, to secure return of his vehicle from Fredericktown Chevrolet.

[*P16] "As a result of the failure of Allstate to investigate and cover the claim, Cawrse suffered losses in the amount of $ 2609.04 for towing, Mechanical work, and damage to the vehicle."

[*P17] In reviewing appellee's testimony, it is apparent he claimed damages to his vehicle based upon the "theory" that his estranged daughter abused the vehicle. Appellee characterized the abuse as vandalism. T. at 8. Appellee argued that appellant failed to investigate his claim of vandalism, and the trial court accepted this argument.

[*P18] Appellant's evidence included the report of Mark Sargent, a forensic mechanic, who opined the damage to the vehicle was not caused by a collision:

[*P19] "Figures No. 20 and 21 show some [**5] mechanical damage to the lower portion of the radiator. This was in all likelihood done when the radiator was removed from the vehicle. There were several different impact angles in this area, which would be consistent with a tool or similar object used to cause this damage. The area just above the mechanical damage was slightly bent, although it was not perforated.

[*P20] "It should be noted that the condenser, located directly in front of the radiator, showed no evidence of impact abrasion and penetration, therefore the marking in this area would be consistent with a non-impact related event. The damage to the cooling fins (sic) in the radiator core in no way jeopardized the proper operation of the vehicle." See Defendant's Exhibit A at Page 15.

[*P21] Mr. Sargent concluded the following:

[*P22] "Following a thorough and complete evaluation of all remaining evidence in this case, and based on my knowledge, training and years of experience as a Forensic Mechanic, it is my professional opinion that the cause of the internal engine damage was an overheat condition that occurred in the engine on one or more occasions. The overheat condition was a result of the cooling fan contacting the radiator during vehicle [**6] operation.

[*P23] "The rotation of the cooling fan wore several of the radiator core tubes to the point where a leak would take place. The evacuation of coolant in this area would result in low coolant levels and an overheat condition. The overheat condition would have been indicated on the instrument cluster by the temperature warning indicator and the temperature gauge. The continued operation of the vehicle for a significant time frame will result in failure of the head gaskets, cylinder heads or the engine block. The 'CHECK ENGINE' light would also have been illuminated, as indicated by history code 14 present on the computer scan diagnostics.

[*P24] "It is my opinion that the cause of the engine failure was an improperly positioned cooling fan with no apparent collision damage to that area. There was no evidence of external collision damage that may have caused or contributed to this event. The cooling fan may not have been spaced properly or was improperly positioned at the time of previous body repair work. There was clear evidence that previous repairs were made to the subject vehicle by the introduction of aftermarket front end components.

[*P25] "The actual cause of the engine damage was the [**7] continued operation of the vehicle with a coolant leak and operation of the vehicle in an overheat state." See, Defendant's Exhibit A at Page 36.

[*P26] Taken as a whole, Mr. Sargent's opinion is consistent with appellee's theory i.e., there was abuse to the vehicle. However, appellee's theory centered upon the effect and not the cause. The described affect was that the engine ran too hot. T. at 7. Appellee admitted he installed a new radiator. Id. Subsequently, appellee discovered the vehicle had a head gasket problem. T. at 8. Other than appellee's theory that vandalism had occurred, there is no other evidence to support

this claim.

[*P27] Based upon the evidence, we are presented with three possible scenarios that caused the damage to the vehicle: 1) appellee's daughter purposefully abused the vehicle by driving it in an overheated state; 2) appellee damaged the vehicle when he replaced the old radiator; or 3) the previous repair for a collision which was covered by appellant damaged the vehicle. T. at 15.

[*P28] Appellee's small claims complaint claims appellee breached the contract by not paying for the repairs to his covered vehicle. The trial court found appellant failed to investigate the claim. [**8] We find this to be factually incorrect. Mr. Sargent's report specifically proved appellant investigated the claim and found the damages were not collision related. As noted in the magistrate's decision, there was confusion as to how to characterize the claim, either as a collision or vandalism. Once appellant determined the damage was not caused by a collision, the claim was denied. Appellee and the trial court appear to place a further burden on appellant to investigate the vandalism claim.

[*P29] Based upon our review of the evidence, we find appellee failed to meet his burden of proof (preponderance of the evidence). Preponderance of the evidence is "the greater weight of the evidence; that is, evidence that you believe because it outweighs or overbalances in your mind the evidence opposed to it. A preponderance means evidence that is *more probable*, more persuasive, or of greater probative value. It is the quality of the evidence that must be weighed." *Schneider v. Schneider (1995), Holmes App. No. 94CA526,1995 Ohio App. LEXIS 4645*, quoting 1 Ohio Jury Instruction (1994), Section 3.50, at 114-115. (Emphasis *sic.*)

[*P30] We further find that appellee expended $ 301.29 in out-of-pocket expenses to process his claim (towing [**9] fees per appellant's representative). T. at 13-14. Therefore, appellee is entitled to $ 301.29. The judgment of the trial court is vacated and judgment is entered for appellee in the amount of $ 301.29.

[*P31] Assignment of Error I is granted in part.

II

[*P32] Appellant claims the trial court erred in finding the claim was not processed in good faith. From our review of the complaint, no such claim of breach of good faith was alleged; therefore, the finding is superfluous to the decision and hereby stricken.

[*P33] The judgment of the Municipal Court of Ashland County, Ohio is hereby affirmed in part and reversed in part. The judgment in the amount of $ 2,609.04 is vacated and the new amount entered is $ 301.29. Costs and interest as stated in the judgment order stand.

By Farmer, P.J.

Hoffman, J. concurs.

Gwin, J. dissents.

/s/ Sheila G. Farmer

/s/ William B. Hoffman

JUDGES

JUDGMENT ENTRY

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Municipal Court of Ashland County, Ohio is hereby affirmed in part and reversed in part. The judgment in the amount of $ 2,609.04 is vacated and the new amount entered is $ 301.29. Costs and interest as stated in the judgment order stand. Costs [**10] to be divided equally between the parties.

/s/ Sheila G. Farmer

/s/ William B. Hoffman

JUDGES

Dissent by: W. Scott Gwin

Dissent

Gwin, J., dissents

[*P34] I dissent from the conclusion reached by the majority.

[*P35] The majority finds the court is factually incorrect on the issue of whether Allstate failed to investigate the claim. I would find otherwise. Admittedly, Allstate did an investigation and found the damages were not the result of a collision. Allstate then denied the claim without investigating any other possibility. The majority finds Allstate had no obligation to investigate further. I believe at the very least, before it denied the claim it had the obligation to investigate the cause appellee gave, which would be covered by the policy. Because Allstate did not do so, I would find it did not properly investigate the claim.

[*P36] The majority lists three possible scenarios that could

have caused the damage to appellee's vehicle, including the one appellee proposed. Sargent's opinion can be construed as supporting appellee's theory of how the damage occurred. The court was free to believe appellee's theory of the cause of the damage, and it chose to believe appellee.

[*P37] I would find the appellee met his burden of proving [**11] his case by a preponderance of the evidence. I would overrule both assignments of error.

/s/ W. Scott Gwin

JUDGE W. SCOTT GWIN

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AT&T Communs. of Ohio, Inc. v. Lynch

Supreme Court of Ohio

January 18, 2012, Submitted; May 8, 2012, Decided

No. 2011-0337

Reporter
132 Ohio St. 3d 92 *; 2012-Ohio-1975 **; 969 N.E.2d 1166 ***; 2012 Ohio LEXIS 1011 ****; 2012 WL 1648923

AT&T COMMUNICATIONS OF OHIO, INC., APPELLEE, v. LYNCH, APPELLANT.

Subsequent History: Reconsideration denied by *AT&T Communs. of Ohio v. Lynch, 132 Ohio St. 3d 1465, 2012 Ohio 3054, 969 N.E.2d 1232, 2012 Ohio LEXIS 1767 (2012)*

Prior History: [****1] APPEAL from the Court of Appeals for Cuyahoga County, No. 94320,

AT&T Communs. of Ohio v. Lynch, 2011 Ohio 302, 2011 Ohio App. LEXIS 320 (Ohio Ct. App., Cuyahoga County, Jan. 27, 2011)

Disposition: Judgment affirmed.

Syllabus

[*92] [***1167] In an administrative appeal to a court of common pleas pursuant to *R.C. 2506.01*, each party seeking to reverse or modify the underlying administrative decision must perfect a separate appeal in order to vest the common pleas court with jurisdiction to review each party's respective assignments of error.

Counsel: McDonald Hopkins, L.L.C., Richard C. Farrin, and Thomas M. Zaino, for appellees.

Robert J. Triozzi, Cleveland Law Director, and Linda L. Bickerstaff, Assistant Law Director, for appellant.

Judges: LUNDBERG STRATTON, J. O'CONNOR, C.J., and PFEIFER, O'DONNELL, LANZINGER, CUPP, and MCGEE BROWN, JJ., concur.

Opinion by: LUNDBERG STRATTON

Opinion

LUNDBERG STRATTON, J.

I. Introduction

[**P1] The issue before the court is whether a single notice of appeal of an administrative decision under *R.C. 2506.01* vests the court of common pleas with jurisdiction to review an appeal filed by a party who did not file a separate appeal. We answer that question in the negative. We [***1168] hold that each party seeking to reverse or modify the underlying administrative decision must perfect a separate appeal. Therefore, we affirm the judgment of the court of [****2] appeals.

II. Facts

[**P2] Appellee, AT&T Communications of Ohio, Inc., applied to the city of Cleveland for an income-tax refund for 1999 through 2002. Appellant, Nassim Lynch, the city's income-tax administrator, dismissed AT&T's application for the refund for 1999, finding that the statute of limitations on the request for the refund had expired. The administrator further determined that any refund that AT&T was claiming for tax years 2000 through 2002 was offset in part by its [*93] other tax obligations. Thus, the administrator denied AT&T's appeal in all respects.

[**P3] AT&T appealed to the Cleveland Board of Income Tax Review. The board affirmed the dismissal of the taxpayer's application for a refund for 1999, agreeing that the statute of limitations had expired. However, the board determined that the administrator had erred in denying part of the taxpayer's refund for the tax years 2000 through 2002 and decided that AT&T should receive the entire refund requested for those years.

[**P4] AT&T appealed the board's decision to the Cuyahoga County Court of Common Pleas, asserting that the board had erred in concluding that the statute of limitations barred AT&T's refund claim for 1999. The administrator [****3] did not file a notice of appeal. He did, however, file a brief asserting two assignments of error regarding the board's decision to order a refund for 2000, 2001, and 2002.

[**P5] AT&T filed a motion to strike the administrator's assignments of error, arguing that because the administrator

did not file a notice of appeal or cross-appeal, the court of common pleas lacked jurisdiction to consider his arguments. Asserting jurisdiction over AT&T's one assignment of error and the administrator's two assignments of error, the court of common pleas upheld the administrator's position on all three assignments. *AT&T Communications of Ohio, Inc. v. Lynch*, C.P. No. CV-06-608252 (Nov. 4, 2009).

[**P6] On appeal to the court of appeals, AT&T asserted, among other assignments of error, that the court of common pleas lacked jurisdiction to consider the administrator's assignments of error because the administrator did not file a notice of appeal. The court of appeals agreed and reversed the common pleas court's judgment in favor of the administrator regarding AT&T's refund for 2000 through 2002. *AT&T Communications of Ohio, Inc. v. Lynch, 8th Dist. No. 94320, 2011 Ohio 302, ¶ 33*. The court of appeals otherwise [****4] affirmed the judgment of the court of common pleas. *Id. at ¶ 38*.

[**P7] The administrator appealed, and AT&T cross-appealed. We accepted the administrator's discretionary appeal for review, but we denied AT&T's cross-appeal. *AT&T Communications of Ohio, Inc. v. Lynch, 128 Ohio St.3d 1556, 2011 Ohio 2905, 949 N.E.2d 43*.

III. Analysis

[**P8] We begin by examining the authority of the court of common pleas to review certain administrative decisions. "The courts of common pleas * * * shall have * * * such powers of review of proceedings of administrative officers and agencies as may be provided by law." *Ohio Constitution, Article VI, Section 4(B)*. Pursuant to this authority, the General Assembly enacted *R.C. 2506.01*, which permits parties to appeal the final decisions of political subdivisions that result [*94] from a quasi-judicial proceeding in which notice, a hearing, and the opportunity for the introduction [***1169] of evidence have been given. *See State ex rel. Painesville v. Lake Cty. Bd. of Commrs., 93 Ohio St.3d 566, 571, 2001 Ohio 1609, 757 N.E.2d 347 (2001)*.[1]

[**P9] *R.C. 2506.01* appeals proceed in accordance with the provisions of *R.C. Chapter 2505*, subject to some exceptions provided in *R.C. Chapter 2506*. *In re Incorporation of Carlisle Ridge Village, 15 Ohio St.2d 177, 180-182, 239 N.E.2d 26 (1968)*. An administrative decision of a taxing body is first appealed to the court of common pleas. *R.C. 2506.01*. That court's decision may then be appealed to the court of appeals. *R.C. 2506.04*. The appeal to the court of common pleas concerns us here.

[**P10] The administrator asserts the following proposition of law: "In a Chapter 2506 administrative appeal, the filing of a single notice of appeal vests jurisdiction in the common pleas court over the final decision of the administrative body and all issues therein without the necessity of each party filing a separate notice of appeal." Here, the administrator argues that an appellant's notice of appeal vests the court of common pleas with jurisdiction [****6] to consider any assignment of error that seeks to reverse a portion of the board's decision. We have never ruled on this exact issue.

[**P11] Citing *R.C. 2506.03*, the administrator asserts that the appeal of an administrative decision to a common pleas court is more akin to a trial, where "the entire matter is tried anew," than to an appeal ("The hearing of an [administrative] appeal shall proceed as in the trial of a civil action"). This language and other provisions that highlight differences between administrative appeals and appeals from court judgments, he claims, indicate that the appeal of an administrative decision to a court of common pleas really proceeds as a retrial of the administrative decision below; therefore, one notice of appeal under *R.C. 2506.01* authorizes a court of common pleas to consider all issues that arise from the underlying administrative decision.

A. Courts of Common Pleas Exercise Appellate Jurisdiction under *R.C. 2506.01*

[**P12] We recognize that under *R.C. 2506.03*, authorizing the courts of common pleas to hold the hearing on appeal "as in the trial of a civil action," the court may admit and consider new evidence, and the court must weigh evidence on the [*95] whole record. [****7] *Cincinnati Bell, Inc. v. Glendale, 42 Ohio St.2d 368, 370, 328 N.E.2d 808 (1975)*, quoting *R.C. 2506.03*.

[**P13] However, while an appeal under *R.C. 2506.01* resembles a de novo proceeding, it is not de novo. *Dudukovich v. Lorain Metro. Hous. Auth., 58 Ohio St.2d 202, 206-207, 389 N.E.2d 1113 (1979)*. There are limits to a court of common pleas review of the administrative body's decision. For example, in weighing evidence, the court may not "blatantly substitute its judgment for that of the agency, especially in areas of administrative expertise." *Id. at 207*. Further, new evidence is admitted in an *R.C. Chapter 2506* appeal only under certain circumstances. We have noted that

[1] The instant case involves an appeal under *R.C. 2506.01*. However, the General Assembly has also provided for the appeal of administrative decisions in *R.C. 119.12*. [****5] "*R.C. 119.12* concerns appeals from *state* agencies, while *R.C. 2505.04*, as applied through *R.C. 2506.01*, concerns appeals from agencies of *political subdivisions*." (Emphasis added.) *Hanson v. Shaker Hts., 152 Ohio App.3d 1, 2003 Ohio 749, 786 N.E.2d 487, ¶ 14 (8th Dist)*.

an R.C. 2506.01 appeal "'makes liberal provision for the introduction of new or additional [***1170] evidence.'" Id. at 206-207. Cincinnati Bell v. Glendale, 42 Ohio St.2d 368, 370, 328 N.E.2d 808 (1975). Typically, however, a court of common pleas, in reviewing an administrative decision, is limited to the "transcript as filed," according to R.C. 2506.03, with limited exceptions involving the integrity of the evidence in the underlying proceeding. *See* Court Street Dev. v. Stow City Council, 9th Dist. No. 19648, 2000 Ohio App. LEXIS 3900, 2000 WL 1226604, *4 (Aug. 30, 2000). Thus, while a court of common pleas in an R.C. 2506.01 appeal [****8] may consider evidence outside the administrative record, that authority is limited.

[**P14] In reviewing the administrative body's decision, a court of common pleas is authorized to determine whether the agency's decision is "unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence." R.C. 2506.04. *See also* Henley v. Youngstown Bd. of Zoning Appeals, 90 Ohio St.3d 142, 147, 2000 Ohio 493, 735 N.E.2d 433 (2000), citing Smith v. Granville Twp. Bd. of Trustees, 81 Ohio St.3d 608, 612, 1998 Ohio 340, 693 N.E.2d 219 (1998), citing Dudukovich, 58 Ohio St.2d at 206-207, 389 N.E.2d 1113The court will then "affirm, reverse, vacate, or modify the order * * *, or remand" the underlying administrative decision under that standard of review specified in the statute. R.C. 2506.04. These standards that a court of common pleas must employ and the dispositions that it must reach are more limited than relief that could be awarded pursuant to a trial, and therefore, the administrative appeal is more akin to an appeal than a trial.

[**P15] Therefore, although an R.C. Chapter 2506 appeal proceeds differently from an appeal of a trial court judgment, a court [****9] of common pleas nevertheless "performs an appellate function." Dvorak v. Athens Mun. Civ. Serv. Comm., 46 Ohio St.2d 99, 103, 346 N.E.2d 157 (1976). Accordingly, we find no merit in the administrator's argument that the distinctions in an R.C. 2506.01 appeal, as compared to the appeal of the judgment of a court, indicate that a single notice of appeal under R.C. 2506.01 authorizes a court of common pleas to consider an appeal by a party that has not filed a separate notice of appeal.

[*96] B. Each Party Seeking to Reverse an Administrative Decision Must Perfect an Appeal

[**P16] Even though we have determined that in the appeal of an administrative decision, a court of common pleas operates more like a court of appeals than a trial court, our analysis is not yet complete. We now look to the procedure for filing an administrative appeal in a court of common pleas pursuant to R.C. 2505.04 to determine whether the filing of a single notice of appeal vests the court of common pleas with jurisdiction to consider any and all challenges to the underlying administrative decision.

[**P17] "Jurisdiction over an administrative appeal does not vest in a common pleas court unless and until an appeal is perfected." John Roberts Mgt. Co. v. Obetz, 188 Ohio App.3d 362, 2010 Ohio 3382, 935 N.E.2d 493, ¶ 11 (10th Dist). [****10] *See also* Richards v. Indus. Comm., 163 Ohio St. 439, 444, 127 N.E.2d 402 (1955) ("Section 2505.04 is clearly a jurisdictional statute"). R.C. 2505.04 provides, "An appeal is perfected when a written notice of appeal is filed * * *." R.C. 2505.05 directs, "The notice of appeal described in section 2505.04 of the Revised Code shall * * * designate, in the case of an administrative-related appeal, the final order appealed from and whether the appeal is on questions of law or questions of law and fact." It continues, "[T]he party appealing shall [***1171] be designated the appellant, and the adverse party, the appellee."

[**P18] "When construing a statute, we first examine its plain language and apply the statute as written when the meaning is clear and unambiguous." MedCorp, Inc. v. Ohio Dept. of Job & Family Servs., 121 Ohio St.3d 622, 2009 Ohio 2058, 906 N.E.2d 1125, ¶ 9. However, "[w]hen a statute is susceptible of more than one interpretation, courts seek to interpret the statutory provision in a manner that most readily furthers the legislative purpose as reflected in the wording used in the legislation." State ex rel. Toledo Edison Co. v. Clyde, 76 Ohio St.3d 508, 513, 1996 Ohio 376, 668 N.E.2d 498 (1996), citing [****11] United Tel. Co. v. Limbach, 71 Ohio St.3d 369, 372, 1994 Ohio 209, 643 N.E.2d 1129 (1994), and Harris v. Van Hoose, 49 Ohio St.3d 24, 26, 550 N.E.2d 461 (1990). Further, when interpreting a statute, courts must "avoid an illogical or absurd result." State ex rel. Shisler v. Ohio Pub. Emps. Retirement Sys., 122 Ohio St.3d 148, 2009 Ohio 2522, 909 N.E.2d 610, ¶ 34 (Pfeifer, J., dissenting), citing In re T.R., 120 Ohio St.3d 136, 2008 Ohio 5219, 896 N.E.2d 1003, ¶ 16.

[**P19] Nowhere in the aforementioned provisions is there any express indication whether a single appeal vests the court of common pleas with authority to hear any and all challenges to the underlying administrative decision. R.C. 2505.04 provides that "[a]n appeal is perfected when a written notice of appeal is filed * * *."

[**P20] We find that the purpose served in perfecting an appeal is instructive in deciding this issue. "The purpose of a notice of appeal * * * is to '* * * apprise [*97] the opposite party of the taking of an appeal.'" Maritime Mfrs., Inc. v. Hi-

Skipper Marina, 70 Ohio St.2d 257, 259, 436 N.E.2d 1034 (1982), quoting *Capital Loan & Savs. Co. v. Biery, 134 Ohio St. 333, 339, 16 N.E.2d 450 (1938)*. "'If this is done beyond [****12] (the) danger of reasonable misunderstanding, the purpose of the notice of appeal is accomplished.'" *Maritime Mfrs. at 259*, quoting *Couk v. Ocean Acc. & Guar. Corp., 138 Ohio St. 110, 116, 33 N.E.2d 9 (1941)*. Thus, a notice of appeal "serves to satisfy due process concerns by 'ensur[ing] that the filing provides sufficient notice to other parties and the courts.'" (Bracketing added in Glover) *United States v. Glover, 242 F.3d 333, 336 (6th Cir.2001)*, quoting *Smith v. Barry, 502 U.S. 244, 248, 112 S.Ct. 678, 116 L.Ed.2d 678 (1992)*. We will rely on the purpose behind the notice requirement as our only guidance and uphold the judgment of the appellate court.

[**P21] While *Maritime Mfrs.* applied the rules of appellate procedure and addressed the appeal of a trial court's judgment to a court of appeals, we have similarly held that the filing of a notice of appeal in an *R.C. 2506.01* administrative appeal serves the purpose of informing the opposing party of the taking of an appeal. *Welsh Dev. Co., Inc. v. Warren Cty. Regional Planning Comm., 128 Ohio St.3d 471, 2011 Ohio 1604, 946 N.E.2d 215, ¶ 29*.

[**P22] An appeal of an administrative decision to a court of common pleas alerts the opposing party that [****13] an appeal of the underlying decision is being taken. Requiring an appellee who seeks to change or reverse a portion of the decision to file a separate appeal also serves that purpose. Accordingly, we hold that in an administrative appeal to a court of common pleas pursuant to *R.C. 2506.01*, each party seeking to reverse or modify the underlying administrative decision must perfect a separate appeal in order to vest the common pleas court with jurisdiction to review each party's respective assignments of error.

IV. Conclusion

[**P23] In the instant case, AT&T perfected an appeal of the administrative [***1172] decision in the court of common pleas, setting forth a single assignment of error that pertained to the 1999 refund request. The administrator did not perfect an appeal in the court of common pleas, but in his appeal brief, he asserted two assignments of error that sought reversal of the board's decision regarding the taxpayer's refund request for 2000 through 2002. Because the administrator failed to perfect a separate appeal, the common pleas court lacked jurisdiction to consider the administrator's assignments of error. Accordingly, we affirm the judgment of the court of appeals.

Judgment affirmed.

O'CONNOR, [****14] C.J., and PFEIFER, O'DONNELL, LANZINGER, CUPP, and MCGEE BROWN, JJ., concur.

End of Document

Medcorp, Inc. v. Ohio Dep't of Job & Family Servs.

Supreme Court of Ohio

January 21, 2009, Submitted; May 7, 2009, Decided

Nos. 2008-0584 and 2008-0630

Reporter
121 Ohio St. 3d 622 *; 2009-Ohio-2058 **; 906 N.E.2d 1125 ***; 2009 Ohio LEXIS 1217 ****

MEDCORP, INC., APPELLEE, v. OHIO DEPARTMENT OF JOB AND FAMILY SERVICES, APPELLANT.

Subsequent History: On reconsideration by *Medcorp, Inc. v. Ohio Dept of Job & Family Servs., 122 Ohio St. 3d 1488, 2009 Ohio 3830, 910 N.E.2d 1041, 2009 Ohio LEXIS 2174 (2009)*

Reconsideration granted by, in part *Medcorp, Inc. v. Ohio Dep't of Job & Family, 2009 Ohio 6546, 2009 Ohio 6546, 2009 Ohio LEXIS 3510 (Ohio, Dec. 15, 2009)*

Affirmed in part and modified in part by, On reconsideration by *Medcorp, Inc. v. Ohio Dep't of Job & Family Servs., 124 Ohio St. 3d 1215, 2009 Ohio 6425, 2009 Ohio LEXIS 3493 (Ohio, Dec. 15, 2009)*

Prior History: [****1] APPEAL from and CERTIFIED by the Court of Appeals for Franklin County, No. 07AP-312, *2008 Ohio 464*.

Medcorp, Inc. v. Ohio Dep't of Job & Family Servs., 2008 Ohio 464, 2008 Ohio App. LEXIS 392 (Ohio Ct. App., Franklin County, Feb. 7, 2008)

Disposition: Judgment reversed and cause dismissed.

Syllabus

SYLLABUS OF THE COURT

[*622] To satisfy the "grounds of the party's appeal" requirement in *R.C. 119.12*, parties appealing under that statute must identify specific legal or factual errors in their notices of appeal.

Counsel: Geoffrey E. Webster, J. Randall Richards, and Eric B. Hershberger, for appellee.

Richard Cordray, Attorney General, Benjamin C. Mizer, Solicitor General, Stephen P. Carney, Deputy Solicitor, and Ara Mekhjian, Assistant Attorney General, for appellant.

Judges: MOYER, C.J. O'CONNOR, LANZINGER, and CUPP, JJ., concur. PFEIFER, LUNDBERG STRATTON, and O'DONNELL, JJ., dissent.

Opinion by: MOYER

Opinion

[***1127] [*623] **MOYER, C.J.**

I

[**P1] The Tenth District Court of Appeals certified this case pursuant to *Section 3(B)(4), Article IV of the Ohio Constitution* and *App.R. 25*, concluding that its judgment is in conflict with the judgment of the Second District Court of Appeals in *David May Ministries v. State ex rel. Petro, Greene App. No. 2007 CA 1, 2007 Ohio 3454*, on the following issue: "Does *R.C. 119.12*'s 'grounds' requirement, which provides that a notice of administrative appeal must state the 'grounds' for the appeal, require [****2] an appellant to specify something beyond restating the statutory formula that the order appealed from is 'not in accordance with law and is not supported by reliable, probative, and substantial evidence?' " We accepted the discretionary appeal of the Ohio Department of Job and Family Services on the same issue and consolidated the cases. *118 Ohio St. 3d 1431, 2008 Ohio 2595, 887 N.E.2d 1201*.

[**P2] For the following reasons, we answer the certified question in the affirmative and reverse the judgment of the court of appeals. We hold that parties filing an appeal under *R.C. 119.12* must identify specific legal or factual errors in their notices of appeal, not simply restate the standard of review for such orders.

II

[**P3] Appellee, Medcorp, Inc., is a medical-transport company that provides ambulance and ambulette services to qualified Medicaid patients. Upon an audit of the claims that

Medcorp had submitted in 1996 and 1997, the Ohio Department of Job and Family Services disallowed all the claims that had been paid. The department subsequently ordered Medcorp to repay $ 534,719.27 that the department had paid to Medcorp for the disallowed claims.

[**P4] Medcorp appealed the department's order to the Franklin [****3] County Court of Common Pleas pursuant to R.C. 119.12. Medcorp's notice of appeal stated:

[**P5] "Pursuant to sections 119.12 and 5111.06 of the Ohio Revised Code, Medcorp, Inc., by and through counsel, hereby appeals from the Adjudication Order issued by the Ohio Department of Job and Family Services dated April 19, 2006 * * *. The Adjudication Order is not in accordance with law and is not supported by reliable, probative, and substantial evidence."

[**P6] The department filed a motion to dismiss the appeal, arguing that Medcorp's notice of appeal failed to state the grounds upon which its appeal was based, as required by R.C. 119.12, and therefore did not properly invoke the trial court's jurisdiction. Rather than ruling on the motion to dismiss, the trial court [*624] issued a decision on the merits of the appeal and reversed the department's order.

[**P7] The department appealed to the Franklin County Court of Appeals and raised the question of the trial court's jurisdiction, along with a question on the merits. The court of appeals, citing Derakhshan v. State Med. Bd. of Ohio, Franklin App. No. 07AP-261, 2007 Ohio 5802, concluded that Medcorp's notice of appeal set forth sufficient grounds to invoke the [****4] jurisdiction of the trial court, and it affirmed the trial court's decision on the merits.

III

[**P8] Pursuant to R.C. 119.12, "[a]ny party desiring to appeal [an order of an administrative agency] shall file a notice of appeal with the agency setting forth the order appealed from and the grounds of the party's appeal." The precise issue before us is what the statutory phrase "grounds of the party's appeal" requires: may an appealing party meet this burden [***1128] by simply providing a general statement that the underlying order "is not in accordance with law and is not supported by reliable, probative, and substantial evidence," as Medcorp did in this case, or are more specific objections required?

[**P9] When construing a statute, we first examine its plain language and apply the statute as written when the meaning is clear and unambiguous. See State v. Lowe, 112 Ohio St. 3d 507, 2007 Ohio 606, P9, 861 N.E.2d 512. The words used must be afforded their usual, normal, and/or customary meanings. See Proctor v. Kardassilaris, 115 Ohio St. 3d 71, 2007 Ohio 4838, P12, 873 N.E.2d 872; R.C. 1.42.

[**P10] The Random House Dictionary of the English Language defines "grounds" in this context as "the foundation or basis [****5] on which a belief or action rests; reason or cause: *grounds for dismissal.*" (Italics sic.) Random House Dictionary (2d Ed.1987) 843. Black's Law Dictionary provides a similar definition for "ground": "[t]he reason or point that something (as a legal claim or argument) relies on for validity <<grounds for divorce> <<several grounds for appeal>." Black's Law Dictionary (8th Ed.2004) 723. These definitions support the conclusion that a "ground of the party's appeal" is the discrete reason or reasons that caused the party to appeal.

[**P11] Thus, to comply with R.C. 119.12, an appealing party must state in its notice of appeal the specific legal and/or factual reasons why it is appealing. The statute does not suggest that parties must present these reasons in exacting detail. Rather, parties must simply designate the explicit objection they are raising to the administrative agency's order, much in the same way that appellants in a court of appeals must assert specific legal arguments in the form of assignments of error and issues for review, App.R. 16(A)(3) and (4), and appellants [*625] in this court must advance propositions of law, S.Ct.Prac.R. III(1)(B)(4) and VI(2)(B)(4).

[**P12] In this case, Medcorp claimed [****6] that the department's audit determination was based on a flawed statistical-sampling methodology for which there is no provision in the department's internal procedural manuals. Thus, in its notice of appeal, Medcorp could have stated, "The department erred when it employed a flawed statistical-sampling methodology to support its audit finding against Medcorp" or "The department used a statistical-sampling methodology not provided for in its internal procedural manuals." If Medcorp believed that the department acted in contravention of a specific statute, it could have simply said, "The department's audit was not conducted in compliance with" that statute. Any of these statements could fairly be called grounds for appeal, and all would have notified the court and the department of the precise argument being advanced.

[**P13] Allowing a party to simply allege that the administrative order in question "is not supported by reliable, probative, and substantial evidence" and/or "is not in accordance with law" in its notice of appeal would create a result inconsistent with the clear intent driving the statute. We must avoid constructions that create absurdities, see In re T.R., 120 Ohio St. 3d 136, 2008 Ohio 5219, P16, 896 N.E.2d

1003, [****7] and we must construe statutes so as to give effect to the General Assembly's intent in enacting them, see Ackison v. Anchor Packing Co., 120 Ohio St. 3d 228, 2008 Ohio 5243, P36, 897 N.E.2d 1118.

[**P14] When a party files an appeal from an order of an administrative agency, it is already making an affirmative statement that it believes that the underlying order "is not supported by reliable, probative, [***1129] and substantial evidence, and/or is not in accordance with law" because it must meet that standard to succeed on appeal under the plain language of R.C. 119.12. If we were to adopt Medcorp's position, those same, general words could be used in virtually every appeal from an administrative agency filed pursuant to the statute.

[**P15] By specifically requiring an appealing party to state the "grounds of [its] appeal" in the notice of appeal, the General Assembly clearly intended that the appealing party should provide some information supporting its conclusion that the order is not in accordance with law and is not supported by reliable, probative, and substantial evidence. If every appealing party could simply restate the standard of review applicable to all appeals without further specification, this [****8] requirement would, in effect, be excised from the statute.

[**P16] Such a construction would also create several problems. First, a boilerplate restatement of the standard of review fails to put the nonappealing party and the court on notice of the specific issues being appealed. In a case that [*626] may include thousands of pages of proceedings and multiple issues, this lack of specificity at an early stage would waste everyone's time.

[**P17] Second, R.C. 119.12 permits courts to review appeals with or without (1) ordering further comments from counsel, (2) ordering briefing, and (3) admitting additional evidence: "The court *shall conduct a hearing* on the appeal * * *. * * * The hearing in the court of common pleas shall proceed as in the trial of a civil action, and the court shall determine the rights of the parties in accordance with the laws applicable to a civil action. At the hearing, *counsel may be heard* on oral argument, *briefs may be submitted*, and *evidence may be introduced* if the court has granted a request for the presentation of additional evidence." (Emphasis added.)

[**P18] This provision reveals that the administrative-appeals process was designed to give the trial court flexibility in selecting [****9] the process for resolution of the case. The court has the discretion to do as much as hold a full hearing with extensive participation from the parties or as little as review the appeal without oral argument, briefing, or additional evidence. However, this flexibility can be exercised only if the appellant identifies the alleged defects in the order or proceedings from which the appeal is taken. A general statement of factual and legal conclusions gives the trial court no guidance and essentially prevents the court from resolving the case summarily when it may be appropriate to do so (e.g., when the appellant's specific argument has recently been rejected in a controlling case). While a trial court could conceivably choose to review the entire record and identify specific errors on its own, giving proper effect to the words of the statute eliminates that necessity.

[**P19] Finally, several courts of appeals have held that trial courts may not dismiss administrative-agency appeals for failure to prosecute, even when the trial court orders or the local rules require the appellant to file a brief and the appellant fails to do so. [1] In these circumstances, the notice of appeal will be the trial [****10] court's only source of guidance regarding the specific issues for appeal. If the appellant has provided only a restatement of the standard [***1130] of review, the trial court will be forced to waste time combing through the record to pinpoint appealable issues. It makes sense that the General Assembly would place on an appellant the burden of identifying the specific grounds of appeal to promote efficient management of the appeal.

[**P20] In view of these reasons and the plain language of R.C. 119.12, we hold that to satisfy the "grounds of the party's appeal" requirement in R.C. 119.12, [*627] parties appealing under that statute must identify specific legal or factual errors in their notices of appeal; they may not simply restate the standard of review. While an extensive explanation of the alleged errors is not required at that point in the proceedings, the stated grounds must be specific enough that the trial court and opposing party can identify the objections and proceed accordingly, much in the same way that assignments of [****11] error and issues for review are presented in the courts of appeals and propositions of law are asserted in this court.

[**P21] Medcorp failed to designate precise errors in its notice of appeal; instead, it simply reiterated the statutory standard of review, that the order was "not in accordance with law and [was] not supported by reliable, probative, and substantial evidence." This statement does not strictly comply with the plain meaning of R.C. 119.12, and thus the trial court lacked jurisdiction to consider Medcorp's appeal. See Hughes

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[1] See, e.g., Red Hotz, Inc. v. Liquor Control Comm. (Aug. 17, 1993), Franklin App. No. 93AP-87, 1993 Ohio App. LEXIS 4032; Minello v. Orange City School Dist. Bd. of Edn. (Dec. 16, 1982), Cuyahoga App. No. 44659, 1982 Ohio App. LEXIS 11662.

v. Ohio Dept. of Commerce, 114 Ohio St.3d 47, 2007 Ohio 2877, 868 N.E.2d 246, P 17-18.

IV

[**P22] For the foregoing reasons, we answer the certified question in the affirmative, reverse the judgment of the court of appeals, and dismiss the cause for lack of jurisdiction.

Judgment reversed and cause dismissed.

O'CONNOR, LANZINGER, and CUPP, JJ., concur.

PFEIFER, LUNDBERG STRATTON, and O'DONNELL, JJ., dissent.

Dissent by: LUNDBERG STRATTON; O'DONNELL

Dissent

LUNDBERG STRATTON, J., dissenting.

[**P23] I respectfully dissent. I agree with the Tenth District Court of Appeals that Medcorp's notice of appeal set forth sufficient grounds to invoke the jurisdiction of the trial court. The plain language [****12] of *R.C. 119.12* does not require an appealing party to state the "grounds of the party's appeal" with any specificity.

[**P24] It is our duty to enforce a statute as written and not add or subtract from the statute. *In re Adoption of Holcomb (1985), 18 Ohio St.3d 361, 366, 18 OBR 419, 481 N.E.2d 613.* I believe that the majority has added a degree of specificity that the General Assembly did not include in the statute. Had the General Assembly intended to require specific grounds in the notice of appeal, it could have included language in *R.C. 119.12* requiring the appealing party to [*628] indicate *how* the order was not supported by reliable, probative, and substantial evidence.

[**P25] As the court of appeals stated in *Derakhshan v. State Med. Bd. of Ohio, Franklin App. No. 07AP-261, 2007 Ohio 5802*, "[w]hile we can appreciate appellee's desire for more detail about appellant's arguments, *R.C. 119.12* only requires an appellant to 'set[ ] forth * * * the grounds of the party's appeal.' It does not require an appellant to set forth specific facts to support those grounds, and we expressly decline to adopt such a requirement." *Id. at P 22.*

[**P26] [***1131] *R.C. 119.12* is a general statute that covers appeals from many different [****13] agencies. Thus, "[t]he language of the statute must be of a general nature to accommodate the many agencies within its purview." *Weissberg v. State, Cuyahoga App. No. 37207, 1977 Ohio App. LEXIS 8761 (Dec. 22, 1977).* The "grounds" requirement may be met by simply stating in the operative words of *R.C. 119.12* that the order appealed from "is not supported by reliable, probative, and substantial evidence, and/or is not in accordance with law." *Appeal of Stocker (1968), 16 Ohio App.2d 66, 70, 45 Ohio Op. 2d 165, 241 N.E.2d 779.*

[**P27] Medcorp stated its grounds for appeal in general terms. The statute requires no more than that, and I disagree with the majority's decision adopting a more stringent standard. Consequently, I would affirm the judgment of the court of appeals.

PFEIFER and O'DONNELL, JJ., concur in the foregoing opinion.

O'DONNELL, J., dissenting.

[**P28] I respectfully dissent. The majority opinion takes a dramatic step away from strict statutory construction and, rather than interpreting the words used in *R.C. 119.12*, simply adds its own requirement to the statute, thereby creating a wholly new procedure for filing a notice of appeal in these kinds of cases.

[**P29] The majority also fails to set forth the degree of specificity [****14] it requires to identify a legal or factual error in a notice of appeal. Here, for example, Medcorp's notice stated that Medcorp appealed because "[t]he Adjudication Order [was] not in accordance with law and [was] not supported by reliable, probative, and substantial evidence." Is a specific statutory reference, or perhaps a case citation, necessary to meet the majority's "specific legal or factual errors" standard? Courts use standards such as "contrary to law" in all manner of cases and with good reason: the parties convey a specific legal thought with such expressions.

[**P30] [*629] *R.C. 119.12* does not set forth the "specificity" requirement imposed by the majority. Rather, it calls for the notice of appeal to identify only the order appealed from and the "grounds" of the party's appeal. It says nothing about legal or factual errors. Thus, in my view, an appeal may be taken on procedural or constitutional grounds by using the words "not in accordance with law," as Medcorp sought to do here.

[**P31] In *Zier v. Bur. of Unemployment Comp. (1949), 151 Ohio St. 123, 38 Ohio Op. 573, 84 N.E.2d 746*, we held that a notice of appeal stating that the appellant appealed "in accordance with his right to appeal under *Section 1346-4* [****15] of the General Code" failed to "'set forth the

decision appealed from and the *errors* therein complained of" and therefore failed to confer jurisdiction upon the court of common pleas. (Emphasis added.) *Zier at 124, 126 - 127*, quoting *Section 1346-4*, General Code.

[**P32] However, the terms "grounds" and "errors" are not synonymous. Black's Law Dictionary (8th Ed.2004) defines "ground" as "[t]he reason or point that something (as a legal claim or argument) relies on for validity <<grounds for divorce> <<several grounds for appeal>." Id. at 723. In contrast, it defines "error" as "[a] mistake of law or of fact in a tribunal's judgment, opinion, or order," id. at 582, and further defines "assignment of error" as "[a] specification of the trial court's alleged errors on which the appellant relies in seeking an appellate court's reversal, vacation, or modification of an adverse judgment," id. at 129. Thus, "errors" are more specific than "grounds."

[**P33] [***1132] Here, in stating that "[t]he Adjudication Order is not in accordance with law and is not supported by reliable, probative, and substantial evidence," Medcorp stated grounds for its appeal. Although it could have stated those grounds with more specificity, [****16] giving facts to demonstrate how the order was not in accordance with law and how it was not supported by the evidence, the plain language of the statute does not require it to do so.

[**P34] Tinkering with statutes as the majority has chosen to do here only complicates the practice of law for practitioners, who rely on the words used by the legislature to determine what they must do to properly file a notice of appeal. *R.C. 119.12* does not require an appellant to identify a specific legal or factual error, nor does it call for a party to "designate precise errors," majority opinion at P 21, in its notice of appeal. The majority's decision to insert these requirements into this statute prevents me from joining it. I would urge the General Assembly to clarify its intent with regard to this important area of law.

PFEIFER, J., concurs in the foregoing opinion.

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Morning View Care Center-Fulton v. Ohio Dep't of Human Servs.

Court of Appeals of Ohio, Tenth Appellate District, Franklin County

June 6, 2002, Rendered

No. 01AP-931

Reporter
148 Ohio App. 3d 518 *; 2002-Ohio-2878 **; 774 N.E.2d 300 ***; 2002 Ohio App. LEXIS 2822 ****

Morning View Care Center-Fulton, Plaintiff-Appellant, v. The Ohio Department of Human Services et al., Defendants-Appellees. *

Subsequent History: [****1] As Corrected October 28, 2002.

Appeal denied by *Morning View Care Ctr.-Fulton v. Ohio Dep't of Human Serv., 96 Ohio St. 3d 1524, 2002 Ohio 5099, 775 N.E.2d 864, 2002 Ohio LEXIS 2467 (2002)*

Appeal after remand at, Claim dismissed by Morning View Care Ctr. - *Fulton v. Ohio Dep't of Job & Family Servs., 2004 Ohio App. LEXIS 4486 (Ohio Ct. App., Franklin County, Sept. 21, 2004)*

Prior History: APPEAL from the Franklin County Court of Common Pleas.

Disposition: Judgment affirmed in part, reversed in part, and cause remanded.

Counsel: Geoffrey E. Webster, for appellant.

Betty D. Montgomery, Attorney General, and Rebecca L. Thomas, for appellees.

Judges: PETREE, J. TYACK, P.J., and LAZARUS, J., concur.

Opinion by: PETREE

Opinion

[***302] [*520] (REGULAR CALENDAR)

PETREE, J.

[**P1] Plaintiff-appellant, Morning View Care Center-Fulton ("MVCC-Fulton"), appeals from a judgment of the Franklin County Court of Common Pleas in favor of defendants-appellees, the Ohio Department of Human Services (now the Ohio Department of Job and Family Services), Jacqueline Romer-Sensky (former director), and Barbara Edwards (a deputy director), in their respective official capacities (collectively "ODJFS"). A judgment entry dated August 3, 2001, incorporated the trial court's written decision granting summary judgment to ODJFS, and dismissing MVCC-Fulton's complaint for declaratory and injunctive relief in connection with the handling by ODJFS of its application for a Medicaid reimbursement rate adjustment as provided in *R.C. Chapter 5111* and Ohio Adm.Code Chapter 5101:3.

[**P2] MVCC-Fulton is an intermediate care facility [****2] for the mentally retarded located in Morrow County and licensed by the state of Ohio. It is among several such facilities in the state owned by a common management group, Morning View Care Centers, operated by Dearth Management, Inc. MVCC-Fulton's 33 beds are certified to participate in federal Medicaid programs administered by ODJFS. MVCC-Fulton and ODJFS have been parties to a series of provider agreements [*521] entered into pursuant to *R.C. 5111.22*. For a number of years prior to 1998, MVCC-Fulton was a 65-bed facility, similarly licensed and certified.

[**P3] [***303] This case involves financial circumstances related to MVCC-Fulton's effort to downsize the capacity of its principal facility and to develop four 8-bed group homes to which former residents of the 65-bed home were transferred as each new building became ready for occupancy. The Ohio Department of Mental Retardation and Developmental Disabilities ("ODMRDD") initially approved the development request in September 1993. The process of constructing the smaller group homes and transferring residents took place during calendar years 1996 and 1997, [1] but licensing changes were not effective until June 1, 1998. Annual [****3] provider agreements from September 1, 1995 through August

* Reporter's Note: An appeal and cross-appeal to the Supreme Court of Ohio were not accepted in 96 Ohio St.3d 1524, 2002-Ohio-5099, 775 N.E.2d 864.

[1] The first group home was opened June 24, 1996, and the others began operations on May 19, September 11, and November 26, 1997, respectively.

31, 1998 (extended to October 31, 1998) identified MVCC-Fulton's certification as a 65-bed intermediate care facility. More recent agreements indicate a certification for 33 beds.

[**P4] The request for rate reconsideration, which pertains only to the main facility, was dated December 29, 1998, and was expressly grounded in "extreme hardship" under *R.C. 5111.29(A)(3)* and *Ohio Adm.Code 5101:3-3-24(D)*. The application pointed primarily to costs related to the downsizing effort that exceeded reimbursements in two cost centers and capital and indirect costs as contributing to the hardship. MVCC-Fulton represented that the reduction in capacity to 33 beds was part of a statewide program of ODMRDD to downsize larger intermediate care facilities for the mentally [****4] retarded and that the reduction in number of residents at the main facility was a main cause of its hardship.

[**P5] MVCC-Fulton suggested that fixed capital costs such as depreciation, amortization, interest expenses, and leasing costs for both real estate and equipment remained constant after the transfer of beds and, thus, caused an increase in the per diem cost per bed that was not adequately addressed by the reimbursements paid during fiscal years 1998 (July 1, 1997 to June 30, 1998) and 1999 (July 1, 1998 to June 30, 1999). MVCC-Fulton asserted that in spite of its aggressive attempts to reduce indirect costs, the size of the main facility and the continuing needs of its residents rendered it unable, during the period for which the rate adjustment was sought, to achieve a reduction proportional to the number of beds eliminated as the result of the downsizing. Disparity between those costs and the reimbursements received during that period fashioned additional financial hardship according to the application for relief. MVCC-Fulton acknowledged that the expenditures allocated to capital and indirect costs exceeded the cost ceilings then in effect for those categories.

[**P6] [****5] [*522] In support of its request, MVCC-Fulton cited such improvements in the quality of life of its residents that resulted from the downsizing as an upgrading of common areas, a conversion from two-resident rooms to private rooms, and the creation of a less institutional environment. Those improvements did not require structural changes to the building. A letter from the outgoing [2] director of ODMRDD accompanied the application for rate reconsideration. The letter confirmed those benefits and encouraged ODJFS to grant the request based upon extreme [***304] hardship. (January 10, 2001 Depositions Ex. 1). [3]

MVCC-Fulton also furnished the documentation required by *Ohio Adm.Code 5101:3-3-24(D)(3)*, including a three-month cost report.

[**P7] [****6] ODJFS reviewed the documentation and then requested additional information to explain certain issues the department identified within the initial request. The agency asked for clarification of the time period for which relief due to extreme hardship was being sought and confirmation of the facility's 1998 calendar year resident census. The department also asked for the following: (1) a copy of an operational plan detailing steps taken to prepare for downsizing; (2) a copy of a transition/downsizing budget; (3) a clearer explanation of the relationship between home office costs and the downsizing effort; (4) more detailed staffing information for both the main facility and the new group homes; (5) drawings of the facilities showing changes in usage and associated costs on a square-foot basis; (6) copies of lease agreements, depreciation schedules and bank statements reflecting interest expense and principal debt; (7) more precise explanation of the figures presented under certain specific accounting codes; (8) copies of budgets for the 1998 and 1999 fiscal years; and (9) any other pertinent documentation reflecting the hardship.

[**P8] MVCC-Fulton responded in detail [****7] and specifically asked for an adjusted rate of $ 173.95 per patient per day based on the information included in its three-month cost report. A rate of $ 146.45 per patient per day was actually in effect during the same period. The total request was for approximately $ 734,354 in additional reimbursements for the two fiscal years addressed. After receiving this March 1, 1999 response to its request for additional information, ODJFS not only reviewed the financial data furnished but also performed its own calculations [*523] where discrepancies were perceived in an attempt to relate increased costs to the downsizing exclusive of other factors.

[**P9] Based upon this analysis of all cost centers and a recalculation of allowable bed days during calendar year 1997, the period upon which the original rate for fiscal 1999 was determined, ODJFS granted a rate increase of $ 12.48 per diem, retroactively effective July 1, 1998. The approved adjustment amounted to a total increased reimbursement of

[2] A transition in gubernatorial administrations as well as departmental leadership occurred during the winter months of 1998-1999.

[3] Depositions of ODJFS employees Harry Saxe, Barbara Edwards, Frank Blair, Susie Weber, and Kevin Carter were conducted on January 10 and 11, 2001. Transcripts of those and later depositions were properly filed in the record during June 2001. Exhibits referred to as "January 10, 2001 Deposition Ex. _" were marked and identified on that date, then referred to in a number of the depositions conducted throughout the discovery proceedings in the trial court.

approximately $ 222,456 for fiscal 1999 only. Relief for fiscal 1998 was denied because the application was deemed not timely for that year.

[**P10] Over the signature of Director Romer-Sensky, [****8] ODJFS issued a 15-page report, with attachments, explaining the decision to grant a lesser adjustment than had been requested. Relying upon the language in *Ohio Adm.Code 5101:3-3-24(D)(1)* that "a request for a rate increase due to extreme hardship must be filed before the end of the fiscal year for which the rate is paid," ODJFS denied relief for fiscal year 1998 because the request for that year "should have been submitted *** on or before June 30, 1998." (January 10, 2001 Depositions Ex. 4, p. 2.) [***305] The director discussed standards ODJFS applied in reaching a decision regarding relief for fiscal year 1999. She specifically identified the necessity for a provider to demonstrate what circumstances are outside its control or a failure in the PPS (Prospective Payment System), and to document all the cost reduction steps implemented, along with the cost savings associated with those steps. (January 10, 2001 Depositions Ex. 4, p. 14.) The director also emphasized the inability of the department to verify the representation by MVCC-Fulton that downsizing of its main facility was mandated. (January 10, 2001 Depositions Ex. 4, p. 5.)

[**P11] MVCC-Fulton [****9] requested that the department reconsider its decision to grant partial relief only. MVCC-Fulton argued that where a rate adjustment is requested on grounds of extreme hardship, the department has the discretion to grant reasonable and appropriate reimbursement of the added costs of downsizing without regard to whether or not a government mandate or circumstances beyond the provider's control precipitate the hardship. Under that standard, the provider argued that an adjustment in the full amount requested is justified. ODJFS did not revise its initial award. MVCC-Fulton then filed its complaint in the Franklin County Common Pleas Court instituting the action from which this appeal is taken.

[**P12] MVCC-Fulton sought both declaratory and injunctive relief as to alleged violations by ODJFS of it rights under the *Fifth* and *Fourteenth Amendments to the United States Constitution*; *Sections 1396* and *1983, Title 42, U.S.Code*; *Sections 1* and *2, Article I, Ohio Constitution*; *R.C. 5111.01 et seq.*; and the provider agreements between the parties. MVCC-Fulton specifically [*524] complained that although it had accomplished its downsizing in a reasonable, cost effective [****10] and efficient manner to the benefit of its residents, ODJFS, with knowledge of the downsizing effort and having acquiesced in the reduction in number of beds, failed to reimburse adequate and reasonable costs for the period extending from July 1, 1997 to June 30, 1999. MVCC-Fulton contended that ODJFS failed to act in conformity with state and federal law when it recognized the need for a rate adjustment but failed to adjust the rate of reimbursement to an adequate and reasonable level in response to the increase in costs related to the downsizing.

[**P13] On September 14, 2000, the trial court dismissed several of those claims pursuant to *Civ.R. 12(B)(6)* [4] on the motion of ODJFS. The disposition of the motion to dismiss is not subject of this appeal. The court later granted summary judgment in favor of ODJFS on the remaining claims. In deciding the motion for summary judgment, the court held that ODJFS was entitled to judgment as a matter of law on MVCC-Fulton's due process and *Section 1983, Title 42, U.S.Code* claims because MVCC-Fulton could not prove it possessed a protected property interest in a higher Medicaid reimbursement rate than it received after ODJFS's partial granting [****11] of the reconsideration request. The court also noted that for purposes of a *Section 1983, Title 42, U.S.Code* action, the department is not a [***306] "person" as contemplated under that statute.

[**P14] The trial court found with respect to the state-law claims for an adjustment to the rate paid during fiscal 1998 that MVCC-Fulton did not request relief in a timely fashion and, therefore, ODJFS was entitled to judgment as a matter of law on any hardship alleged to have been experienced during that period. Finally, while recognizing that *Ohio Adm.Code 5101:3-3-24(D)* [****12] permits reimbursement of costs in excess of established rate ceilings under circumstances amounting to extreme hardship, the court determined that ODJFS did not abuse its discretion by granting an adjustment less than that asked for by MVCC-Fulton in the portion of the request attributable to fiscal year 1999. In reaching this conclusion, the trial court referred to what it termed the "unequivocal" discretion with regard to extreme hardship adjustments conferred upon the department by *R.C. 5111.29* and adopted the position that "'reasonable costs' are by definition those costs that fall within the ceilings set by *R.C. 5111.20 to 5111.32* ***." The court concluded that ODJFS was entitled to judgment as a matter of [*525] law on the claims that it violated *R.C. 5111.21* by not fully reimbursing the reasonable costs MVCC-Fulton alleged it had incurred and would incur between July 1, 1998 and June 30, 1999.

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[4] The trial court granted the motion to dismiss as to the equal protection claims of MVCC-Fulton under the United States and Ohio Constitutions and as to the *Section 1396(a), Title 42, U.S.Code* statutory claims alleged under ***Section 1983, Title 42, U.S.Code***. The court denied the motion to dismiss with respect to the procedural and substantive due process claims brought under ***Section 1983, Title 42, U.S.Code*** as well as the *R.C. Chapter 5111* state law claims.

[**P15] Appealing from that adverse judgment, MVCC-Fulton presents a single assignment of error for this court's consideration:

The trial court erred in granting summary judgment in [****13] favor of appellees and against appellant when there remained genuine issues of material fact and movants were not otherwise entitled to judgment as a matter of law.

[**P16] For the reasons that follow, we affirm the trial court's judgment as to the due process claims brought by MVCC-Fulton pursuant to *Section 1983, Title 42, U.S.Code*, and as to the claims for relief under state law that relate to fiscal 1998. As to the claims for relief under state law for fiscal 1999, however, we find that MVCC-Fulton produced evidence in opposition to the motion for summary judgment sufficient, when viewed most favorably to it as the nonmoving party, to establish the existence of genuine issues of material fact to be litigated. We, therefore, reverse the trial court's judgment in the latter respect.

[**P17] The Medicaid program is a source of federal funding designed to supplement state reimbursement to providers of medical and long-term care services to the poor. *Wilder v. Virginia Hospital Assn. (1990), 496 U.S. 498, 502, 110 S. Ct. 2510, 110 L. Ed. 2d 455*. The administration of the program is left to the individual participating states according to a federally approved [****14] plan that includes provision for reimbursement to service providers on a reasonable cost-related basis. *Ohio Academy of Nursing Homes, Inc. v. Creasy (1983), 1983 Ohio App. LEXIS 15007*, Franklin App. No. 83AP-47; and *State ex rel. Shady Acres Nursing Home, Inc. v. Rhodes (1982), 1982 Ohio App. LEXIS 12537*, Franklin App. No. 82AP-352.

[**P18] Ohio has a prospective cost-related system of reimbursement under which the annual costs for services in the calendar year ending prior to the effective date of a current rate are utilized to calculate that rate. *Ohio Academy of Nursing Homes, Inc. v. Creasy, supra, 1983 Ohio App. LEXIS 15007*,. In this case, for example, the rate of reimbursement paid to MVCC-Fulton during fiscal 1998 was based upon its cost reports for calendar 1996, and the rate for fiscal 1999 was calculated from calendar 1997 cost reports. Absent one or more of the circumstances mentioned in *R.C. 5111.29* that permits a request for rate reconsideration, [***307] a provider cannot expect additional payments should its actual costs exceed the rate set for the current year. Instead, those increased costs will serve as the foundation for a higher rate of reimbursement in later years. Id.

[**P19] [*526] *R.C. 5111.21(A)* [****15] provides in substance, as it has since originally enacted, [5] that "the department of job and family services shall pay *** the reasonable costs of services provided to an eligible medicaid recipient by an eligible nursing facility or intermediate care facility for the mentally retarded." See, also, *Worthington Nursing Home, Inc. v Creasy (1982), 4 Ohio App.3d 92, 97, 4 Ohio B. 174, 446 N.E.2d 841*. For the purposes of *R.C. 5111.20 to 5111.32* and of *Ohio Adm.Code 5101:3-3*:

'Reasonable' means that a cost is an actual cost that is appropriate and helpful to develop and maintain the operation of patient care facilities and activities, including normal standby costs, and that does not exceed what a prudent buyer pays for a given item or services. Reasonable costs may vary from provider to provider and from time to time for the same provider. [*R.C. 5111.20(U)* and *Ohio Adm.Code 5101:3-3-01(AA)*.]

[**P20] [****16] The Ohio General Assembly has provided a procedure by which a facility may seek reconsideration of its Medicaid reimbursement rate, but has vested the responsibility to adopt specific rules for establishment of the process to ODJFS. *R.C. 5111.29(A)*. Among the directives to ODJFS, with respect to rate reconsideration, *R.C. 5111.29(A)(3)* provides:

The rules shall provide that the department, through the rate reconsideration process, may increase a facility's rate as calculated under *sections 5111.23 to 5111.28 of the Revised Code* if the department, in its sole discretion, determines that the rate as calculated under those sections works an extreme hardship on the facility.

[**P21] The department's decision at the conclusion of the reconsideration process is not subject to any administrative proceedings under Ohio Adm.Code Chapter 119 or any other provision of the Revised Code. *R.C. 5111.29(A)(5)*.

[**P22] As the legislature directed, ODJFS adopted *Ohio Adm.Code 5101:3-3-24(D)* pursuant to which a Medicaid [****17] provider may apply for a rate adjustment due to extreme hardship. The rule allows for an increase of the provider facility's rate if the department, in its sole discretion, determines that the calculated rate works an extreme hardship on the facility. A rate adjustment shall, if sought on those grounds, "be granted only once for a

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[5] Beginning in 1980 there have been five versions of *R.C. 5111.21(A)* with effective dates, respectively, of July 1, 1980, December 23, 1986, November 14, 1989, December 13, 1990, and July 1, 2000. The quoted language, except for the name of the agency, has been the same in all five versions.

particular circumstance to a particular facility." *Ohio Adm.Code 5101:3-3-24(D)*. "A request for rate reconsideration due to extreme hardship must be filed before the end of the fiscal year for which the rate is paid." *Ohio Adm.Code 5101:3-3-24(D)(1)*. [*527] One of three conditions must exist for a request for rate reconsideration due to extreme hardship to have merit: (1) a prior request for relief due to extreme circumstances [6] has been denied; (2) the [***308] basis for the request is specifically not eligible for relief due to extreme circumstance; or (3) "the facility can demonstrate that the request for rate reconsideration due to extreme circumstances would be denied because it already has costs equal to or exceeding the ceiling in the cost center at issue." *Ohio Adm.Code 5101:3-3-24(D)(2)(c)* [****18] .

[**P23] The request, in writing, must give a detailed explanation as to why a rate adjustment due to extreme hardship is warranted, [****19] including steps taken to address the circumstances outside the rate reconsideration process. *Ohio Adm.Code 5101:3-3-24(D)(3)(a) and (d)*. A three-month cost report, as described in the rule, must accompany the request. *Ohio Adm.Code 5101:3-3-24(D)(3)(e)*. Justification for a rate adjustment in excess of applicable ceilings must be provided in writing. *Ohio Adm.Code 5101:3-3-24(D)(4)*. The effective date of any rate adjustment granted shall be determined by the sole discretion of the department. *Ohio Adm.Code 5101:3-3-24(D)(5)*.

[**P24] When an appellate court reviews a case that was concluded at the trial level by summary judgment, it does so de novo, applying the same standards as required of the trial court. *Ryberg v. Allstate Ins. Co. (2001), 2001 Ohio App. LEXIS 3126*, Franklin App. No. 00AP-1243. The review must be undertaken independently and without deference to the lower court's determination. *Al-Najjar v. R & S Imports, Inc. (2000), 2000 Ohio App. LEXIS 3877*, Franklin App. No. 99AP-1391. Where the decision as to whether the trial court properly granted summary judgment involves only questions [****20] of law, a reviewing court has complete and independent authority. *American Motorists Ins. Co. v. Olin Hunt Specialty Products, Inc. (2001), 2001 Ohio App. LEXIS 4169*, Franklin App. No. 00AP-1313, citing *Village of Grafton v. Ohio Edison Co.* (1996), *77 Ohio St.3d, 102, 105, 671 N.E.2d 241*.

[**P25] Summary judgment is appropriate pursuant to *Civ.R. 56* where: (1) no genuine issue of material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) when the evidence is viewed most strongly in favor of the nonmoving party, reasonable minds can come to but one conclusion, a conclusion adverse to the nonmoving party. *Ryberg, supra, 2001 Ohio App. LEXIS 3126*, [*528] citing *Tokles & Son, Inc. v. Midwestern Indemn. Co. (1992) 65 Ohio St.3d 621, 629, 605 N.E.2d 936*.

[**P26] The trial court correctly ruled that ODJFS, as an agency, is not a "person" subject to suit under *Section 1983, Title 42, U.S.Code*. This court previously held that one of the elements of a *Section 1983* claim is that the conduct in controversy must be committed by a person acting under color of state law and that the state is not a "person" for purposes of *Section 1983*. *Mankins v. Paxton (2001), 142 Ohio App.3d 1, 10, 753 N.E.2d 918*. [****21] We agree that the departmental defendant-appellee is entitled to judgment as a matter of law on claims brought pursuant to *Section 1983, Title 42, U.S.Code* and alleged against it as an agency of the state of Ohio. We affirm the trial court's judgment on that issue.

[**P27] To show that the former director and the deputy director of ODJFS violated its due process rights and that it [***309] is entitled to relief under *Section 1983, Title 42, U.S.Code*, MVCC-Fulton must identify a constitutionally protected property right in a higher adjusted rate than has been granted by ODJFS. That property interest must be based on a legitimate claim of entitlement, created not by the constitution, but instead by existing rules or understandings from an independent source such as state law that secures certain benefits and that supports claims of entitlement to those benefits. *Drake Center, Inc. v. Dept. of Human Services (1998), 125 Ohio App.3d 678, 701, 709 N.E.2d 532*; quoting *Board of Regents v. Roth (1972), 408 U.S. 564, 577, 92 S. Ct. 2701, 33 L. Ed. 2d 548*. If state law, including administrative rules, retains for the government a significant discretionary authority [****22] over the granting of a benefit, a lack of entitlement in a constitutional sense is indicated. Id., quoting *Senape v Constantino (C.A. 2, 1991), 936 F.2d 687, 690*.

[**P28] To justify relief on grounds of procedural due process, MVCC-Fulton must establish not only a legitimate property interest, but also that it was deprived of that interest without a meaningful opportunity to be heard. *Ohio Academy of Nursing Homes, Inc. v. Barry (1990), 56 Ohio St.3d 120,*

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[6] Rate reconsiderations because of "extreme circumstances" differ from those due to "extreme hardship" and are addressed by *R.C. 5111.29(A)(2)* and *Ohio Adm.Code 5101:3-3-24(C)*. "Extreme circumstances" are factors beyond the facility's control. *Ohio Adm.Code 5101:3-3-24(C)(1)*. Any rate reconsideration due to "extreme circumstances" shall not increase a rate in excess of any established rate limitations or maximum rates. *Ohio Adm.Code 5101:3-3-24(C)(4)*. The facility must not have efficiency incentives and equity payments included in the prospective rate that cover the cost increase, and costs in excess of ceilings will not be considered in the determination of available efficiency incentives. *Ohio Adm.Code 5101:3-3-24(C)(3)(a)*.

125, 564 N.E.2d 686, citing Cooperman v. University Surgical Assoc., Inc. (1987), 32 Ohio St.3d 191, 199-200, 513 N.E.2d 288. In Drake Center, supra, 125 Ohio App. 3d at 692-693, this court held that Ohio Adm.Code 5101:3-3-24(A) and (D) both provide opportunities to be heard that comply with the federal requirement that "the Medicaid agency must provide an appeals or exception procedure that allows individual providers an opportunity to submit additional evidence and receive prompt administrative review, with respect to such issues as the agency determines appropriate, of payment rates." Section 447.253(e), Title 42, C.F.R. A natural extension [****23] of that decision is that the procedure by which a provider may seek a [*529] rate adjustment pursuant to Ohio Adm.Code 5101:3-3-24 constitutes a "meaningful opportunity to be heard" for procedural due process purposes as well.

[**P29] The essence of substantive due process is the protection from certain arbitrary, wrongful governmental actions irrespective of the fairness of the procedures used to implement them. Southern Health Facilities, Inc. v. Somani (1995), 1995 Ohio App. LEXIS 5866, Franklin App. No. 95APE06-826. Generally, rules promulgated by an administrative agency have the force and effect of law unless they are unreasonable or are in conflict with related statutes enacted by the General Assembly. Ohio Academy of Nursing Homes, Inc. v. Barry, supra, at 127. They must have a reasonable relation to a proper legislative purpose and must not be arbitrary or discriminatory in their effect. Id. To satisfy substantive due process requirements, an administrative agency must interpret its own rules and apply them in a fashion that is neither arbitrary nor capricious. See Oswalt v. Ohio Adult Parole Auth. (2001), 2001 Ohio App. LEXIS 4467, Franklin App. No. 01AP-363. Still, a party [****24] alleging that a public official has violated its rights to substantive due process must establish a legitimate claim of entitlement to a constitutionally protected property interest.

[**P30] The Ohio Supreme Court has determined that a licensed Medicaid provider has a legitimate property interest in the reimbursement rate provided for it under R.C. 5111.21 and 5111.22, and that such interest may "not be diminished absent due process of law." Ohio Academy of Nursing Homes, Inc. v. Barry, supra, at 126-127. The question squarely presented by this [***310] appeal is whether or not MVCC-Fulton likewise has a legitimate property interest in an increased rate pursuant to the rate reconsideration provisions of R.C. 5111.29.

[**P31] As was true in *Drake Center*, MVCC-Fulton does not challenge the state's reimbursement system as a whole. Drake Center, supra, 125 Ohio App. 3d at 687-689. Drake Center sought an adjustment in its reimbursement rate pursuant to R.C. 5111.257 and Ohio Adm.Code 5105:3-3-25 based upon the contention that it was [****25] entitled to additional compensation as a provider of "outlier" services. [7] Id., 125 Ohio App. 3d at 683. This court decided that R.C. 5111.257 does not create a mandatory duty on the agency's part to recognize all facilities requesting rate reimbursement under that statute as qualified providers [*530] of outlier services. Instead, we observed that the "rulemaking function under the statute involves exercise of agency discretion in determining whether there are facilities that serve residents whose diagnoses or needs are not measured adequately ***." Id., 125 Ohio App. 3d at 695. Our conclusion in the *Drake Center* appeal was that the provider failed to show it had a protected property interest in additional reimbursement as a provider of outlier services. Id., 125 Ohio App. 3d at 701.

[**P32] [****26] We find no compelling reason to distinguish MVCC-Fulton's substantive due process claims from those of Drake Center. R.C. 5111.29(A)(3) vests ODJFS with considerable discretion and does not create a mandatory duty on the agency's part. R.C. 5111.257 provides in part that "the rules may require that a facility that qualifies for a rate adjustment under this division receive authorization from the department to admit or retain a resident who qualifies the facility for the rate adjustment ***." While the criteria for an adjustment pursuant to R.C. 5111.257 differs from the showing required by R.C. 5111.29(A)(3), the relief provided by both statutes is nonetheless an adjustment to the originally calculated rate for the subject facility. MVCC-Fulton, as a provider seeking additional reimbursement due to extreme hardship, does not have a constitutionally protected property interest in the adjusted reimbursement rate it seeks. Without a valid property interest, a substantive due process claim cannot succeed. Vermont Assembly of Home Health Agencies, Inc. v. Shalala (D.Vt. 1998), 18 F. Supp. 2d 355, 368. [****27] Therefore, we affirm the trial court's decision that ODJFS is entitled to judgment as a matter of law on MVCC-Fulton's substantive due process claims as well as on its procedural due process claims.

[**P33] We also come to the same conclusion as the trial

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[7] "Outlier" means residents who have special care needs as defined under rule 5101:3-3-25 of the Ohio Administrative Code. Ohio Adm.Code 5101:3-3-01(S). "Outlier services" are those clusters of services which have been determined by ODJFS to require staffing ratios, certain indirect costs, and capital investments beyond the levels otherwise addressed in rules 5101:3-3-43 and 5101:3-3-78 of the Ohio Administrative Code when delivered by qualified providers to individuals who have been prior authorized for the receipt of a category of service identified as an outlier service by ODJFS and/or set forth as such in Chapter 5101:3-3 of the Ohio Administrative Code. Ohio Adm.Code 5101:3-3-25(B)(2).

court with respect to the lack of timeliness by MVCC-Fulton in applying for relief for fiscal 1998. The plain language contained in *Ohio Adm.Code 5101:3-3-24(D)(1)*, as quoted above, requires that MVCC-Fulton should have sought relief for fiscal 1998 on or before June 30, 1998. There is no factual dispute that the initial request for rate reconsideration due to extreme hardship was dated December 29, 1998. Consequently, the request was timely only as to fiscal 1999. [***311] The interpretation of statutes and administrative rules should follow the principle that neither is to be construed in any way other than as the words demand. *Clark v. State Bd. of Registration for Professional Engineers & Surveyors (1997), 121 Ohio App.3d 278, 284, 699 N.E.2d 968*. Because we find the regulatory language that limits the date by which an application for rate reconsideration due to extreme hardship must [****28] be filed to be clear and unambiguous, we must apply the regulation as written. *Symmes Twp. Bd. of Trustees v. Smyth (2000), 87 Ohio St.3d 549, 553, 721 N.E.2d 1057*; *State v. Gillman (2001), 2001 Ohio App. LEXIS 5571*, Franklin App. No. 01AP-662, and *Charvat v. Dispatch Consumer Services, Inc. [*531] (Aug. 22, 2000), 2000 Ohio App. LEXIS 3792*, Franklin App. No. 99AP-1368.

[**P34] The argument by MVCC-Fulton, that another rule vesting the department with discretion to determine the effective date of any rate adjustment granted due to extreme hardship excuses a provider from seeking relief in timely fashion, is not well- taken. If the application is not timely filed, it ought not be granted. The other rule that provides for discretion in determining the effective date for relief, if granted, does not apply if an application is denied as untimely. The conclusion by the trial court that ODJFS is entitled to judgment as a matter of law on the claims of MVCC-Fulton that pertain to fiscal 1998 is affirmed.

[**P35] As to MVCC-Fulton's *R.C. Chapter 5111* claims for an adjustment of the rate paid to it during fiscal 1999, ODJFS, the party moving for summary judgment, bears the initial responsibility to inform the court of the basis [****29] for its motion and to identify those portions of the record that demonstrate the absence of a genuine issue of fact as to a material element of one or more of the nonmoving party's claims for relief. *Christensen v. Ohio Mulch Supply, Inc. (2001), 2001 Ohio App. LEXIS 3559*, Franklin App. No. 00AP-1036, and *Al-Najjar, supra, 2000 Ohio App. LEXIS 3877*, citing *Dresher v. Burt (1996), 75 Ohio St.3d 280, 292, 662 N.E.2d 264*.

[**P36] If ODJFS satisfies this initial burden by presenting or identifying appropriate *Civ.R. 56(C)* evidence, MVCC-Fulton must then present similarly qualified evidence in rebuttal sufficient to establish that genuine issues of material fact must be preserved for trial. Id., citing *Norris v. Ohio Standard Oil Co. (1982), 70 Ohio St.2d 1, 2, 24 Ohio Op. 3d 1, 433 N.E.2d 615*. The nonmoving party does not need to try its case at this juncture, but it must produce more than a scintilla of evidence in furtherance of its claims. *McBroom v. Columbia Gas of Ohio, Inc. (2001), 2001 Ohio App. LEXIS 2849*, Franklin App. No. 00AP-1110. MVCC-Fulton may not merely rely on the allegations in its pleadings or simply restate and reargue those allegations in order to avoid summary judgment. *Swedlow, Butler, Inman, Levine & Lewis* [****30] *Co., L.P.A. v. Gabelman (1998), 1998 Ohio App. LEXIS 3325*, Franklin App. No. 97APG12-1578.

[**P37] To decide whether ODJFS is entitled to summary judgment on the claims of MVCC-Fulton that the department failed to comply with the requirements of *R.C. 5111.01, et seq.*, and *Ohio Adm.Code 5101:3-3*, et seq., we must examine the evidence properly presented by the parties in support of and in opposition to the motion for summary judgment. We must consider that evidence in a light most favorable to MVCC-Fulton, the nonmoving party. *Ryberg, supra, 2001 Ohio App. LEXIS 3126*,. MVCC-Fulton relies specifically on the provisions of *R.C. 5111.21(A)* and *5111.29(A)(3)* and *Ohio Adm.Code 5101:3-3-24(D)* in arguing that a genuine issue of material fact remains as [***312] to whether or not ODJFS abused its discretion when it granted a rate adjustment in an aggregate amount less than what MVCC-Fulton [*532] contended was necessary to fully reimburse the reasonable costs it alleged were and would be incurred between July 1, 1998 and June 30, 1999.

[**P38] Reviewing the *Civ.R. 56(C)* evidence presented by ODJFS in the light required, we conclude that [****31] the department satisfies its initial burden. The affidavit of Charlene Murphy, Technical Analysis Manager of the Reimbursement Section of the Bureau of Long Term Care Facilities, explains in detail the procedure followed by the department in reviewing the request by MVCC-Fulton for a rate adjustment grounded upon extreme hardship. Ms. Murphy identifies and qualifies as appropriate under *Civ.R. 56(C)* documents, which are attached to and incorporated in her affidavit and which the department considered, including information furnished by the applicant and reports generated by ODJFS. The evidence offered shows a thorough, comprehensive consideration of MVCC-Fulton's request for relief due to extreme hardship. Upon that evidence, absent additional evidence from MVCC-Fulton to rebut it, a conclusion that ODJFS is entitled to summary judgment as a matter of law would be proper. The burden, therefore, shifts to MVCC-Fulton to establish otherwise.

[**P39] In opposition to the motion for summary judgment, MVCC-Fulton provides an affidavit by Bert Cummins,

C.P.A., and a properly authenticated copy of correspondence from the former director of ODMRDD in support of the application for rate [****32] adjustment due to extreme hardship. MVCC-Fulton also relies upon the depositions, with exhibits, of a number of witnesses, the transcripts of which were filed in the trial court record.

[**P40] Based upon his experience and his review of the documentation submitted to and considered by ODJFS, the analysis reports created by ODJFS personnel, and the transcripts of deposition testimony by ODJFS employees, Cummins concludes:

The result of the Department of Job & Family Services rate reconsideration review (to grant the minimal relief provided to Morning View Care Center) is completely unsupported by any of the data and analysis set forth in its letter to the provider stating its decision, the attachments to that correspondence and any of the other documents prepared by the Department. *** [Cummins Affidavit, paragraph 11.]

[**P41] Cummins identifies several specific examples of ODJFS having abused its discretion, including an attempt to calculate an overpayment related to renovations, an audit function, and factor that calculation into the amount of capital relief granted. The witness opines that this calculation is "an abuse" and inappropriate within the context of the rate [****33] reconsideration process for determining a rate adjustment based upon extreme hardship. (Cummins Deposition, p. 91.) He also questions the department's emphasis on "MVCC-Fulton's failure to prepare a transition plan and adequately assess the downsizing feasibility" [*533] (January 10, 2001 Depositions Ex. 4, p. 14), explaining that the concept of adequate planning is undefined and presents the provider with a "moving target if there's a target at all." (Cummins Deposition, p. 76.)

[**P42] Steven Stanisa, also a C.P.A. and a consultant to the long-term care industry, was deposed as a prospective expert witness on behalf of MVCC-Fulton. His testimony includes his opinion that "the department inappropriately exercised its discretion" in relation to its approval of the hardship request and "failed to reimburse [***313] the reasonable cost of the provider" in caring for its residents. (Stanisa deposition, p. 15.) The witness identifies the $ 12.48 per patient per day rate adjustment approved as an abuse of discretion inasmuch as he does not believe it to be based upon the costs detailed in the required three-month cost report that accompanied the application. (Stanisa deposition, pp. 50-51.)

[**P43] [****34] We recognize that generally a reviewing court will not intrude into areas of administrative discretion for the reason that a rebuttable presumption of validity attaches to actions of administrative agencies. *Ohio Academy of Nursing Homes, Inc. v. Barry, supra, at 129*; and *Ohio Academy of Nursing Homes, Inc. v. Creasy, supra, 1983 Ohio App. LEXIS 15007*, quoting *Country Club Home, Inc. v. Harder (1980), 228 Kan. 756, 763, 620 P.2d 1140* and 771; *620 P.2d 1140*. State agencies and their personnel, acting pursuant to a grant or delegation of authority from the legislature, enjoy reasonable latitude with respect to decisions made within their administrative domain. *Ohio State Pharmaceutical Assn. v. Creasy (S.D.Ohio 1984), 587 F. Supp. 698, 704*. An agency's interpretation of a statute that governs its actions should be given deference so long as the interpretation is not irrational, unreasonable or inconsistent with the statutory purpose. *Ellis Center for Long Term Care v. DeBuono (1998), 669 N.Y.S.2d 782, 175 Misc.2d 443, 448*. Similar deference should be given an agency's interpretation of the rules and regulations it is required to administer, [****35] unless that interpretation is unreasonable or conflicts with a statute covering the same subject. *State ex rel. Celebrezze v. Nat'l. Lime & Stone Co. (1994), 68 Ohio St.3d 377, 382, 627 N.E.2d 538*.

[**P44] The agency's interpretation and application of its rules cannot be arbitrary, capricious or otherwise contrary to law; nor can the interpretation and application constitute an abuse of discretion. See *Ohio Academy of Nursing Homes, Inc. v. Barry, supra, at 129*. The agency must "articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Manufacturers Assn of the United States, Inc. v. State Farm Mut. Auto. Ins. Co. (1983), 463 U.S. 29, 43, 103 S. Ct. 2856, 77 L. Ed. 2d 443*, quoting *Burlington Truck Lines, Inc. v. United States (1962), 371 U.S. 156, 168, 83 S. Ct. 239, 9 L. Ed. 2d 207*. [*534] A judicial review of that explanation must inquire whether the decision is based upon relevant factors and whether there has been a clear error in judgment on the agency's part. Id. Among the indicia that agency action is arbitrary and capricious [****36] are: (1) that the agency has relied on factors the legislature did not intend it to consider; (2) that the agency failed to consider an important aspect of the problem; (3) that the agency's explanation of its decision is contrary to the evidence before it; or (4) that the agency's action is implausible to an extent that it cannot be attributed to agency expertise. Id.

[**P45] Here, the department's announcement of its decision included the following explanation:

In order for ODHS to grant a rate adjustment as a result of a request for rate reconsideration due to extreme hardship, a provider should clearly demonstrate the following:

The financial hardship is the result of factors outside the provider's control[.]

The PPS [Prospective Payment System] is failing to respond appropriately to the circumstances presented.

[***314] MVCC-Fulton's failure to prepare a transition plan and adequately assess the downsizing feasibility is neither outside the provider's control nor a failure of the PPS. As such, the failure to effectively plan and analyze the proposed downsizing cannot serve as the basis for relief due to extreme hardship.

The basic principles underlying the provisions of [****37] *OAC Rule 5101:3-3-24(D)* was to respond to situations where a provider could not reasonably control and/or the PPS was not responding appropriately. These provisions were in no way intended to protect the operator of a long-term care facility from the risks and responsibilities of operating a business venture. ***

MVCC-Fulton did not fully demonstrate which circumstances neither were outside their control, a failure in the PPS, or documented all the cost reduction steps implemented by the provider, along with the associated cost savings with these steps. *** [January 10, 2001 Depositions Ex. 4, p. 14.]

[**P46] The deposition testimony of Barbara Edwards and Harry Saxe is evidence of the extent to which ODJFS focused on the issue whether a mandate, either by direct order or statewide policy, was in effect that required MVCC-Fulton to downsize its primary facility. Susie Weber and Charlene Murphy acknowledge in their deposition testimony that, according to their respective understandings, the department rules do not require submission of transition plans in connection with an extreme hardship application. Also, in her second deposition, Charlene [****38] Murphy admitted that the department had not, to her knowledge, previously adjusted the number of patient days from a prior year that [*535] used to calculate a provider's current rate of reimbursement in the context of ruling upon a request for that rate to be adjusted due to downsizing.

[**P47] In the course of completing the required de novo review of the trial court's judgment, we have considered a significant volume of evidence presented in support of and in opposition to the motion for summary judgment. We conclude from that evidence, viewing it, as we must, most favorably to the nonmoving party, that MVCC-Fulton has sustained its burden to establish the existence of genuine issues of material fact concerning whether ODJFS complied with the requirements of *R.C. 5111.01, et seq.*, and *Ohio Adm.Code 5101:3-3*, et seq., in granting limited relief in response to the application expressly grounded in extreme hardship under *R.C. 5111.29(A)(3)* and *Ohio Adm.Code 5101:3-3-24(D)* for fiscal 1999.

[**P48] Even though the discretion vested in ODJFS by *R.C. 5111.29(A)(3)* is broad, [****39] it is neither unlimited, nor "unequivocal" [8] as the trial court has characterized it. The use by the agency of that discretion cannot amount to an abuse of discretion or otherwise not be in accordance with the law, including applicable regulations. *Ohio Academy of Nursing Homes, Inc. v. Barry, supra, at 129*. We find the evidence produced by MVCC-Fulton, particularly testimony by Bert Cummins and Steven Stanisa, is sufficient to establish a genuine issue of fact as to whether ODJFS abused its discretion in determining the amount of the rate adjustment granted to MVCC-Fulton.

[**P49] [***315] The explanation by ODJFS of its [****40] actions, together with deposition testimony describing some of the areas of agency focus in its analysis, is evidence that the department applied standards not applicable to the grounds upon which relief was requested. A decision to grant or deny relief requested under extreme hardship provisions should be reached according to the regulations governing that type of relief. To the extent that the agency emphasized issues pertaining to extreme circumstances, governed by *Ohio Adm.Code 5101:3-3-24(C)*, and government mandate, addressed by Ohio Adm.Code 5101:3-3-241, a genuine issue of material fact exists as to whether it reasonably applied its own regulations. Relief for extreme circumstances is appropriate upon a showing that the circumstances are beyond a provider's control. Applicable rate ceilings limit relief for extreme circumstances. By contrast, ineligibility for extreme circumstances relief is a prerequisite to seeking alternative relief for extreme hardship, and a provider seeking relief due to extreme hardship has an opportunity to justify a [*536] rate adjustment in excess of applicable ceilings. The use of these extreme [****41] circumstances standards to determine entitlement to relief for extreme hardship is contrary to the express provisions of *Ohio Adm.Code 5101:3-3-24(C)* and disregards the distinction drawn by the legislature when it enacted *R.C. 5111.29(A)(3)* separate from *R.C. 5111.29(A)(2)*.

[**P50] ODJFS has argued, and the trial court found, that the decision by this court in *The Ohio Academy of Nursing Homes, Inc. v. Creasy, supra, 1983 Ohio App. LEXIS 15007*, defines what are reasonable costs in the rate-setting context as being limited to only those costs that do not exceed the ceilings applicable to various cost centers. While we did find

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[8] "Unequivocal" is defined in Webster' Encyclopedic Unabridged Dictionary of the English Language (1996), 1548, as: (1) not equivocal, unambiguous, clear, having only one possible meaning; (2) explicit, definite, not merely implied or suggested; (3) absolute, unqualified, not subject to conditions or exceptions; (4) conclusive, unquestionable, not subject to dispute or challenge.

such ceilings to be reasonable in that case and to generally be an appropriate methodology for defining reasonable costs in a prospective cost-related system of reimbursement, we were deciding issues dissimilar to those presented here. We held that "it is not per se unreasonable that all nursing homes be reimbursed for specific cost centered ceilings based upon costs which ninety percent of the nursing homes incur ***." Id.

[**P51] In this case, where the issues to be decided require a showing [****42] of extreme hardship and a determination whether the existing rate under the prospective payment system responds reasonably to an increase in costs related to the hardship, the correct measure of "reasonable" costs is that provided by the legislature in *R.C. 5111.20(U)*, as quoted above. Because *Ohio Adm.Code 5101:3-3-24(D)(4)* contemplates occasions where justification for a rate adjustment beyond the ceilings may be shown, a genuine issue of material fact also exists as to whether ODJFS correctly calculated the "reasonable costs of services provided" consistent with *R.C. 5111.21(A)*.

[**P52] MVCC-Fulton is not necessarily entitled to an adjusted rate equal to its total request. ODJFS would have ignored its responsibility to determine what is reasonable had it simply paid the amount requested. *Worthington Nursing Home, Inc. v. Creasy, supra, at 97*. As we noted in that case, there is no presumption that all costs expended not in excess of fixed ceilings are reasonable. Id. Similarly, where in relation to extreme hardship rate reconsideration requests, a provider has the opportunity [****43] to show its increased costs to be reasonable and necessary even though they have risen above the applicable ceilings, ODJFS must determine what is reasonable independent of the ceilings. In such an instance, we view the ceilings to be evidence of what is reasonable, but not determinative in every case without regard [***316] to the circumstances presented by the provider.

[**P53] Because we conclude that ODJFS is not entitled to judgment as a matter of law on the claims of MVCC-Fulton under state law that the department failed to comply with the requirements of *R.C. 5111.01, et seq.*, and *Ohio Adm.Code 5101:3-3*, et seq., we sustain the single assignment of error in respect [*537] to those state claims. However, we affirm the trial court's judgment that ODJFS, as an agency, is not a "person" subject to suit under *Section 1983, Title 42, U.S.Code*; that ODJFS is entitled to judgment as a matter of law on MVCC-Fulton's due process claims; and that ODJFS is entitled to judgment as a matter of law on the claims of MVCC-Fulton that pertain to fiscal 1998. Accordingly, the assignment of error is sustained in part and overruled in part, and the judgment of the Franklin County [****44] Court of Common Pleas is affirmed in part and reversed in part. This cause is remanded to that court for further proceedings in accordance with law and consistent with this opinion.

Judgment affirmed in part, reversed in part, and cause remanded.

TYACK, P.J., and LAZARUS, J., concur.

End of Document

Columbus-Suburban Coach Lines, Inc. v. Public Utilities Com.

Supreme Court of Ohio

December 17, 1969, Decided

No. 69-235

Reporter
20 Ohio St. 2d 125 *; 254 N.E.2d 8 **; 1969 Ohio LEXIS 315 ***; 49 Ohio Op. 2d 445

COLUMBUS-SUBURBAN COACH LINES, INC., ET AL., APPELLANTS, v. PUBLIC UTILITIES COMMISSION OF OHIO, APPELLEE

Prior History: [***1] APPEAL from the Public Utilities Commission.

On May 3, 1967, Executive Motor Livery, Inc., applied to the Public Utilities Commission of Ohio for a certificate of public convenience and necessity to transport persons and baggage over irregular routes to and from Columbus, Ohio. The applicant proposed to use seven-passenger Cadillac limousines mainly in Columbus, but also to other parts of Ohio.

A motion to dismiss the application was filed by the appellants on the basis that the appellee was without jurisdiction to issue the certificate. The appellee denied that motion and the application was heard before an attorney examiner who found that the applicant was a motor transportation company and recommended that the application be granted. On December 9, 1968, the appellee issued its order overruling appellants' exceptions to the examiner's finding and recommendation, adopted the attorney examiner's report and ordered issuance of the certificate. Thereafter, the appellants' motions for a rehearing were denied. On April 3, 1969, appellants filed a notice of their intention to appeal to this court.

Disposition: *Order reversed.*

Counsel: *Mr. Taylor C. Burneson, Mr Donald A. Finkbeiner, Mr. Barrett Elkins, Mr James M. Burtch, Mr. Howard Gould, Mr. David Reichert* and *Mr. Stephen D. Strauss*, for appellants.

Mr. Paul W. Brown, attorney general, *Mr. Sheldon A. Taft* and *Mr. Gerald P. Wadkowski*, for appellee.

Judges: MATTHIAS, acting Chief Justice, KERNS, O'NEILL, HERBERT, DUNCAN and CORRIGAN, JJ., concur. SCHNEIDER, J., dissents. KERNS, J., of the Second Appellate District, sitting for TAFT, C. J.

Opinion by: PER CURIAM

Opinion

[*126] [**9] The sole question raised by this appeal is whether the Public Utilities Commission of Ohio has the authority under *Section 4921.02, Revised Code*, to issue a certificate of public convenience and necessity to a corporation for the transportation of both persons and property, for hire, by motor-propelled vehicles, over public highways in this state by irregular routes.

Prior to 1937, the predecessor to *Section 4921.02, Revised Code*, Section 614-84, General [***3] Code (113 Ohio Laws 482, 485), stated:

"* * * the words 'irregular route' shall be understood to refer to that portion of the public highway over which is conducted or provided any other operation of any motor propelled vehicle by a motor transportation company."

That statute was amended in 1937 (117 Ohio Laws 349, 351) to read:

"* * * The words 'irregular route' shall be understood to refer to that portion of the public highway over which is conducted or provided any other operation of any motor vehicle by a motor transportation company *transporting property*." (Emphasis added.)

Since 1937, the plain and unambiguous statutory language has declared that only property may be transported over an irregular route.

Appellee argues that the applicant in this case is a motor transportation company subject to its jurisdiction and that its findings thereon are not manifestly against the weight of the evidence. Appellee suggests that, although the significance of the 1937 amendment to the statutory definition of "irregular route" cannot be easily explained, the amendment should not be construed as restricting its authority, under *Chapter 4921, Revised Code*, to issue a certificate of [***4] public

convenience and necessity to this applicant.

An examination of the legislative history of *Section 4921.02, Revised Code*, reveals that the amendment to the definition of "irregular route" must be considered a limitation [*127] and restriction, imposed by the General Assembly, on the jurisdiction and power of the appellee. Prior to the amendment of 1937, the definition of "irregular route" applied to an operation involving the transportation of both persons and property. The addition of "transporting persons and property" to the definition of "irregular route" would have been superfluous. Thus, because the General Assembly acted in 1937 to amend the definition so as to expressly mention property, the rational conclusion is that the General Assembly intended to exclude the transportation of persons by irregular routes. See *State, ex rel. Boda, v. Brown (1952), 157 Ohio St. 368, 105 N. E. 2d 83*.

Appellee argues that such a construction and holding would necessarily mean that the General Assembly intended to hand over to "regular route" passenger-carriers the monopoly of irregular route passenger carriage and that it intended to deny valuable transportation service [***5] between many rural areas of Ohio. If such is the result, it is a problem that the General Assembly must consider. This court, in construing *Section 4921.02, Revised Code*, must assume that the words "transporting property" were inserted therein for a specific purpose. See *State, ex rel. Camean, v. Board of Ed. (1960), 170 Ohio St. 415, 165 N. E. 2d 918*. In determining legislative intent it is the duty of this court to give effect to the words used, not to delete words used or to insert words not used.

[**10] The appellee, by granting the application of Executive Motor Livery, Inc., to transport both property and persons over irregular routes, disregarded the statutory limitations and restrictions imposed by the General Assembly upon its authority to issue a certificate of public convenience and necessity. Appellee's order granting that application is, therefore, unlawful and is reversed.

Order reversed.

End of Document

PHMSA Response Letter October 2011 Ref. No. 11-0059

October 12, 2011

PHMSA Response Letter October 2011 Ref. No. 11-0059

Core Terms

tank, coupler, upper, cargo, inspect, insulate, visual inspection, corrosive, transport, external, jacket, lading, assembly, abraded, corrode, distort, unsafe, dent, weld

Cite: 11-0059

Type: DOT PHMSA Hazmat Interpretations

Text

PHMSA Response Letter

October 12, 2011

Mr. Daniel G. Shelton
HazMat Resources Inc.
124 Rainbow Drive, # 2471
Livingston, TX 77399

Reference No.: 11-0059

Dear Mr. Shelton:

This responds to your letter regarding the requirement for the removal of the upper coupler assembly during various tests and inspections of cargo tank motor vehicles (CTMV) under the Hazardous Materials Regulations (HMR; 49 CFR Parts 171-180). Specifically, you describe two scenarios and ask several specific questions for each scenario. The questions regarding both non-insulated and insulated cargo tanks transporting a lading corrosive to the tank are paraphrased and answered as follows:

For non-insulated cargo tanks transporting a lading corrosive to the tank:

Q1: Is the upper coupler required to be removed to perform the external visual inspection?

A1: In accordance with § 180.407(d)(2)(ix), as part of the external visual inspection test for CTMVs transporting lading corrosive to the tank, an upper coupler must be removed from the CTMV and areas of the cargo tank covered by the upper coupler must be inspected for corroded and abraded areas, dents, distortions, defects in welds, and any other condition that might render the tank unsafe for transportation service. However, as stated in a previous letter of interpretation (Reference No.: 02-0290, see attached), an upper coupler may remain on the cargo tank under the following specific conditions:

PHMSA Response Letter October 2011 Ref. No. 11-0059

1. The upper coupler must allow a complete external visual inspection of the area of the cargo tank that is directly above the upper coupler. The visual inspection must be as effective as performing an external visual inspection of this area if the turntable were to be removed.

2. The external visual inspection and pressure test must be conducted by directly viewing the tank; therefore, the use of a device that creates an image of the tank (i.e., mirrors, cameras, or fiber optics) is prohibited.

3. All major appurtenances and structural attachments on the cargo tank that can be inspected without dismantling the turntable assembly must be inspected for any corrosion or damage that might prevent safe operation (§ 180.407(d)(2)(viii)).

4. Areas covered by the turntable assembly must be inspected for corroded and abraded areas, dents, distortions, defects in welds, and any other condition that render the cargo tank unsafe for transportation service (§ 180.407(g)(1)(iii)).

Q2. Is the upper coupler required to be removed to perform the pressure test?

A2: The answer is yes, unless all the conditions and criteria in A1, 1 through 4 are met. The requirement to remove the upper coupler assembly as part of a pressure test for CTMVs was adopted into the HMR under final rule HM-183A on September 9, 1990 [55 FR 37041]. As specified in § 180.407(g)(1)(iii), except for cargo tanks carrying lading corrosive to the tank, as part of a pressure test for CTMVs, an upper coupler must be removed from the CTMV, and areas of the cargo tank covered by the upper coupler must be inspected for corroded and abraded areas, dents, distortions, defects in welds, and any other condition that might render the cargo tank unsafe for transportation. Although this requirement states ¿except for cargo tanks carrying material corrosive to the tank¿ it was not the intention of HM-183A to except these materials from removing the upper coupler during the pressure test. Instead, it was the intent to limit the requirement to remove the upper coupler for pressure testing to only CMTVs carrying material corrosive to the tank.

Q3: Is a ¿UC¿ marking, indicating the upper coupler has been inspected, required to be applied to the CTMV?

A3: The answer is no. Each cargo tank successfully completing the test and inspection requirements contained in § 180.407 must be marked as specified in § 180.415. There is no requirement in this section to mark a CTMV that has been successfully tested and inspected with ¿UC¿ marking.

For insulated cargo tanks transporting a lading corrosive to the tank:

Q4: Is the upper coupler required to be removed to perform the external visual inspection?

A4: The answer is no. In accordance with § 180.407(d)(2)(ix), as part of the external visual inspection test for CTMVs transporting lading corrosive to the tank, an upper coupler must be removed from the CTMV and areas of the cargo tank covered by the upper coupler must be inspected for corroded and abraded areas, dents, distortions, defects in welds, and any other condition that might render the tank unsafe for transportation service. However, there is no requirement to remove the insulation and jacketing covering the area of the cargo tank shell above the upper coupler. Therefore, if one did remove the upper coupler, finding any of the conditions identified in § 180.407(d)(2)(ix) would be impossible without removing the jacketing and insulation.

Q5: Is the jacketing and insulation above the upper coupler required to be removed so the shell of the cargo tank can be inspected?

A5: The answer is no. In accordance with § 180.407(d)(1), where insulation precludes a complete external visual inspection as required by paragraphs § 180.407(d)(2)-(6), the cargo tank also must be given an internal visual inspection as specified in § 180.407(e). If an internal visual inspection is precluded because the cargo tank is lined, coated, or designed so as to prevent access for internal inspection, the tank must be hydrostatically or pneumatically tested in accordance with § 180.407(g)(1)(iv).

Q6: Is the upper coupler required to be removed to perform the pressure test?

A6: The answer is no. In accordance with § 180.407(g)(1)(iii), except for cargo tanks carrying lading corrosive to the tank, areas covered by the upper coupler (fifth wheel) assembly must be inspected for corroded and abraded areas, dents, distortions,

defects in welds, and any other condition that might render the tank unsafe for transportation service. The upper coupler (fifth wheel) assembly must be removed from the cargo tank for this inspection. However, since insulation and jacketing cover the area of the cargo tank above the upper coupler and there is no requirement to remove the insulation and jacketing, unless it is otherwise impossible to reach test pressure and maintain a condition of pressure equilibrium after the test pressure is reached or the vacuum integrity of the insulation space cannot be maintained, there are no requirements to remove the upper coupler to inspect areas of the cargo tank shell above the upper coupler that are not visible.

Q7: Is the jacketing and insulation above the upper coupler required to be removed so the shell of the cargo tank can be inspected?

A7: The answer is no. In accordance with § 180.407(g)(2), when pressure testing an insulated cargo tank, the insulation and jacketing need not be removed unless it is otherwise impossible to reach test pressure and maintain a condition of pressure equilibrium after test pressure is reached, or the vacuum integrity cannot be maintained in the insulation space.

I hope this satisfies your inquiry. Please contact us if we can be of further assistance.

Sincerely,

T. Glenn Foster

Chief, Regulatory Review and Reinvention Branch

Standards and Rulemaking Division

180.407

DMS ID# 11-0059

End of Document

PHMSA Response Letter July 2006 Ref. No. 06-0034

July 31, 2006

PHMSA Response Letter July 2006 Ref. No. 06-0034

Core Terms

tank, visual inspection, motor vehicle, external, insulate, inspect, cargo, annual, hazardous material, transport, leakage, fulfill, partial

Cite: 06-0034

Type: DOT PHMSA Hazmat Interpretations

Text

PHMSA Response Letter

Jul 31, 2006

Mr. Thomas P. Lynch Reference No. 06-0034
Vice President and General Counsel
National Tank Truck Carriers, Inc.
2200 Mill Rd.
Alexandria, VA 22314

Dear Mr. Lynch:

This is in response to your letter requesting clarification of the Hazardous Materials Regulations (HMR; 49 CFR Parts 17 1-180) regarding the applicability of an exception allowing cargo tank motor vehicles to undergo a partial external visual inspection and a leakage test to fulfill annual test and inspection requirements. You ask whether the exception applies to all materials being transported in insulated MC 330 and MC 331 cal-go tank motor vehicles and, in particular, to the transportation of pyrophoric materials.

The answer is yes. The table in § 180.407(c) excepts insulated MC 330 and MC 331 cargo tank motor vehicles from the internal visual inspection requirement and this exception applies to all hazardous materials being transported in insulated MC 330 and MC 331 cargo tank motor vehicles. These cargo tank motor vehicles are required to have an internal visual inspection at least once every five years in conjunction with the pressure test. Because the insulation prevents a complete external visual inspection, those items able to be externally inspected must be inspected annually in accordance with § 180.407(d) and noted in the inspection report. The annual, partial external visual inspection and a leakage test performed in accordance with § 180.407(h) fulfill :he annual inspection and test requirements applicable to insulated MC 330 and MC 331 cargo tank motor vehicles. Once the external visual inspection and leakage test have been successfully completed, the tank may be marked in accordance with § 180.415(b)).

I hope this information is helpful. Please contact this office should you have additional questions.

Sincerely,

Hattie L. Mitchell

Chief, Regulatory Review and Reinvention

Office of Hazardous Materials Standards

180.407(c)

End of Document

49 CFR 180.407

This document is current through the June 6, 2018 issue of the Federal Register. Title 3 is current through June 1, 2018.

§ 180.407 Requirements for test and inspection of specification cargo tank.

(a) General.

(1)A cargo tank constructed in accordance with a DOT specification for which a test or inspection specified in this section has become due, may not be filled and offered for transportation or transported until the test or inspection has been successfully completed. This paragraph does not apply to any cargo tank filled prior to the test or inspection due date.

(2) Except during a pressure test, a cargo tank may not be subjected to a pressure greater than its design pressure or MAWP.

(3)A person witnessing or performing a test or inspection specified in this section must meet the minimum qualifications prescribed in § 180.409.

(4) Each cargo tank must be evaluated in accordance with the acceptable results of tests and inspections prescribed in § 180.411.

(5) Each cargo tank which has successfully passed a test or inspection specified in this section must be marked in accordance with § 180.415.

(6)A cargo tank which fails a prescribed test or inspection must:

(i) Be repaired and retested in accordance with § 180.413; or

(ii) Be removed from hazardous materials service and the specification plate removed, obliterated or covered in a secure manner.

(b) Conditions requiring test and inspection of cargo tanks. Without regard to any other test or inspection requirements, a specification cargo tank must be tested and inspected in accordance with this section prior to further use if:

(1) The cargo tank shows evidence of dents, cuts, gouges, corroded or abraded areas, leakage, or any other condition that might render it unsafe for hazardous materials service. At a minimum, any area of a cargo tank showing evidence of dents, cuts, digs, gouges, or corroded or abraded areas must be thickness tested in accordance with the procedures set forth in paragraphs (i)(2), (i)(3), (i)(5), and (i)(6) of this section and evaluated in accordance with the criteria prescribed in § 180.411. Any signs of leakage must be repaired in accordance with § 180.413. The suitability of any repair affecting the structural integrity of the cargo tank must be determined either by the testing required in the applicable manufacturing specification or in paragraph (g)(1)(iv) of this section.

(2) The cargo tank has sustained damage to an extent that may adversely affect its lading retention capability. A damaged cargo tank must be pressure tested in accordance with the procedures set forth in paragraph (g) of this section.

(3) The cargo tank has been out of hazardous materials transportation service for a period of one year or more. Each cargo tank that has been out of hazardous materials transportation service for a period of one year or more must be pressure tested in accordance with § 180.407(g) prior to further use.

(4)[Reserved]

(5) The Department so requires based on the existence of probable cause that the cargo tank is in an unsafe operating condition.

(c) Periodic test and inspection. Each specification cargo tank must be tested and inspected as specified in the following table by an inspector meeting the qualifications in § 180.409. The retest date shall be determined from the specified interval identified in the following table from the most recent inspection or the CTMV certification date.

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COMPLIANCE DATES -- INSPECTIONS AND TEST UNDER § 180.407(C)

Test or inspection (cargo tank specification, configuration, and service)	**Date by which first test must be completed (see note 1)**	**Interval period after first test**
External Visual Inspection:		
All cargo tanks designed to be loaded by vacuum with full opening rear heads	September 1, 1991	6 months.
All other cargo tanks	September 1, 1991	1 year.
Internal Visual Inspection:		
All insulated cargo tanks, except MC 330, MC 331, MC 338 (see Note 4)	September 1, 1991	1 year.
All cargo tanks transporting lading corrosive to the tank	September 1, 1991	1 year.
MC 331 cargo tanks less than 3,500 gallons water capacity in dedicated propane service constructed of nonquenched and tempered NQT SA-612 steel (see Note 5).	September 1, 2016	10 year
All other cargo tanks, except MC 338	September 1, 1995	5 years.
Lining Inspection:		
All lined cargo tanks transporting lading corrosive to the tank	September 1, 1991	1 year.
Leakage Test:		

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COMPLIANCE DATES -- INSPECTIONS AND TEST UNDER § 180.407(C)

Test or inspection (cargo tank specification, configuration, and service)	Date by which first test must be completed (see note 1)	Interval period after first test
MC 330 and MC 331 cargo tanks in chlorine service	September 1, 1991	2 years.
All other cargo tanks except MC 338	September 1, 1991	1 year.
Pressure Test:		
(Hydrostatic or pneumatic) (See Notes 2 and 3)	----------	
All cargo tanks which are insulated with no manhole or insulated and lined, except MC 338	September 1, 1991	1 year.
All cargo tanks designed to be loaded by vacuum with full opening rear heads	September 1, 1992	2 years.
MC 330 and MC 331 cargo tanks in chlorine service	September 1, 1992	2 years.
MC 331 cargo tanks less than 3,500 gallons water capacity in dedicated propane service constructed of nonquenched and tempered NQT steel (See Note 5).	September 1, 2017	10 years.
All other cargo tanks	September 1, 1995	5 years.
Thickness Test:		
All unlined cargo tanks transporting material corrosive to the tank, except MC 338	September 1, 1992	2 years.

Note 1: If a cargo tank is subject to an applicable inspection or test requirement under the regulations in effect on December 30, 1990, and the due date (as specified by a requirement in effect on December 30, 1990) for completing the required inspection or test occurs before the compliance date listed in table I, the earlier date applies.

Note 2: Pressure testing is not required for MC 330 or MC 331 cargo tanks in dedicated sodium metal service.

Note 3: Pressure testing is not required for uninsulated lined cargo tanks, with a design pressure MAWP 15 psig or less, which receive an external visual inspection and lining inspection at least once each year.

Note 4: Insulated cargo tanks equipped with manholes or inspection openings may perform either an internal visual inspection in conjunction with the external visual inspection or a hydrostatic or pneumatic pressure-test of the cargo tank.

Note 5: A 10-year inspection interval period also applies to cargo tanks constructed of NQT SA-202, NQT SA-455, or NQT SA-612 steels provided the materials have full-size equivalent (FSE) Charpy vee notch (CVN) energy test data that demonstrated 75% shear-area ductility at 32 [degrees] F with an average of 3 or more samples >15 ft-lb FSE with no sample <10 ft-lb FSE.

(d) External visual inspection and testing. The following applies to the external visual inspection and testing of cargo tanks:

(1) Where insulation precludes a complete external visual inspection as required by paragraphs (d)(2) through (d)(6) of this section, the cargo tank also must be given an internal visual inspection in accordance with paragraph (e) of this section. If external visual inspection is precluded because any part of the cargo tank wall is externally lined, coated, or designed to prevent an external visual inspection, those areas of the cargo tank must be internally inspected. If internal visual inspection is precluded because the cargo tank is lined, coated, or designed so as to prevent access for internal inspection, the tank must be hydrostatically or pneumatically tested in accordance with paragraph (g)(1)(iv) of this section. Those items able to be externally inspected must be externally inspected and noted in the inspection report.

(i) Visual inspection is precluded by internal lining or coating, or

(ii) The cargo tank is not equipped with a manhole or inspection opening.

(2) The external visual inspection and testing must include as a minimum the following:

(i) The tank shell and heads must be inspected for corroded or abraded areas, dents, distortions, defects in welds and any other conditions, including leakage, that might render the tank unsafe for transportation service;

(ii) The piping, valves, and gaskets must be carefully inspected for corroded areas, defects in welds, and other conditions, including leakage, that might render the tank unsafe for transportation service;

(iii) All devices for tightening manhole covers must be operative and there must be no evidence of leakage at manhole covers or gaskets;

(iv) All emergency devices and valves including self-closing stop valves, excess flow valves and remote closure devices must be free from corrosion, distortion, erosion and any external damage that will prevent safe operation. Remote closure devices and self-closing stop valves must be functioned to demonstrate proper operation;

(v) Missing bolts, nuts and fusible links or elements must be replaced, and loose bolts and nuts must be tightened;

(vi) All markings on the cargo tank required by parts 172, 178 and 180 of this subchapter must be legible;

(vii)[Reserved]

(viii) All major appurtenances and structural attachments on the cargo tank including, but not limited to, suspension system attachments, connecting structures, and those elements of the upper coupler (fifth wheel) assembly that can be inspected without dismantling the upper coupler (fifth wheel) assembly must be inspected for any corrosion or damage which might prevent safe operation;

(ix) For cargo tanks transporting lading corrosive to the tank, areas covered by the upper coupler (fifth wheel) assembly must be inspected at least once in each two year period for corroded and abraded areas, dents, distortions, defects in welds, and any other condition that might render the tank unsafe for transportation service. The upper coupler (fifth wheel) assembly must be removed from the cargo tank for this inspection.

(3) All reclosing pressure relief valves must be externally inspected for any corrosion or damage which might prevent safe operation. All reclosing pressure relief valves on cargo tanks carrying lading corrosive to the valve must be removed from the cargo tank for inspection and testing. Each reclosing pressure relief valve required to be removed and tested must be tested according to the requirements set forth in paragraph (j) of this section.

(4) Ring stiffeners or other appurtenances, installed on cargo tanks constructed of mild steel or high-strength, low-alloy steel, that create air cavities adjacent to the tank shell that do not allow for external visual inspection must be thickness tested in accordance with paragraphs (i)(2) and (i)(3) of this section, at least once every 2 years. At least four symmetrically distributed readings must be taken to establish an average thickness for the ring stiffener or appurtenance. If any thickness reading is less than the average thickness by more than 10%, thickness testing in accordance with paragraphs (i)(2) and (i)(3) of this section must be conducted from the inside of the cargo tank on the area of the tank wall covered by the appurtenance or ring stiffener.

(5) Corroded or abraded areas of the cargo tank wall must be thickness tested in accordance with the procedures set forth in paragraphs (i)(2), (i)(3), (i)(5) and (i)(6) of this section.

(6) The gaskets on any full opening rear head must be:

(i) Visually inspected for cracks or splits caused by weather or wear; and

(ii) Replaced if cuts or cracks which are likely to cause leakage, or are of a depth one-half inch or more, are found.

(7) The inspector must record the results of the external visual examination as specified in § 180.417(b).

(e) Internal visual inspection.

(1) When the cargo tank is not equipped with a manhole or inspection opening, or the cargo tank design precludes an internal inspection, the tank shall be hydrostatically or pneumatically tested in accordance with 180.407(c) and (g).

(2) The internal visual inspection must include as a minimum the following:

(i) The tank shell and heads must be inspected for corroded and abraded areas, dents, distortions, defects in welds, and any other condition that might render the tank unsafe for transportation service.

(ii) Tank liners must be inspected as specified in § 180.407(f).

(3) Corroded or abraded areas of the cargo tank wall must be thickness tested in accordance with paragraphs (i)(2), (i)(3), (i)(5) and (i)(6) of this section.

(4) The inspector must record the results of the internal visual inspection as specified in § 180.417(b).

(f) Lining inspection. The integrity of the lining on all lined cargo tanks, when lining is required by this subchapter, must be verified at least once each year as follows:

(1) Rubber (elastomeric) lining must be tested for holes as follows:

(i) Equipment must consist of:

(A)A high frequency spark tester capable of producing sufficient voltage to ensure proper calibration;

(B)A probe with an "L" shaped 2.4 mm (0.09 inch) diameter wire with up to a 30.5 cm (12-inch) bottom leg (end bent to a 12.7 mm (0.5 inch) radius), or equally sensitive probe; and

(C)A steel calibration coupon 30.5 cm 0A 30.5 cm (12 inches 0A 12 inches) covered with the same material and thickness as that to be tested. The material on the coupon shall have a test hole to the metal substrate made by puncturing the material with a 22 gauge hypodermic needle or comparable piercing tool.

(ii) The probe must be passed over the surface of the calibration coupon in a constant uninterrupted manner until the hole is found. The hole is detected by the white or light blue spark formed. (A sound lining causes a dark blue or purple spark.) The voltage must be adjusted to the lowest setting that will produce a minimum 12.7 mm (0.5 inch) spark measured from the top of the lining to the probe. To assure that the setting on the probe has not changed, the spark tester must be calibrated periodically using the test calibration coupon, and the same power source, probe, and cable length.

(iii) After calibration, the probe must be passed over the lining in an uninterrupted stroke.

(iv) Holes that are found must be repaired using equipment and procedures prescribed by the lining manufacturer or lining installer.

(2) Linings made of other than rubber (elastomeric material) must be tested using equipment and procedures prescribed by the lining manufacturer or lining installer.

(3) Degraded or defective areas of the cargo tank liner must be removed and the cargo tank wall below the defect must be inspected. Corroded areas of the tank wall must be thickness tested in accordance with paragraphs (i)(2), (i)(3), (i)(5) and (i)(6) of this section.

(4) The inspector must record the results of the lining inspection as specified in § 180.417(b).

(g) Pressure test. All components of the cargo tank wall, as defined in § 178.320(a) of this subchapter, must be pressure tested as prescribed by this paragraph.

(1) Test Procedure --

(i) As part of the pressure test, the inspector must perform an external and internal visual inspection, except that on an MC 338 cargo tank, or a cargo tank not equipped with a manhole or inspection opening, an internal inspection is not required.

(ii) All self-closing pressure relief valves, including emergency relief vents and normal vents, must be removed from the cargo tank for inspection and testing according to the requirements in paragraph (j) of this section.

(A) Each self-closing pressure relief valve that is an emergency relief vent must open at no less than the required set pressure and no more than 110 percent of the required set pressure, and must reseat to a leak-tight condition at no less than 90 percent of the start-to-discharge pressure or the pressure prescribed for the applicable cargo tank specification.

(B) Normal vents (1 psig vents) must be tested according to the testing criteria established by the valve manufacturer.

(C) Self-closing pressure relief devices not tested or failing the tests in this paragraph (g)(1)(ii) must be repaired or replaced.

(iii) Except for cargo tanks carrying lading corrosive to the tank, areas covered by the upper coupler (fifth wheel) assembly must be inspected for corroded and abraded areas, dents, distortions, defects in welds, and any other condition that might render the tank unsafe for transportation service. The upper coupler (fifth wheel) assembly must be removed from the cargo tank for this inspection.

(iv) Each cargo tank must be tested hydrostatically or pneumatically to the internal pressure specified in the following table. At no time during the pressure test may a cargo tank be subject to pressures that exceed those identified in the following table:

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Specification	Test pressure
MC 300, 301, 302, 303,	20.7 kPa (3 psig) or design pressure, whichever is greater.

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Specification	Test pressure
305, 306	
MC 304, 307	275.8 kPa (40 psig) or 1.5 times the design pressure, whichever is greater.
MC 310, 311, 312	20.7 kPa (3 psig) or 1.5 times the design pressure, whichever is greater.
MC 330, 331	1.5 times either the MAWP or the re-rated pressure, whichever is applicable.
MC 338	1.25 times either the MAWP or the re-rated pressure, whichever is applicable.
DOT 406	34.5 kPa (5 psig) or 1.5 times the MAWP, whichever is greater.
DOT 407	275.8 kPa (40 psig) or 1.5 times the MAWP, whichever is greater.
DOT 412	1.5 times the MAWP.

(v)[Reserved]

(vi) Each cargo tank of a multi-tank cargo tank motor vehicle must be tested with the adjacent cargo tanks empty and at atmospheric pressure.

(vii) All closures except pressure relief devices must be in place during the test. All prescribed loading and unloading venting devices rated at less than test pressure may be removed during the test. If retained, the devices must be rendered inoperative by clamps, plugs, or other equally effective restraining devices. Restraining devices may not prevent detection of leaks or damage the venting devices and must be removed immediately after the test is completed.

(viii) Hydrostatic test method. Each cargo tank, including its domes, must be filled with water or other liquid having similar viscosity, at a temperature not exceeding 100 [degrees]F. The cargo tank must then be pressurized to not less than the pressure specified in paragraph (g)(1)(iv) of this section. The cargo tank, including its closures, must hold the prescribed test pressure for at least 10 minutes during which time it shall be inspected for leakage, bulging or any other defect.

(ix) Pneumatic test method. Pneumatic testing may involve higher risk than hydrostatic testing. Therefore, suitable safeguards must be provided to protect personnel and facilities should failure occur during the test. The cargo tank must be pressurized with air or an inert gas. The pneumatic test pressure in the cargo tank must be reached by gradually increasing the pressure to one-half of the test pressure. Thereafter, the pressure must be increased in steps of approximately one-tenth of the test pressure until the required test pressure has been reached. The test pressure must be held for at least 5 minutes. The pressure must then be reduced to the MAWP, which must be maintained during the time the entire cargo tank surface is inspected. During the inspection, a suitable method must be used for detecting the existence of leaks. This method must consist either of coating the entire surface of all joints under pressure with a solution of soap and water, or using other equally sensitive methods.

(2) When testing an insulated cargo tank, the insulation and jacketing need not be removed unless it is otherwise impossible to reach test pressure and maintain a condition of pressure equilibrium after test pressure is reached, or the vacuum integrity cannot be maintained in the insulation space. If an MC 338 cargo tank used for the

transportation of a flammable gas or oxygen, refrigerated liquid is opened for any reason, the cleanliness must be verified prior to closure using the procedures contained in § 178.338-15 of this subchapter.

(3) Each MC 330 and MC 331 cargo tank constructed of quenched and tempered steel in accordance with Part UHT in Section VIII of the ASME Code (IBR, see § 171.7 of this subchapter), or constructed of other than quenched and tempered steel but without postweld heat treatment, used for the transportation of anhydrous ammonia or any other hazardous materials that may cause corrosion stress cracking, must be internally inspected by the wet fluorescent magnetic particle method immediately prior to and in conjunction with the performance of the pressure test prescribed in this section. Each MC 330 and MC 331 cargo tank constructed of quenched and tempered steel in accordance with Part UHT in Section VIII of the ASME Code and used for the transportation of liquefied petroleum gas must be internally inspected by the wet fluorescent magnetic particle method immediately prior to and in conjunction with the performance of the pressure test prescribed in this section. The wet fluorescent magnetic particle inspection must be in accordance with Section V of the ASME Code and CGA Technical Bulletin TB-2 (IBR, see § 171.7 of this subchapter). This paragraph does not apply to cargo tanks that do not have manholes. (See § 180.417(c) for reporting requirements.)

(4) All pressure bearing portions of a cargo tank heating system employing a medium such as, but not limited to, steam or hot water for heating the lading must be hydrostatically pressure tested at least once every 5 years. The test pressure must be at least the maximum system design operating pressure and must be maintained for five minutes. A heating system employing flues for heating the lading must be tested to ensure against lading leakage into the flues or into the atmosphere.

(5) Exceptions.

(i) Pressure testing is not required for MC 330 and MC 331 cargo tanks in dedicated sodium metal service.

(ii) Pressure testing is not required for uninsulated lined cargo tanks, with a design pressure or MAWP of 15 psig or less, which receive an external visual inspection and a lining inspection at least once each year.

(6) Acceptance criteria. A cargo tank that leaks, fails to retain test pressure or pneumatic inspection pressure, shows distortion, excessive permanent expansion, or other evidence of weakness that might render the cargo tank unsafe for transportation service, may not be returned to service, except as follows: A cargo tank with a heating system which does not hold pressure may remain in service as an unheated cargo tank if:

(i) The heating system remains in place and is structurally sound and no lading may leak into the heating system, and

(ii) The specification plate heating system information is changed to indicate that the cargo tank has no working heating system.

(7) The inspector must record the results of the pressure test as specified in § 180.417(b).

(h) Leakage test. The following requirements apply to cargo tanks requiring a leakage test:

(1) Each cargo tank must be tested for leaks in accordance with paragraph (c) of this section. The leakage test must include testing product piping with all valves and accessories in place and operative, except that any venting devices set to discharge at less than the leakage test pressure must be removed or rendered inoperative during the test. All internal or external self-closing stop valves must be tested for leak tightness. Each cargo tank of a multi-cargo tank motor vehicle must be tested with adjacent cargo tanks empty and at atmospheric pressure. Test pressure must be maintained for at least 5 minutes. Cargo tanks in liquefied compressed gas service must be externally inspected for leaks during the leakage test. Suitable safeguards must be provided to protect personnel should a failure occur. Cargo tanks may be leakage tested with hazardous materials contained in the cargo tank during the test. Leakage test pressure must be no less than 80% of MAWP marked on the specification plate except as follows:

(i)A cargo tank with an MAWP of 690 kPa (100 psig) or more may be leakage tested at its maximum normal operating pressure provided it is in dedicated service or services; or

(ii) An MC 330 or MC 331 cargo tank in dedicated liquified petroleum gas service may be leakage tested at not less than 414 kPa (60 psig).

(iii) An operator of a specification MC 330 or MC 331 cargo tank, and a nonspecification cargo tank authorized under § 173.315(k) of this subchapter, equipped with a meter may check leak tightness of the internal self-closing stop valve by conducting a meter creep test. (See Appendix B to this part.)

(iv) An MC 330 or MC 331 cargo tank in dedicated service for anhydrous ammonia may be leakage tested at not less than 414 kPa (60 psig).

(v)A non-specification cargo tank required by § 173.8(d) of this subchapter to be leakage tested, must be leakage tested at not less than 16.6 kPa (2.4 psig), or as specified in paragraph (h)(2) of this section.

(2) Cargo tanks used to transport petroleum distillate fuels that are equipped with vapor collection equipment may be leak tested in accordance with the Environmental Protection Agency's "Method 27-- Determination of Vapor Tightness of Gasoline Delivery Tank Using Pressure-Vacuum Test," as set forth in Appendix A to 40 CFR part 60. Test methods and procedures and maximum allowable pressure and vacuum changes are in *40 CFR 63.425(e)*. The hydrostatic test alternative, using liquid in Environmental Protection Agency's "Method 27-- Determination of Vapor Tightness of Gasoline Delivery Tank Using Pressure-Vacuum Test," may not be used to satisfy the leak testing requirements of this paragraph. The test must be conducted using air.

(3)A cargo tank that fails to retain leakage test pressure may not be returned to service as a specification cargo tank, except under conditions specified in § 180.411(d).

(4) After July 1, 2000, Registered Inspectors of specification MC 330 and MC 331 cargo tanks, and nonspecification cargo tanks authorized under § 173.315(k) of this subchapter must visually inspect the delivery hose assembly and piping system while the assembly is under leakage test pressure utilizing the rejection criteria listed in § 180.416(g). Delivery hose assemblies not permanently attached to the cargo tank motor vehicle may be inspected separately from the cargo tank motor vehicle. In addition to a written record of the inspection prepared in accordance with § 180.417(b), the Registered Inspector conducting the test must note the hose identification number, the date of the test, and the condition of the hose assembly and piping system tested.

(5) The inspector must record the results of the leakage test as specified in § 180.417(b).

(i) Thickness testing.

(1) The shell and head thickness of all unlined cargo tanks used for the transportation of materials corrosive to the tank must be measured at least once every 2 years, except that cargo tanks measuring less than the sum of the minimum prescribed thickness, plus one-fifth of the original corrosion allowance, must be tested annually.

(2) Measurements must be made using a device capable of accurately measuring thickness to within [+/-]0.002 of an inch.

(3) Any person performing thickness testing must be trained in the proper use of the thickness testing device used in accordance with the manufacturer's instruction.

(4) Thickness testing must be performed in the following areas of the cargo tank wall, as a minimum:

(i) Areas of the tank shell and heads and shell and head area around any piping that retains lading;

(ii) Areas of high shell stress such as the bottom center of the tank;

(iii) Areas near openings;

(iv) Areas around weld joints;

(v) Areas around shell reinforcements;

(vi) Areas around appurtenance attachments;

(vii) Areas near upper coupler (fifth wheel) assembly attachments;

(viii) Areas near suspension system attachments and connecting structures;

(ix) Known thin areas in the tank shell and nominal liquid level lines; and

(x)Connecting structures joining multiple cargo tanks of carbon steel in a self-supporting cargo tank motor vehicle.

(5) Minimum thicknesses for MC 300, MC 301, MC 302, MC 303, MC 304, MC 305, MC 306, MC 307, MC 310, MC 311, and MC 312 cargo tanks are determined based on the definition of minimum thickness found in § 178.320(a) of this subchapter. The following Tables I and II identify the "In-Service Minimum Thickness" values to be used to determine the minimum thickness for the referenced cargo tanks. The column headed "Minimum Manufactured Thickness" indicates the minimum values required for new construction of DOT 400 series cargo tanks, found in Tables I and II of §§ 178.346-2, 178.347-2, and 178.348-2 of this subchapter. In-Service Minimum Thicknesses for MC 300, MC 301, MC 302, MC 303, MC 304, MC 305, MC 306, MC 307, MC 310, MC 311, and MC 312 cargo tanks are based on 90 percent of the manufactured thickness specified in the DOT specification, rounded to three places.

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Table I. – In-Service Minimum Thickness for MC 300, MC 303, MC 304, MC 306, MC 307, MC 310, MC 311, and MC 312 Specification Cargo Tanks Constructed of Steel and Steel Alloys

Minimum manufactured thickness (US gauge or inches)	Nominal decimal equivalent for (inches)	In-service minimum thickness reference (inches)
19	0.0418	0.038
18	0.0478	0.043
17	0.0538	0.048
16	0.0598	0.054
15	0.0673	0.061
14	0.0747	0.067
13	0.0897	0.081
12	0.1046	0.094
11	0.1196	0.108
10	0.1345	0.121
9	0.1495	0.135
8	0.1644	0.148
7	0.1793	0.161
3/16	0.1875	0.169
1/4	0.2500	0.225
5/16	0.3125	0.281
3/8	0.3750	0.338

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Table II. -- In-Service Minimum Thickness for MC

301, MC 302, MC 304, MC 305, MC 306,

MC 307, MC 311, and MC 312 Specification

Cargo Tanks Constructed of Aluminum and Aluminum Alloys

Minimum manufactured thickness	In-service minimum thickness (inches)
0.078	0.070
0.087	0.078
0.096	0.086
0.109	0.098
0.130	0.117
0.141	0.127
0.151	0.136
0.172	0.155
0.173	0.156
0.194	0.175
0.216	0.194
0.237	0.213
0.270	0.243
0.360	0.324
0.450	0.405
0.540	0.486

(6) An owner of a cargo tank that no longer conforms to the minimum thickness prescribed for the design as manufactured may use the cargo tank to transport authorized materials at reduced maximum weight of lading or reduced maximum working pressure, or combinations thereof, provided the following conditions are met:

(i)A Design Certifying Engineer must certify that the cargo tank design and thickness are appropriate for the reduced loading conditions by issuance of a revised manufacturer's certificate, and

(ii) The cargo tank motor vehicle's nameplate must reflect the revised service limits.

(7) An owner of a cargo tank that no longer conforms with the minimum thickness prescribed for the specification may not return the cargo tank to hazardous materials service. The tank's specification plate must be removed, obliterated or covered in a secure manner.

(8) The inspector must record the results of the thickness test as specified in § 180.417(b).

(9) For MC 331 cargo tanks constructed before October 1, 2003, minimum thickness shall be determined by the thickness indicated on the U1A form minus any corrosion allowance. For MC 331 cargo tanks constructed after October 1, 2003, the minimum thickness will be the value indicated on the specification plate. If no corrosion allowance is indicated on the U1A form then the thickness of the tank shall be the thickness of the material of construction indicated on the U1A form with no corrosion allowance.

(10) For 400-series cargo tanks, minimum thickness is calculated according to tables in each applicable section of this subchapter for that specification: § 178.346-2 for DOT 406 cargo tanks, § 178.347-2 for DOT 407 cargo tanks, and § 178.348-2 for DOT 412 cargo tanks.

(j) Pressure vent bench test. When required by this section, pressure relief valves must be tested for proper function as follows:

(1) Each self-closing pressure relief valve must open and reseat to a leaktight condition at the pressures prescribed for the applicable cargo tank specification or at the following pressures:

(i) For MC 306 cargo tanks:

(A) With MC 306 reclosing pressure relief valves, it must open at not less than 3 psi and not more than 4.4 psi and must reseat to a leak tight-condition at no less than 2.7 psi.

(B) With reclosing pressure relief valves modified as provided in § 180.405(c) to conform with DOT 406 specifications, according to the pressures set forth for a DOT 406 cargo tank in § 178.346-3 of this subchapter.

(ii) For MC 307 cargo tanks:

(A) With MC 307 reclosing pressure relief valves, it must open at not less than the cargo tank MAWP and not more than 110% of the cargo tank MAWP and must reseat to a leak tight-condition at no less than 90% of the cargo tank MAWP.

(B) With reclosing pressure relief valves modified as provided in § 180.405(c) to conform with DOT 407 specifications, according to the pressures set forth for a DOT 407 cargo tank in § 178.347-4 of this subchapter.

(iii) For MC 312 cargo tanks:

(A) With MC 312 reclosing pressure relief valves, it must open at not less than the cargo tank MAWP and not more than 110% of the cargo tank MAWP and must reseat to a leak tight-condition at no less than 90% of the cargo tank MAWP.

(B) With reclosing pressure relief valves modified as provided in § 180.405(c) to conform with DOT 412 specifications, according to the pressures set forth for a DOT 412 cargo tank in § 178.348-4 of this subchapter.

(iv) For MC 330 or MC 331 cargo tanks, it must open at not less than the required set pressure and not more than 110% of the required set pressure and must reseat to a leak-tight condition at no less than 90% of the required set pressure.

(v) For DOT 400-series cargo tanks, according to the pressures set forth for the applicable cargo tank specification in §§ 178.346-3, 178.347-4, and 178.348-4, respectively, of this subchapter.

(vi) For cargo tanks not specified in this paragraph, it must open at not less than the required set pressure and not more than 110% of the required set pressure and must reseat to a leak-tight condition at no less than 90% of the required set pressure or the pressure prescribed for the applicable cargo tank specification.

(2) Normal vents (1 psig vents) must be tested according to the testing criteria established by the valve manufacturer.

(3) Self-closing pressure relief devices not tested or failing the tests in paragraph (j)(1) of this section must be repaired or replaced.

Statutory Authority

AUTHORITY NOTE APPLICABLE TO ENTIRE PART:

49 U.S.C. 5101-5128; *49 CFR 1.81* and *1.97*.

History

[*54 FR 25032*, June 12, 1989, as amended at *55 FR 21038*, May 22, 1990; *55 FR 37067*, Sept. 7, 1990; *56 FR 27878*, June 17, 1991; *57 FR 45466*, Oct. 1, 1992; *58 FR 51534*, Oct. 1, 1993; *59 FR 49135*, Sept. 26, 1994; *59 FR 55177*, Nov. 3, 1994; *59 FR 55178*, Nov. 3, 1994; *60 FR 17402*, Apr. 5, 1995; *61 FR 27166, 27176*, May 30, 1996; *61 FR 51334, 51342*, Oct. 1, 1996; *64 FR 28030, 28051*, May 24, 1999, as corrected at *64 FR 36802, 36806*, July 8, 1999; *65 FR 58614, 58632*, Sept. 29, 2000; *68 FR 19258, 19286*, Apr. 18, 2003, as corrected at *68 FR 52363, 52371*, Sept. 3, 2003; *68 FR 75734, 75764*, Dec. 31, 2003; *74 FR 16135, 16144*, Apr. 9, 2009; *74 FR 53182, 53189*, Oct. 16, 2009; *81 FR 35484, 35545*, June 2, 2016]

Annotations

Notes

[EFFECTIVE DATE NOTE:

74 FR 16135, 16144, Apr. 9, 2009, revised paragraphs (d)(3) and (g)(1)(ii)(A), effective May 11, 2009. For compliance date information, see *74 FR 16135*, Apr. 9, 2009; *74 FR 53182, 53189*, Oct. 16, 2009, revised paragraph (h)(2), effective Oct. 16, 2009; *81 FR 35484, 35545*, June 2, 2016, amended this section, effective July 5, 2016.]

Research References & Practice Aids

NOTES APPLICABLE TO ENTIRE CHAPTER:

[PUBLISHER'S NOTE: For Federal Register citations concerning Chapter I Advisory guidance, see *61 FR 30444*, June 14, 1996; *67 FR 31974*, May 13, 2002; *78 FR 41853*, July 12, 2013.]

NOTES APPLICABLE TO ENTIRE PART:

[PUBLISHER'S NOTE: For Federal Register citations concerning Part 180 Clarifications, see: *58 FR 53626*, Oct. 15, 1993.]

[PUBLISHER'S NOTE: For Federal Register citations concerning Part 180 Comment Period Extensions, see: *61 FR 24904*, May 17, 1996.]

[PUBLISHER'S NOTE: For Federal Register citations concerning Part 180 Notices, see: *76 FR 37661*, June 28, 2011.]

[PUBLISHER'S NOTE: For Federal Register citations concerning Part 180 Emergency Restrictionpara.rohibition Order, see: *79 FR 55403*, Sept. 16, 2014.]

End of Document

2008 WL 2600374 (Ohio P.U.C.)
Slip Copy

In the Matter of National Safe T Propane, Notice of Apparent Violation and Intent to Assess Forfeiture.

07-1207-TR-CVF

Ohio Public Utilities Commission

June 25, 2008
OPINION AND ORDER

APPEARANCES:

Mr. Robert W. Rettich III, 46 East Main Street, Germantown, Ohio 45327, on behalf of National Safe T Propane.

Ms. Nancy H. Rogers, Attorney General of Ohio, by Duane Luckey, Section Chief, and Mr. William Wright and Ms. Sarah Parrot, Assistant Attorneys General, 180 East Broad Street, Columbus, Ohio 43215, on behalf of the Public Utilities Commission of Ohio.

BY THE COMMISSION

*1 The Commission, considering the alleged violations, the arguments of the parties, and the applicable law, and being otherwise fully advised, hereby issues its opinion and order.

OPINION:

I. Nature of the Proceeding and Background

On December 21, 2006, Officer Robert Barrett (Officer Barrett) of the Commission's Transportation Department inspected a National Safe T Propane (NSP) cargo tank vehicle at the scales adjacent to Interstate Highway 70 in Preble County, Ohio. During the inspection, Officer Barrett determined that the cargo tank contained Class 2.1 liquified petroleum gas (propane) residue, and that there were the following apparent violations of the Code of Federal Regulations (C.F.R.) for which a civil monetary forfeiture was assessed:

49 C.F.R. 180.415(b): Cargo tank test or inspection markings, MC-331 spec ct failed to display a letter "P" & test date marking for the 5 year pressure test (see photos).

49 C.F.R. 180.415(b): Cargo tank test or inspection markings, MC-331 spec ct failed to display a letter "I" & test date marking for the 5 year internal visual inspection (see photos).

NSP was timely served a notice of preliminary determination in accordance with Rule 4901:2-7-12, Ohio Administrative Code (O.A.C.). In the notice of preliminary determination, NSP was notified that Commission staff (Staff) intended to assess a civil forfeiture of $682.50 for the combined two violations of 49 C.F.R. 180.415(b). Counsel for NSP responded on November 20, 2007, by requesting an administrative hearing. A prehearing telephone conference was scheduled for January 9, 2008, and NSP's counsel was contacted, but no settlement was agreed upon. The matter went to hearing on April 4, 2008. Staff filed a brief on May 23, 2008. NSP did not file a brief.

II. The Law

Under Rule 4901:2-5-02(A), O.A.C., the Commission adopted the Federal Motor Carrier Safety Rules (FMCSR), 49 C.F.R. 40, 42, 383, 387, and 390-397, to govern the transportation of persons or property in intrastate commerce within Ohio. In addition, Rule 4901:2-5-02(B), O.A.C., requires all motor carriers engaged in interstate commerce in Ohio to operate in conformity with all rules of the U.S. Department of Transportation (DOT). Further, Section 4919.99, Revised Code, authorizes the Commission to assess a civil forfeiture of up to $10,000 per day per violation against any person who violates the safety rules adopted by the Commission when transporting persons or property, in interstate commerce, into or through this state.

*2 Counsel for NSP requested an administrative hearing under the provisions of Rule 4901:2-7-13, O.A.C. At such a hearing, Staff is required by Rule 4901:2-7-20(A), O.A.C., to prove the occurrence of the violation by a preponderance of the evidence.

III. Issues in the Case

Staff's Position

Officer Barrett stated that on December 21, 2006, he was on duty at the platform scale next to Interstate Highway 70 in Preble County, Ohio, where he conducted a Level 2 inspection of an NSP cargo tank motor vehicle (Tr. 11-12). According to Officer Barrett, a Level 2 inspection consists of what can be visually seen during a walk-around of the vehicle. While doing so and examining documents carried by the driver, Officer Barrett determined that the cargo tank contained the residue of liquefied petroleum gas, also known as propane (Tr. 18-19, 24, 20, 47).

Officer Barrett asserted that the cargo tank contained some, but not all, of the markings that are required to indicate that periodic testing of the cargo tank was up-to-date (Tr. 25, 27). In explanation, Officer Barrett stated that test markings must consist of a V to represent the external visual test, K for the leakage test, I for the internal visual test, and P for the pressure test. Officer Barrett added that the month and year that each test was conducted must also be indicated, with a slash or dash between the abbreviation for each test and its respective year (Tr. 36-37). According to Officer Barrett, there is a minimum size required for test date markings, and the markings must be placed near the cargo tank's specification plate or on the front head of the tank (Tr. 37).

Next, Officer Barrett explained that NSP's cargo tank, as indicated by the certification plate attached by its manufacturer, was a DOT 331 tank, and that such a tank must have an external visual and leakage test annually, with pressure and internal visual tests conducted every five years (Tr. 27, 29). Officer Barrett stated, and the photograph introduced into evidence as Staff Exhibit 2-A confirms, that the markings "MO 9 YR 06" were placed horizontally on a decal near the tank's certification plate. Immediately below the "MO 9 YR 06," on the same decal, the markings "V" and "K" were placed horizontally (Tr. 42; Staff Ex. 2-A). To Officer Barrett, the "MO 9 YR 06" and "V K" indicated that the annual external visual and leakage tests were conducted in September 2006 and were up-to-date, given that he inspected the tank in December 2006 (Tr. 42, 57). Officer Barrett was able to confirm that the external visual and leakage tests were current when the driver produced test report forms indicating that such tests were conducted in September 2006 (Tr. 27).

Officer Barrett noted that other markings on the tank did not clearly indicate if the pressure and internal visual tests had been conducted. In explanation, Officer Barrett stated that the markings "03 PIW," which were written horizontally, were placed below the horizontal markings "QT," which in turn were placed below the decal containing "MO 9 YR 06 V K." Officer Barrett added that he had never seen a "W" marking before and was unaware that "W" had any meaning under federal rules, so he was unsure if "03 PIW" indicated that the pressure and internal visual tests were conducted in 2003 (Tr. 25, 43, 51-52). Furthermore, he added, although federal rules require that the month, and not just the year, of testing be marked on a cargo tank, the NSP cargo tank displayed no numbered markings representing the month in which the pressure and internal visual tests were conducted, if indeed the "03 PIW" indicated the presence of such tests in 2003 (Tr. 43-44). According to Officer Barrett, the driver did not produce any test report forms regarding when

the pressure and internal visual tests were conducted, so there was no documentation to indicate what "03 PIW" might represent (Tr. 27).

*3 When asked if the "MO 9" marking, in conjunction with the "03 PIW" could mean that the pressure and internal visual tests were conducted in September 2003, Officer Barrett replied that such a conclusion "could be, but may not be" accurate (Tr. 53-54). In his opinion, if the pressure and internal visual tests were done simultaneously with the exterior visual and the leakage test, the V, K, I, and P markings would all be in the same decal, rather than placing the I and P markings elsewhere (Tr. 62).

Mr. Jonathan Frye, Chief of the Compliance Division for the Commission's Transportation Department, testified regarding the assessment of forfeitures following a roadside inspection. In his position, Mr. Frye explained, he reviews the civil forfeiture assessments made by the Compliance Officers that work under his supervision (Tr. 73). Mr. Frye added that a civil forfeiture is calculated when a Compliance Officer reviews the driver/vehicle examination report which is prepared during an inspection (Staff Exhibits 1 and 1-A), checks the violations against a civil forfeiture violations chart to determine the point value assigned to a respective violation (Staff Exhibit 3), and calculates the dollar value of the fine on a forfeiture assessment worksheet (Staff Exhibit 4) (Tr. 76, 79-83). For the alleged violations found during Officer Barrett's inspection, Mr. Frye observed, points were assessed for each of the markings that was absent from the cargo tank (Tr. 84). Mr. Frye observed that there were no factors present such as a leak into the environment that would increase the fine further (Tr. 84), nor were factors present such as lack of culpability by NSP that would decrease the fine (Tr. 97). Mr. Frye also noted that NSP was issued Staff Ex. 5, the Notice of Preliminary Determination, when the parties were unable to resolve matters through a settlement conference. The Notice of Preliminary Determination, according to Mr. Frye, includes information instructing the carrier how to pay the forfeiture or request an administrative hearing (Tr. 88).

NSP's Position

Mr. Jay Kothari (Mr. Kothari), the Chief Operating Officer of NSP, testified that his role at NSP is managerial, taking him to multiple NSP offices to handle matters such as human resources, maintenance, sales/marketing, receivables, (Tr. 105, 112). He added that he is not an attorney and that his interpretation of 49 C.F.R. 180.415(b) is his opinion as a lay person (Tr. 115). He viewed and was involved in the purchase of the cargo tank at issue during late 2005 or early 2006, and asserted that paperwork about testing of the tanker would have been transferred at the time of the purchase (Tr. 116, 118, 131).

Upon examining Staff Exhibit 2-A, Mr. Kothari noted that the "MO 9 YR 06" markings were on the same line on a decal, with the letters "V" and "K" directly below on the same decal, all of which indicated to him that external visual and leak tests were conducted in September 2006. Below the aforementioned decal, observed Mr. Kothari, the markings "03 PIW" were placed on the same line. Mr. Kothari added that that required testing had been "aligned" for this particular tanker, meaning that September is the month during which the pressure and internal visual tests, as well as the external visual and leak tests, were conducted. With this in mind, Mr. Kothari stated that the "MO 9" marking was associated with the "03 PIW" marking, meaning that the pressure and internal visual tests were conducted in September 2003. If the pressure and internal visual tests had been done in a month other than September, i.e. not "aligned," he added, a numerical decal representing a different month would have been placed on the tank to the left of the "03 PIW" marking (Tr. 107-109).

*4 Mr. Kothari further asserted that an observer would know that the "MO 9" marking applied to the internal visual and pressure tests because "MO 9" was the only marking indicating a month that had been placed on the cargo tank in the same location as other test date information (Tr. 109). Mr. Kothari stated that when he had read 49 C.F.R. 180.415(b), "my interpretation of it is that there needed to be a month and year specified on the tanker, not necessarily multiple months and multiple years" (Tr. 108). Mr. Kothari believes that the test date markings for the cargo tank are of the required size and added that the "W" in the marking "03 PIW" designated a test required in Canada, because the cargo

tank had been used in Canada prior to its purchase by NSP in September 2006 (Tr. 110). After the purchase, stated Mr. Kothari, NSP conducted external visual and leak tests in September 2006 and placed "MO 9 YR 06 V K" markings on the cargo tank. Mr. Kothari asserted that there had been no violations concerning this particular cargo tank from the time it was purchased until Officer Barrett's inspection, despite its use three or more times weekly, including trips in interstate transportation to Indianapolis, Indiana (Tr. 137, 139). Mr. Kothari concluded that cargo tank is in compliance with 49 C.F.R. 180.415(b) (Tr. 111).

Mr. Kothari did not produce any documentation proving that the internal visual and pressure tests were current and added that he did not do so because the alleged violation concerns the absence of proper test date markings, not whether such tests had actually occurred (Tr. 118-119). In addition, Mr. Kothari believes that no documentation had been provided prior to hearing proving that the internal visual and pressure tests were performed in September 2003 (Tr. 133). Mr. Kothari stated that after the inspection by Officer Barrett and the allegation of marking violations, NSP added an "09" marking to the left of the "03 PIW" marking (Tr. 135).

Commission Conclusion

In examining Staff's allegation that the cargo tank lacked the proper markings for the internal visual and pressure tests, the Commission takes notice of 49 C.F.R. 180.415, which reads in part as follows:

(a) Each cargo tank successfully completing the test and inspection requirements contained in Sec. 180.407 must be marked as specified in this section.

(b) Each cargo tank must be durably and legibly marked, in English, with the test date (month and year) followed by the type of test or inspection performed, subject to the following provisions:

(1) The date must be readily identifiable with the applicable test or inspection.

(2) The markings must be in letters and numbers at least 32 mm (1.25 inches) high, on the tank shell near the specification plate, or anywhere on the front head.

*5 (3) The type of test or inspection may be abbreviated as follows:

(i) V for external visual inspection and test;

(ii) I for internal visual inspection;

(iii) P for pressure test;

(iv) L for lining inspection;

(v) T for thickness test; and

(vi) K for leakage test for a cargo tank tested under Sec. 180.407, except Sec. 180.407(h)(2); and

(vii) K-EPA27 for a cargo tank tested under Sec. 180.407(h)(2).

Examples to paragraph (b). The markings "10-99 P, V, L" represent that in October 1999 a cargo tank passed the prescribed pressure test, external visual inspection and test, and the lining inspection. The markings "2-00 K-EPA 27" represent that in February 2000 a cargo tank passed the leakage test under Sec. 180.407(h)(2). . . .

(Emphasis added.)

Applying the above rule to NSP's alleged violations, the Commission first observes that under 49 C.F.R. 180.407 (b) (1) a test date must indicate month and year and be "readily identifiable with the applicable test or inspection." Taking into account Staff Exhibit 2-A and the testimony of Officer Barrett and Mr. Kothari, the Commission observes that the month and year markings "MO 9 YR 06" are written horizontally and are placed directly above the "V K" markings on the same decal, thus making the test date of September 2006 "readily identifiable" with "V K" markings for the external visual and leakage tests.

Whether there are pressure and internal visual test date markings in compliance with 49 C.F.R. 180.415(b), however, is questionable. Mr. Kothari contends that the "03 PIW" marking should be read with the "MO 9" marking to indicate that the pressure and internal visual tests were conducted in September 2003. In contrast, Officer Barrett correctly states that a "W" marking has no meaning under the federal rules; with "W" placed next to "P I", the Commission can understand why Officer Barrett could not definitely determine whether "P I" referred to pressure and internal visual tests.

Even if the Commission were to assume that the "P I" referred to pressure and internal visual tests, the meaning of the "03" marking is unclear. Although Mr. Kothari states that "03" represents the year 2003, Staff Exhibit 2-A shows the "03" marking placed below "QT," with "QT" placed below "V K," and "V K" placed below "MO 9 YR 06." [1] Such placement of markings does not result in "MO 9" being "readily identifiable" with "03"; consequently, an observer would not with certainty conclude that "03" represented "2003." Finally, the Commission observes that NSP did not submit any documentation proving that the pressure and internal visual tests were, as Mr. Kothari contends, indeed conducted in September 2003.

***6** In conclusion, the evidence supports a finding that NSP violated 49 C.F.R. 180.415(b) by not properly marking its cargo tank for internal visual and pressure tests. Therefore, the violation will remain as part of NSP's record, and NSP must pay the civil forfeiture of $682.50. Payment of the forfeiture must be made by certified check or money order made payable to "Treasurer, State of Ohio" and mailed or delivered to "Public Utilities Commission of Ohio, Attention: Fiscal Department, 180 East Broad Street, 13th Floor, Columbus, Ohio 43215-3793." Payment must be made within 15 days of this opinion and order.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

(1) On December 21, 2006, Commission staff conducted a roadside inspection of an NSP cargo tank. Staff found two violations of 49 C.F.R. 180.415(b), failure to properly display test date markings on a cargo tank for pressure and internal visual tests.

(2) NSP was timely served a notice of preliminary determination that set forth a combined civil forfeiture of $682.50 for the violations of 49 C.F.R. 180.415(b).

(3) A hearing in this matter was convened on April 4, 2008.

(4) Staff demonstrated at hearing, by a preponderance of the evidence, that the NSP cargo tank did not display markings as required for the pressure and internal visual tests, thereby violating 49 C.F.R. 180.415(b).

(5) NSP should be assessed the $682.50 forfeiture for violation of 49 C.F.R. 180.415(b).

(6) Pursuant to Section 4905.83, Revised Code, NSP must pay the State of Ohio the civil forfeiture assessed for the violation of 49 C.F.R. 180.415(b). NSP shall have 30 days from the date of this opinion and order to pay the assessed forfeiture of $682.50.

(7) Payment of the forfeiture must be made by certified check or money order made payable to "Treasurer, State of Ohio" and mailed or delivered to the Public Utilities Commission of Ohio, Attention: Fiscal Department, 180 East Broad Street, 13th Floor, Columbus, Ohio 43215-3793.

ORDER:

It is, therefore,

ORDERED, That NSP pay the assessed amount for the violation of 49 C.F.R. 180.415(b) within 30 days of the date of this opinion and order to the State of Ohio, as set forth in Findings of Fact and Conclusions of Law (6) and (7) above. It is, further,

ORDERED, That the Attorney General of Ohio take all legal steps necessary to enforce the terms of this opinion and order. It is, further,

ORDERED, That a copy of this opinion and order be served upon all parties of record.

Footnotes

1 Officer Barrett explained that the "QT" markings indicate that the cargo tank was quenched and tempered during the manufacturing process and that, consequently, the contents of the tank must be noncorrosive (Tr. 60-61).

End of Document

Dayton ex rel. Scandrick v. McGee

Supreme Court of Ohio

July 29, 1981, Decided

No. 80-1564

Reporter
67 Ohio St. 2d 356 *; 423 N.E.2d 1095 **; 1981 Ohio LEXIS 590 ***; 21 Ohio Op. 3d 225

CITY OF DAYTON, EX REL. SCANDRICK, APPELLEE, v. CITY OF DAYTON MAYOR MCGEE ET AL., APPELLANTS

Prior History: [***1] APPEAL from the court of Appeals for Montgomery County.

Relator-appellee, Sam C. Scandrick, is a resident and taxpayer of the city of Dayton, Ohio. Respondents-appellants are the mayor, city commissioners, and various other officials of the city of Dayton.

There is no dispute as to the operative facts in the instant cause. Prior to October 1979, the city of Dayton advertised and solicited bids for the public construction of a project referred to as the "Addition to [the] Stewart-Patterson Recreation Center." In response to such advertisement and solicitation, several bids were received, only two of which are relevant to this case. The lowest bid, in the amount of $ 240,540, was submitted by Fryman-Kuck General Contractors, Inc. The second lowest bid was submitted by Leo B. Schroeder, Inc. Schroeder's bid was in the amount of $ 241,690. The difference between the two bids was $ 1,150, or, approximately one-half of one percent of the contract price. Notwithstanding the fact that the Fryman-Kuck bid was the lowest received, Michael L. Schierloh, Director of Dayton's Department of Urban Development, recommended that the contract be awarded to Leo B. Schroeder, Inc. [***2] The basis for the director's recommendation was basically that Schroeder was a city resident. On November 7, 1979, the Dayton City Commission accepted the recommendation and decided to award the contract to Schroeder. On November 13, 1979, relator filed the instant action seeking a permanent injunction prohibiting respondents from both entering into the contract with Schroeder and making any payments to Schroeder pursuant thereto. Following a hearing, the court, on January 8, 1980, entered an order granting the requested permanent injunction. The Court of Appeals, in a split decision, affirmed.

The cause is now before this court pursuant to the allowance of a motion to certify the record.

Disposition: *Judgment affirmed.*

Counsel: *Messrs. Pickrel, Schaeffer & Ebeling, Mr. William L. Havermann* and *Mr. Frank M. Root,* for appellee.

Mr. Thomas G. Petkewitz, city attorney, and *Mr. Thomas P. Randolph,* for appellants.

Judges: STEPHENSON, P. BROWN, SWEENEY, LOCHER, HOLMES and C. BROWN, JJ., concur. CELEBREZZE, C. J., dissents. STEPHENSON, J., of the Fourth Appellate District, sitting for [***3] W. BROWN, J.

Opinion by: PER CURIAM

Opinion

[*357] [**1096] Unless all bids are rejected, Section 35.13 of the Dayton Revised Code of General Ordinances requires that contracts be awarded to the "lowest and best" bidders. [1] [***4] The sole issue before this court is whether the appellants' use of the [*358] unannounced residency criterion in determining which bid was "lowest and best" constitutes an abuse of discretion. Were the question simply one of which bid was lowest, the answer would be clear. [2]

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[1] "§ 35.13 *CONTRACT AWARDING PROCEDURE.*

"(A) Unless the director of the department in charge of the work rejects all the bids, he shall certify which is the lowest and best bid and transmit the proceedings to the City Manager, who, if he approves the making of a contract upon such bid, shall transmit the proceedings to the City Attorney. In determining which is the lowest and best bid, the director shall give consideration to the affirmative action program submitted in accordance with § 35.16 with particular attention to the probable effectiveness of such program in insuring minority group representation in all trades and all phases of the bidder's operation. The director shall further give consideration to whether the bidder is a minority-owned firm, and the number of minority persons such bidder employs. * * *"

[2] This is true notwithstanding the opinion of the appellants that the difference between the bids was "insubstantial" or, as stated by the

Appellants, however, were not required to award the contract to the lowest bidder; rather, they were empowered to make a qualitative determination as to which bid was both lowest and "best."

In reaching their decision, as to which bid was lowest and best, appellants were required by ordinance to consider only the bidder's affirmative action program and its "probable effectiveness." Appellants had "no problems" with the affirmative action programs of either Fryman-Kuck or Schroeder. Additionally, it was acknowledged that both bidders were capable of performing the contract in an acceptable manner. Thus, in these important areas, the qualifications of Fryman-Kuck and Schroeder were identical. The contractors differed in only one respect -- Schroeder was a "resident" of the city of Dayton, whereas Fryman-Kuck was not. [3]

[***5] Appellants argue that, in the exercise of their sound discretion, they were entitled to consider and give controlling weight to the [**1097] fact that Schroeder was a city "resident." Appellants, through the city deputy director of law, advanced, as the rationale for favoring "resident" bidders, the assertion that such bidders offered "year-round employment with the city and * * * [paid] city income and property taxes. The permanent tax base provided by companies situated within the city is an essential element in the city's ability to provide necessary municipal services to its citizens." In support of this contention, the director of the city's department of urban development stated that it was one of the city's "premier policies" to encourage businesses to locate within the city and, in furtherance of this policy, appellants awarded contracts to businesses which did locate within the city. The Court of Appeals held that utilization of the unannounced criterion of residency [*359] constituted an abuse of discretion. For the reasons set forth below, we agree.

"The meaning of the term 'abuse of discretion' * * * connotes more than an error of law or of judgment; it [***6] implies an unreasonable, arbitrary or unconscionable attitude * * *." *Steiner* v.. *Custer* (1940), *137 Ohio St. 448*, paragraph two of the syllabus; *Conner* v.. *Conner* (1959), *170 Ohio St. 85*; *Rohde* v.. *Farmer* (1970), *23 Ohio St. 2d 82*; and *State* v.. *Adams* (1980), *62 Ohio St. 2d 151*. "Arbitrary" means "without adequate determining principle; * * * not governed by any fixed rules or standard." Black's Law Dictionary (5 Ed.). "Unreasonable" means "irrational." *Id.* Under the facts of the instant cause, we find appellants' actions to have been both arbitrary and unreasonable.

Despite the purported primacy of the policy to prefer resident bidders, appellants did not announce or disclose the existence of such policy to the bidders *until after the bids were opened.* It appears, therefore, that appellants made a conscious decision to withhold this pertinent information until after they had actual knowledge of the amounts of the bids. In effect, appellants modified their requirements without notice. This action tended to undermine the integrity of the competitive bidding process. See *Boger Contracting Corp.* v.. *Board* (1978), *60 Ohio App. 2d [***7] 195*.

Moreover, the record demonstrates no logical nexus between appellants' goal of increasing the city's tax base and their decision to award the contract to Schroeder. On the state of the record, it is impossible for appellants to have reached any reasonable conclusion that would justify the deference shown Schroeder. [4] The arbitrary nature of appellants' decision [*360] is illustrated by the following testimony presented at the hearing on the injunction:

"[Appellants' counsel Mr. Randolph] Q. Now here again I might be engaging in speculation but, or asking you to, when you say to award contracts to business, that is not in every circumstance, is it?

"[Schierloh] A. No it's not.

"[Objection.] * * *

"MR. RANDOLPH: The point is, your honor, the recommendation was made by the department director here and we would not want to leave the court with the impression that he always recommends the contract go to the local bidder and the [**1098] question is if the difference in the award were, say ten percent, what his recommendation would be,

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trial court, that the bids were "substantially the same."

[3] Fryman-Kuck General Contractors, Inc., listed its "[h]ome office address" as Brookville, Ohio.

[4] Schierloh's testimony on this point demonstrates the absence of any logical or rational connection between the espoused purposes for awarding contracts to "resident" bidders and the decision to award the contract in question to Schroeder. Schierloh stated, in part, that when "making a determination" based upon "city residency," the city considers "the location of the home office * * * and the fact there is a work force employed there within the city full time, year round office personnel and staff, etc." It is difficult to determine from what source the appellants derived these "facts" regarding Schroeder's work force, since Schierloh also testified that it was beyond the city's "ability or discretion" to determine the residency of the bidder's employees, nor did Schierloh speak with Schroeder or visit its offices to ascertain whether there was a full-time, "year round" staff employed. It further appears that the only source for Schierloh's opinion that Schroeder was a "resident" of the city, and the basis for his recommendation, was Schroeder's "[h]ome office address" as reflected on the "bidder's proposal" and the fact that Schierloh had driven by this address "many times" and observed the building located at that address.

would his recommendation be the same? * * *

"[Schierloh] A. Well if you, if the items have been entered and as we [***8] state, the difference is approximately one half of one percent difference, we'd recommend we go this way. *If the difference were many percentages greater than that, I would not say we at all could recommend that to the department or City Manager for approval, in fact, we have not in the past done that.*" (Emphasis added.)

[***9] The evil here is not necessarily that "resident" bidders are preferred but that there are absolutely no guidelines or established standards for deciding by how "many percentages" a bid may exceed the lowest bid and yet still qualify as the "lowest and best" bid. Absent such standards, the bidding process becomes an uncharted desert, without landmarks or guideposts, and subject to a city official's shifting definition of what constitutes "many percentages." Neither contractors nor the public are well served by such a situation.

While municipal governing bodies are necessarily vested with wide discretion, such discretion is neither unlimited nor unbridled. The presence of standards against which such discretion may be tested is essential; otherwise, the term "abuse of discretion" would be meaningless. In its opinion, the [*361] trial court stated that: "* * * [t]he lack of an announced standard and priority of miscellaneous considerations allows unbridled discretion and political favoritism." We find neither allegation nor proof of political favoritism. However, we do find, due to the lack of announced standards, that appellants' action in this case was arbitrary. Accordingly, [***10] the judgment of the Court of Appeals is affirmed.

Judgment affirmed.

Dissent by: CELEBREZZE

Dissent

CELEBREZZE, C. J., dissenting.

Since, in my estimation, relator has failed to establish his standing to even argue the merits of whether the city commission abused its discretion in awarding the contract to Leo B. Schroeder, Inc., I respectfully dissent.

The majority opinion, conveniently, omits the critical consideration in this case -- that Scandrick, the relator, is an employee of Fryman-Kuck, the unsuccessful bidder.

However, since relator has characterized his suit as a taxpayers' action, pursuant to R. C. 733.56 through 733.59, the threshold issue is what harm, if any, has been done to the *public* by the awarding of the contract to Leo B. Schroeder, Inc.

A plaintiff, in bringing a taxpayers' action, is exercising a privilege which is only exercisable in a public capacity. *Trustees of Prairie Twp.* v.. *Garver* (1931), 41 Ohio App. 232. A taxpayers' action which is brought for the sole purpose of serving the private interest of another person cannot be maintained. It is beyond dispute that an Ohio court will not grant relief to a taxpayer who is a mere figurehead [***11] for an unsuccessful bidder. *Roberts* v.. *Columbus* (1913), 15 N.P. (N.S.) 297. See, generally, *State, ex rel. Nimon,* v.. *Village of Springdale* (1966), 6 Ohio St. 2d 1; *Andrews* v.. *Ohio Building Authority* (1975), 74 Ohio Op. 2d 184 (Holmes, J.). Indeed, R. C. 733.56 through 733.59 only contemplate a taxpayers' action in the [*362] face of the misapplication of public funds, abuse of corporate powers, fraud, or corruption, elements which are clearly inapplicable to the case at bar.

Applying the foregoing principles to the facts *sub judice,* it is immediately evident that relator is not suing under the guise of the public-spirited citizen-watchdog, but rather, as a figurehead for the unsuccessful [**1099] bidder who is now attempting to secure collateral review of the bidding process. This we should refuse to legitimatize. Conspicuous by its absence from relator's complaint and brief are allegations of public harm, resulting from the misapplication of public funds, abuse of corporate powers, fraud, or corruption. Relator's only claim is that Fryman-Kuck was adversely affected by the contracting process.

This court has recently and emphatically [***12] stated that we do not sit as a super board of zoning appeals. *Peachtree Development Co.* v.. *Paul* (1981), 67 Ohio St. 2d 345; see *Leslie* v.. *Toledo* (1981), 66 Ohio St. 2d 488; *Brown* v.. *Cleveland* (1981), 66 Ohio St. 2d 93. Yet the majority's philosophy will thrust this court into the role of a super board of contract appeals, reviewing, clause by clause, the provisions of the thousands of contracts which are let by the public bodies of this state every year. The majority's approach threatens to mature into a judicial Midas, roaming through all contracts and turning everything that it touches into an actionable taxpayers' claim. For me, this lack of standing is too high a hurdle to leap and, accordingly, I dissent.

End of Document

3189 Fisher Rd. v. Franklin County Econ. Dev. & Planning Dep't

State of Ohio, Court of Common Pleas, Franklin County

November 4, 2010, Filed

CASE NO. 09CVF09-13597

Reporter
2010 Ohio Misc. LEXIS 15025 *

3189 FISHER ROAD, LLC, Appellant, vs. FRANKLIN COUNTY ECONOMIC DEVELOPMENT AND PLANNING DEPARTMENT, et al., Appellees.

Judges: [*1] JUDGE JOHN F. BENDER.

Opinion by: JOHN F. BENDER

Opinion

GENERAL DIVISION

DECISION AND ENTRY ON MERITS OF *REVISED CODE 2506.01* ADMINISTRATIVE APPEAL. AFFIRMING DECISION ISSUED BY FRANKLIN COUNTY BOARD OF ZONING APPEALS ON AUGUST 18, 2009

Issued this_____day of November 2010.

BENDER, J.

This case is a *Revised Code 2506.01* administrative appeal, by 3189 Fisher Road, LLC (Appellant), from a decision that the Franklin County Board of Zoning Appeals (BZA) issued on August 18, 2009. In that decision, the BZA denied Appellant's appeal from a decision issued on May 1, 2009 by the Franklin County Economic Development and Planning Department (Department), denying Appellant's application for a certificate of zoning compliance. The record that the BZA has certified to the Court, in accordance with *R.C. 2506.02*, establishes that the facts of this case are not in dispute.

I. Facts

Appellant is an Ohio limited liability company that owns a parcel of real property located at 3189 Fisher Road in Franklin Township, Ohio. Jack Beatley is the LLC's sole member. The property contains 2.86 acres and is located in a "Rural District" pursuant to the Franklin County Zoning Resolution (Zoning Resolution or FCZR). The principal structure on the property is a single-family home that contains [*2] 1,468 square feet.

The Zoning Resolution is administered and enforced by an Administrative Officer, specifically, the Director of the Department or his/her designee. FCZR 705.01. One of the Administrative Officer's powers is to issue a certificate of zoning compliance when the zoning regulations have been followed or, conversely, to refuse to issue a certificate in the event of non-compliance. FCZR 705.011.

The Zoning Resolution provides:

> 705.02 - CERTIFICATE OF ZONING COMPLIANCE - No occupied or vacant land shall hereafter be changed in its use in whole or part until the Certificate of Zoning Compliance has been issued by the Administrative Officer. No existing or new building shall hereafter be changed in its use in whole or in part until the Certificate of Zoning Compliance shall have been issued by the Administrative Officer. ***
>
> 705.021 - Building Permit - No building permit for the extension, erection or alteration of any building shall be issued before an application has been made and a Certificate of Zoning Compliance issued, and no building shall be occupied until such certificate is approved.

On December 4, 2008, Appellant applied to the Department for a certificate of zoning [*3] compliance and a building permit, to build a 9,300-square-foot pole barn on the property, with a walkway connecting the pole barn to the existing house. On December 15, 2008, the Administrative Officer issued a certificate of zoning compliance to Appellant. In an affidavit executed on December 30, 2008 in support of the application for the building permit, Mr. Beatley stated that he intended to build an "accessory structure" on the property, which would be used solely as a personal storage building. On December 31, 2008, the Department issued a building permit to Appellant.

In April 2009, Appellant built the 9,300-square foot pole barn and a 140-foot-long walkway connecting it to the house. Mr.

Beatley intends to live on the property someday and use the pole barn as a garage for his collection of cars and boats. The house is currently rented out to a tenant but Mr. Beatley intends to live there after it is expanded and remodeled.

When the pole barn was completed in April 2009, Mr. Beatley determined that it was not large enough to house all of his vehicles, so he decided to add another 9,000 square feet to the structure, roughly doubling the building's size to 18,300 square feet.

On April [*4] 16, 2009, Appellant applied to the Department for a new certificate of zoning compliance and a new building permit, to build the 9,000-square-foot addition to the pole barn. In an affidavit executed on April 17, 2009 in support of the application for the building permit, Mr. Beatley again stated that he intended to build an "accessory structure" on the property that would be used solely as a personal storage building.

On May 1, 2009, the Administrative Officer denied Appellant's application for a new certificate of zoning compliance, explaining that the "[a]dditional building is accessory to [the] primary structure and exceeds the maximum size of 2,160 [square feet] on a lot greater than 2 acres but less than 3." Record p. 0004.

On June 1, 2009, Appellant appealed the Administrative Officer's decision to the BZA pursuant to FCZR 705.015 and 805.01, which provide:

> 705.015 - Interpretation and Enforcement - *** Any person aggrieved by any decision or interpretation, either written or verbal, of the zoning officer may appeal such decision without fee to the Board of Zoning Appeals. Such appeals shall take priority on the BZA agenda, and shall be heard at the next available hearing, with abutters notified [*5] by the county zoning office.
> ***
>
> 805.01 - Procedure - Appeals to the BZA may be taken by any person aggrieved or by any officer of Franklin County affected by any decision of the Zoning Administrative Officer. Such appeal shall be taken within twenty (20) days after the decision by filing, with the Administrative Officer and the BZA, a notice of appeal specifying the grounds upon which the appeal is being taken. The Administrative Officer shall transmit to the BZA all the papers constituting the record upon which the action appealed was taken. The BZA shall fix a reasonable time for the public hearing of the appeal, give at least ten (10) days notice in writing to the parties in interest, give notice of such public hearing by one (1) publication in one (1) or more newspapers of general circulation in Franklin County at least ten (10) days before the date of such hearing and decide the appeal within a reasonable time after it is submitted.

On July 20, 2009, the BZA commenced a public hearing on the appeal but tabled the appeal until August 17, 2009. The BZA notified persons living within 300 feet of the property that the BZA would conduct a public hearing on the appeal on August 17, 2009. [*6] The BZA invited those persons to attend the hearing or, in lieu of attending, to submit written comments to the BZA. Prior to August 17, 2009, the BZA received written communications from Appellant's neighbors, expressing their opposition to Appellant's expansion of the pole barn.

On August 17, 2009, the BZA reconvened its hearing on the appeal. Appellant asserted that, under the Zoning Resolution, the pole barn was simply an addition to the principal structure on the property, the house, and that it was not an accessory building subject to the 2,160-square-foot limitation for such a structure. The Department asserted that the pole barn was an accessory building and therefore subject to the square-foot limitation. Several neighbors testified in opposition to Appellant's proposed expansion of the pole barn.

In a decision issued on August 18, 2009, the BZA denied Appellant's appeal, thereby affirming the Department's May 1, 2009 decision denying Appellant's application for a certificate of zoning compliance.

On September 10, 2009, Appellant appealed the BZA's decision to this Court pursuant to *R.C. 2506.01*. II.

Preliminary Procedural Issue

Before addressing the merits of this appeal, the Court must rule [*7] on Appellant's request that the Court supplement the record with certain documents pursuant to *R.C. 2506.03*. Brief of Appellant, Nov. 19, 2009, p. 10. For the following reasons, Appellant's request must be denied.

Revised Code 2506.03 provides:

§2506.03. Hearing of appeal

> (A) The hearing of an appeal taken in relation to a final *** decision covered by division (A) of *section 2506.01 of the Revised Code* shall proceed as in the trial of a civil action, but the court shall be confined to the transcript filed under *section 2506.02 of the Revised Code* unless it appears, on the face of that transcript or by affidavit filed by the appellant, that one of the following applies:
> (1) The transcript does not contain a report of all

evidence admitted or proffered by the appellant.
(2) The appellant was not permitted to appear and be heard in person, or by the appellant's attorney, in opposition to the final *** decision, and to do any of the following:
(a) Present the appellant's position, arguments, and contentions;
(b) Offer and examine witnesses and present evidence in support;
(c) Cross-examine witnesses purporting to refute the appellant's position, arguments, and contentions;

(d) Offer evidence to refute evidence and testimony offered in opposition to the appellant's position, arguments, and contentions; [*8]
(e) Proffer any such evidence into the record, if the admission of it is denied by the officer or body appealed from.
(3) The testimony adduced was not given under oath.
(4) The appellant was unable to present evidence by reason of a lack of the power of subpoena by the officer or body appealed from, or the refusal, after request, of that officer or body to afford the appellant opportunity to use the power of subpoena when possessed by the officer or body.
(5) The officer or body failed to file with the transcript conclusions of fact supporting the final order, adjudication, or decision.
(B) If any circumstance described in divisions (A)(i) to (5) of this section applies, the court shall hear the appeal upon the transcript and additional evidence as may be introduced by any party. At the hearing, any party may call, as if on cross-examination, any witness who previously gave testimony in opposition to that party. (Emphasis added.)

The Court is confined to the BZA transcript filed pursuant to *R.C. 2506.02*, unless one of the conditions specified in *R.C. 2506.03(A)* appears on the face of the transcript or by Appellant's affidavit. Appellant has not filed an affidavit in support of its request that the Court supplement [*9] the record pursuant to *R.C. 2506.03*. Furthermore, having reviewed the BZA transcript, the Court concludes that none of the conditions specified in the statute appears on the face of the transcript. Accordingly, Appellant's request that the Court supplement the record pursuant to *R.C. 2506.03* is hereby DENIED.

III. Standards of Appellate Review

Revised Code 2506.04, which governs this appeal, provides in relevant part:

If an appeal is taken in relation to a final *** decision covered by division (A) of *section 2506.01 of the Revised Code*, the court may find that the *** decision is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence on the whole record. Consistent with its findings, the court may affirm, reverse, vacate, or modify the *** decision, or remand the cause to the officer or body appealed from with instructions to enter [a] *** decision consistent with the findings or opinion of the court. *** (Emphasis added.)

It is the Court's obligation to consider the entire record and to determine from the record whether the BZA's August 18, 2009 decision is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, [*10] reliable, and probative evidence. *Henley v. Youngstown Bd. of Zoning Appeals (2000), 90 Ohio St. 3d 142, 147*. The BZA's decision is presumed to be valid, and the burden is on Appellant to prove otherwise. Krumm v. Upper Arlington City Council, Franklin App. No. 05AP-802, *2006-Ohio-2829, at ¶8*.

Appellant has asserted three "assignments of error" in support of its appeal. A common pleas court, however, is not obligated to separately address each "assignment of error" raised in an administrative appeal brought pursuant to *R.C. Chapter 2506*. Dyke v. Shaker Heights, Cuyahoga App. No. 83010, 2004-01110-514, at ¶¶61-65, discretionary appeal not allowed, *102 Ohio St. 3d 1485, 2004-Ohio-3069*. Instead, the court's inquiry is limited to whether the agency's decision is "unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence on the whole record." *R.C. 2506.04*.

IV. Analysis

Appellant docs not argue that the BZA's August 18, 2009 decision is unsupported by the preponderance of substantial, reliable, and probative evidence. On the contrary, the facts of this case are undisputed, and Appellant does not challenge the factual underpinning for the BZA's decision.

Appellant argues that the BZA's decision is arbitrary, capricious, and unreasonable. Specifically, Appellant [*11] contends that, between December 15, 2008, when the Administrative Officer issued the certificate of zoning compliance to Appellant for the original pole barn, and May 1, 2009, when the Administrative Officer denied a certificate of zoning compliance to Appellant for the expansion of the pole barn, the Department "whimsically" changed its interpretation of what constitutes an "accessory building"

under the Zoning Resolution, thereby unfairly subjecting Appellant's pole barn to the 2,160-square-foot limitation for such structures. Brief of Appellant, Nov. 19, 2009, P.9.

Appellant's property is located in a Rural District and is therefore subject to the regulations set forth in FCZR Chapter 302 - Rural District Regulations. There are two permitted uses for property in a Rural District: "one-family dwelling structures," FCZR 302.021, and "accessory buildings," FCZR 302.023. A "dwelling" is "[a]ny building which is completely intended for, designed for, and used for residence purposes, but for the purposes of this ordinance, shall not include a hotel, motel, nursing home, tourist cabins, college or university dormitories, or military barracks." FCZR 720.011. Appellant's pole barn is clearly not [*12] a "dwelling," as is the single-family home on the property.

The Zoning Resolution defines an "accessory building" as follows:

ACCESSORY BUILDING - A customary accessory building or use is one which:

a.) Is subordinate to in area, extent or purpose and serves the principal building or use;

b.) Contributes to the comfort, convenience, or necessity of occupants of the principal building or use served; and

c.) Is located on the same lot as the principal building or principal use served, with the single exception of such accessory off-street parking facilities as are permitted to locate elsewhere than on the same lot with the building or use served. FCZR 720.011.

An accessory building on a lot between two and three acres may not exceed 2,160 square feet. FCZR 512.02.

The Administrative Officer, on May 1, 2009, determined that Appellant's pole barn was an "accessory building" to the house and exceeded the maximum size of 2,160 square feet on a lot between two and three acres in size. At the BZA hearing, Matt Brown, a Planner for the Department, testified that, between December 15, 2008 and May 1, 2009, the Department changed its interpretation of what constitutes an "accessory building" under [*13] FCZR 720.011:

> MR. MATT BROWN: *** The interpretation at that time [December 15, 2008] was that the walkway connecting the house to that structure [the pole barn] made that structure part of the principal building.
>
> [BZA MEMBER CHRISTOPHER BAER]: So that first existing building at the end of that walkway is part of the principal residence?
>
> MR. MATT BROWN: That was the interpretation at the time the building permit was issued. Yes.
>
> MR. BAER: You said that was a couple years ago?
>
> MR. MATT BROWN: Yes.
>
> MR. BAER: So is that the same interpretation today?
>
> MR. MATT BROWN: The interpretation today is that the proposed structure is an accessory building. Record pp. 0128 - 0129.
>
> ***
>
> MR. MATT BROWN: The interpretation at the time that building permit was issued, the interpretation was that that was attached to the house, part of the principal structure. The interpretation today --
>
> MR. BAER: And it was an attached garage, right?
>
> MR. MATT BROWN: If it was an attached garage.
>
> MR. BAER: That's the way it flew a couple years ago.
>
> MR. MATT BROWN: The interpretation at that time, correct. If that original, what's there now, that walkway and this garage had come before us today, now, we would have denied it saying [*14] it was an accessory structure. The interpretation has changed. Record pp. 0135 - 0137.
>
> MR. BAER: What are the facts that you're relying on to distinguish this from being an addition to a principal residence versus that definition of accessory building? What are the facts that you think distinguish this to be an accessory building, versus an addition to a principal residence?
>
> MR. MATT BROWN: The applicant has stated that he's using this building to store a car collection and whatever personal items. That use is secondary to the use of the property for residential purposes. Record pp. 0169 - 0170.
>
> ***
>
> MR. MATT BROWN: Our interpretation today is different than what it was in December of 2008.
>
> MR. BAER: Is that the same thing as saying that the original 9,000-square-foot permit was in error --
>
> [PLANNING ADMINISTRATOR LEE BROWN]: Yes.
>
> MR. BAER: - in December of '08? It should never have been issued?
>
> MR. MATT BROWN: Correct.
>
> MR. LEE BROWN: Correct.
>
> MR. MATT BROWN: With the current interpretation. Yes.
>
> MR. BAER: What are the facts for that?
>
> MR. MATT BROWN: That the use of that structure --
>
> MR. BAER: Talking about personal use?
>
> MR. MATT BROWN: Yes. That's an accessory use to the principal use of that property. [*15] That makes it an accessory building.
>
> MR. GUYTON: What was the interpretation before for the original 9,000?
>
> MR. MATT BROWN: The interpretation was that if it were connected to the house, as built, that it would be

just considered part of the primary structure. Record pp. 0211 - 0213.

In December 2008, it was the Department's interpretation that the walkway connecting the pole barn to the house rendered the pole barn a part of the house, and therefore not subject to the 2,160-square-foot limitation for an accessory building. In May 2009, it was the Department's interpretation that the pole barn was an accessory building, not part of the house, and therefore subject to the 2,160-square-foot limitation for an accessory building.

Appellant contends that the Department's change in interpretation, as affirmed by the BZA, is arbitrary, capricious, and unreasonable. The Court does not agree.

"Arbitrary" means without adequate determining principle, not governed by any fixed rules or standards. *Dayton ex rel. Scandrick v. McGee (1981), 67 Ohio St. 2d 356, 359.* "Capricious" means "characterized by or guided by unpredictable or impulsive behavior" or "contrary to the evidence or established rules of law." Black's Law Dictionary (8th Ed. Rev. 2004) 224. "Unreasonable" [*16] means irrational, that which is not in accordance with reason or that which has no factual foundation. *Scandrick, supra.*

The Administrative Officer is empowered "[t]o interpret and enforce this Zoning Resolution[.]" FCZR 705.015. When a zoning code authorizes an officer to interpret that code, such interpretation will be upheld if it is a "reasonable" interpretation. McDowell v. Gahanna, Franklin App. No. 08AP-1041, *2009-Ohio-6768, at ¶21.* Accordingly, if the Administrative Officer's interpretation of "accessory building" is a reasonable one, this Court must uphold it.

The Zoning Resolution defines an "accessory building" as a building that is subordinate in purpose to the principal building, serves the principal building, contributes to the convenience or necessity of occupants of the principal building, and is located on the same lot as the principal building. FCZR 720.011. The principal building on Appellant's property is the single-family home. Mr. Beatley intends to live in the house and use the pole barn to house his collection of cars and boats. It is reasonable for the Administrative Officer to conclude that the pole barn is subordinate in purpose to the house, serves the house, contributes to the convenience or necessity [*17] of occupants of the house, and is located on the same lot as the house. The Court concludes that the Administrative Officer's interpretation of "accessory building," as affirmed by the BZA on August 18, 2009, is a reasonable one.

Accordingly, the Court does not find that the BZA's August 18, 2009 decision is arbitrary, capricious, or unreasonable.

Appellant also argues, in support of its appeal, that the BZA acted illegally by considering the testimony of Appellant's neighbors at the hearing on August 17, 2009. The Court finds this argument to be without merit. The BZA was obligated, by FCZR 705.015 and 805.01, supra, to conduct a "public" hearing on Appellant's appeal and to notify abutting property owners of that public hearing. Moreover, at the conclusion of the hearing on August 17, 2009, the following discussion took place:

> [APPELLANT'S ATTORNEY WILLIAM REES]: *** Now, I had previously voiced my objection to taking any public input on this. I understand this board has to have public meetings, but it doesn't mean they have to accept public testimony. And this is simply an appeal from a denial by Staff.
>
> Now, this board was to figure out whether or not they made an error in this denial [*18] and not weigh it with public sentiment on the issue. *** Record pp. 0240 - 0241.
>
> ***
>
> *** I want to keep my objection on the record that I don't believe you should be taking testimony from the public on this issue.
>
> CHAIRPERSON BAER: Thank you. Did we get any guidance on this issue?
>
> MR. LEE BROWN: Yes, Mr. Chairman. We did speak with legal counsel, and they did advise us that we can take testimony, but when the board makes their decision, that they are to decide on what is relevant to the actual case itself.
>
> CHAIRPERSON BAER: Even though some of that relevant testimony may come from the audience?
>
> MR. LEE BROWN: Yes, sir. Record p. 0248.

When the BZA issued its decision on August 18, 2009, it rendered the following findings of fact and no others:

1. The existing walkway and building have been constructed as stated by the building contractor and reflected in the recorded minutes.
2. The proposed building would be used for personal storage only.
3. The owner does not reside in the house at this time but may at a time in the future.
4. The proposed building would not cause the property to exceed the permitted lot coverage of 20 percent.

The BZA did not incorporate, into its factual findings, any [*19] of the objections to the expansion of the pole barn voiced by Appellant's neighbors. Furthermore, the BZA rendered its findings of fact with Appellant's consent; Appellant was afforded the opportunity to object to the BZA's factual findings but did not. Record p. 0256.

Neither the record nor the BZA's August 18, 2009 decision supports Appellant's argument that the BZA was improperly influenced by testimony from the audience members. Moreover, as the Second Appellate District has succinctly stated, this Court "will not presume that the BZA was so unsophisticated as to have been unable to differentiate between the objective observations and the subjective opinions of the hearing participants where there was other evidence in the record to support its decision." John P. Raisch, Inc. v. Bd. of Zoning Appeals, City of Moraine (1999), Montgomery App. No. 17561, unreported.

V. Conclusion

Having considered the entire record on appeal, the Court finds that the August 18, 2009 decision of the Franklin County Board of Zoning Appeals is not unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence. The decision [*20] is hereby **AFFIRMED.**

/s/ John F. Bender

JUDGE JOHN F. BENDER

End of Document

49 CFR 172.101

This document is current through the June 6, 2018 issue of the Federal Register. Title 3 is current through June 1, 2018.

Code of Federal Regulations > TITLE 49 -- TRANSPORTATION > SUBTITLE B -- OTHER REGULATIONS RELATING TO TRANSPORTATION > CHAPTER I -- PIPELINE AND HAZARDOUS MATERIALS SAFETY ADMINISTRATION, DEPARTMENT OF TRANSPORTATION > SUBCHAPTER C -- HAZARDOUS MATERIALS REGULATIONS > PART 172 -- HAZARDOUS MATERIALS TABLE, SPECIAL PROVISIONS, HAZARDOUS MATERIALS COMMUNICATIONS, EMERGENCY RESPONSE INFORMATION, TRAINING REQUIREMENTS, AND SECURITY PLANS > SUBPART B -- TABLE OF HAZARDOUS MATERIALS AND SPECIAL PROVISIONS

§ 172.101 Purpose and use of hazardous materials table.

[PUBLISHER'S NOTE: Because of their size and complexity, the Hazardous Materials table in paragraph (l)(3) and the tables in Appendices A and B cannot be efficiently reproduced on LEXIS. The tables are amended frequently, and recent amendments have been subject to multiple delayed effective dates. For these reasons, these tables do not appear on LEXIS. See the version of the table in the latest edition of the CFR book and consult the List of CFR Sections Affected for subsequent amendments.]

[PUBLISHER'S NOTE: From October 2, 2012, through the present, the versions of the Hazardous Materials tables in paragraph (l)(3) and the tables in Appendices A and B, as they appear in the 2012 Government Printing Office (GPO) edition of the CFR, have been amended at the following Federal Register citations: *77 FR 60935, 60940,* Oct. 5, 2012; *78 FR 988, 1033,* Jan. 7, 2013, as corrected at *78 FR 8431,* Feb. 6, 2013; *78 FR 14702, 14712,* Mar. 7, 2013, as corrected at *78 FR 17874,* Mar. 25, 2013; *78 FR 15303, 15322,* Mar. 11, 2013; *78 FR 42457, 42475,* July 16, 2013; *78 FR 60745, 60751,* Oct. 2, 2013; *78 FR 65454, 65469,* Oct. 31, 2013; *78 FR 69310,* Nov. 19, 2013; *79 FR 15033, 15043,* Mar. 18, 2014; *79 FR 46012, 46034,* Aug. 6, 2014; *80 FR 1076, 1116,* Jan. 8, 2015; *80 FR 72914, 72920,* Nov. 23, 2015; *80 FR 79424, 79449,* Dec. 21, 2015; *81 FR 3636, 3665,* Jan. 21, 2016; *81 FR 35484, 35513,* June 2, 2016; *82 FR 15796, 15838,* Mar. 30, 2017.]

(a) The Hazardous Materials Table (Table) in this section designates the materials listed therein as hazardous materials for the purpose of transportation of those materials. For each listed material, the Table identifies the hazard class or specifies that the material is forbidden in transportation, and gives the proper shipping name or directs the user to the preferred proper shipping name. In addition, the Table specifies or references requirements in this subchapter pertaining to labeling, packaging, quantity limits aboard aircraft and stowage of hazardous materials aboard vessels.

(b) Column 1: Symbols. Column 1 of the Table contains six symbols ("+", "A", "D", "G", "I" and "W" as follows:

(1) The plus (+) sign fixes the proper shipping name, hazard class and packing group for that entry without regard to whether the material meets the definition of that class, packing group or any other hazard class definition. When the plus sign is assigned to a proper shipping name in Column (1) of the § 172.101 Table, it means that the material is known to pose a risk to humans. When a plus sign is assigned to mixtures or solutions containing a material where the hazard to humans is significantly different from that of the pure material or where no hazard to humans is posed, the material may be described using an alternative shipping name that represents the hazards posed by the material. An appropriate alternate proper shipping name and hazard class may be authorized by the Associate Administrator.

(2) The letter "A" denotes a material that is subject to the requirements of this subchapter only when offered or intended for transportation by aircraft, unless the material is a hazardous substance or a hazardous waste. A shipping description entry preceded by an "A" may be used to describe a material for other modes of transportation provided all applicable requirements for the entry are met.

(3) The letter "D" identifies proper shipping names which are appropriate for describing materials for domestic transportation but may be inappropriate for international transportation under the provisions of international regulations (e.g., IMO, ICAO). An alternate proper shipping name may be selected when either domestic or international transportation is involved.

(4) The letter "G" identifies proper shipping names for which one or more technical names of the hazardous material must be entered in parentheses, in association with the basic description. (See § 172.203(k).)

(5) The letter "I" identifies proper shipping names which are appropriate for describing materials in international transportation. An alternate proper shipping name may be selected when only domestic transportation is involved.

(6) The letter "W" denotes a material that is subject to the requirements of this subchapter only when offered or intended for transportation by vessel, unless the material is a hazardous substance or a hazardous waste. A shipping description entry preceded by a "W" may be used to describe a material for other modes of transportation provided all applicable requirements for the entry are met.

(c) Column 2: Hazardous materials descriptions and proper shipping names. Column 2 lists the hazardous materials descriptions and proper shipping names of materials designated as hazardous materials. Modification of a proper shipping name may otherwise be required or authorized by this section. Proper shipping names are limited to those shown in Roman type (not italics).

(1) Proper shipping names may be used in the singular or plural and in either capital or lower case letters. Words may be alternatively spelled in the same manner as they appear in the ICAO Technical Instructions or the IMDG Code. For example "aluminum" may be spelled "aluminium" and "sulfur" may be spelled "sulphur". However, the word "inflammable" may not be used in place of the word "flammable".

(2) Punctuation marks and words in italics are not part of the proper shipping name, but may be used in addition to the proper shipping name. The word "or" in italics indicates that there is a choice of terms in the sequence that may alternately be used as the proper shipping name or as part of the proper shipping name, as appropriate. For example, for the hazardous materials description "Carbon dioxide, solid or Dry ice" either "Carbon dioxide, solid" or "Dry ice" may be used as the proper shipping name; and for the hazardous materials description "Articles, pressurized pneumatic or hydraulic," either "Articles, pressurized pneumatic" or "Articles, pressurized hydraulic" may be used as the proper shipping name.

(3) The word "poison" or "poisonous" may be used interchangeably with the word "toxic" when only domestic transportation is involved. The abbreviation "n.o.i." or "n.o.i.b.n." may be used interchangeably with "n.o.s.".

(4) Except for hazardous wastes, when qualifying words are used as part of the proper shipping name, their sequence in the package markings and shipping paper description is optional. However, the entry in the Table reflects the preferred sequence.

(5) When one entry references another entry by use of the word "see", if both names are in Roman type, either name may be used as the proper shipping name (e.g., Ethyl alcohol, see Ethanol).

(6) When a proper shipping name includes a concentration range as part of the shipping description, the actual concentration, if it is within the range stated, may be used in place of the concentration range. For example, an aqueous solution of hydrogen peroxide containing 30 percent peroxide may be described as "Hydrogen peroxide, aqueous solution with not less than 20 percent but not more than 40 percent hydrogen peroxide" or "Hydrogen peroxide, aqueous solution with 30 percent hydrogen peroxide. " Also, the percent sign (%) may be used in place of the word "percent" when words in italics containing the word "percent" are used in addition to the proper shipping name.

(7) Use of the prefix "mono" is optional in any shipping name, when appropriate. Thus, Iodine monochloride may be used interchangeably with Iodine chloride. In "Glycerol alpha-monochlorohydrin" the term "mono" is considered a prefix to the term "chlorohydrin" and may be deleted.

(8) Use of the word "liquid" or "solid". The word "liquid" or "solid" may be added to a proper shipping name when a hazardous material specifically listed by name may, due to differing physical states, be a liquid or solid. When the packaging specified in Column 8 is inappropriate for the physical state of the material, the table provided in paragraph (i)(4) of this section should be used to determine the appropriate packaging section.

(9) Hazardous wastes. If the word "waste" is not included in the hazardous material description in Column 2 of the Table, the proper shipping name for a hazardous waste (as defined in § 171.8 of this subchapter), shall include the word "Waste" preceding the proper shipping name of the material. For example: Waste acetone.

(10) Mixtures and solutions. (i) A mixture or solution meeting the definition of one or more hazard class that is not identified specifically by name, comprised of a single predominant hazardous material identified in the Table by technical name and one or more hazardous and/or non-hazardous material, must be described using the proper shipping name of the hazardous material and the qualifying word "mixture" or "solution", as appropriate, unless--

(A) Except as provided in § 172.101(i)(4) the packaging specified in Column 8 is inappropriate to the physical state of the material;

(B) The shipping description indicates that the proper shipping name applies only to the pure or technically pure hazardous material;

(C) The hazard class, packing group, or subsidiary hazard of the mixture or solution is different from that specified for the entry;

(D) There is a significant change in the measures to be taken in emergencies;

(E) The material is identified by special provision in Column 7 of the § 172.101 Table as a material poisonous by inhalation; however, it no longer meets the definition of poisonous by inhalation or it falls within a different hazard zone than that specified in the special provision; or

(F) The material can be appropriately described by a shipping name that describes its intended application, such as "Coating solution", "Extracts, flavoring" or "Compound, cleaning liquid."

(ii) If one or more of the conditions in paragraphs (c)(10)(i)(A) through (F) of this section is satisfied then the proper shipping name selection process in (c)(12)(ii) must be used.

(iii)A mixture or solution meeting the definition of one or more hazard class that is not identified in the Table specifically by name, comprised of two or more hazardous materials in the same hazard class, must be described using an appropriate shipping description (e.g., "Flammable liquid, n.o.s."). The name that most appropriately describes the material shall be used; e.g., an alcohol not listed by its technical name in the Table shall be described as "Alcohol, n.o.s." rather than "Flammable liquid, n.o.s.". Some mixtures may be more appropriately described according to their application, such as "Coating solution" or "Extracts, flavoring liquid" rather than by an n.o.s. entry. Under the provisions of subparts C and D of this part, the technical names of at least two components most predominately contributing to the hazards of the mixture or solution may be required in association with the proper shipping name.

(11) Except for a material subject to or prohibited by § 173.21, 173.54, 173.56(d), 173.56(e), 173.224(c) or 173.225(b) of this subchapter, a material that is considered to be a hazardous waste or a sample of a material for which the hazard class is uncertain and must be determined by testing may be assigned a tentative proper shipping name, hazard class, identification number and packing group, if applicable, based on the shipper's tentative determination according to:

(i) Defining criteria in this subchapter;

(ii) The hazard precedence prescribed in § 173.2a of this subchapter;

(iii) The shipper's knowledge of the material;

(iv) In addition to paragraphs (c)(11)(i) through (iii) of this section, for a sample of a material other than a waste, the following must be met:

(A) Except when the word "Sample" already appears in the proper shipping name, the word "Sample" must appear as part of the proper shipping name or in association with the basic description on the shipping paper.

(B) When the proper shipping description for a sample is assigned a "G" in Column (1) of the § 172.101 Table, and the primary constituent(s) for which the tentative classification is based are not known, the provisions requiring a technical name for the constituent(s) do not apply; and

(C)A sample must be transported in a combination packaging that conforms to the requirements of this subchapter that are applicable to the tentative packing group assigned, and may not exceed a net mass of 2.5 kg (5.5 pounds) per package.

Note to Paragraph (c)(11): For the transportation of samples of self-reactive materials, organic peroxides, explosives or lighters, See §§ 173.224(c)(3), 173.225(c)(2), 173.56(d) or 173.308(b)(2) of this subchapter, respectively.

(12) Except when the proper shipping name in the Table is preceded by a plus (+) --

(i) If it is specifically determined that a material meets the definition of a hazard class, packing group or hazard zone, other than the class, packing group or hazard zone shown in association with the proper shipping name, or does not meet the defining criteria for a subsidiary hazard shown in Column 6 of the Table, the material shall be described by an appropriate proper shipping name listed in association with the correct hazard class, packing group, hazard zone, or subsidiary hazard for the material.

(ii) Generic or n.o.s. descriptions. If an appropriate technical name is not shown in the Table, selection of a proper shipping name shall be made from the generic or n.o.s. descriptions corresponding to the specific hazard class, packing group, hazard zone, or subsidiary hazard, if any, for the material. The name that most appropriately describes the material shall be used; e.g., an alcohol not listed by its technical name in the Table shall be described as "Alcohol, n.o.s." rather than "Flammable liquid, n.o.s.". Some mixtures may be more appropriately described according to their application, such as "Coating solution" or "Extracts, flavoring, liquid", rather than by an n.o.s. entry, such as "Flammable liquid, n.o.s." It should be noted, however, that an n.o.s. description as a proper shipping name may not provide sufficient information for shipping papers and package markings. Under the provisions of subparts C and D of this part, the technical name of one or more constituents which makes the product a hazardous material may be required in association with the proper shipping name.

(iii) Multiple hazard materials. If a material meets the definition of more than one hazard class, and is not identified in the Table specifically by name (e.g., acetyl chloride), the hazard class of the material shall be determined by using the precedence specified in § 173.2a of this subchapter, and an appropriate shipping description (e.g., "Flammable liquid, corrosive n.o.s.") shall be selected as described in paragraph (c)(12)(ii) of this section.

(iv) If it is specifically determined that a material is not a forbidden material and does not meet the definition of any hazard class, the material is not a hazardous material.

(13) Self-reactive materials and organic peroxides. A generic proper shipping name for a self-reactive material or an organic peroxide, as listed in Column 2 of the Table, must be selected based on the material's technical name and concentration, in accordance with the provisions of §§ 173.224 or 173.225 of this subchapter, respectively.

(14)A proper shipping name that describes all isomers of a material may be used to identify any isomer of that material if the isomer meets criteria for the same hazard class or division, subsidiary risk(s) and packing group, unless the isomer is specifically identified in the Table.

(15) Unless a hydrate is specifically listed in the Table, a proper shipping name for the equivalent anhydrous substance may be used, if the hydrate meets the same hazard class or division, subsidiary risk(s) and packing group.

(16) Unless it is already included in the proper shipping name in the § 172.101 Table, the qualifying words "liquid" or "solid" may be added in association with the proper shipping name when a hazardous material specifically listed by name in the § 172.101 Table may, due to the differing physical states of the various isomers of the material, be either a liquid or a solid (for example "Dinitrotoluenes, liquid" and "Dinitrotoluenes, solid"). Use of the words "liquid" or "solid" is subject to the limitations specified for the use of the words "mixture" or "solution" in paragraph (c)(10) of this section. The qualifying word "molten" may be added in association with the proper shipping name when a hazardous material, which is a solid in accordance with the definition in § 171.8 of this subchapter, is offered for transportation in the molten state (for example, "Alkylphenols, solid, n.o.s., molten").

(d) Column 3: Hazard class or Division. Column 3 contains a designation of the hazard class or division corresponding to each proper shipping name, or the word "Forbidden".

(1)A material for which the entry in this column is "Forbidden" may not be offered for transportation or transported. This prohibition does not apply if the material is diluted, stabilized or incorporated in a device and it is classed in accordance with the definitions of hazardous materials contained in part 173 of this subchapter.

(2) When a reevaluation of test data or new data indicates a need to modify the "Forbidden" designation or the hazard class or packing group specified for a material specifically identified in the Table, this data should be submitted to the Associate Administrator.

(3)A basic description of each hazard class and the section reference for class definitions appear in § 173.2 of this subchapter.

(4) Each reference to a Class 3 material is modified to read "Combustible liquid" when that material is reclassified in accordance with § 173.150(e) or (f) of this subchapter or has a flash point above 60 [degrees] C (140 [degrees] F) but below 93 [degrees] C (200 [degrees] F).

(e) Column 4: Identification number. Column 4 lists the identification number assigned to each proper shipping name. Those preceded by the letters "UN" are associated with proper shipping names considered appropriate for international transportation as well as domestic transportation. Those preceded by the letters "NA" are associated with proper shipping names not recognized for international transportation, except to and from Canada. Identification numbers in the "NA9000" series are associated with proper shipping names not appropriately covered by international hazardous materials (dangerous goods) transportation standards, or not appropriately addressed by international transportation standards for emergency response information purposes, except for transportation between the United States and Canada. Those preceded by the letters "ID" are associated with proper shipping names recognized by the ICAO Technical Instructions (IBR, See § 171.7 of this subchapter).

(f) Column 5: Packing group. Column 5 specifies one or more packing groups assigned to a material corresponding to the proper shipping name and hazard class for that material. Class 2, Class 7, Division 6.2 (other than regulated medical wastes), and ORM-D materials, do not have packing groups. Articles in other than Class 1 are not assigned to packing groups. For packing purposes, any requirement for a specific packaging performance level is set out in the applicable packing authorizations of Part 173. Packing Groups I, II and III indicate the degree of danger presented by the material is great, medium or minor, respectively. If more than one packing group is indicated for an entry, the packing group for the hazardous material is determined using the criteria for assignment of packing groups specified in subpart D of part 173. When a reevaluation of test data or new data indicates a need to modify the specified packing group(s), the data should be submitted to the Associate Administrator. Each reference in this column to a material which is a hazardous waste or a hazardous substance, and whose proper shipping name is preceded in Column 1 of the Table by the letter "A" or "W", is modified to read "III" on those occasions when the material is offered for transportation or transported by a mode in which its transportation is not otherwise subject to requirements of this subchapter.

(g) Column 6: Labels. Column 6 specifies codes which represent the hazard warning labels required for a package filled with a material conforming to the associated hazard class and proper shipping name, unless the package is otherwise excepted from labeling by a provision in subpart E of this part, or part 173 of this subchapter. The first code is indicative of the primary hazard of the material. Additional label codes are indicative of subsidiary

hazards. Provisions in § 172.402 may require that a label other than that specified in Column 6 be affixed to the package in addition to that specified in Column 6. No label is required for a material classed as a combustible liquid or for a Class 3 material that is reclassed as a combustible liquid. For "Empty" label requirements, see § 173.428 of this subchapter. The codes contained in Column 6 are defined according to the following table:

LABEL SUBSTITUTION TABLE

Label code	Label name
1	Explosive.
1.1 fn1	Explosive 1.1 fn1
1.2 fn1	Explosive 1.2 fn1
1.3 fn1	Explosive 1.3 fn1
1.4 fn1	Explosive 1.4 fn1
1.5 fn1	Explosive 1.5 fn1
1.6 fn1	Explosive 1.6 fn1
2.1	Flammable Gas
2.2	Non-Flammable Gas
2.3	Poison Gas
3	Flammable Liquid
4.1	Flammable Solid
4.2	Spontaneously Combustible
4.3	Dangerous When Wet
5.1	Oxidizer
5.2	Organic Peroxide
6.1 (inhalation hazard, Zone A or B).	Poison Inhalation Hazard
6.1 (other than inhalation hazard, Zone A or B) fn2.	Poison
6.2	Infectious substance
7	Radioactive
8	Corrosive
9	Class 9

fn1 Refers to the appropriate compatibility group letter.

fn2 The packing group for a material is indicated in column 5 of the table.

(h) Column 7: Special provisions. Column 7 specifies codes for special provisions applicable to hazardous materials. When Column 7 refers to a special provision for a hazardous material, the meaning and requirements of that special provision are as set forth in § 172.102 of this subpart.

(i) Column 8: Packaging authorizations. Columns 8A, 8B and 8C specify the applicable sections for exceptions, non-bulk packaging requirements and bulk packaging requirements, respectively, in part 173 of this subchapter. Columns 8A, 8B and 8C are completed in a manner which indicates that "§ 173." precedes the designated

numerical entry. For example, the entry "202" in Column 8B associated with the proper shipping name "Gasoline" indicates that for this material conformance to non-bulk packaging requirements prescribed in § 173.202 of this subchapter is required. When packaging requirements are specified, they are in addition to the standard requirements for all packagings prescribed in § 173.24 of this subchapter and any other applicable requirements in subparts A and B of part 173 of this subchapter.

(1) Exceptions. Column 8A contains exceptions from some of the requirements of this subchapter. The referenced exceptions are in addition to those specified in subpart A of part 173 and elsewhere in this subchapter. A "None" in this column means no packaging exceptions are authorized, except as may be provided by special provisions in Column 7.

(2) Non-bulk packaging. Column 8B references the section in part 173 of this subchapter which prescribes packaging requirements for non-bulk packagings. A "None" in this column means non-bulk packagings are not authorized, except as may be provided by special provisions in Column 7. Each reference in this column to a material which is a hazardous waste or a hazardous substance, and whose proper shipping name is preceded in Column 1 of the Table by the letter "A" or "W", is modified to include "§ 173.203" or "§ 173.213", as appropriate for liquids and solids, respectively, on those occasions when the material is offered for transportation or transported by a mode in which its transportation is not otherwise subject to the requirements of this subchapter.

(3) Bulk packaging. Column (8C) specifies the section in part 173 of this subchapter that prescribes packaging requirements for bulk packagings, subject to the limitations, requirements, and additional authorizations of Columns (7) and (8B). A "None" in Column (8C) means bulk packagings are not authorized, except as may be provided by special provisions in Column (7) and in packaging authorizations Column (8B). Additional authorizations and limitations for use of UN portable tanks are set forth in Column 7. For each reference in this column to a material that is a hazardous waste or a hazardous substance, and whose proper shipping name is preceded in Column 1 of the Table by the letter "A" or "W" and that is offered for transportation or transported by a mode in which its transportation is not otherwise subject to the requirements of this subchapter:

(i) The column reference is § 173.240 or § 173.241, as appropriate.

(ii) For a solid material, the exception provided in Special provision B54 is applicable.

(iii) For a Class 9 material which meets the definition of an elevated temperature material, the column reference is § 173.247.

(4) For a hazardous material which is specifically named in the Table and whose packaging sections specify packagings not applicable to the form of the material (e.g., packaging specified is for solid material and the material is being offered for transportation in a liquid form) the following table should be used to determine the appropriate packaging section:

Packaging section reference for solid materials	**Corresponding packaging section for liquid materials**
§ 173.187	§ 173.181
§ 173.211	§ 173.201
§ 173.212	§ 173.202
§ 173.213	§ 173.203
§ 173.240	§ 173.241
§ 173.242	§ 173.243

(5) Cylinders. For cylinders, both non-bulk and bulk packaging authorizations are set forth in Column (8B). Notwithstanding a designation of "None" in Column (8C), a bulk cylinder may be used when specified through the section reference in Column (8B).

(j) Column 9: Quantity limitations. Columns 9A and 9B specify the maximum quantities that may be offered for transportation in one package by passenger-carrying aircraft or passenger-carrying rail car (Column 9A) or by cargo aircraft only (Column 9B), subject to the following:

(1)"Forbidden" means the material may not be offered for transportation or transported in the applicable mode of transport.

(2) The quantity limitation is "net" except where otherwise specified, such as for "Consumer commodity" which specifies "30 kg gross."

(3) When articles or devices are specifically listed by name, the net quantity limitation applies to the entire article or device (less packaging and packaging materials) rather than only to its hazardous components.

(4)A package offered or intended for transportation by aircraft and which is filled with a material forbidden on passenger-carrying aircraft but permitted on cargo aircraft only, or which exceeds the maximum net quantity authorized on passenger-carrying aircraft, shall be labelled with the CARGO AIRCRAFT ONLY label specified in § 172.448 of this part.

(5) The total net quantity of hazardous material for an outer non-bulk packaging that contains more than one hazardous material may not exceed the lowest permitted maximum net quantity per package as shown in Column 9A or 9B, as appropriate. If one material is a liquid and one is a solid, the maximum net quantity must be calculated in kilograms. See § 173.24a(c)(1)(iv).

(k) Column 10: Vessel stowage requirements. Column 10A [Vessel stowage] specifies the authorized stowage locations on board cargo and passenger vessels. Column 10B [Other provisions] specifies codes for stowage and handling requirements for specific hazardous materials. Hazardous materials offered for transportation as limited quantities are allocated stowage category A and are not subject to the stowage codes assigned by column 10B. The meaning of each code in Column 10B is set forth in § 176.84 of this subchapter. Section 176.63 of this subchapter sets forth the physical requirements for each of the authorized locations listed in Column 10A. (For bulk transportation by vessel, see 46 CFR parts 30 to 40, 70, 98, 148, 151, 153 and 154.) The authorized stowage locations specified in Column 10A are defined as follows:

(1) Stowage category "A" means the material may be stowed "on deck" or "under deck" on a cargo vessel or on a passenger vessel.

(2) Stowage category "B" means--

(i) The material may be stowed "on deck" or "under deck" on a cargo vessel and on a passenger vessel carrying a number of passengers limited to not more than the larger of 25 passengers, or one passenger per each 3 m of overall vessel length; and

(ii)"On deck only" on passenger vessels in which the number of passengers specified in paragraph (k)(2)(i) of this section is exceeded.

(3) Stowage category "C" means the material must be stowed "on deck only" on a cargo vessel or on a passenger vessel.

(4) Stowage category "D" means the material must be stowed "on deck only" on a cargo vessel or on a passenger vessel carrying a number of passengers limited to not more than the larger of 25 passengers or one passenger per each 3 m of overall vessel length, but the material is prohibited on a passenger vessel in which the limiting number of passengers is exceeded.

(5) Stowage category "E" means the material may be stowed "on deck" or "under deck" on a cargo vessel or on a passenger vessel carrying a number of passengers limited to not more than the larger of 25 passengers, or one passenger per each 3 m of overall vessel length, but is prohibited from carriage on a passenger vessel in which the limiting number of passengers is exceeded.

(6) Stowage category "01" means the material may be stowed "on deck" in closed cargo transport units or "under deck" on a cargo vessel (up to 12 passengers) or on a passenger vessel.

(7) Stowage category "02" means the material may be stowed "on deck" in closed cargo transport units or "under deck" on a cargo vessel (up to 12 passengers) or "on deck" in closed cargo transport units or "under deck" in closed cargo transport units on a passenger vessel.

(8) Stowage category "03" means the material may be stowed "on deck" in closed cargo transport units or "under deck" on a cargo vessel (up to 12 passengers) but the material is prohibited on a passenger vessel.

(9) Stowage category "04" means the material may be stowed "on deck" in closed cargo transport units or "under deck" in closed cargo transports on a cargo vessel (up to 12 passengers) but the material is prohibited on a passenger vessel.

(10) Stowage category "05" means the material may be stowed "on deck" in closed cargo transport units on a cargo vessel (up to 12 passengers) but the material is prohibited on a passenger vessel.

(l) Changes to the Table. (1) Unless specifically stated otherwise in a rule document published in the FEDERAL REGISTER amending the Table --

(i) Such a change does not apply to the shipment of any package filled prior to the effective date of the amendment; and

(ii) Stocks of preprinted shipping papers and package markings may be continued in use, in the manner previously authorized, until depleted or for a one-year period, subsequent to the effective date of the amendment, whichever is less.

(2) Except as otherwise provided in this section, any alteration of a shipping description or associated entry which is listed in the § 172.101 Table must receive prior written approval from the Associate Administrator.

(3) The proper shipping name of a hazardous material changed in the May 6, 1997 final rule, in effect on October 1, 1997, only by the addition or omission of the word "compressed," "inhibited," "liquefied" or "solution" may continue to be used to comply with package marking requirements, until January 1, 2003.

[PUBLISHER'S NOTE: The Hazardous Materials table cannot be efficiently reproduced on LEXIS. See the Publisher's Note at the beginning of this section.]

APPENDIX A TO § 172.101 -- LIST OF HAZARDOUS SUBSTANCES AND REPORTABLE QUANTITIES

1.This Appendix lists materials and their corresponding reportable quantities (RQ's) that are listed or designated as "hazardous substances" under section 101(14) of the Comprehensive Environmental Response, Compensation, and Liability Act, *42 U.S.C. 9601*(14) (CERCLA; *42 U.S.C. 9601* et seq). This listing fulfills the requirement of CERCLA, *42 U.S.C. 9656*(a), that all "hazardous substances," as defined in *42 U.S.C. 9601*(14), be listed and regulated as hazardous materials under *49 U.S.C. 5101*-5127. That definition includes substances listed under sections 311(b)(2)(A) and 307(a) of the Federal Water Pollution Control Act, *33 U.S.C. 1321*(b)(2)(A) and 1317(a), section 3001 of the Solid Waste Disposal Act, *42 U.S.C. 6921,* and section 112 of the Clean Air Act, *42 U.S.C. 7412.* In addition, this list contains materials that the Administrator of the Environmental Protection Agency has determined to be hazardous substances in accordance with section 102 of CERCLA, *42 U.S.C. 9602.* It should be noted that *42 U.S.C. 9656*(b) provides that common and contract carriers may be held liable under laws other than CERCLA for the release of a hazardous substance as defined in that Act, during transportation that commenced before the effective date of the listing and regulating of that substance as a hazardous material under *49 U.S.C. 5101*-5127.

2.This Appendix is divided into two TABLES which are entitled "TABLE 1-HAZARDOUS SUBSTANCES OTHER THAN RADIONUCLIDES" and "TABLE 2-RADIONUCLIDES." A material listed in this Appendix is regulated as a hazardous material and a hazardous substance

under this subchapter if it meets the definition of a hazardous substance in § 171.8 of this subchapter.

3.The procedure for selecting a proper shipping name for a hazardous substance is set forth in § 172.101(c).

4.Column 1 of TABLE 1, entitled "Hazardous substance", contains the names of those elements and compounds that are hazardous substances. Following the listing of elements and compounds is a listing of waste streams. These waste streams appear on the list in numerical sequence and are referenced by the appropriate "D", "F", or "K" numbers. Column 2 of TABLE 1, entitled "Reportable quantity (RQ)", contains the reportable quantity (RQ), in pounds and kilograms, for each hazardous substance listed in Column 1 of TABLE 1.

5.A series of notes is used throughout TABLE 1 and TABLE 2 to provide additional information concerning certain hazardous substances. These notes are explained at the end of each TABLE.

6.TABLE 2 lists radionuclides that are hazardous substances and their corresponding RQ's. The RQ's in Table 2 for radionuclides are expressed in units of curies and terabecquerels, whereas those in Table 1 are expressed in units of pounds and kilograms. If a material is listed in both Table 1 and Table 2, the lower RQ shall apply. Radionuclides are listed in alphabetical order. The RQ's for radionuclides are given in the radiological unit of measure of curie, abbreviated "Ci", followed, in parentheses, by an equivalent unit measured in terabecquerels, abbreviated "TBq".

7.For mixtures of radionuclides, the following requirements shall be used in determining if a package contains an RQ of a hazardous substance: (i) if the identity and quantity (in curies or terabecquerels) of each radionuclide in a mixture or solution is known, the ratio between the quantity per package (in curies or terabecquerels) and the RQ for the radionuclide must be determined for each radionuclide. A package contains an RQ of a hazardous substance when the sum of the ratios for the radionuclides in the mixture or solution is equal to or greater than one; (ii) if the identity of each radionuclide in a mixture or solution is known but the quantity per package (in curies or terabecquerels) of one or more of the radionuclides is unknown, an RQ of a hazardous substance is present in a package when the total quantity (in curies or terabecquerels) of the mixture or solution is equal to or greater than the lowest RQ of any individual radionuclide in the mixture or solution; and (iii) if the identity of one or more radionuclides in a mixture or solution is unknown (or if the identity of a radionuclide by itself is unknown), an RQ of a hazardous substance is present when the total quantity (in curies or terabecquerels) in a package is equal to or greater than either one curie or the lowest RQ of any known individual radionuclide in the mixture or solution, whichever is lower.

[PUBLISHER'S NOTE: Table 1 cannot be efficiently reproduced on LEXIS. See the Publisher's Note at the beginning of this section.]

[PUBLISHER'S NOTE: Table 2 cannot be efficiently reproduced on LEXIS. See the Publisher's Note at the beginning of this section.]

APPENDIX B TO § 172.101 -- LIST OF MARINE POLLUTANTS

1.See § 171.4 of this subchapter for applicability to marine pollutants. This appendix lists potential marine pollutants as defined in § 171.8 of this subchapter.

2.Marine pollutants listed in this appendix are not necessarily listed by name in the § 172.101 Table. If a marine pollutant not listed by name or by synonym in the § 172.101 Table meets the definition of any hazard Class 1 through 8, then you must determine the class and division of the material in accordance with § 173.2a of this subchapter. You must also select the most appropriate hazardous material description and proper shipping name. If a marine pollutant not listed by name or by synonym in the § 172.101 Table does not meet the definition of any Class 1 through 8, then you must offer it for transportation under the most appropriate of the following two Class 9 entries: "Environmentally hazardous substances, liquid, n.o.s.," UN3082, or "Environmentally hazardous substances, solid, n.o.s." UN3077.

3.This appendix contains two columns. The first column, entitled "S.M.P." (for severe marine pollutants), identifies whether a material is a severe marine pollutant. If the letters "PP" appear in this column for a material, the material is a severe marine pollutant, otherwise it is not. The second column, entitled "Marine Pollutant", lists the marine pollutants.

4.If a material is not listed in this appendix and meets the criteria for a marine pollutant as provided in Chapter 2.9 of the IMDG Code, (incorporated by reference; see § 171.7 of this subchapter), the material may be transported as a marine pollutant in accordance with the applicable requirements of this subchapter.

5.If a material or a solution meeting the definition of a marine pollutant in § 171.8 of this subchapter does not meet the criteria for a marine pollutant as provided in section 2.9.3.3 and 2.9.3.4 of the IMDG Code, (incorporated by reference; see § 171.7 of this subchapter), it may be excepted from the requirements of this subchapter as a marine pollutant if that exception is approved by the Associate Administrator.

[PUBLISHER'S NOTE: The List of Marine Pollutants table cannot be efficiently reproduced on LEXIS. See the Publisher's Note at the beginning of this section.]

Statutory Authority

AUTHORITY NOTE APPLICABLE TO ENTIRE PART:

49 U.S.C. 5101-5128, 44701; *49 CFR 1.81*, *1.96* and *1.97*.

History

[55 FR 46798, Nov. 7, 1990; *55 FR 52474,* Dec. 21, 1990, as amended by *56 FR 49987, 49988,* Oct. 2, 1991; *56 FR 66162,* Dec. 20, 1991; *57 FR 1878,* Jan 16, 1992; *57 FR 45454-45457,* Oct. 1, 1992; *57 FR 47513,* Oct. 16, 1992; *57 FR 52935,* Nov. 5, 1992; *57 FR 59309, 59310,* Dec. 15, 1992; *58 FR 3348,* Jan. 8, 1993; *58 FR 50231,* Sept. 24, 1993; *58 FR 50494,* Sept. 27, 1993; *58 FR 50501,* Sept. 27, 1993; *58 FR 51528-51530,* Oct. 1, 1993; *59 FR 28491,* June 2, 1994, as corrected at *59 FR 35411,* July 11, 1994, as corrected at *59 FR 37537,* July 22, 1994; *59 FR 38052,* July 26, 1994; *59 FR 49132,* Sept. 26, 1994; *59 FR 67407-67408, 67485,* Dec. 29, 1994; *60 FR 26800, 26805,* May 18, 1995; *60 FR 40032,* Aug. 4, 1995; *60 FR 48780, 48786,* Sept. 20, 1995; *60 FR 49048, 49072,* Sept. 21, 1995; *60 FR 49106, 49108-49110,* Sept. 21, 1995; *60 FR 50292, 50303,* Sept. 28, 1995; *61 FR 18926, 18932,* April 29, 1996; *61 FR 20747, 20749,* May 8, 1996; *61 FR 27166, 27172,* May 30, 1996, as confirmed at *61 FR 51236,* Oct. 1, 1996; *61 FR 28666, 28674,* June 5, 1996, as confirmed at *61 FR 38605, 38642,* July 25, 1996; *61 FR 50616, 50623,* Sept. 26, 1996; *61 FR 51238, 51240,* Oct. 1, 1996; *61 FR 51334, 51337, 51338,* Oct. 1, 1996; *62 FR 1217, 1227,* Jan. 8, 1997; *62 FR 14334, 14337,* Mar. 26, 1997; *62 FR 24701, 24702, 24714, 24716, 24717,* May 6, 1997, as corrected at *62 FR 45702,* Aug. 28, 1997; *62 FR 30767, 30770,* June 5, 1997, as corrected and amended at *62 FR 34667, 34669,* June 27, 1997; *62 FR 39398, 39404,* July 22, 1997; *62 FR 51554, 51558, 51560,* Oct. 1, 1997; *63 FR 37454, 37459, 37461,* July 10, 1998; *63 FR 52844, 52847,* Oct. 1, 1998; *64 FR 10742, 10753, 10772, 10773, 10774,* Mar. 5, 1999, as corrected at *64 FR 44426, 44428, 44578, 44579,* Aug. 16, 1999; *64 FR 45388, 45396,* Aug. 19, 1999; *64 FR 51912, 51916, 51918,* Sept. 27, 1999, as corrected at *64 FR 54730,* Oct. 7, 1999, and as corrected and amended at *64 FR 61219, 61220,* Nov. 10, 1999; *65 FR 7310, 7311,* Feb. 14, 2000; *65 FR 50450, 50457, 50458, 50459,* Aug. 18, 2000; *65 FR 58614, 58620, 58626,* Sept. 29, 2000, as corrected at *65 FR 60382,* Oct. 11, 2000; *66 FR 33316, 33337, 33413,* June 21, 2001; *66 FR 45177, 45182,* Aug. 28, 2001; *66 FR 45376, 45379,* Aug. 28, 2001; *67 FR 9926, 9927,* Mar. 5, 2002, as corrected at *67 FR 13680,* Mar. 25, 2002; *67 FR 15736, 15739, 15743,* Apr. 3, 2002; *67 FR 51626, 51641,* Aug. 8, 2002; *67 FR 53118, 53133,* Aug. 14, 2002, as corrected at *67 FR 54967,* Aug. 27, 2002 and as corrected at *67 FR 57635,* Sept. 11, 2002; *67 FR 61006, 61013,* Sept. 27, 2002; *68 FR 19258, 19274,* Apr. 18, 2003, as corrected at *68 FR 52363, 52368,* Sept. 3, 2003; *68 FR 44992, 45011, 45026,* July 31, 2003; *68 FR 48562, 48567,* Aug. 14, 2003; *68 FR 57629, 57632,* Oct. 6, 2003; *69 FR 3632, 3665,* Jan. 26, 2004, as corrected *69 FR 55113, 55116,* Sept. 13, 2004; *69 FR 34604, 34608,* June 22, 2004; *69 FR 41967, 41968,* July 13, 2004; *69 FR 54042,*

54045, Sept. 7, 2004; 69 FR 75208, 75215, Dec. 15, 2004, as confirmed and amended at 72 FR 44930, 44947, 44948, Aug. 9, 2007; 69 FR 76044, 76063, 76150, Dec. 20, 2004; 70 FR 34066, 34072, June 13, 2005; 70 FR 34381, 34388, June 14, 2005; 70 FR 56084, 56091, Sept. 23, 2005, as corrected at 70 FR 59119, Oct. 11, 2005; 71 FR 3418, 3425, Jan. 23, 2006; 71 FR 14586, 14601, Mar. 22, 2006; 71 FR 32244, 32256, June 2, 2006; 71 FR 33858, 33876, June 12, 2006; 71 FR 54388, 54391, Sept. 14, 2006; 71 FR 78596, 78612, 78626, Dec. 29, 2006; 72 FR 4442, 4455, Jan. 31, 2007; 72 FR 55091, Sept. 28, 2007; 72 FR 55678, 55684, Oct. 1, 2007, as corrected at 72 FR 59146, Oct. 18, 2007; 73 FR 1089, 1094, Jan. 7, 2008; 73 FR 4699, 4713, Jan. 28, 2008, as corrected at 73 FR 40914, July 16, 2008; 74 FR 1770, 1796, Jan. 13, 2009; 74 FR 2200, 2233-2249, Jan. 14, 2009; 74 FR 52896, 52900, Oct. 15, 2009, as confirmed at 74 FR 65696, Dec. 11, 2009; 74 FR 53182, 53186, Oct. 16, 2009; 75 FR 63, 69, Jan. 4, 2010; 75 FR 5376, 5390, Feb. 2, 2010; 75 FR 53593, 53596, Sept. 1, 2010; 76 FR 3308, Jan. 19, 2011; 76 FR 37283, 37285, June 27, 2011; 76 FR 43510, 43525, July 20, 2011; 76 FR 56304, 56312, Sept. 13, 2011; 76 FR 82163, 82172, Dec. 30, 2011; 77 FR 60935, 60939, 60940, Oct. 5, 2012; 78 FR 988, 1033, Jan. 7, 2013, as corrected at 78 FR 8431, Feb. 6, 2013; 78 FR 14702, 14712, Mar. 7, 2013, as corrected at 78 FR 17874, Mar. 25, 2013; 78 FR 15303, 15322, Mar. 11, 2013; 78 FR 42457, 42475, July 16, 2013; 78 FR 60745, 60751, Oct. 2, 2013; 78 FR 65454, 65469, Oct. 31, 2013; 78 FR 69310, Nov. 19, 2013; 79 FR 46012, 46034, Aug. 6, 2014; 80 FR 1076, 1116, Jan. 8, 2015; 80 FR 9217, Feb. 20, 2015; 80 FR 72914, 72920, Nov. 23, 2015; 80 FR 79424, 79449, Dec. 21, 2015; 81 FR 3636, 3665, Jan. 21, 2016; 81 FR 35484, 35513, June 2, 2016; 82 FR 15796, 15838, Mar. 30, 2017]

Annotations

Notes

[EFFECTIVE DATE NOTE:

78 FR 988, 1033, Jan. 7, 2013, amended this section, effective Jan. 1, 2013. For compliance date information, see: 78 FR 988, Jan. 7, 2013; 78 FR 14702, 14712, Mar. 7, 2013, amended this section, effective May 6, 2013; 78 FR 15303, 15322, Mar. 11, 2013, amended this section, effective May 10, 2013. For compliance date information, see: 78 FR 15303, Mar. 11, 2013; 78 FR 42457, 42475, July 16, 2013, amended this section, effective Aug. 15, 2013; 78 FR 60745, 60751, Oct. 2, 2013, amended this section, effective Oct. 1, 2013; 78 FR 65465, 65469, Oct. 31, 2013, amended this section, effective Oct. 31, 2013; 79 FR 46012, 46034, Aug. 6, 2014, amended the Hazardous Materials Table, effective Aug. 6, 2014. For compliance date information, see: 79 FR 46012, Aug. 6, 2014, and 80 FR 9217, Feb. 20, 2015; 80 FR 1076, 1116, Jan. 8, 2015, amended this section, effective Jan. 1, 2015. For compliance date information, see: 80 FR 1076, Jan. 8, 2015; 80 FR 72914, 72920, Nov. 23, 2015, amended this section, effective Dec. 23, 2015; 80 FR 79424, 79449, Dec. 21, 2015, amended this section, effective Jan. 20, 2016; 81 FR 3636, 3665, Jan. 21, 2016, amended this section, effective Feb. 22, 2016; 81 FR 35484, 35513, June 2, 2016, amended the Hazardous Materials Table, effective July 5, 2016; 82 FR 15796, 15838, Mar. 30, 2017, amended the Hazardous Materials Table, effective Mar. 30, 2017.]

Case Notes

LexisNexis® Notes

Case Notes Applicable to Entire Part
Admiralty Law : Shipping : Regulations & Statutes : General Overview
Criminal Law & Procedure : Criminal Offenses : Miscellaneous Offenses : General Overview
Criminal Law & Procedure : Criminal Offenses : Weapons : Possession : General Overview
Environmental Law : Hazardous Wastes & Toxic Substances : CERCLA & Superfund : Enforcement : Cost Recovery Actions :
Environmental Law : Hazardous Wastes & Toxic Substances :
Environmental Law : Hazardous Wastes & Toxic Substances :

Environmental Law : Hazardous Wastes & Toxic Substances :
Environmental Law : Hazardous Wastes & Toxic Substances : Transportation
International Trade Law : General Overview
Transportation Law : Air Transportation : Charters
Transportation Law : Carrier Duties & Liabilities : Hazardous Materials

Case Notes Applicable to Entire Part

Part Note

Admiralty Law : Shipping : Regulations & Statutes : General Overview

Poliskie Line Oceaniczne v. Hooker Chemical Corp., 499 F. Supp. 94, 499 F. Supp. 94, 1980 U.S. Dist. LEXIS 9413 (SD NY Apr. 8, 1980).

Overview: *When a cargo owner failed to place dunnage between drums of hazardous materials and stated that it had complied with all applicable regulations, it was responsible when the drums leaked in their shipping container and caused a chemical reaction.*

- Sulphur dichloride is classified as a hazardous material by *49 C.F.R. § 172.101* and, as such, may not be transported by vessel unless it is prepared for transportation in accordance with the regulations contained in Title 49. *49 C.F.R. §§ 176.1*, *176.3*, *176.5*. *49 C.F.R. § 176.76* requires that: (1) the material must be in proper condition for transportation according to the requirements of this subchapter; (2) all packages in the container must be secured to prevent movement in any direction; (3) bulkheads made of dunnage which extend to the level of the cargo must be provided unless the packages are stowed flush with the sides or ends; (4) dunnage must be secured to the floor when the cargo consists of dense materials or heavy packages; (6) Any slack spaces between packages must be filled with dunnage. *Go To Headnote*

Criminal Law & Procedure : Criminal Offenses : Miscellaneous Offenses : General Overview

United States v. King, 915 F. Supp. 244, 1996 U.S. Dist. LEXIS 1025 (D Kan Jan. 10, 1996).

Overview:

- U.S. Sentencing Guidelines Manual § 2Q1.2 applies to offenses involving substances that are designated toxic or hazardous by statute or regulation. Methyl acrylate is designated as a hazardous or toxic substance by several federal regulations, including *49 C.F.R. § 172.101*, *40 C.F.R. § 372.65*, and *40* CFR Part 63, Subpart F Thus, § 2Q1.2 appears to be the more appropriate section when dealing with sentencing related to methyl acetate. Under the enhancement in § 2Q1.2(b)(1)(B) for discharge of such a substance, however, the court has the authority to depart two levels in either direction to take account of the degree of harm resulting from the discharge, the quantity and nature of the substance, and the duration of the offense and the risk associated with the violation. U.S.SG § 2Q1.2, comment (n.5). *Go To Headnote*

Criminal Law & Procedure : Criminal Offenses : Weapons : Possession : General Overview

United States v. Scharstein, 531 F. Supp. 460, 1982 U.S. Dist. LEXIS 10459 (ED Ky Jan. 22, 1982).

Overview: *Federal rules of evidence did not require the court to instruct prospective witnesses excluded from the courtroom not to discuss the case with other witnesses. Doctrine of lenity did not prevent government from selecting which statute to prosecute.*

- *49 C.F.R. §§ 172.101*, 173.88, 173.91, and 173.100 all deal with the manner in which Class B and C fireworks must be transported to promote safety. The regulations prescribe certain requirements dealing with labeling, packaging, mode of transportation, placarding and shipping papers. Hence, the aspect of the transportation of Class B and C fireworks is the manner in which the items must be transported. *Go To Headnote*

Environmental Law : Hazardous Wastes & Toxic Substances : CERCLA & Superfund : Enforcement : Cost Recovery Actions :

United States v. King, 915 F. Supp. 244, 1996 U.S. Dist. LEXIS 1025 (D Kan Jan. 10, 1996).

Overview:

- U.S. Sentencing Guidelines Manual § 2Q1.2 applies to offenses involving substances that are designated toxic or hazardous by statute or regulation. Methyl acrylate is designated as a hazardous or toxic substance by several federal regulations, including *49 C.F.R. § 172.101*, *40 C.F.R. § 372.65*, and *40* CFR Part 63, Subpart F Thus, § 2Q1.2 appears to be the more appropriate section when dealing with sentencing related to methyl acetate. Under the enhancement in § 2Q1.2(b)(1)(B) for discharge of such a substance, however, the court has the authority to depart two levels in either direction to take account of the degree of harm resulting from the discharge, the quantity and nature of the substance, and the duration of the offense and the risk associated with the violation. U.S.SG § 2Q1.2, comment (n.5). *Go To Headnote*

Environmental Law : Hazardous Wastes & Toxic Substances :

Cariffe v. P/r Hoegh Cairn, 830 F. Supp. 144, 1993 U.S. Dist. LEXIS 10392 (ED NY July 27, 1993).

Overview: *Summary judgment in favor of shipowner was not proper because although stevedore had the primary duty to protect longshoreman, shipowner had a duty to alert stevedore of hazardous material, unless it was obvious to stevedore that hazard was present.*

- The purpose of the Optional Hazardous Material Table (OHMT) is to list materials that are subject to regulation under widely applied international standards. They are listed in the interest of providing consistency with those standards and to alert persons offering or accepting these materials for transportation that the materials may be subject to regulation in international transport. *49 C.F.R. § 172.102 (1987)*. The OHMT section does not designate materials as hazardous materials and it does not specify packaging requirements, exceptions or limitations. They are made only in *49 C.F.R. § 172.101*. Section 172.101 contains the Hazardous Materials Table that lists all the materials that are designated as hazardous materials for the purpose of transportation of those materials in commerce. *Go To Headnote*

Environmental Law : Hazardous Wastes & Toxic Substances :

Roth v. Norfalco Llc, 651 F.3d 367, 2011 U.S. App. LEXIS 13119 (3rd Cir June 28, 2011).

Overview: *Where employee was burned by acid while unloading a railway tank car, his common law claims were expressly preempted by Hazardous Materials Transportation Act because, inter alia, his design requirement concerned the design of a package, container, or packaging component that was qualified for use in transporting hazardous materials in commerce.*

- Sulfuric acid is a "hazardous material." *49 C.F.R. § 172.101*. Accordingly, railway tank cars carrying the chemical must adhere to design specifications approved by the Department of Transportation (DOT). *49 C.F.R. § 173.242(a)*. Tank cars must be mounted to a railcar structure in a specified manner. *49 C.F.R. §§ 179.10-179.11*. Tank car volume and weight capacity are spelled out. *49 C.F.R. § 179.13*. Most tank car models must satisfy DOT standards for thermal resistance. *49 C.F.R. § 179.18*. Modifications to the design features set forth in the Hazardous Materials Regulations are prohibited absent written authorization from the DOT. *49 C.F.R. §§ 179.3-179.4*. *Go To Headnote*

United States v. M/v Santa Clara I, 887 F. Supp. 825, 1995 U.S. Dist. LEXIS 6488 (D SC May 8, 1995).

Overview: *Carrier's bill of lading provision that shifted all liability for spills of hazardous cargo to shippers or consignees was null and void under COGSA, and the carrier was an owner of the cargo while at sea under CERCLA and liable for the spills.*

- The Department of Transportation regulations regarding the shipping of hazardous materials list magnesium phosphide as a hazardous material assigned to packing group I, the most dangerous of three possible packing group categories. *49 C.F.R. § 172.101 (1993)*. Further, any shipper of a hazardous material is required to certify that the material is properly classified, described, packaged, marked and labeled according to those regulations. *49 C.F.R. § 172.204*. *Go To Headnote*

United States v. Scharstein, 531 F. Supp. 460, 1982 U.S. Dist. LEXIS 10459 (ED Ky Jan. 22, 1982).

Overview: *Federal rules of evidence did not require the court to instruct prospective witnesses excluded from the courtroom not to discuss the case with other witnesses. Doctrine of lenity did not prevent government from selecting which statute to prosecute.*

- *49 C.F.R. §§ 172.101*, 173.88, 173.91, and 173.100 all deal with the manner in which Class B and C fireworks must be transported to promote safety. The regulations prescribe certain requirements dealing with labeling, packaging, mode of transportation, placarding and shipping papers. Hence, the aspect of the transportation of Class B and C fireworks is the manner in which the items must be transported. *Go To Headnote*

Environmental Law : Hazardous Wastes & Toxic Substances :

Riley v. Ala. Great Southern R.R., 2002 U.S. Dist. LEXIS 18645 (ED LA Sept. 27, 2002).

Overview: *Motion to remand was granted. As movants did not have cause of action for damages for negligent transportation of hazardous material under federal law, their claims did not arise under federal law. Also, their claims were not preempted.*

- The regulations promulgated pursuant to the Hazardous Materials Transportation Act (HMTA), *49 U.S.C.S. § 5101* et seq., are found in title 49 of the Code of Federal Regulations. Chlorine is specifically identified as a hazardous material *49 C.F.R. § 172.101* app. A, and detail specifications for tank cars that carry hazardous material have been promulgated, including specifications for valves on pressure tank cars, 4 C.F.R. §§ 179.100-13 and 100-19. *Go To Headnote*

Environmental Law : Hazardous Wastes & Toxic Substances : Transportation

O'callaghan v. Baerlocher, Inc., 1999 U.S. Dist. LEXIS 16540 (ND Miss Oct. 6, 1999).

Overview: *Truck driver failed to establish trucking company breached its duty to handle barium compounds appropriately during transportation process. Facts were disputed concerning company's duty to label barium shipment.*

- Except as specified in *49 C.F.R. § 172.400a*, each person who offers for transportation or transports a hazardous material in any of the following packages or containment devices, shall label the package or containment device with labels specified for the material in the *49 C.F.R. § 172.101* Table and in this subpart: A non-bulk package; A bulk packaging with a volumetric capacity of less than 18 m3. *49 C.F.R. § 172.400 (1994)*. *49 C.F.R. § 172.400a* goes on to specify circumstances under which a shipper or carrier may be exempt from the labeling requirements of the regulations. *Go To Headnote*

United States v. M/v Santa Clara I, 887 F. Supp. 825, 1995 U.S. Dist. LEXIS 6488 (D SC May 8, 1995).

Overview: *Carrier's bill of lading provision that shifted all liability for spills of hazardous cargo to shippers or consignees was null and void under COGSA, and the carrier was an owner of the cargo while at sea under CERCLA and liable for the spills.*

- The Department of Transportation regulations regarding the shipping of hazardous materials list magnesium phosphide as a hazardous material assigned to packing group I, the most dangerous of three possible packing group categories. *49 C.F.R. § 172.101 (1993)*. Further, any shipper of a hazardous material is required to certify that the material is properly classified, described, packaged, marked and labeled according to those regulations. *49 C.F.R. § 172.204*. *Go To Headnote*

Crockett v. Uniroyal, Inc., 592 F. Supp. 821, 1984 U.S. Dist. LEXIS 14814 (MD Ga July 19, 1984).

Overview: *Summary judgment was awarded against family of decedent and chemical producer because they did not allege a breach of duty by railway company or railway transporter that entitled them to prevail upon their wrongful death and indemnity claims.*

- *40 C.F.R. § 262.21*regarding required information states that (a) The manifest must contain all of the following information: (1) A manifest document number; (2) The generator's name, mailing address, telephone number, and Environmental Protection Agency (EPA) identification number; (3) The name and EPA identification number of each transporter; (4) The name, address and EPA identification number of the designated facility and an alternate facility, if any; (5) The description of the wastes, the proper shipping name, required by regulations of the United States Department of Transportation in *49 CFR §§ 172.101*, *172.202*, and *172.203*; (6) The total quantity of each hazardous waste by units of weight or volume, and the type and number of containers as loaded into or onto the transport vehicle. (b) The following certification must appear on the manifest: This is to certify that the above named materials are properly classified, described, packaged, marked, and labeled and are in proper condition for transportation according to the applicable regulations of the Department of Transportation and the Environmental Protection Agency. *Go To Headnote*

Poliskie Line Oceaniczne v. Hooker Chemical Corp., 499 F. Supp. 94, 499 F. Supp. 94, 1980 U.S. Dist. LEXIS 9413 (SD NY Apr. 8, 1980).

Overview: *When a cargo owner failed to place dunnage between drums of hazardous materials and stated that it had complied with all applicable regulations, it was responsible when the drums leaked in their shipping container and caused a chemical reaction.*

- Sulphur dichloride is classified as a hazardous material by *49 C.F.R. § 172.101* and, as such, may not be transported by vessel unless it is prepared for transportation in accordance with the regulations contained in Title 49. *49 C.F.R. §§ 176.1*, *176.3*, *176.5*. *49 C.F.R. § 176.76* requires that: (1) the material must be in proper condition for transportation according to the requirements of this subchapter; (2) all packages in the container must be secured to prevent movement in any direction; (3) bulkheads made of dunnage which extend to the level of the cargo must be provided unless the packages are stowed flush with the sides or ends; (4) dunnage must be secured to the floor when the cargo consists of dense materials or heavy packages; (6) Any slack spaces between packages must be filled with dunnage. *Go To Headnote*

International Trade Law : General Overview

Cariffe v. P/r Hoegh Cairn, 830 F. Supp. 144, 1993 U.S. Dist. LEXIS 10392 (ED NY July 27, 1993).

Overview: *Summary judgment in favor of shipowner was not proper because although stevedore had the primary duty to protect longshoreman, shipowner had a duty to alert stevedore of hazardous material, unless it was obvious to stevedore that hazard was present.*

- The purpose of the Optional Hazardous Material Table (OHMT) is to list materials that are subject to regulation under widely applied international standards. They are listed in the interest of providing consistency with those standards and to alert persons offering or accepting these materials for transportation that the materials may be subject to regulation in international transport. *49 C.F.R. § 172.102 (1987)*. The OHMT section does not designate materials as hazardous materials and it does not specify packaging requirements, exceptions or limitations. They are made only in

49 C.F.R. § 172.101. Section 172.101 contains the Hazardous Materials Table that lists all the materials that are designated as hazardous materials for the purpose of transportation of those materials in commerce. *Go To Headnote*

Transportation Law : Air Transportation : Charters

Riley v. Ala. Great Southern R.R., 2002 U.S. Dist. LEXIS 18645 (ED LA Sept. 27, 2002).

Overview: *Motion to remand was granted. As movants did not have cause of action for damages for negligent transportation of hazardous material under federal law, their claims did not arise under federal law. Also, their claims were not preempted.*

- The regulations promulgated pursuant to the Hazardous Materials Transportation Act (HMTA), *49 U.S.C.S. § 5101* et seq., are found in title 49 of the Code of Federal Regulations. Chlorine is specifically identified as a hazardous material *49 C.F.R. § 172.101* app. A, and detail specifications for tank cars that carry hazardous material have been promulgated, including specifications for valves on pressure tank cars, 4 C.F.R. §§ 179.100-13 and 100-19. *Go To Headnote*

Transportation Law : Carrier Duties & Liabilities : Hazardous Materials

Roth v. Norfalco Llc, 651 F.3d 367, 2011 U.S. App. LEXIS 13119 (3rd Cir June 28, 2011).

Overview: *Where employee was burned by acid while unloading a railway tank car, his common law claims were expressly preempted by Hazardous Materials Transportation Act because, inter alia, his design requirement concerned the design of a package, container, or packaging component that was qualified for use in transporting hazardous materials in commerce.*

- Sulfuric acid is a "hazardous material." *49 C.F.R. § 172.101*. Accordingly, railway tank cars carrying the chemical must adhere to design specifications approved by the Department of Transportation (DOT). *49 C.F.R. § 173.242(a)*. Tank cars must be mounted to a railcar structure in a specified manner. *49 C.F.R. §§ 179.10-179.11*. Tank car volume and weight capacity are spelled out. *49 C.F.R. § 179.13*. Most tank car models must satisfy DOT standards for thermal resistance. *49 C.F.R. § 179.18*. Modifications to the design features set forth in the Hazardous Materials Regulations are prohibited absent written authorization from the DOT. *49 C.F.R. §§ 179.3-179.4*. *Go To Headnote*

United States v. Moesser, 2010 U.S. Dist. LEXIS 123271 (D Utah Nov. 19, 2010).

Overview: *Facial vagueness challenge of DOT regulations concerning firearms in airports failed because facial vagueness challenges were permitted only if First Amendment protections were involved, and the court could not rule on an as-applied vagueness challenge until after factual determinations that would be useful in the matter were made at trial.*

- The Table of Hazardous Materials and Special Provisions (Table of Hazardous Materials or Table), located at *49 C.F.R. § 172.101*, provides an extensive list with classifications and other information on all of the hazardous materials covered under the regulations. The Table prohibits the transportation of smokeless powder on passenger aircraft. It provides four categories, or shipping names, of smokeless powder and bans them all from passenger aircraft. *49 C.F.R. § 172.101*. The Table also lists primers as a hazardous material. It provides three categories, or shipping names, of cap type primers and another potential shipping name applicable in this case, Cases, cartridges, empty with primer. § 172.101. Because primers are listed in the Hazardous Materials Table, they may only be offered for transportation in commerce if properly classed, described, packaged, marked, labeled, and in condition for shipment as required or authorized by applicable requirements of the regulations unless an exception applies. *49 C.F.R. § 171.2(e)*. *Go To Headnote*

Riley v. Ala. Great Southern R.R., 2002 U.S. Dist. LEXIS 18645 (ED LA Sept. 27, 2002).

Overview: *Motion to remand was granted. As movants did not have cause of action for damages for negligent transportation of hazardous material under federal law, their claims did not arise under federal law. Also, their claims were not preempted.*

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Overview: *Truck driver failed to establish trucking company breached its duty to handle barium compounds appropriately during transportation process. Facts were disputed concerning company's duty to label barium shipment.*

- Except as specified in *49 C.F.R. § 172.400a*, each person who offers for transportation or transports a hazardous material in any of the following packages or containment devices, shall label the package or containment device with labels specified for the material in the *49 C.F.R. § 172.101* Table and in this subpart: A non-bulk package; A bulk packaging with a volumetric capacity of less than 18 m3. *49 C.F.R. § 172.400 (1994)*. *49 C.F.R. § 172.400a* goes on to specify circumstances under which a shipper or carrier may be exempt from the labeling requirements of the regulations. *Go To Headnote*

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United States v. M/v Santa Clara I, 887 F. Supp. 825, 1995 U.S. Dist. LEXIS 6488 (D SC May 8, 1995).

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Cariffe v. P/r Hoegh Cairn, 830 F. Supp. 144, 1993 U.S. Dist. LEXIS 10392 (ED NY July 27, 1993).

Overview: *Summary judgment in favor of shipowner was not proper because although stevedore had the primary duty to protect longshoreman, shipowner had a duty to alert stevedore of hazardous material, unless it was obvious to stevedore that hazard was present.*

- The purpose of the Optional Hazardous Material Table (OHMT) is to list materials that are subject to regulation under widely applied international standards. They are listed in the interest of providing consistency with those standards and to alert persons offering or accepting these materials for transportation that the materials may be subject to regulation in international transport. *49 C.F.R. § 172.102 (1987)*. The OHMT section does not designate materials as hazardous materials and it does not specify packaging requirements, exceptions or limitations. They are made only in *49 C.F.R. § 172.101*. Section 172.101 contains the Hazardous Materials Table that lists all the materials that are designated as hazardous materials for the purpose of transportation of those materials in commerce. *Go To Headnote*

Crockett v. Uniroyal, Inc., 592 F. Supp. 821, 1984 U.S. Dist. LEXIS 14814 (MD Ga July 19, 1984).

Overview: *Summary judgment was awarded against family of decedent and chemical producer because they did not allege a breach of duty by railway company or railway transporter that entitled them to prevail upon their wrongful death and indemnity claims.*

- *40 C.F.R. § 262.21*regarding required information states that (a) The manifest must contain all of the following information: (1) A manifest document number; (2) The generator's name, mailing address, telephone number, and Environmental Protection Agency (EPA) identification number; (3) The name and EPA identification number of each transporter; (4) The name, address and EPA identification number of the designated facility and an alternate facility, if any; (5) The description of the wastes, the proper shipping name, required by regulations of the United States Department of Transportation in *49 CFR §§ 172.101*, *172.202*, and *172.203*; (6) The total quantity of each hazardous waste by units of weight or volume, and the type and number of containers as loaded into or onto the transport vehicle. (b) The following certification must appear on the manifest: This is to certify that the above named materials are properly classified, described, packaged, marked, and labeled and are in proper condition for transportation according to the applicable regulations of the Department of Transportation and the Environmental Protection Agency. *Go To Headnote*

Poliskie Line Oceaniczne v. Hooker Chemical Corp., 499 F. Supp. 94, 499 F. Supp. 94, 1980 U.S. Dist. LEXIS 9413 (SD NY Apr. 8, 1980).

Overview: *When a cargo owner failed to place dunnage between drums of hazardous materials and stated that it had complied with all applicable regulations, it was responsible when the drums leaked in their shipping container and caused a chemical reaction.*

- Sulphur dichloride is classified as a hazardous material by *49 C.F.R. § 172.101* and, as such, may not be transported by vessel unless it is prepared for transportation in accordance with the regulations contained in Title 49. *49 C.F.R. §§ 176.1*, *176.3*, *176.5*. *49 C.F.R. § 176.76* requires that: (1) the material must be in proper condition for transportation according to the requirements of this subchapter; (2) all packages in the container must be secured to prevent movement in any direction; (3) bulkheads made of dunnage which extend to the level of the cargo must be provided unless the packages are stowed flush with the sides or ends; (4) dunnage must be secured to the floor when the cargo consists of dense materials or heavy packages; (6) Any slack spaces between packages must be filled with dunnage. *Go To Headnote*

Research References & Practice Aids

NOTES APPLICABLE TO ENTIRE CHAPTER:

[PUBLISHER'S NOTE: For Federal Register citations concerning Chapter I Advisory guidance, see *61 FR 30444*, June 14, 1996; *67 FR 31974*, May 13, 2002; *78 FR 41853*, July 12, 2013.]

NOTES APPLICABLE TO ENTIRE PART:

[PUBLISHER'S NOTE: For Federal Register citations concerning Part 172 Formal Interpretation of Regulations, see: *63 FR 30411*, June 4, 1998.]

[PUBLISHER'S NOTE: For Federal Register citations concerning Part 172 Notices, see: *76 FR 37661*, June 28, 2011.]

[PUBLISHER'S NOTE: For Federal Register citations concerning Part 172 Emergency Restrictionpara.rohibition Order, see: *79 FR 55403*, Sept. 16, 2014.]

[PUBLISHER'S NOTE: For Federal Register citations concerning Part 172 Response to Appeal, see: *80 FR 71952*, Nov. 18, 2015.]

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