

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, :

Complainant, :

v. : OSHRC Docket No. 78-4862

HOOVER CHEMICAL CO., :

Respondent. :

DECISION

Before BARNAKO, Acting Chairman; CLEARY and COTTINE, Commissioners.

BY THE COMMISSION:

A decision of Administrative Law Judge Charles K. Chaplin is before the Commission for review pursuant to section 12(j), 29 U.S.C. § 661(i), of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678. Judge Chaplin vacated a citation alleging an other than serious violation of the standard at 29 C.F.R. § 1910.1017(j).^{1/}

^{1/} The standard provides, in pertinent part:

§ 1910.1017 Vinyl Chloride

* * *

(j) Training. 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.

The standard sets out the requirements for training programs.

The Secretary of Labor ("Secretary") filed a letter stating that the judge's decision should be affirmed. The Secretary stated that "Training requirements are not applicable in this case because respondent's cited compounding and calendering operations simply are not processes which could result in hazardous exposure to vinyl chloride by the nature of the operations themselves." He thereby indicated that he did not wish to pursue the case. Respondent, Hooker Chemical Company, filed a brief urging affirmance of the decision. Therefore, there is no expression of interest in Commission review by an aggrieved party. Moreover, the judge's decision raises no issue of compelling public interest. Accordingly, the case will not be reviewed, and the judge's decision is affirmed. See PPG Industries (Caribe), 80 OSAHRC ___, 8 BNA OSHC 2003, 1980 CCH OSHD ¶ 24,733 (No. 77-2235, 1980); Abbott-Sommer, Inc., 76 OSAHRC 21/A2, 3 BNA OSHC 2032, 1975-76 CCH OSHD ¶ 20,428 (No. 9507, 1976). The decision is accorded the precedential value of an unreviewed judge's decision. See Leone Construction Co., 76 OSAHRC 12/E6, 3 BNA OSHC 1979, 1975-76 CCH OSHD ¶ 20,387 (No. 4090, 1976), appeal withdrawn, No. 76-4070 (2d Cir. May 17, 1976).

SO ORDERED.

FOR THE COMMISSION


RAY H. DARLING, JR.
Executive Secretary

DATED: MAR 31 1981

2/ In his direction for review, Commissioner Cottine specified the following issue:

Whether the Administrative Law Judge erred in concluding that 29 C.F.R. § 1910.1017(j) has no application to places of employment where the levels of vinyl chloride in the ambient air are below 0.5 ppm.

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COTTINE, Commissioner, dissenting:

The interpretation of the employee training provision of the vinyl chloride standard is a matter of compelling public interest.^{1/} The Commission is obligated to exercise its responsibility to interpret the standard in this case because the revised enforcement policy of the Secretary of Labor amounts to a modification of the vinyl chloride standard without the rulemaking proceedings required by the Act, specifically 29 U.S.C. §655(b).^{2/}

The Respondent was cited for noncompliance with 29 C.F.R. §1910.1017(j)^{3/} for failing to provide employee training regarding vinyl chloride

^{1/} For my individual views on the assessment of compelling public interest as a basis for Commission review in the absence of party interest, see my separate opinions in PPG Indus. (Caribe), 1980 OSAHRC , 8 BNA OSHC 2003, 1980 CCH OSHD ¶24,733 (No. 77-2235, 1980); Cargill, Inc., 80 OSAHRC 28/D8, 8 BNA OSHC , 1980 CCH OSHD ¶24,359 (No. 78-3006, 1980); Keco Indus., Inc., 78 OSAHRC 105/D9, 7 BNA OSHC 2048, 1979 CCH OSHD ¶24,117 (No. 78-661, 1979); Cargill, Inc., 79 OSAHRC 90/A2, 7 BNA OSHC 2045, 1979 CCH OSHD ¶23,981 (Nos. 78-2862 & 78-3864, 1979).

^{2/} Section 6(b) of the Act, 29 U.S.C. §655(b), sets forth the procedures by which "[t]he Secretary may by rule promulgate, modify, or revoke any occupational safety or health standard."

^{3/} 29 C.F.R. §1910.1017(j) provides:

(j) Training. 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.

(1) The program shall 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;

(Continued)

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for employees working in certain areas of its resin facility that are not "regulated areas" as defined in §1910.1017(e)^{4/} and where vinyl chloride concentrations do not exceed the "action level" of §1910.1017(b)(1).^{5/} The administrative law judge concluded that the cited standard is not applicable "to places of employment where VC levels in the ambient air are below 0.5 ppm", and the citation was vacated. For the reasons that follow, the judge's decision is inconsistent with the specific terms of the cited provision and should not be affirmed.

3/ (Continued)

- (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
 - (xi) A review of this standard at the employee's first training and indoctrination program, and annually thereafter.
- (2) All materials relating to the program shall be provided upon request to the Assistant Secretary and the Director.

4/ 29 C.F.R. §1910.1017(e) provides:

- (e) Regulated area. (1) 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 limit.
- (2) Access to regulated areas shall be limited to authorized persons.

5/ 29 C.F.R. §1910.1017(b)(1) provides:

- (b) Definitions. (1) "Action level" means a concentration of vinyl chloride of 0.5 ppm averaged over an 8-hour work day.

Arguing to the judge for affirmance of the citation, the Secretary cited the preamble accompanying publication of the permanent vinyl chloride standard at 39 Fed. Reg 35890 (1974) and stated, "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." (Letter to judge in lieu of brief (March 19, 1979)). Although the cited conditions clearly involve work areas where employees are engaged in polyvinyl chloride operations, the Secretary now claims on review that training requirements are not applicable and that this view "is the enforcement policy now adopted by the OSHA National Office in identical situations." (Letter to Commission in lieu of brief (July 6, 1979)). In contrast to the letter submitted to the administrative law judge, the representation on review provides no citation to the standard, the accompanying preamble, or any subsequent revision in support of its new interpretation.

This new interpretation is inconsistent with the provisions and structure of the vinyl chloride standard as discussed in the preamble accompanying publication of the permanent standard. The "action level" of one-half of the permissible exposure limit was included in the permanent standard to "minimize the impact of the standard on the employers who have attained exposure levels well below the permissible limit," 39 Fed. Reg. at 35893, by exempting those low level exposure areas from "some provisions of the standard." Id. (emphasis supplied). Examples of provisions that do not apply when the action level is not exceeded are

medical surveillance (§1910.1017(k))^{6/} and periodic monitoring (§1910.1017(d)). The Secretary stated, "[i]n 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." Id. (emphasis supplied). However, those provisions that exempt areas not in excess of the action level specifically include the action level requirement. Furthermore, the action level requirement for these provisions was expressly described in the preamble to the promulgating document. 39 Fed. Reg. at 35893, 35895.

In contrast, the employee training provision at issue in this case is limited neither by its terms nor by the accompanying explanation in the preamble. 39 Fed. Reg. at 35895. The standard specifically applies to "[e]ach employee engaged in vinyl chloride or polyvinyl chloride operations." §1910.1017(j) (emphasis supplied). There is no reference to the action level and no exemption from the clearly stated application of the training provisions. The proper interpretation of the standard is that stated by the Secretary in his letter to the judge: "[E]ach employee engaged in PVC operations, regardless of how minimal the monitoring results, must be trained, and we recognize no exceptions to the training

6/ Section 1910.1017(d) states, in pertinent part,

(d) Monitoring.

* * *

(2) Where a determination . . . shows any employee exposures, without regard to the use of respirators in excess of the action level, a program for determining exposures for each such employee shall be established.

7/ Section 1910.1017(k) states, in pertinent part,

(k) Medical surveillance. A program of medical surveillance shall be instituted for each employee exposed, without regard to the use of respirators, to vinyl chloride in excess of the action level.

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requirement." Any variation from this requirement must be pursuant to rulemaking consistent with the provisions of section 6(b)(5) of the Act, 29 U.S.C. §655(b)(5). See Florida Peach Growers Ass'n v. Brennan, 489 F.2d 120 (5th Cir. 1974); United States Steel Corp., 77 OSAHRC 12/C3, 2 BNA OSHC 1343, 1974-75 CCH OSHD ¶19,047 (Nos. 2975 & 4349, 1974) (lead & concurring opins.), appeal dismissed, 517 F.2d 1400 (3d Cir. 1975).

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