

WESTERN ELECTRIC, INC.

Review Commission Decision

SECRETARY OF LABOR, Complainant v. WESTERN ELECTRIC, INC., Respondent, OSAHRC Docket No. 8902, January 24, 1977.

Eugene F. DeShazo, Kansas City, Mo., for complainant.

Laurel J. McKee, Western Electric, New York, N.Y., for respondent.

Review Commission Judge Paul E. Dixon, Before Barnako, Chairman; Moran and Cleary, Commissioners.

CARCINOGENS

Vinyl Chloride—Monitoring Requirement ▶ 220.04

Employer's decision not to monitor operation in which solution containing polyvinyl chloride (PVC) was utilized to coat wire coils did not violate monitoring requirement of emergency temporary standard for vinyl chloride, 29 CFR 1910.93q(c)(1), because decision was based on discovery that only negligible amount of vinyl chloride (VC) was released in another operation which employer thought was likely to result in higher concentration of VC than coil coating and on employer's understanding of process by which VC is released from PVC.

Full Text of Decision

BARNAKO, Chairman:

The issue in this case is whether Respondent (Western Electric) violated the monitoring requirement of the emergency temporary standard for vinyl chloride.¹ Western Electric was cited for allegedly failing to monitor an operation in which a solution containing polyvinyl chloride was utilized to encapsulate wire coils at its plant in Lee's Summit, Missouri. It defended on the basis that (1) VC was not "released" during the encapsulation process within

¹The temporary standard was promulgated on April 5, 1974, and was codified at 29 C.F.R. Sec. 1910.93q, 39 F.R. 12343 (April 5, 1974). It was superseded on January 1, 1975 by a permanent standard, now codified at 29 C.F.R. Sec. 1910.1017, 39 F.R. 35890 (Oct. 4, 1974). The temporary standard established an exposure limit of 50 parts per million (ppm). The monitoring provision states as follows:

1910.93q(c) *Monitoring*. (1) *Initial monitoring*. As soon as possible, but not later than April 22, 1974, every employer of an employee working in an area or operation in which vinyl chloride is manufactured, reacted, handled, processed, released, repacked, or stored shall begin monitoring the ambient air of the area to determine whether it contains vinyl chloride in concentrations in excess of 50 ppm.

the meaning of the standard; and (2) the PVC solution was a "fabricated product" and therefore excluded from the standard. Judge Paul E. Dixon rejected both arguments and affirmed the citation. For the reasons which follow, we reverse his decision.

Vinyl chloride (VC) is a gas at room temperature. Inhalation of excessive amounts can result in angiosarcoma, a rare form of liver cancer. The discovery of VC's carcinogenic property led to the promulgation of first the temporary standard, and later the permanent standard. See generally, *Society of the Plastics Industry, Inc. v. U.S. Department of Labor*, 509 F.2d 1301 [2 OSHC 1496] (2d Cir. 1975), cert. denied, 421 U.S. 992 [3 OSHC 1195] (1975).

Polyvinyl chloride (PVC) is manufactured from VC. At room temperature, PVC is a plastic found in many common products. PVC itself presents no inhalation hazard. When PVC is manufactured, however, a certain amount of VC gas becomes trapped inside the solid material. Some of this gas escapes at room temperature. The rate of escape accelerates as PVC is heated. The application of heat, however, does not cause PVC molecules to change into VC. Thus, the total amount of VC that can be released from a mass of PVC is limited to the amount trapped inside when the PVC was manufactured.

Western Electric utilizes PVC in a process whereby wire coils are coated with a layer of insulation. A rectangular tank, approximately 18 by 24 inches in area, contains one to two gallons of a liquid designated Hysol CG7-4331. The liquid consists of 55% fine particles of PVC suspended in a plasticizer. A number of wire coils, shaped like doughnuts and approximately one inch in diameter, are heated in an oven to 360°F. They are then immersed in the tank for 20 seconds. After they are removed from the tank, they are heated in the oven for five minutes and then allowed to cool. The tank is covered except when the coils are in it. The coating operation is performed approximately once per month.

Western Electric employs approximately 4700 persons at its Lee's Summit plant. Among these are two full-time industrial hygienists. At the time the emergency temporary standard was promulgated, Western Electric had already instituted a company-wide program to determine

²Section 1910.93q(a)(2) provided:

This section does not apply to the handling, storage, or other use of vinyl chloride polymers and copolymers in the form of fabricated products.

whether VC presented a hazard to any of its employees. It also developed a sophisticated analytical method to measure the airborne concentration of VC.³

One of Western Electric's industrial hygienists, Widner, thought that the emergency temporary standard applied only to operations which used VC as a raw material, or used PVC resin to manufacture products of PVC. He concluded that, although Western Electric utilized PVC products in several areas of its plant, it was not subject to the standard because it used no raw PVC resin. Nevertheless, he did monitor one operation in the plant to determine the amount of VC released. The operation monitored was one in which sheets of PVC are welded together to make exhaust ducts. Widner thought that, of all the operations in the plant utilizing PVC, this would result in the release of the greatest amount of VC. The concentration of VC measured was in the range of several parts per billion.⁴ This result reinforced Widner's conclusion that the levels of VC in all areas of the plant were well below the level of 50 ppm specified in the standard. Accordingly, he decided it was unnecessary to monitor the other operations in which PVC is used.

On May 31, 1974, the plant was inspected by Complainant's industrial hygienist, who sampled the coil coating operation for VC. Thereafter, Western Electric also took VC samples around the tank. Much of the evidentiary record is devoted to the analytical procedures used to analyze these samples, and to the results obtained. Both parties challenge the results obtained by the other on various grounds. For our present purposes, however, the exact concentration is unimportant. It is sufficient to observe that the highest concentration measured by Complainant was 1.7 ppm, or approximately one-thirtieth of the 50 ppm limit established by the standard.⁵

Complainant contends that because some amount of VC, however small is "released," Western Electric violated the standard by

³Western Electric's technique used a mass spectrometer in conjunction with a gas chromatograph. Complainant's chemist testified that this was far superior to the method he employed, which utilized only a gas chromatograph.

⁴One part per billion is 1/1000 of a part per million. Thus, the level of 50 ppm specified in the standard would equal 50,000 parts per billion.

⁵We also note, however, that this concentration was measured inside the lip of the tank. Complainant's breathing zone sample yielded no measurable concentration when analyzed with a technique sensitive to 0.3 ppm. We also note that Sec. 1910.93(q)(3) requires that the monitoring procedure only be sensitive to 5 ppm.

failing to monitor the coil coating operation. In Complainant's view, it is unimportant how much VC is in fact released, because this is the very information sought to be obtained by the monitoring requirement. He argues that this interpretation of the standard is suggested by our decision in *GAF Corporation*, Docket No. 3203, BNA 3 OSHC 1686, CCH OSHD para. 20,163 (1975), per. for review filed, No. 76-1028 (D.C. Cir., Jan. 13, 1976).

Western Electric points out that any operation involving PVC, even those in which the PVC is at room temperature, results in the "release" of at least a few molecules of VC. It contends that the standard was obviously not intended to require monitoring when only a negligible amount of VC is released in a process utilizing PVC. Western Electric argues that, since the standard specifies a sensitivity requirement of 5 ppm for the analytical process, it should only be read to apply to concentrations in excess of 5 ppm.

We do not entirely agree with either party's suggested interpretation of the standard. Complainant would have us read the standard to require monitoring of every operation where VC is released without regard to whether there is any realistic possibility that the 50 ppm limit of the standard may be approached. The express purpose of the monitoring requirement, however, is "to determine whether (the ambient air) contains vinyl chloride in excess of 50 ppm." If it can be reliably predicted from the physical circumstances that the concentration of VC will be well below 50 ppm, then formal monitoring would be a useless act, and it is unreasonable to interpret the standard to require such an act.

Furthermore, Complainant's interpretation would give a greater scope to the emergency temporary standard than was intended when the standard was promulgated. At that time, Complainant stated in the preamble to the standard:

... It has been decided to promulgate a standard containing only those essential provisions which are deemed necessary to provide protection to employees from *grave danger* until a regular rulemaking proceeding in accordance with sections 6(b) and (c) of the Act can be concluded. . . . 39 F.R. 12342 (April 5, 1974). (Emphasis supplied).⁶

⁶Pursuant to 29 U.S.C. Sec. 655(e), an emergency temporary standard to protect employees from "grave danger" may be promulgated without resort to rulemaking proceedings. Upon promulgation of such a temporary standard, a regular rulemaking proceeding leading to the promulgation of a permanent standard must be commenced.

This statement of the purpose of the standard is inconsistent with an interpretation which applies the standard to every employment situation utilizing PVC in any manner except as a "fabricated product". The standard was intended to protect employees, not to require monitoring for its own sake.

On the other hand, it would also be unreasonable to have the monitoring requirement depend on the existence of a particular minimum level of VC, as Western Electric urges. We cannot use hindsight to say that monitoring was not required simply because, after monitoring, the concentration proves to be below a certain level.

The record shows, however, that Western Electric's decision not to monitor the coil coating process was based, not on hindsight, but on foresight. It had monitored one operation which it thought was likely to result in a higher concentration of VC than the coil coating operation. It discovered that only a negligible amount of VC was released in the welding operation. This result, coupled with Western Electric's understanding of the process by which VC is released from PVC, strongly suggested that the amount of VC released in the coil coating operation would also be negligible compared to 50 ppm. Nothing in the record casts doubt on the validity of this judgment, or on the good faith with which it was made. Under these circumstances, we cannot conclude that Western Electric violated a standard intended only to protect employees from grave danger.

A contrary result is not suggested by our decision in *GAF Corporation*, supra. That case involved the interpretation of a standard which required that medical examinations be provided to "employees who are engaged in occupations exposed to airborne concentrations of asbestos fibers." We rejected the argument that the standard only required medical examinations for employees exposed to concentrations of asbestos exceeding the limits provided in the asbestos standard.

Our decision in this case is consistent with that in *GAF*. In both cases, we have rejected the argument that the requirements of the respective standards only become operative when a particular minimum value of the air contaminant is shown to exist. Furthermore, *GAF* did not involve the situation in this case, where the concentration of the air contaminant is negligible compared to the limit established by the standard.

Western Electric alternatively argues that the Hysol liquid it used was a "fabri-

cated product", and therefore exempt from the standard. The emergency temporary standard contains no definition of "fabricated product." The permanent standard does, however, contain such a definition. Western Electric contends that, under this definition, the Hysol liquid is a fabricated product. Complainant would have us read the same definition and reach the opposite conclusion.

Since we have concluded that Western Electric did not violate the standard, it is not necessary to reach the issue of whether the Hysol liquid is a fabricated product. We note, however, that it would be anomalous to apply a definition to the emergency temporary standard which was not operative until the temporary standard was superseded. Whether the Hysol liquid is a "fabricated product" within the definition in the permanent standard can only appropriately be determined in a case arising under that standard.

Accordingly, the Judge's decision is reversed and the citation is vacated.

Concurring Opinion

MORAN, Commissioner, concurring:

I agree with the lead opinion except that I disassociate myself from its discussion of *Secretary v. GAF Corporation*, OSAHRC Docket No. 3203 [3 OSHC 1686], November 14, 1975.

Dissenting Opinion

CLEARY, Commissioner, dissenting:

The majority's interpretation of the standard at issue in this case is contrary to its clear meaning. Moreover, in reaching their erroneous reading of the standard my colleagues have ignored precedent limiting this Commission's role in the interpretation of an occupational safety and health standard.

In pertinent part, the initial monitoring requirement of the emergency temporary standard for vinyl chloride is as follows:

Sec. 1910.93q *Vinyl chloride*.

* * *

(c) *Monitoring*. (1) *Initial monitoring*.

As soon as possible, but not later than April 22, 1974, every employ-

29 C.F.R. Sec. 1910.101(b) provides:

Fabricated product means a product made wholly or partly from polyvinyl chloride, and which does not require further processing at temperatures and for times sufficient to cause mass melting of the polyvinyl chloride resulting in the release of vinyl chloride.

er of an employee working in an area or operation in which vinyl chloride is . . . released . . . shall begin monitoring the ambient air of the area to determine whether it contains vinyl chloride in concentrations in excess of 50 ppm.

By its terms the standard requires monitoring of employee exposure levels in every operation in which any vinyl chloride is released.

The majority, however, reads differently this unequivocal language. My colleagues would not require monitoring even if vinyl chloride is released "[i]f it can be reliably predicted from the physical circumstances that the concentration of VC will be well below 50 ppm. . . ." This is in error.

I submit that this monitoring standard is by its very nature intended to supplant "reliable predictions." No matter how meticulously it is performed a "reliable prediction" cannot be considered as an acceptable alternative to physically monitoring ambient air levels in areas where vinyl chloride is released. Simple logic does not support the majority's action. Moreover, the wording of the standard itself is not amenable to the strained "interpretation" announced in the lead opinion.

Vinyl chloride poses an extremely grave health hazard to thousands of workers. Inhalation of vinyl chloride has been linked to angiosarcoma of the liver, an extremely rare and irreversible cancer. *Society of Plastics Industries, Inc. v. O.S.H.A.*, 509 F.2d 1301, 1306 [2 OSHC 1496] (2d Cir. 1975), cert. denied, 421 U.S. 992 [3 OSHC 1195] (1975). The deleterious consequences of employee exposure to vinyl chloride mandate the need for reliable measures of exposure levels in operations where vinyl chloride is released.

The Secretary of Labor plainly recognized this fact when he adopted a standard that required monitoring of work environments where any vinyl chloride gas is released.⁶ Nevertheless, the majority has

⁶In attempting to reject complainant's reading of the standard the lead opinion suggests that complainant's interpretation would give greater scope to the standard than was originally intended. Cited in support of this proposition is language from the standard's preamble noting the standard's intent to protect employees from "grave danger." The Chairman apparently is reading the phrase "grave danger" as some form of limitation upon the monitoring requirement. This is error in my opinion.

The Secretary's use of the phrase "grave danger" should be considered only in the manner it was intended, namely as a simple reference to the grave consequences of vinyl chloride exposure. It was never intended as limiting the duty to physically monitor to

ignored the Secretary's approach to this grave problem and has, in effect, substituted its own monitoring standard. By doing so my colleagues are plainly questioning the wisdom of the standard.⁹ This Commission has consistently held that it lacks the requisite authority to question the wisdom of standards. *Vin Radio Co., Inc.*, 4 ENA OSHC 1151, 1975-76 CCH OSHD para. 20,633 (No. 5007, 1976) and authorities cited therein.¹⁰

Finally, even if I were to assume that the unequivocal language of the standard permits the latitude of interpretation presumed in the lead opinion, the majority errs when it rejects the Secretary's interpretation. As the adopting agency, the Secretary's interpretation is entitled to great weight. Indeed, as noted by the Fifth Circuit

"[T]he promulgator's interpretation is controlling as long as it is one of several reasonable interpretations, although it may not appear as reasonable as some other.

Brennan v. Southern Contractors Service, 492 F.2d 498, 501 [1 OSHC 1648] (5th Cir. 1974) (cites omitted). In my opinion the interpretation urged by the Secretary is the *only* reasonable interpretation of the standard at issue in this case. The majority errs when it rejects the reasonable interpretation of the standard urged by the Secretary. I would adopt the Secretary's reading which would require initial monitoring in work environments where any amount of vinyl chloride is released. My colleagues' reading of the standard is contrary to its terms and requires determinations of employee exposure to this extremely harmful substance to educated guesswork.

Further, if Western Electric believes that its techniques are superior to those of the standard it has recourse to the variance

only those situations where exposure levels well below 50 ppm cannot be "reliably predicted from the physical circumstances."

⁹The lead opinion suggests that the Secretary's version of the standard might require formal monitoring that might later prove to be a "useless act." I submit that formal monitoring that discloses statistically insignificant exposure levels cannot properly be considered a "useless act" if it supplants a "reliable prediction" that if in error might lead to a useless death of an affected employee.

¹⁰Moreover, I submit that the practical effect of the majority's holding is to undermine and reject determinations made by the Secretary in promulgating the standard in question as an emergency temporary standard under the terms of 29 U.S.C. Sec. 655(c). As such, my colleagues are implicitly questioning the determinations . . . (A) that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards, and (B) that such emergency standard is necessary to protect employees from such danger." 29 U.S.C. Sec. 655(c)(1).

procedures under the Act published in 29 CFR Part 1965 in order to obtain particularized relief. The majority's action makes unnecessary the use of this avenue by providing general relief under a general test of reasonableness that has possible harmful implications far beyond the contours of this case.

In sum, there was no dispute that some quantity of vinyl chloride was released into the work environment during respondent's coating operation. Inasmuch as the evidence showed that respondent had not monitored the ambient air in accordance with the standard's requirements, a failure to comply with 29 CFR Sec. 1910.93(q)(1) was shown. I would not, therefore, disturb Judge Dixon's decision affirming the citation. Rather, I would adopt his disposition of the issue noted above and all other issues in the direction for review.

MERRITT-MERIDIAN CORPORATION

Review Commission Decision

SECRETARY OF LABOR, Complainant v. MERRITT-MERIDIAN CORPORATION, Respondent, OSAHRC Docket No. 76-2467, January 21, 1977.

Francis V. LaRuffa, Regional Solicitor, New York, N.Y., for complainant.

Dennis Paise, Construction Employees of the Hudson Valley, Newburgh, N.Y., for respondent.

Review Commission Judge Abraham M. Gold.

Before Barnako, Chairman; Moran and Cleary, Commissioners.

NOTICE OF CONTEST

Timeliness—Excuse for Delay ▶55.101

Employer's filing of written notice of contest 17 days after expiration of statutory contest period is not excused by "clerical error," and, despite fact that employer gave timely oral notification of intent to contest citation, such untimely notice of contest must be dismissed.

Full Text of Decision

CLEARY, Commissioner:

On July 21, 1976, Judge Gold granted the Secretary of Labor's motion to dismiss respondent employer's notice of contest for not being timely filed. The case is before us on orders for review by the Chairman and Commissioner Moran.

Respondent was cited for five safety violations under the Occupational Safety and Health Act while engaged on school construction in Wallkill, New York. The Secretary proposed a total penalty of \$105 for the violations. A signed return receipt of the notice of proposed penalty was postmarked on April 24, 1976.

Respondent had an informal conference in the Secretary's area office on May 11, 1976. At the conference respondent orally informed the Secretary's representative of its intent to contest. This oral notice was within the fifteen working-day period permitted by section 10(a) of the Act¹ for giving notice of a contest. However, because of clerical error respondent's written notice of contest was not filed until June 1, 1976. The June 1 date is beyond the 15 working-day period permitted by section 10(a) of the Act for giving notice of contest.

The issue before us is whether the oral notice to the Secretary's representative on May 11 is sufficient to meet the statutory requirement for a notice of contest.

A divided Commission has reversed the precedent represented by *American Airlines, Inc.*, 13 OSAHRC 99, 2 BNA OSHC 1320, CCH OSHD para. 18,908 (No. 4532, 1974) and held that a timely oral notice of contest may be permissible of section 10(a) under limited circumstances. In *Wood Products Co.*, 4 BNA OSHC 1688, 1689, CCH 1976-77 OSHD para. 21,097, p. 25,396 (No. 9206, 1976), the Commission by divided vote held that an oral notice of contest for an employer appearing *pro se* was permissible when the employer had been confused by the events involved and misunderstanding resulting from communications with the Secretary's area director. In *P & M Sales, Inc.*, 4 BNA OSHC 1158, CCH 1975-76 OSHD para. 20,673 (No. 3443, 1976), the Commission again by divided vote held that a filing of a written notice of contest as to the penalty and an oral notice of contest concerning the citation was sufficient notice concerning the citation under the facts of the case.

¹Section 10(a) reads as follows:

If . . . the Secretary issues a citation . . . he shall . . . notify the employer by certified mail of the penalty, if any, proposed to be assessed . . . and that the employer has fifteen working days within which to notify the Secretary that he wishes to contest the citation or proposed assessment of penalty. If, within fifteen working days from the receipt of the notice issued by the Secretary, the employer fails to notify the Secretary that he intends to contest the citation or proposed assessment of penalty . . . the citation and the assessment, as proposed, shall be deemed a final order of the Commission and not subject to review by any court of law.