

Certified
No. 071494



UNION CARBIDE CORPORATION
CHEMICALS AND PLASTICS
P. O. BOX 471, TEXAS CITY, TEXAS 77590



**BUSINESS
CONFIDENTIAL**

September 18, 1980

Mr. R. Davis Layne, Area Director
U. S. Department of Labor
Occupational Safety & Health Admin.
Houston South Area Office
1100 Nasa Road 1, Suite 505
Houston, TX 77058

Ref: Your Letter Dated September 8, 1980; Union Carbide Corporation
C1127

Dear Mr. Layne:

This is to acknowledge receipt of your letter of September 8, 1980; and to advise you that investigation of subject complaint is in progress. This complaint is very difficult to evaluate because:

- 1) The individual subjected to the alleged hazard is not named.
- 2) The conference at which the alleged hazard occurred is not specified.
- 3) It is not our understanding that subjection of an individual to cigarette smoke resulting from the personal preference of other employees would be considered a health hazard.

We will continue to try to determine the facts of this case.

Yours very truly,


J. B. Leverton

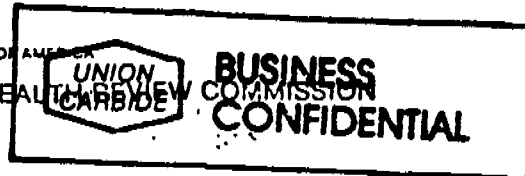
JBL:fr

bcc: D. L. Engle
D. H. Glenn, M.D.
J. S. Knight
K. E. Martin
R. Van Mynen - 501
R. R. Rankin - CLC
R. Ritchie
R. J. Taylor
D. B. Whittington
J. W. Whittlesey - 501
A. P. Yalcinkaya

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UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION



NOTICE OF DECISION

Secretary v. UNION CARBIDE CORPORATION
OSHRC Docket No. 80-1943

Enclosed is a copy of my decision in the above-entitled case. This decision constitutes my final disposition of the proceeding pursuant to 29 U.S.C. §661(i) and 5 U.S.C. §557. I have this date mailed the original decision together with the Commission's file, transcript of testimony, and all exhibits to Richard Shiffmann, Chief Review Counsel at the Commission's Office in Washington, D.C.

I am required to advise you as follows:

- (1) The decision will be filed with the Commission on September 24, 1981 and will become the final order of the Commission on October 26, 1981 unless a member of the Commission directs that it be reviewed. Parties will not receive any further communications from the Commission unless the decision is directed for review. (See paragraphs 4, 5, and 6 below.)
- (2) You may petition for discretionary review of this decision by the Commission. An original and three copies of such a petition must be submitted in accordance with 29 CFR 2200.91. The last day the Commission may consider your petition is October 26, 1981, the final order date. This final order date is set by law and cannot be extended.
- (3) Petitions for review should be mailed to:

Richard Shiffmann, Chief Review Counsel
Occupational Safety & Health Review Commission
1825 K Street, N.W.
Washington, D.C. 20006
- (4) Should review be ordered, each party will be notified and given opportunity to submit a brief.
- (5) Please complete and mail the enclosed postcard, indicating whether you presently intend to seek review of this decision. Your response on the card does not bind you in any way, but assists the Commission in scheduling future workload.
- (6) For further details on the review process, see Commission Rules 90, 91, 92, 93, 94, and 95.

DATED: September 4, 1981

Erwin L. Stuller
ERWIN L. STULLER
Judge

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UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH COMMISSION



SECRETARY OF LABOR,

Complainant,

v.

UNION CARBIDE CORPORATION,

Respondent,

INTERNATIONAL ASSOCIATION
OF MACHINISTS AND AEROSPACE
WORKERS, AND ITS INSTRUMENT
LOCAL NO. 903 AFL-CIO,

Authorized
Employee Representative.

DECISION AND ORDER

DOCKET NO. 80-1943

APPEARANCES:

Fred Haas, Esquire
Office of Regional Solicitor
United States Department of Labor
555 Griffin Square Building, Room 501
Griffin & Young Streets
Dallas, Texas 57202

Attorney for the Complainant.

Jack Simpson, Esquire
Union Carbide Corporation
270 Park Avenue, 46th Floor
New York, New York 10017

Attorney for the Respondent.

Mr. Sam Mann, Representative
International Association of Machinists
and Aerospace Workers, and its
Instrument Local No. 903 AFL-CIO
4828 Houston Drive
Galveston, Texas 77550

Representative for the Affected Employees.

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DECISION



Following an employee complaint, the Texas City, Texas, worksite of Union Carbide Corporation was inspected by the Secretary's Industrial Hygienist. Union Carbide later received the Citation charging a serious violation of the General Duty Clause of the Act. Union Carbide has denied the charge but has admitted jurisdiction.^{1/}

This case principally concerns the exposure of an employee to ethylene diamines which I refer to as amines. The exposure came at the Union Carbide facility during a release of the substance during the manufacturing process on November 5, 1979. The Citation and Complaint referred to the date of the violation as March 13, 1980. However, the Complainant's opening statement refers to the date of the violation as November 5, 1979.^{2/} Similarly the Respondent's opening statement refers to the violation as of the date of the release of the amines.^{3/} The issues were actually tried as though November 5, 1979 was the date in issue. The Respondent's post-trial brief principally concerns itself with the occurrences in early November of 1979. The inspection conducted by the Secretary's Industrial Hygienist on March 13, 1980 was an investigation of the November 5th incident.

By implied consent the parties treated the period on or about November 5, 1979 as the period of the alleged violation.

Consequently, I amend the pleadings to state that the date of the alleged violation was November 5, 1948 (Rule 15(b), Fed. R. Civ. P).



FINDINGS OF FACT

Union Carbide is a large corporation that employs at least a hundred people producing approximately 300 chemicals at its sprawling Texas facility. It has produced amines there since 1948.

Although many of the chemicals produced at this facility are toxic, there are more employment restrictions concerning amines than any other single chemical produced at the plant. Approximately 10% to 12% of the employees who were assigned to work in the areas where the amines were produced or stored, or who had been exposed to amines developed some type of allergic reaction that required these employees thereafter to be restricted from these areas. The restrictions are to limit the possibility of employees' further exposure.^{4/}

After continuing exposures to amines, an employee begins to develop sensitivity which may be either a dermatitis, or a more serious form of sensitivity -- a respiratory sensitivity. Anyone can develop that allergy. Once sensitivity to amines has developed, it is permanent and continuing. As it progresses, it can develop into asthmatic symptoms which includes difficulty in breathing. The effect is accumulative. This sensitivity does



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not diminish in any way as time passes. Each exposure leads to a more traumatic condition. Therefore, it is essential that additional exposures be avoided. Consequently, the medical advisor to Union Carbide had recommended to both the employees and their supervisors that employees having shown a sensitivity to amines should not be employed in areas where they would again be exposed to the chemical.^{5/}

Terrence D. Lemmond, Jr., developed amines sensitivity during his employment at Union Carbide. In May of 1968, the employer's medical division recognized this problem and recommended to Mr. Lemmond's supervisors that he not be given work in areas where he would be exposed to amines. These recommendations were repeated through the years. In 1968, Mr. Lemmond was approximately 20 years of age.^{6/} In 1969, they recommended that he not be allowed to work in the Chemical Area. It was also recommended that he not be allowed to do ladder or scaffold work or be required to frequently climb stairs or lift anything in excess of 50 lbs.^{7/}

Mr. Lemmond's supervisors were aware of the restrictions.^{8/} Through the years they assigned him to work areas where he would have little chance of further exposure to amines.

It is the employer's practice to allow employees to transfer from their particular task or area after having worked in the area or at the task for one year.^{9/} After having worked at a task for approximately one year, in 1979 Mr. Lemmond requested a transfer. As is the custom, his application for transfer did

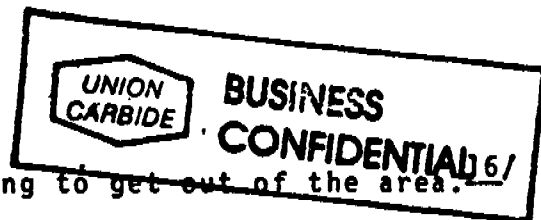


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not request a specific area or task at which he wished to work.^{10/} On November 2, 1979, Mr. R. E. Kirkland, the employer's maintenance superintendent and a supervisor of Mr. Lemmond, formally assigned him to work in the Chemical Area. The assignment was to be effective on November 12, 1979.^{11/}

It was customary for employees upon being transferred to go to the area in which they were to be transferred at least a week prior to the effective date of the transfer. This was done so that the transferred employee would have an opportunity to become familiar with his new task.^{12/} As a result, on October 29, 1979 Mr. Lemmond went to work at Building 92 in the Chemical Area. His time card where he was required to "clock-in" was placed at the entry way to the Chemical Area.^{13/} Prior to and at the time of making the assignment, Mr. Kirkland was aware of the work restrictions regarding Mr. Lemmond.^{14/}

Periodically there are toxic releases of amines into the atmosphere. The employer had a set procedure for employees during such releases. They have wind socks throughout the plant to let the employees know which way the wind is blowing. The procedure is for the employees to go cross wind to get away from the toxic fumes. On November 5, 1979, there was a release of amines into the atmosphere. In order to escape the toxic fumes, Mr. Lemmond had to go through the fumes in the Chemical Area. While there were some respirators available, there were not enough for everybody.^{15/} Mr. Lemmond was still in the Chemical Area when he was exposed to the amines release.



At the time he was running attempting to get out of the area.^{6/}

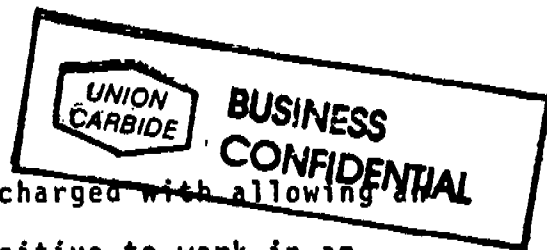
He then went to the dispensary and after he was tested, was given oxygen and antihistamines, and then was allowed to return to work. As it was very late in the workday, he returned to his post of duty and then left for home. The following day he clocked-in and then went to his post of duty in the Chemical Area. Before lunch time he went to see Mr. Kirkland and informed him that he was ill and wanted to be transferred out of the Chemical Area. Mr. Kirkland told him that an occasional release wouldn't hurt him.^{17/} Sometime later, Mr. Lemmond was transferred out of the Chemical Area.

There is a reasonable probability that Mr. Lemmond's exposure to an amines release could result in a severe asthmatic attack.^{18/} The degree of injury is dependent on the amount of exposure. Wind dissipates with chemical rapidly. The further the employee is from the point of release, the safer he is.^{19/} The company doctor did not recall an employee having been exposed to amines release outside the Chemical Area.^{20/}

OPINION

Union Carbide is charged with a serious violation of the General Duty Clause of the Act. This section of the Act provides:

"Each employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees."^{21/}



The employer here was specifically charged with allowing an employee who it knew was amines sensitive to work in an area where the potential for amines releases existed.^{22/}

In order to prove this allegation, the Secretary established that: (1) the employer failed to render the workplace free of a hazard which was (2) recognized, and (3) causing or likely to cause death or serious physical harm. National Realty & Construction Co., Inc., v. OSHRC, 489 F.2d 1257, 1265 (D.C. Cir. 1973). The hazard here was the possible exposure of an amines sensitive employee to amines. The hazard was recognized by this employer. This is shown by the fact that since 1968 the employer has restricted the area in which this employee was allowed to work. That the hazard was likely to cause serious physical harm was shown by the testimony that indicated that a reasonable probability existed that further exposure of this employee to amines could result in an asthmatic attack. The employer acting through Mr. Kirkland was well aware of the hazard, but in spite of this knowledge, assigned the employee to the restricted area exposing him to releases of amines. After his exposure on November 5, 1979, he was again sent back into the restricted area and worked there for part of the day on November 6, 1979. Therefore, the amended serious citation will be affirmed as alleged.

Union Carbide makes many arguments in defense. Those arguments based on erroneous facts will not be discussed as fully, if at all. First series of arguments claim that

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"the Secretary failed to prove Respondent had a general duty to restrict Mr. Lemmond from the entire Chemical Area or that the workplace was not free of recognized hazards." The evidence shows that Mr. Lemmond developed an allergy or sensitivity to amines while employed by Union Carbide. This was due to his employment exposures to amines at the worksite. Further exposures constituted a hazard to his health. The employer recognized this hazard when they formally restricted him from working in the Chemical Area. This admitted knowledge of the dangerous potential of further exposure of the employee to a chemical periodically vented into the atmosphere at the worksite is sufficient to establish a "recognized hazard".

Continental Oil Co. v. OSHRC, 630 F.2d 446,448 (6th Cir. 1980); Empire-Detroit Steel v. OSHRC, 579 F.2d 378,383; Usery v. Marquette Cement Manufacturing Co., 568 F.2d 902,910 (2nd Cir. 1977); Cape and Vineyard Div. v. OSHRC, 512 F.2d 1148,1152 (1st Cir. 1975); Brennan v. OSHRC (Vy Lactos & Laboratories, Inc.) 494 F.2d 460, 463-64 (8th Cir. 1974). The hazard was the amines which were produced in the Chemical Area. Therefore, the Chemical Area was not free of a recognized hazard.

The statute establishes the duty concerned here. The specific area is one established by the employer's medical experts and obviously agreed to by the supervisors. The fact that no employee had ever been exposed to an amines release outside that area supports the correctness of the decision. Consequently, these arguments will be rejected.

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Union Carbide maintains that "it was only Mr. ~~personal sensitivity that created the problem~~" and "Mr. Lemmond had a condition which created individual not workplace problems."^{23/} These statements embody the attitude that Mr. Kirkland and Union Carbide have taken in this matter. They refuse to recognize their statutory responsibility which indicates their lack of good faith. Mr. Lemmond did not create the problem. Union Carbide did. It did this by repeatedly exposing its employees to poisons at the worksite. There is no evidence nor is it claimed that Mr. Lemmond had an amines sensitivity prior to his employment at Union Carbide. But after multiple exposures to the poison at the worksite at age 20, he developed this sensitivity. Ten to twelve percent of the work force at the worksite developed similar sensitivities. Regardless of why the employer refuses to face its responsibility, the Act holds the employer responsible.

Another series of arguments concern the employee violating the rule on four occasions by going into the restricted area unknown to the employer. In effect, it argues that it is not doing anything worse than what the employee has on four occasions done to himself. The employer is not responsible for the idiosyncratic behavior of an employee that is beyond their control. If they were, it would constitute strict liability. However, they are responsible for their own acts. Their knowingly assigning and allowing the employee to work in an area where



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there is a potential for danger is a violation of the Act whether or not the employee has done something similarly dangerous in the past.

It also argues that the building to which the employee was assigned was a safe place. The employee's work assignment during the period required him to leave the building from time to time. Once out of the building, he was exposed to the hazard. Should the door in the building be left open he would be exposed to the hazard. Therefore, knowingly assigning him to this building in the Chemical Area violated the statute.

Union Carbide has several arguments based on facts concerning the specific exposure of Mr. Lemmond to the amines release on November 5, 1979. The violation is not the exposure to this one release. It is knowingly assigning the employee to a potentially dangerous area and allowing him to work there on October 29, 1979 through November 6, 1979. For the sake of discussion, assuming that Mr. Lemmond was not seriously injured by the amines release, this does not relieve the employer of responsibility for knowingly allowing him to work in the zone of danger. It is the potential as well as the actual danger that is to be avoided.

Finally, Union Carbide argues that it did not have the required knowledge. The evidence shows that several of the employer's executives, including supervisors of the employees, have been specifically informed of the restrictions several times over the years. This knowledge is imputed to the corporate



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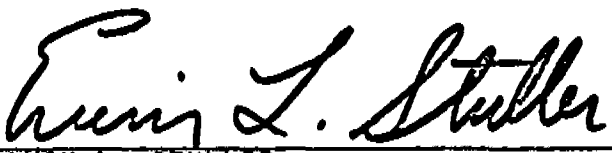
employer. They appear to be arguing that it was merely a negligent oversight of Mr. Kirkland to assign the employee to the restricted area. I have strong doubts about this. After viewing the demeanor of Mr. Kirkland and Mr. Lemmond while testifying, and after considering their testimony and the corroboration of that testimony, I resolve all conflicts in the testimony of the two witnesses in Mr. Lemmond's favor. Indeed I give little weight to Mr. Kirkland's testimony. Even on the witness stand, he appeared to be a tough, vengeful man. I find that he was at least capable of harrassing Mr. Lemmond in the past and probably was doing just that when he assigned him to the Chemical Area. His remark made on November 6th that exposure to amines would not hurt him shows his utter disregard for Mr. Lemmond's health or his company's obligation under the statute. It is obvious here that Union Carbide has ratified this supervisor's act.

After considering the gravity of the violation, the size of the employer, its lack of previous violations, and the evidence concerning its good faith, I conclude that the proposed penalty is not appropriate. Consequently, I will modify the proposed penalty to, \$1000, the maximum allowed for the violation charged.

ORDER



The Citation herein, as amended, and the proposed penalty, as modified, are AFFIRMED. A total penalty of \$1000 is ASSESSED.


ERWIN L. STULLER
Judge

DATED: September 24, 1981



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FOOTNOTES

1/ The violation was alleged to have taken place at the time of the inspection, March 13, 1980. A citation was issued on March 18, 1980. It charges a violation of the General Duty Clause of the Act (29 U.S.C. 654(a)(1)). Union Carbide filed a timely Notice of Contest. At that point the Commission acquired jurisdiction over the subject matter under Section 659 of the Act. Union Carbide has also admitted jurisdiction in its Answer.

2/ Tr. 16.

3/ Tr. 19.

4/ Tr. 220-221.

5/ Tr. 222-224.

6/ Exhibit 9.

7/ Exhibits 1, 2, and 3.

8/ Tr. 93.

9/ Tr. 95.

10/ Tr. 134.

11/ Exhibit 9.

12/ Tr. 141-143.

13/ Tr. 171-172.

14/ Tr. 92

15/ Tr. 112-113, 145-146.

16/ Tr. 189.

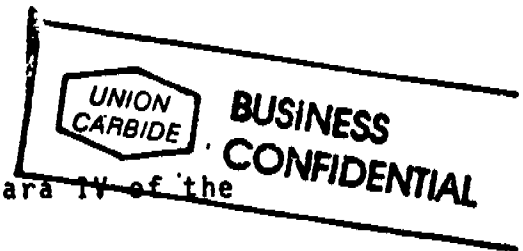
17/ Tr. 148-149.

18/ Tr. 234.

19/ Tr. 244.

20/ Tr. 250.

21. Section 5(a)(1) of the Act [29 U.S.C. 654(a)(1)].



22/ The amended violation as described in para IV of the Complaint is as follows:

Section 5(a)(1) of the Occupational Safety and Health Act of 1970: The employer did not furnish employment and a place of employment which were free from recognized hazards that were causing or were likely to cause death or serious physical harm to employees, in that:

(a) An amine-sensitive employee was allowed to work in an area where there existed the potential of amine releases particularly a release of ethylene diamine.

23/ Respondent's Brief, page 9 and 12.

CITATION and NOTIFICATION OF PENALTY

Clear Lake City Area Office
1100 Nasa Rd. 1 - Suite 505
Houston, TX 77058

TYPE OF VIOLATION(S)	CITATION NO.
SERIOUS	1

TO: Union Carbide, Inc.
P.O. Box 471
Texas City, TX 77590

Attn: Mr. Larry Smith

RECEIPT DATE	OSHA NUMBER
3/18/80	S6329 019
REGION	AREA
6	1365
	OF

Certified Mail No. 5910333
Return Receipt Requested
INSPECTION DATE:

3/13/80

INSPECTION SITE:

5th Avenue South 3300
Texas City, TX 77590

THE LAW REQUIRES that a copy of this Citation be posted immediately in a prominent place at or near the location of the violation(s) cited below. The Citation must remain posted until the violations cited below have been corrected, or for 3 working days (excluding weekends and Federal holidays) whichever is longer.

PENALTIES ARE DUE WITHIN 15 DAYS OF RECEIPT OF THIS NOTIFICATION UNLESS CONTESTED (See enclosed booklet)

This Section May Be Detached Before Posting

The citation describes violations of the Occupational Safety and Health Act of 1970. The penalty(ies) listed below are based on these violations. You must correct the violations referred to in this citation by the dates listed below and pay the penalties proposed, unless within 15 working days (excluding weekends and Federal holidays) from your receipt of this citation and penalty you mail a notice of contest to the U.S. Department of Labor Area Office at the address shown above. (See the enclosed booklet which outlines your responsibilities and courses of action and should be read in conjunction with this form.)

EM NUMBER STANDARD, REGULATION OR SECTION OF THE ACT VIOLATED:	DESCRIPTION	DATE BY WHICH VIOLATION MUST BE CORRECTED	PENALTY
1	Section 5(a)(1) of the Occupational Safety and Health Act of 1970: The employer did not furnish employment and a place of employment which were free from recognized hazards that were causing or were likely to cause death or serious physical harm to employees, in that: (a) An employee who was medically restricted from the chemical area of the plant because of his sensitivity to amine compounds, was assigned to the chemical area with management's knowledge.	Immediately	\$800

AREA DIRECTOR

R. DAVIS LAYNE

NOTICE TO EMPLOYEES - The law gives an employee or his representative the opportunity to object to any abatement date for a violation if he believes the date to be unreasonable. A contest must be mailed to the U.S. Department of Labor Area Office at the address shown above within 15 working days (excluding weekends and Federal holidays) of the receipt by the employer of this citation and penalty.

EMPLOYER RESPONSIBILITIES AND COURSES OF ACTION - The enclosed booklet outlines employer responsibilities and courses of action and should be read in conjunction with this notification.

EMPLOYER DISCRIMINATION UNLAWFUL - The law prohibits discrimination by an employer against an employee for filing a complaint or for exercising any rights under this Act. An employee who believes that he has been discriminated against may file a complaint no later than 30 days after the discrimination with the U.S. Department of Labor Area Office at the address shown above.

\$800
TOTAL PENALTY FOR THIS CITATION
Make check or Money Order Payable To "DOL OSHA"
Indicate OSHA No. on Remittance

CITATION and NOTIFICATION OF PENALTY

OSHA 2 REV. 6/78

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Interview with Mr. Bob Kirkland

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Mr. Lemmond came to me after he had worked in Area 7 for eleven months and told me that when his year was up he wanted to be transferred to Another Area. ^{5/2/55} This meeting was held because Mr. Lemmond had heard out in the plant that a evening shift would be started to cover a shut down in the ethanol unit. I told him there would not be a evening shift for instrument people but that it would be covered with overtime people. I told him that I would have an opening on the day and I asked him if he would like to work there. Mr. Lemmond said yes he would. This Area was medically restrictive on his medical records because this ^{is} was a part of the chemical Area and he is ^{ALLERGIC SENSITIVE 55} Allergic to Amines. I overlooked the fact that he was to be in the ethanol unit which ^{is} part of the ^{chemical 55} area which ^{includes 55} contains amines. ... that is reminded

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