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Number 9

THE BUREAU OF NATIONAL AFFAIRS, INC.

April 28, 1977

5 OSHC 1242

AIR PRODUCTS AND CHEMICALS, INC.

Review Commission Final Order

SECRETARY OF LABOR, Complainant v. AIR PRODUCTS AND CHEMICALS, INC., Respondent. OSAHRC Docket No. 76-150, March 28, 1977.

Jack R. Fisher, New York, N.Y., for complainant.

Raymond H. Schenck, Law Department, Air Products and Chemicals, Inc., Allentown, Pa., for respondent.

Warren J. Bunn, District 8, Oil, Chemical and Atomic Workers, International Union, Union, N.J., for employees.

Review Commission Judge Jerome C. Ditore.

Before Barnako, Chairman; Moran and Cleary, Commissioners.

CARCINOGENS

1. Vinyl Chloride "Emergency"—Failure to Report ▶220.04 ▶30.031

Secretary's failure to establish that "massive release" of vinyl chloride into atmosphere of workplace occurred requires

vacation of citation for violation of 29 CFR 1910.1017(n)(2) for failure to report vinyl chloride "emergency" to Occupational Safety and Health Administration.

2. Medical Surveillance—Necessity ▶220.04 ▶200.18

Evidence that one employee was exposed to eight-hour time-weighted average of 1.5 ppm of vinyl chloride on day of "emergency" and that other employee who may have been exposed to vinyl chloride requested medical attention and was refused such attention establishes violation of medical surveillance requirements of 29 CFR 1910.1017(k).

Full Text of Order

BY THE COMMISSION:

The Respondent has filed a Motion to Vacate the Direction for Review in the above-captioned case. It is clear that the Respondent does not seek modification or reversal of the Judge's decision and, therefore, in accordance with paragraph 1 of the Commission's policy statement, 41 Fed. Reg. 53015 (1976), Respondent's motion is GRANTED. The Judge's decision is the final order of the Commission.

Commissioner Moran would deny the motion.

Digest of Judge's Report

[Digest] The employer, a chemical manufacturer, was cited for 12 nonserious violations of the Occupational Safety and Health Act following an inspection of its Piscataway, N.J., "Maintenance Shop and High Pressure Laboratory." Ultimately contested were an alleged violation of 29 CFR 1910.1017(n)(2) for failure to report a vinyl chloride "emergency" to the Occupational Safety and Health Administration, and an alleged violation of 29 CFR 1910.1017(k)(3) for a failure to afford appropriate medical attention to two employees exposed to the "emergency." No penalties were proposed for these items.

The contested charges were based on the events of October 14, 1975. During a test run involving the use of vinyl chloride (VC) in a closed reactor vessel, the alarm bell on a gas chromatograph monitor sounded repeatedly, indicating concentrations of VC in excess of the permissible 1 ppm at one or more sampling locations. The printout from the chromatograph showed readings of 200 to 700 ppm at two locations during this period. However, just before the alarm

sounded the chromatograph had been used to monitor inside the closed system where the VC level was as high as 3500 ppm. The engineer in charge of the laboratory thought that the chromatograph was saturated with VC and was not reading accurately. However, the Labor Department's inspectors contended that the sampling lines and filters could not be saturated with VC because they were made of materials impervious to VC. In addition to the chromatograph readings, one employee was wearing a personal monitoring device which on the day in question showed an eight-hour time-weighted average exposure of 1.5 ppm.

[1] The Secretary's evidence was not sufficient to establish a "massive release" of VC gas into the atmosphere of the workplace, in view of the doubtful accuracy of the chromatograph printouts. Paragraph (b)(5) of Section 1910.1017 defines "emergency" in terms of a "massive release" of VC. Accordingly, no violation of the cited standards could be found.

[2] However, the evidence was sufficient to establish a violation of the general medical surveillance requirements of 29 CFR 1910.1017(k). One employee was exposed to 1.5 ppm, three times the "action level" at which a medical program is required. The other exposed employee requested medical attention immediately after the incident, but was refused. Since the issues of employee exposure and protection were tried at the hearing, the pleadings were amended to conform to the proof establishing a violation of paragraph (k), and that portion of the citation was affirmed without penalty.

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by different persons at different times, the language of 1910.94(a)(2)(ii) and 1910.94(b)(2) cannot be used as a guide in interpreting 1910.94(d)(4). See 2A Sutherland Statutory Construction §§51.01-.03 (4th ed. 1973).

The Secretary further argues that the Judge's interpretation of 1910.94(d)(4) renders that section redundant to 1910.1000. However, as discussed above, the cited standard applies where the Secretary has shown either that the TLV level in 1910.1000 has been exceeded or that there is a fire or explosion hazard. The standard at 1910.1000 does not deal with hazards from fire or explosion. Therefore, our interpretation of 1910.94(d)(4) does not render it redundant.

Applying the provisions of 1910.94(d)(4) to the facts of this case, we conclude that the Secretary has not proved that a hazard within the meaning of 1910.94(d)(3) exists. The TLV level prescribed for sodium hydroxide in 1910.1000 was not exceeded and the Secretary failed to show a fire or explosion hazard. Therefore, additional ventilation in conformance with Tables G-14 and G-15 of 1910.94 was unnecessary.

Accordingly, we vacate the citation which alleged a violation of 1910.94(d)(4) and the penalty proposed therefor. It is so ORDERED.

Dissenting Opinion

CLEARY, Commissioner, dissenting:

I dissent from the disposition ordered by my colleagues. Before deciding this important case involving the exposure of employees to sodium hydroxide I would invite briefs or oral argument on the application of section 1910.94 from qualified amici such as ACGIH, ANSI, and NIOSH (National Institute for Occupational Safety and Health). See 3A C.J.S. §3 at 424, *Amicus Curiae*. Cf. 1 CFR §305.71.6, Recommendation No. 71-6 of the Administrative Conference of the United States. I would also be receptive to a motion for reconsideration filed by the Secretary indicating that qualified persons or organizations are willing to express their views as amici upon rehearing.

To illustrate the need for briefing of this kind I note that Appendix H to the source standard, ANSI Z9.1-1971, gives sample calculations for minimum ventilation rates that are not triggered by the presence of amounts of airborne contaminants in excess of the threshold limit values. See particularly example H.4, which deals specifically with a sodium hydroxide solution. I would

also want to see or hear argument on the Secretary's contention that the ventilation requirement cited here is in part directed against sudden, temporary high levels of airborne contaminants in excess of the TLV. No discussion or refutation of the argument is given in the lead opinion.

If no standard is found applicable, I would not, in view of the testimony that concentrations of sodium hydroxide not in excess of the TLV may present hazards to employees, dispose of this case until consideration is given to remanding for further proceedings to investigate the possible application of section 5(a)(1). *Dunlop v. Uriel G. Ashworth*, 538 F.2d 562, 564 [3 OSHC 2065] (4th Cir. 1976). There is testimony by an expert industrial hygienist pointing out that simply because the TLV was not exceeded does not mean that employees are not subjected to health hazards. The inhalation of even small quantities of sodium hydroxide, a caustic substance, could injure employees, and skin contact could cause skin ulcerations, defatting and emulsifying of skin tissue, burns, holes in the nasal septum and dermatitis.

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**BOISE CASCADE CORPORATION,
COMPOSITE CAN DIVISION**

Review Commission Decision

SECRETARY OF LABOR, Complainant v. BOISE CASCADE CORPORATION, COMPOSITE CAN DIVISION, Respondent, OSAHRC Docket No. 802, April 7, 1977.

John Weiss and Eugene DeShazo, Kansas City, Mo., for complainant.

Warren E. Jones, Boise, Idaho, for respondent.

Irene Miotk, President, United Steel Workers of America, Local 1965, for employees.