

April 8, 1980

To: W. T. Gunning - R. D. Holmes
S. C. Alten - R. D. Hardesty
M. S. Fox - G. Brewer
J. D. Krumholz - K. Konter
R. L. Hart - T. A. Galioto
M. D. Schrader - A. S. Flynn
G. A. Kaswell - C. McCann
C. D. Langlois - W. B. Dovey

Re: OSHA VINYL CHLORIDE TRAINING

The attached Occupational Safety and Health Review Commission decision will have an impact on the required OSHA annual training on Vinyl Chloride. This decision concludes: "2. The standard of 29 CFR 1910.1017(j) Training; has no application to places of employment where Vinyl Chloride levels in ambient air are below 0.5 ppm." This decision permits us to discontinue the required OSHA annual training in areas such as Compounding, Laboratories, Dryer Buildings and Warehouses where the VCM levels are below 0.5ppm.

Because of the incorrect statement concerning BFGoodrich training on page 7, we must be sure that our required OSHA annual training is current and suitable records on file. After this decision is published, it might cause an inspection. You should be sure that the following employees have received the training:

- Production employees assigned to regulated areas.
- Maintenance employees assigned to regulated areas.
- Technical and staff employees assigned to regulated areas.
- Employees assigned to hazardous tasks, such as unloading VCM.
- New employees (This should be conducted with all new employees even if they are not in the 1-4 categories.)
- Non-regulated areas where VCM is produced or processed. (This should be done even though it is no longer required.)

It has also been brought to my attention that we are doing a poor job in labeling our resin and compound. You should be following Ed Begnaud's letter of July 15, 1977 on labeling bags, boxes, bulk trailers and bulk hopper cars. Please review your labeling procedures.

H. Waltemate
H. Waltemate

HW/pdl
Enclosure

NGC 15382

cc: E. C. Martinelli
C. E. Fleming
C. L. Woods
L. V. Goode
R. L. Toole
E. L. Beeler
C. J. Nosal

R. C. Kaminski
R. A. Kelley
T. S. Bialke
R. L. Martin
H. C. Botelho

NGC 15383

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, :
Complainant, :
v. : OSHRC Docket No. 78-4862
HOOKER CHEMICAL CO., :
Respondent. :

APPEARANCES

Barnett Silverstein, Esq.
for the Secretary

Bruce L. Harrison, Esq.
for the respondent.

DECISION AND ORDER

Chaplin, Judge

In September 1978, the Secretary of Labor (Secretary) inspected the worksite of Hooker Chemical Co. (Hooker) and issued a citation for an other (than serious) violation containing two separately stated violations. Hooker contested item 2 which alleged that:

Employee(s) engaged in vinyl chloride or polyvinyl chloride operations were not provided training in a program relating to the hazards of vinyl chloride and precautions for its safe use:

- a) Calendar [sic], Compound, and Warehouse Areas.

1/ At the hearing the Secretary moved to amend the complaint to drop the warehouse area from the citation. This amendment was granted (Tr. 12).

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This was alleged to be a violation of the standard at 29 C.F.R. 1910.1017(j) which provides:

Each employee engaged in vinyl chloride or polyvinyl chloride operations shall be provided training in a program relating to the hazards of vinyl chloride and precautions for its safe use.

Subparagraphs of this standard delineate the content of such a program. No penalty was proposed but abatement was directed by November 28, 1978.

In its answer, Hooker admitted the Review Commission had jurisdiction of the parties and this matter. A hearing was held February 9, 1979, at which time the parties stipulated (Ex. J-1) that Hooker is engaged in the polymerization of raw vinyl chloride (VC) in its resin facility, takes the resin, adds stabilizers, inhibitors, plasticizers, and colors, mixes and extrudes the product into food grade quality polyvinyl chloride (PVC) pellets in its compound facility; sends the resin through blender, mill, extruder and calender machines to produce vinyl film and sheets, and ships the finished product from its warehouse. The resin facility is a regulated area as defined in 29 C.F.R. 1910.1017(e)^{2/} and the calender and compound areas are not and are below the action level (Tr. 170). The inspection of Hooker's facilities on September 22, 1978, was based on a complaint of inadequate medical testing and training of employees operating the resin facility. The employees working in the resin area are fully trained under section 1910.1017(j) and employees in the compound and calender areas are not. The untrained employees at Hooker's two plant sites number 275 (Tr. 141, 142).

^{2/} (e) Regulated area.

- (i) A regulated area shall be established where:
 - (i) Vinyl chloride or polyvinyl chloride is manufactured, reacted, repackaged, stored, handled or used; and
 - (ii) Vinyl chloride concentrations are in excess of the permissible exposure limits.

THE EVIDENCE

Mr. Martin Dubin, an industrial hygienist (CO) with a Master's degree in science and occupational health employed by the Secretary, testified that he conducted the inspection of Hooker's plant and at the opening conference ascertained that employees in the resin facility routinely received training and medical examinations; however, employees outside the resin facility were not trained (Tr. 17). After inspecting the resin facility he briefly stopped in the compound and calender areas where he looked at the operations (Tr. 18). The citation involved in this case was issued because the compound and calender areas were engaged in PVC operations (Tr. 20). Since compliance with the standard turned on the definition of the words "... engaged in vinyl chloride or polyvinyl chloride operations. . .", as used in the standard, Mr. Harrison asked him how this phrase was defined and he responded that he looked to the standard at section 1910.1017(a)(2) which states:

This section applies to the manufacture, reaction, packaging, repackaging, storage, handling or use of vinyl chloride or polyvinyl chloride, but does not apply to the handling or use of fabricated products made of polyvinyl chloride.

Other than this, there was no definition (Tr. 21). In answer to my question he stated that "... regulated areas. . ." were all plant areas where the ambient air contained high levels of VC and that VC operations were all those other areas where VC may be in the air but not in the high ranges (Tr. 37). On redirect examination he stated that Hooker's records showed VC monomer in the compound area, but below the action level, 0.5 ppm over an 8-hour period. (Tr. 45, 51). He expressed his opinion that every employee involved

in VC operations must be trained, no matter how minimal their exposure (Tr. 46). In the calender area he observed employees calendering, milling and blending PVC to form sheet and roll which he interpreted as PVC operations (Tr. 52). In the compound area the employees were extruding or blending PVC pellets which he considered being engaged in PVC operations (Tr. 53).

Mr. Charles W. Kiefert, Division Manager of Safety for Hooker, testified that one of his responsibilities was training employees with respect to VC (Tr. 61). As an offer of proof, after Mr. Silverstein's objection was sustained, Mr. Harrison developed, through questioning of Mr. Kiefert, data respecting industry accident rates compared to Hooker's to reflect where Hooker was applying its assets to improve health conditions. (In its Answer, Hooker had alleged that "Abatement of the alleged violation is economically infeasible." Counsel argues that economic feasibility was an affirmative defense to complying with all standards (Tr. 64-71)). Kiefert also indicated that he spent two days a week in employee safety meetings. In response to Mr. Silverstein's questions he stated the division of Hooker of which the cited plant was a part had a gross profit in 1978 of approximately \$750,000. In reply to my question he estimated his safety budget as being in excess of \$100,000 a year.

Kiefert stated further that during a strike period, beginning in August 1978, 37 replacement employees received some training requiring six instructor hours per week (Tr. 82). Each regular employee went to one training session each month so that a weekly meeting was held to accommodate four shifts (Tr. 84). These meetings lasted from 45 minutes to 2 hours. A corporate decision was made that for employees in nonregulated

areas, VC training would reduce time available for training in higher priority safety areas (Tr. 85). The standard alleged to have been violated requires that the training program for employees include:

- (i) The nature of the health hazard from chronic exposure to vinyl chloride including specifically the carcinogenic hazard.
- (ii) The specific nature of operations which could result in exposure to vinyl chloride in excess of the permissible limit and necessary protective steps;
- (iii) The purpose for, proper use, and limitations of respiratory protective devices;
- (iv) The fire hazard and acute toxicity of vinyl chloride, and the necessary protective steps;
- (v) The purpose for and a description of the monitoring program;
- (vi) The purpose for, and a description of, the medical surveillance program;
- (vii) Emergency procedures;
- (viii) Specific information to aid the employee in recognition of conditions which may result in the release of vinyl chloride; and
- (ix) A review of this standard at the employee's first training and indoctrination program, and annually thereafter.

Mr. Kiefert was asked to estimate the cost of establishing such a program for the employees in the compound and calendering areas (Tr. 98). He replied that this could be accomplished in one separate safety meeting.

With respect to Hooker's defense that the Secretary had become actively involved in a labor-management dispute (Tr. 22), I ruled that such matter was not germane to the issue before me. However, Mr. Harrison was

permitted to make an offer of proof (Tr. 100). Mr. Kiefert testified that Hooker's cited plant was struck at midnight, August 20, 1978, and the strike lasted seven weeks, generating a lot of hostility. The inspection took place during the strike as a result of an employee complaint.

Mr. Harold F. Dubec, Jr., Hooker's Manager of Environmental Compliance, responsible for coordination of all regulatory compliance efforts in the Division here being cited and who had formerly been Division Manager of Safety and Security, testified that his education included a degree in Chemical Engineering and previous work experience with American Cyanamid for five years as plant safety engineer (Tr. 109). He was a certified safety professional. When asked to whom the standard at 1910.1017(j) applied he expressed the opinion that it only applied to the regulated areas, i.e., areas at or above the action level (Tr. 118, 120). With respect to the nine subjects required to be included in a training program, he stated that monitoring had shown VC levels below the action level, therefore the employees in these nonregulated areas had no need for the specified training (Tr. 111). On cross-examination he stated that Hooker was continuing to monitor for VC and that in the compounding and calendering areas VC was present "In hundredths of parts per million ranges..." The basis for his opinion regarding the inapplicability of the standard was that the entire standard only applied to regulated areas (Tr. 121).

In an offer of proof, Hooker's counsel took Mr. Dubec through additional incidents occurring during the strike and the training given employees. He said each retraining session took one man-day of the trainer's time and the employees were trained on an overtime basis (Tr. 136). The cost of each training session was the salary for the trainer, publications

issued (Ex. R-1 & 2), clerical support time and participating employee wages. He estimated 18 additional training sessions would be required to train employees in nonregulated areas and such additional training might require hiring a consultant to do the training.

On redirect examination, the CO stated that based on office files and conversations with other employees in his office and of other chemical employers, he believed retraining was given to all employees. In rebuttal,

Mr. Kiefert took the stand to testify that he had contacted the three employers mentioned by the CO as retraining its employees and determined that Stauffer Chemical and Tenneco trained the same as Hooker and B. F. Goodrich trained new hires only (Tr. 163).

Complainant's exhibit C-1, a pamphlet titled "Vinyl Chloride", published by the U. S. Department of Labor, Occupational Safety and Health Administration, June 1975, discusses the hazard of VC and points out that "If a fabricating plant tests its air and finds that VC levels are less than 0.5 ppm ('action level'), the plant is effectively exempted from much of the rest of the standard." (Underscoring supplied).

THE ISSUE

While the Secretary did not file a post hearing brief, he did submit a letter which rather succinctly states the issue.

...since any VC exposure may be harmful, each employee engaged in PVC operations, regardless of how minimal the monitoring results, must be trained, and we recognize no exceptions to the training requirement. . .

Hooker, in its excellent brief, stated the issue in a different cast, i.e., that "...the training requirement applies only to employees working in regulated areas, as that term is defined at [1910] .1017(e)."

DISCUSSION

The initial standard governing employee exposure to VC was contained in 1910.93 and established a ceiling value of 500 ppm of air. In April 1974, an emergency temporary standard was promulgated (39 FR 12341) reducing the permissible exposure level to 50 ppm and other requirements including monitoring and respiratory protection (1910.93g). On May 10, 1974, the Secretary proposed a permanent standard that limited employee exposure to "no detectable level" and added, for the first time, a provision respecting a "regulated area". In the proposal there was a section (1910.93a(j)(3)) which came under the hearing of emergency situations:

- (3) Each authorized employee shall be trained in a program relating to the hazards of vinyl chloride and the precautions for safe use.
 - (1) The program shall include:
 - (A) The nature of the fire hazard, and the necessary protective steps;
 - (B) The nature of the toxic hazard, including local and systemic effects, acute and chronic effects including specifically the carcinogenic hazard;
 - (C) The specific nature of operations which could result in exposure to vinyl chloride, and necessary protective steps;
 - (D) The purpose for and application of the medical surveillance program;
 - (E) The purpose for and application of decontamination practices;
 - (F) The purpose for and significance of emergency practices and procedures;
 - (G) The employee's specific role under normal operating or emergency conditions;
 - (H) Specific information to aid the employee in recognition and evaluation of conditions and situations which may result in the release of vinyl chloride;
 - (I) The purpose for and application of specific first aid procedures and practices;
 - (J) A review of this standard at the employee's first training and indoctrination program and annually thereafter.

(A separate provision for employee training was added to the final standard rather than including it within the section on emergency situations as in the proposal (39 FR 168970.)) An "authorized employee" was defined (1910.93q(b)(2)) as an employee whose duties require him to be in the regulated area and who has been specifically assigned by the employer. Thus we see that initially the Secretary proposed that employees required to work in the regulated area were to be trained for emergency situations in a program relating to the hazards of VC. However, in the permanent standard adopted, and in issue here, these training requirements were imposed on employees engaged in VC or PVC operations. The Secretary now desires to interpret this to require that virtually everyone employed where VC or PVC is handled be trained. In response to my query he replied that somewhere between the person who delivered raw materials and the president of the employer there was an area where VC operations occurred and clearly the compound and calender areas fit that description (Tr. 56).

In publishing the permanent standard the Secretary established the concept of an "action level" and he said:

Employers who, in fact, are substantially below the exposure limit will be subjected to only minimal burdens by virtue of the 'action level'...

...The purpose of the action level is to minimize the impact of the standard on the employers who have attained exposure levels well below the permissible limit. Thus, where the results of monitoring under paragraphs (d)(1) or (d)(2) demonstrate that no employee is exposed in excess of 0.5 ppm TWA, employers may, in effect, be exempted from some provisions of the standard... In our judgment, exposures below the action level do not present a sufficient hazard to warrant application of the entire standard to the many employers who are or will be below that level.

From this it may be inferred that even exposure below the action level requires compliance with some part of the standard. The Secretary cites a Commission decision, Travenol Alaska Laboratories, Inc. OSAHRC (Docket No. 13693, 1975) (Judge's Decision) in support of its position that employers such as Hooker may not decide what is required of them. However, Travenol dealt with a requirement that monitoring records contain certain data and Judge Burroughs ruled that this was required of all employers required to conduct initial monitoring. Such a holding is in accord with the Secretary's statement by inference that even an employer with exposure levels below the action level had to comply with a part of the standard. But such a holding is of no assistance in resolving the issue before me. Further, the Secretary said:

...Employers who, in fact, are substantially below the exposure limit will be subjected to only minimal burdens by virtue of the 'action level' to be discussed below.

This accords with the conclusion I have reached.

In further amplification of the standard he explained that certain programs could be discontinued where exposure was below the action level.

When he discussed the "Signs and labels" required he considered it:

...imperative that a worker be fully informed and that he realize the possible risks involved in his occupation. Coupled with the training requirement in the standard, we believe that the signs and labels required will adequately inform employees of the hazard.

Who has to be informed and trained? Quite obviously employees in the regulated areas since "...such signs will warn unauthorized personnel to keep out. . ." He also said:

...The proper application of most protective measures requires an amount of training and indoctrination of employees that cannot easily be conveyed on a sign or label. . .

Since the signs and labels were to warn personnel entering the regulated areas, the training was intended for regulated area employees.

The sole explanation for the new training requirement was:

(12) Training. A separate provision for employee training has been added to the final standard rather than including it within the section on emergency situations as in the proposal. The new paragraph provides for training of employees concerning the carcinogenic hazard of VC, emergency procedures, the need for monitoring and an annual review of the standard. It also provides for training of employees concerning the purpose for, proper use of, and limitations connected with respiratory protection.

Quite obviously the training requirement continues to be an answer to emergency situations as it was in the proposal. When we look to the nature of the training the Secretary requires, it is apparent that they are directed to employees who will be responding to an emergency. Who will respond to an emergency? Fire fighters, first aiders and employees working where the emergency exists logically need to be trained. Is it the Secretary's position that the amount of VC in the air may increase because of the inadvertent release of trapped VC in food grade quality products of the resin facility? If so, monitoring will show this, and as soon as the "action level" is reached a set of requirements is activated.

It is my decision that if the Secretary intended the standard to require what is contended in this case, the standard is inartfully drawn and can only be considered vague, insofar as that intent is seen. It behooves the Secretary to define the term "VC operations" since he has been so careful to define other trigger terms.

FINDINGS OF FACT

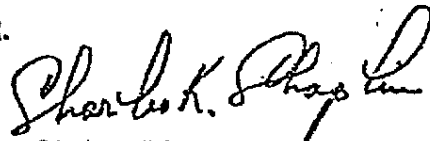
1. Hooker is an employer who processes raw VC into finished products.
2. Some of its manufacturing facility is "regulated" with respect to VC exposure.
3. The raw VC processes through a resin facility (regulated), where it is chemically changed, to a compound area where substances are added to give it permanence and create "food grade" quality PVC (unregulated) to a calender area where finished products are created (unregulated).
4. The amount of VC in the ambient air in the compound and calender areas approaches the nondetectable levels, as low as hundredths of parts per million.
5. Employees in regulated areas are trained but those in nonregulated areas are not.

CONCLUSIONS OF LAW

1. The Review Commission has jurisdiction over the parties and the issue in this case.
2. The standard at 29 C.F.R. 1910.1017(j) has no application to places of employment where VC levels in the ambient air are below 0.5 ppm.
3. Hooker did not violate Sec. 5(a)(2) of the Act (29 U.S.C. 654(a)(2)).

ORDER

It is hereby ORDERED that item number 2 of the citation for an alleged other than serious violation is vacated.


CHARLES K. CHAPLIN
Judge, OSHRC

Dated: May 7, 1979
Hyattsville, Maryland