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DATE: October 25, 1991

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Communication

SUBJ: MSDS WARNINGS

VISTA

Attached is an article illustrating the "degree" of warning and standard of foreseeable misuse manufacturers must consider when developing MSDS's. It also illustrates the trail of liability that can lead back to the producer of bulk chemicals.

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and Health Review Commission must be upheld if they are supported by substantial evidence in the record as a whole.

Given S & E Contractors Inc.'s failure to produce or document the existence of a written work rule governing the use of fall protection, the hearing judge reasonably concluded that S & E did not take all feasible steps to prevent violation of the fall protection standard at 29 CFR 1926.701(f)(2), the court said. Rejecting S & E's assertion that the violation was caused by an employee's "idiosyncratic behavior" (21 OSHR 32), the court found the employees' actions were not a departure from a uniformly and effectively communicated and enforced work rule.

Furthermore, the court said, substantial evidence also supports the ALJ's finding of a violation of 29 CFR 1926.651(c), for failure to adequately slope or shore an excavation. The court said it would not disturb the ALJ's reliance on witness testimony unless such testimony was contradicted by "[i]ncontrovertible documentary evidence of physical facts." No such documentary evidence appears in the record, the court said, affirming the ALJ's final order.

S & E Contractors Inc. brought the appeal in March, challenging the hearing judge's order (14 OSHC 2150), which became final when the review commission declined to review it.

Litigation

WARNINGS TO WORKERS ABOUT HAZARDS OF GAS MAY HAVE BEEN INADEQUATE, APPEALS COURT RULES

A jury could find that the material safety data sheet accompanying a shipment of propylene gas failed to warn two workers who were killed about all hazards connected with using the gas, the U.S. Court of Appeals for the Fifth Circuit ruled Sept. 3 (*Little v. Liquid Air Corp.*, CA 5, No. 90-1807, 9/3/91).

The court ruled that the district court acted prematurely when it granted summary judgment in favor of Chevron Chemical Co. and Liquid Air Corp. Chevron odorized the gas and sold it in bulk to Liquid Air, which in turn repackaged the gas and sold it to another supplier. That supplier sold the container to a welding company, which resold the container to the workers' employer.

Chevron provided a material safety data sheet to Liquid Air. Liquid Air then produced its own material safety data sheet, which was substantially similar to the one provided by Chevron. Chevron's MSDS described the properties of propylene, including its flammability and explosiveness. The MSDS warned that in the event of a leak or spill, the area should be evacuated.

At Liquid Air's request, Chevron added ethyl mercaptan to the gas to give it an odor similar to that of rotten eggs.

Workers Killed

Marvin Joe Little and Charles Carter were using the gas to make repairs with a cutting torch inside a compartment on a barge. They discovered a leak in a hose connecting the torch to the gas and had another worker remove the hose to repair it. While waiting for the repairs to be made, Little and Carter remained in the compartment. After a short while, they could not detect the pungent odor of the gas. Then Carter, apparently assuming that the gas had dissipated, lit a cigarette. Carter was killed instantly when he was blown through a manhole onto the barge's deck and Little died five days later after being severely burned.

The workers' relatives then filed wrongful death suits. The suits charged that Chevron and Liquid Air failed to warn the respective purchasers of propylene that "nasal

fatigue" would affect the continued ability of exposed individuals to smell the gas.

Chevron and Liquid Air argued that while they did not warn about nasal fatigue, the deaths would have been avoided if the workers had followed the companies' warning to evacuate the area when a leak or spill occurred.

The court ruled that a jury should have been allowed to decide whether this warning was adequate. The court noted that a jury could conclude that the workers did follow the warning and were injured nevertheless. It was conceivable, the court said, that rather than leave the compartment with the hose and remain in the presence of the leaking gas, the workers decided to remain inside the compartment and wait. When they did attempt to leave the compartment, the gas exploded, the court further theorized.

Two Defenses

The court also concluded that the district court improperly granted summary judgment on the basis of the bulk seller defense and the sophisticated user defense.

Under the bulk seller defense, the seller is required only to warn the intermediate distributor of the product and not each individual consumer. However, the bulk seller's reliance on the intermediate distributor to provide adequate warnings to each consumer must be reasonable, the court said.

In this case, there was a question of whether Chevron's reliance on Liquid Air was reasonable, the court ruled. The fact that Chevron provided Liquid Air with a material safety data sheet did not insure that Liquid Air was adequately trained to handle propylene gas, the court said. Furthermore, the court noted that Chevron's MSDS did not list all critical information about the gas and that Liquid Air admitted it was not aware of nasal fatigue.

Finally, under the sophisticated user defense, the manufacturer or distributor of a product is not liable for failure to warn the user of the product of a particular danger that the user knows or reasonably may be expected to know exists, the court said. The court ruled that it was questionable whether Little and Carter, as the users of the product, were sophisticated. There was enough evidence for a jury to conclude that the workers were not fully aware of propylene's dangers because they had not been adequately warned, the court said.

Review Commission

EMPLOYER FAILED TO TIMELY CONTEST CITATIONS, COMMISSION DECIDES, AFFIRMING ALJ'S DISMISSAL

Because an electrical contractor failed to file a written notice of contest within 15 working days of his receipt of citations, an administrative law judge properly granted the secretary of labor's motion to dismiss the notice of contest, the Occupational Safety and Health Review Commission decided Oct. 4 (*Secretary of Labor v. All Phase Electric and Maintenance Inc.*, OSHRC, Docket No. 90-0505, 10/4/91).

This case raises the question of whether an employer's miscalculation of the final day for filing a notice of contest should be classified as a "mistake" or "excusable neglect" within the meaning of Rule 60(b) of the Federal Rules of Civil Procedure, the commission explained.

All Phase Electric and Maintenance Inc.'s president acknowledged that he received the citations Dec. 18, 1989. Under Section 10(a) of the Occupational Safety and Health Act, the company had 15 working days to file its notice of contest.