United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1924 Building – Room 2R90, 100 Alabama Street SW
Atlanta, Georgia 30303-3104

Secretary of Labor, Complainant, v. M.A. Mortenson Company, Respondent.	OSHRC Docket No. **14-1039**

Appearances:

Malia Lawson Holzberger, Esquire, U.S. Department of Labor, Office of the Solicitor, Nashville, Tennessee
For the Secretary

Ashley Kasarjian, Esquire, Snell & Wilmer, L.L.P., Phoenix, Arizona
For the Respondent

BEFORE: Administrative Law Judge Heather A. Joys

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission pursuant to § 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651- 678 (2014) (the Act). M. A. Mortenson Company, Inc., (hereinafter Mortenson) is a construction company headquartered in Minneapolis, Minnesota, doing business throughout the United States. On May 1, 2014, Occupational Safety and Health Administration Compliance Officer (CSHO) Jim Provins conducted an inspection of Mortenson at a jobsite located at T650 Joel Drive at the United States Army Installation at Fort Campbell, Kentucky, where Mortenson was the general contractor. Based upon CSHO Provins inspection, the Secretary of Labor, on June 12, 2014, issued a Citation and Notification of Penalty with two items to Mortenson alleging other than serious violations of 29 CFR §§ 1910. 1200(e)(1)(i) and 1910.1200(g)(8), for failing to include an Ansul Sentry ABC portable fire extinguisher or its contents in a list of hazardous chemicals at the worksite or to have available to employees material safety data sheets for the

fire extinguishers and their contents, respectively. The Secretary proposed no penalty for the Citation. Mortenson timely contested the Citation. Both alleged violations are at issue.

A hearing was held in this matter on October 28, 2014 in Nashville, Tennessee. The proceedings were conducted pursuant to the Commission's Simplified Proceedings. 29 CFR §§ 2200.200-211. The parties filed post-hearing briefs in this matter on December 3, 2014.

For the reasons that follow, Items 1 and 2 of Citation 1 are vacated.

Jurisdiction

At the hearing, the parties stipulated that jurisdiction of this action is conferred upon the Commission pursuant to § 10(c) of the Act (Tr. 10-11). Mortenson also admits that at all times relevant to this action, it was an employer engaged in a business affecting interstate commerce within the meaning of § 3(5) of the Act, 29 U.S.C. § 652(5) (Tr. 10).

Background and Facts

Mortenson is a Minnesota corporation that performs general contracting services for construction projects throughout the United States (Tr. 10-11, 49, 118). It has approximately 100 employees (Tr. 49). According to Marni Hogan, Mortenson's operating group safety director, approximately half of the company's work is on "vertical" construction projects such as hospitals, stadiums, and other large buildings, and half is on renewable energy projects such as wind turbines (Tr. 118-19). Mortenson serves as the general contractor on most of its projects, managing the work of various subcontractors (Tr. 118).

Beginning in November of 2013, Mortenson contracted with Fort Campbell to complete a three-phase renovation to the Installation's existing medical facility (Tr. 22, 51, 119-20). Mortenson was to serve as the general contractor for the project with responsibility for oversight of all the subcontractors and their work (Tr. 11, 22, 119). Mortenson had approximately 12 to 13 employees working on the site (Tr. 52, 120, 167). These employees included Tom Wilson, the senior project manager; Chris Johnson, the senior superintendent; Rick Daleberg, the onsite safety engineer; and an unnamed administrative assistant (Tr. 22, 164-66). The remaining employees worked as quality engineers or managers and assistant project managers (Tr. 168-69). Ms. Hogan testified all these individuals, with the exception of the administrative assistant would have spent a portion of their workday inspecting and "walking around the site" (Tr. 165-

67). Mortenson's employees performed no manual labor at the worksite (Tr. 129).

On May 1, 2014, CSHO Provins conducted an inspection of the Fort Campbell worksite (Tr. 19). As part of his inspection, CSHO Provins reviewed various safety programs implemented and maintained by Mortenson at the worksite (Tr. 25-26). Among those programs reviewed by CSHO Provins was Mortenson's hazard communication program (Tr. 25-26). CSHO Provins noted, although Mortenson had a list of hazardous chemicals present at the worksite, as well as material safety data sheets (MSDS) for those chemicals, it had not included either the Ansul Sentry ABC portable fire extinguishers or the chemicals contained therein in its list of hazardous chemicals (Tr. 25-27). Nor did Mortenson have MSDSs for those chemicals available for employees (Tr. 26, 31-32). Based upon this omission, CSHO Provins recommended citations alleging violations of the hazard communication standard at 29 CFR §§ 1910.1200(e)(1)(i) and 1910.1200(g)(8) be issued.

CSHO Provins had conducted a walk around inspection of portions of the worksite and estimated he had seen eight to ten fire extinguishers located throughout the project (Tr. 34). One of these fire extinguishers, depicted in Exhibits C-1A, 1B, and 1C, was a 10-pound fire extinguisher manufactured by Ansul and rated as an ABC fire extinguisher (Tr. 11, 33-34). The ABC rating refers to the type of fires the extinguisher can suppress (Tr. 35). The fire extinguisher was placed in an orange holder and stood approximately 30 inches from the base of the holder to the top of the fire extinguisher (Tr. 35). The MSDS for the fire extinguisher indicates it contains calcium carbonite which is considered a hazardous chemical (Exh. C-3; Tr. 28). It also contains ammonium sulfate and ammonium phosphate which are listed on the MSDS as "non-hazardous components." (Exh. C-3). CSHO Provins testified these chemicals are skin, eye, and respiratory irritants (Tr. 38; Exh. C-3). The fire extinguisher's contents are also compressed to 140 to 180 psi, which CSHO Provins testified exceeds the level of 40 psi considered a physical hazard, regulated by the Hazard Communication Standard (Tr. 28-29). CSHO Provins noted this, and at least eight to ten similar, fire extinguishers were available for employee use throughout the site and, as Mortenson concedes, employees had been trained on how to use them (Tr. 30). CSHO Provins observed operations that could result in a fire breaking out, including grinding, cutting, and welding (Tr. 30, 38-39, 59). Based upon his experience with fire extinguisher training, CSHO Provins testified the contents of a fire extinguisher could

come in contact with an employee's skin or could be inhaled when used (Tr. 56-57).

CSHO Provins distinguished the fire extinguishers on the worksite from those found in a typical residence. First, CSHO Provins testified the typical residential fire extinguisher is much smaller, weighing 1 to 2 ½ pounds (Tr. 40). Prior to his work with OSHA, CSHO Provins had experience inspecting homes for a private company and testified, in those years, he never saw fire extinguishers of the size found at the worksite in a home (Tr. 59). CSHO Provins testified the number of fire extinguishers at the worksite exceeded the number typically found in a home or even a multi-family dwelling such as a condominium complex (Tr. 46). He testified the potential for a fire breaking out at the worksite was greater than that in a home because of the work being performed at the worksite (Tr. 58-59). Additionally, he testified he would expect a home fire to be smaller (Tr. 58-59).

Mortenson concedes neither the fire extinguishers nor their contents are included in its hazard communication program (Tr. 144). However, Ms. Hogan testified the fire extinguishers were not included because the company policy is to evacuate in the event of a fire and to use the fire extinguishers only to aide in evacuation (Tr. 147; Exhs. R-4, R-7). She testified she considered the type of firefighting Mortenson employees would engage in to be similar to that performed by a home owner in response to a residential fire (Tr. 147). She testified the 10-pound fire extinguishers located at the worksite are available for purchase by the public at a variety of physical locations and online and contain the same chemicals found in the smaller fire extinguishers commonly found in residences (Tr. 128, 150-54; Exhs. R-8, R-9).

Ms. Hogan provided much of the safety training to the Mortenson employees and subcontractors at the worksite (Tr. 122-24). She testified she trained employees to follow Mortenson's emergency action plan and fire protection policy, both of which emphasize evacuation over firefighting (Tr. 124, 142; Exhs. R-4, R-7). Although she conceded employees were trained in the use of the fire extinguishers, she testified the training did not involve a demonstration of use of the fire extinguishers (Tr. 133, 168). Ms. Hogan testified Mortenson employees do not recharge the fire extinguishers and only perform a visual inspection (Tr. 133-34). Therefore, Mortenson employees would have no other occasion to handle the fire extinguishers.

Ms. Hogan testified Mortenson takes precautions to prevent fires at the worksite.

Mortenson has a hot work program pursuant to which hot work permits are issued (Tr. 135; Exhs. R-5, R-6). Ms. Hogan testified Mortenson personnel are responsible for ensuring subcontractors comply with its hot work program on site (Tr. 135). Among the precautions taken to prevent fires, the hot work program requires an employee engaged in qualifying work have his or her own fire extinguisher within 35 feet of the work being performed (Tr. 136-37; Exh. R-6). Ms. Hogan testified in her position with Mortenson, she would be notified of any fire or other emergency at the worksite and was aware of none at the Fort Campbell site (Tr. 143).

The Citation

The Secretary has the burden of establishing the employer violated the cited standard. To prove a violation of an OSHA standard, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies; (2) the employer failed to comply with the terms of the cited standard; (3) employees had access to the violative condition; and (4) the cited employer either knew or could have known with the exercise of reasonable diligence of the violative condition. *JPC Group, Inc.*, 22 BNA OSHC 1859, 1861 (No. 05-1907, 2009).

The Secretary alleges Respondent violated two standards under 29 CFR §1910.1200 or the Hazard Communication Standard. This standard contains requirements for employers with regard to hazardous chemicals to which employees may be exposed at the worksite. The Secretary alleges Mortenson violated §1910.1200(e)(1)(i) for failing to list the Ansul Sentry ABC fire extinguisher on its list of hazardous chemicals at the worksite and §1910.1200(g)(8) for failing to have an MSDS for the Ansul Sentry ABC fire extinguishers available for employees. Mortenson contends it neither listed the fire extinguisher on its list of hazardous chemicals, nor had the MSDS for the fire extinguisher onsite because it was not required to do so. Specifically, Mortenson argues the Ansul Sentry ABC fire extinguishers fall within the exception to the standard at §1910.1200(b)(6)(ix) or the "consumer products" exception. Therefore, the threshold issue for resolution is whether that exception to the standard applies in this circumstance.

Consumer Products Exception

It is well settled the party seeking the benefit of an exception to a legal requirement has the burden of proof to show that it qualifies for that exception. *C.J. Hughes Construction, Inc.,*

17 BNA OSHC 1753, 1756 (No. 93-3177, 1996). Therefore, as the party seeking the benefit of the exception, it is Mortenson's burden to show the consumer products exception to the Hazard Communication Standard applies to the Ansul Sentry ABC fire extinguishers on the worksite.

The consumer products exception found at 29 CFR §1910.1200(b)(6)(ix) states the requirements of the Hazard Communication Standard do not apply to

> [a]ny consumer product or hazardous substance, as those terms are defined in the Consumer Product Safety Act (15 U.S.C. 2051 et seq.) and Federal Hazardous Substances Act (15 U.S.C. 1261 et seq.) respectively, where the employer can demonstrate it is used in the workplace in the same manner as normal consumer use, and which use results in a duration and frequency of exposure which is not greater than exposures experienced by consumers[.]

The terms of the exception set out three elements to the employer's burden of proof. First, the employer must establish the fire extinguisher falls within the definition of either a consumer product under the Consumer Product Safety Act **or** a hazardous substance under the Federal Hazardous Substances Act. Second, the employer must establish the fire extinguishers were used in the same manner as a "normal consumer." Finally, the employer must show that employees' exposure is of the same duration and frequency as the normal consumer.

The Commission first addressed the consumer products exception in its decision in *Safeway Store No. 914*, 16 BNA OSHC 1504 (No. 91-373, 1993). In that case, employees had used a windshield washer fluid sold in the employer's store to clean the glass on their checkout scanners frequently throughout the day. There was little dispute the product met the definition of both a consumer product and a hazardous substance. However, the Secretary had argued because the product was not used in the manner intended by the manufacturer when preparing the label and the duration and exposure was not the same as would be experienced by the consumer, the exemption would not apply. The Commission disagreed, holding the exception was not "limited by the manner or purpose for which a manufacturer markets a product." *Id*. at 1511. Rather, if the product is used in a "reasonably predictable" manner the employer has met its burden. The Commission held to establish the third element - that the duration and frequency must be similar to a normal consumer – the employer need not show exposure was equal to "the point of exact mathematical precision." *Id*. With regard to the windshield washer fluid, the Commission found the exception applied because the product was used as a glass cleaner, which

was a reasonably predictable use, and the frequency of use was sufficiently similar to the frequency with which a consumer would use the product.

In so holding, the Commission relied on the language in the 1987 Preamble to the Hazard Communication Standard. Specifically, the Commission quoted the language of the Preamble stating "to the extent that workers are exposed to substances *in a manner similar to that of the general public*, there is no need for any HCS requirement." *Id*., *quoting*, 52 Fed. Reg. 31852, 31862 (1987) (emphasis in the original). The Commission went on to hold, based upon this language, the employer has the burden to "demonstrate that its employee's use and exposure is 'comparable' to that of a consumer." *Safeway Store No. 914*, 16 BNA OSHC at 1513.

Also in *Safeway Store No. 914*, the Commission addressed employee use of a sanitizer containing ammonium chlorides by employees at the store, finding it did not meet the requirements of the exception. The Commission found, although the product was used in a manner similar to other commercial enterprises, the employer had not shown the product, or other similar products containing ammonium chlorides, was used by residential consumers for that purpose. Of note, the Commission held it was insufficient to show only that concentrations of the hazardous substances in the product were similar to that in products used by residential consumers. Rather, the employer must also show similarity of use.

Applying the analysis set out in *Safeway Store No. 914* to the facts of the instant case, I find Mortenson has met its burden to establish applicability of the consumer products exception. I find the fire extinguishers fall within the definition of both a hazardous substance and a consumer product; the fire extinguishers were being used for the intended purpose; and the record shows the duration and exposure likely to be experienced by employees on the worksite is comparable to that of the normal consumer.

The parties stipulated the fire extinguisher and its contents are hazardous substances under the Federal Hazardous Substances Act (Tr. 11). That alone would be sufficient to meet the first element of the exception. However, the record also establishes the fire extinguishers are a consumer product as that term is defined in the Consumer Product Safety Act. The Consumer Product Safety Act defines a consumer product very broadly as

> any article, or component part thereof, produced or distributed (i) for sale to a consumer for use in or around a permanent or temporary household or residence, a school, in recreation, or otherwise, or (ii) for the personal use, consumption or enjoyment of a consumer in or around a permanent or temporary household or residence, a school, in recreation, or otherwise…

15 U.S.C. 2052(a)(5).1 There is no dispute fire extinguishers meet the definition of a consumer product in that they are sold for consumer use in a residence.2 The Consumer Product Safety Act defines the term "distributed into commerce" as "to sell in commerce, to introduce or deliver for introduction into commerce, or to hold for sale or distribution after introduction into commerce." 15 U.S.C. 2052(a)(7). Nothing in the definition requires the product ever be sold. Rather, the only requirement is that it be held out for sale after introduction into commerce. Whether such a large fire extinguisher is typically found in a residence does not remove it from coverage under the statute. Therefore, I find the 10-pound Ansul Sentry ABC fire extinguisher is a consumer product.

The second requirement under the exception is that the product must be used in a similar, or reasonably predictable, manner to normal consumer use. I find Mortenson has met its burden with regard to this requirement as well. There can be no dispute the purpose of a fire extinguisher is to put out fires. There was no evidence Mortenson employees used, or were expected to use, the fire extinguishers for any purpose other than putting out fires. Mortenson inspected the fire extinguishers, but only to ensure they were charged. Mortenson employees did not recharge the fire extinguishers. The evidence establishes Mortenson employees used the fire extinguishers for the same purpose as any consumer, and I find Mortenson has met its burden.

Finally, Mortenson must show the manner in which its employees could use the fire extinguishers would result in a duration or frequency of exposure comparable to a consumer. Mortenson presented evidence of its emergency action plan that called for evacuation rather than firefighting in the event of a fire (Exhs. R-4, R-7). According to the undisputed testimony of Ms. Hogan, employees are trained to use fire extinguishers to aide in evacuation. Mortenson also presented evidence of its hot work permit program designed to prevent fires (Exhs. R-5, R-

1 The statute goes on to list exceptions, none of which are applicable here.

2 This conclusion is consistent with the Advisory Opinion of the General Counsel of the Consumer Products Safety Commission in the record at Exh. R-16.

6). There was no evidence of any fires on the worksite. Therefore, the preponderance of the evidence establishes the potential exposure of employees to the hazards associated with the fire extinguishers is comparable to that of a consumer putting out a residential fire.

CSHO Provins testified the potential for fires at the worksite was greater than in a residence and that any such fire would be larger than one would expect at a residence. This was speculative on his part. Although he testified the work performed at the site that could cause a fire, there are likewise conditions or activities in a residence, such as cooking, that could cause a fire (Tr. 147). Unlike a residence, Mortenson had in place a program designed to reduce the likelihood of a fire. As described by Ms. Hogan, Mortenson's hot work permit program and its emergency action plan would actually reduce the likelihood of a fire and, consequently, its employees' exposure to the contents of the fire extinguishers.

I find the Secretary's reliance on the Commission's holdings in *Atlantic Battery Co.*, 16 BNA OSHC 2131 (No. 90-1474, 1994), and *American Sterilizer Company*, 19 BNA OSHC 1082 (No. 91-2494, 1997), misplaced. In *Atlantic Battery*, the Commission addressed applicability of the consumer products exception to toluene (used as a paint thinner) and spray enamel in use at the employer's worksite. 16 BNA OSHC at 2175-76. The employer had argued the exception applied because both could be purchased at a hardware store and were used in approximately the same quantities as a consumer. The Commission rejected the employer's argument with regard to the use of toluene because the employer purchased large quantities and had a 55 gallon drum of the chemical on site. The Commission found "an ordinary consumer would not have a 55 gallon drum of this chemical in his or her garage." *Id*. at 2176. Similarly, the spray enamel used by the employer did not fall within the exception because "an ordinary consumer would not have a spray booth for purposes of spray painting batteries nor would it" use the product routinely and frequently. *Id*. Thus, both the quantity of the chemical on site and the frequency of use were not consistent with ordinary consumer use.

In *American Sterilizer,* the Commission found the consumer products exception did not apply to gasoline and diesel fuel used at the employer's worksites to run internal combustion engines for powering compressors for blasters. Employees used the blasters in a cleaning operation that also required the use of supplied-air respirators. Although both the blasters and the respirators were powered by a compressor, the compressor used for the respirator was

electric because an electric engine does not generate carbon monoxide as an internal combustion engine does. The employer had a policy prohibiting employees from using the internal combustion engine powered compressor for the supplied-air respirators. An employee died of carbon monoxide poisoning when he used the same gasoline powered compressor for both his blaster and his respirator. The employer argued the use of gasoline in the small quantities needed to power the compressor was analogous to a homeowner's use of gasoline to power his lawnmower. The Commission disagreed, holding because noncompliance with the employer's prohibition against use of the gasoline powered compressor for the respirator had the potential to expose employees to fatal level of carbon monoxide, use of the gasoline by employees was not substantially similar to a homeowner using it to power his lawnmower.

I find the facts of the instant case are materially different from those in *Atlantic Battery* and *American Sterilizer*. In *American Sterilizer*, an employee's noncompliance with the employer's safety program ran the risk of an exposure to a fatal level of a hazardous substance – an exposure the residential consumer would not face. In the instant case, even if Mortenson's employees used the fire extinguishers to fight a fire, the evidence does not establish exposure to either the compressed air or the contents of the fire extinguishers would be significantly greater than a consumer fighting a residential fire. Unlike the employer in *Atlantic Battery*, Mortenson expects its employees to use the fire extinguishers on rare occasions and takes precautions to ensure as much. Under the Commission's holding in *Safeway Store No. 914,* the fact that the fire extinguishers are larger than those typically used by a consumer in his home is insufficient on its own to rebut Mortenson's evidence of similarity of use and exposure, particularly in light of the unrebutted evidence of the effectiveness of Mortenson's hot work program.

Both the Secretary and Mortenson reference advisory letters issued by the Secretary interpreting various subparts of the Hazard Communication Standard. Although the Secretary's interpretation of his own standards is entitled to deference, *Martin v. OSHRC, (CF&I Steel Corp.)*, 941 F.2d 1051, 1056 (10th Cir. 1991); *Unarco Commercial Products*, 16 BNA OSHC 1499, 1502-03 (No. 89-1555, 1993), no such deference is required here as none of these interpretations address the issue at hand. Although those letters relied upon by Mortenson address the consumer products exception, none address its applicability to fire extinguishers (Exhs. R-11, R-12, R-13, R-14, R-15). On the other hand, one relied upon by the Secretary

addresses fire extinguishers, but is equally inapplicable because it only addresses the labeling obligations of the distributer of the fire extinguishers, not the end consumer (Exh. C-2A). Thus, I find all of these letters inapposite to the issue before me.

Based on the foregoing, I find Mortenson has met its burden to establish the consumer products exception to the Hazard Communication Standard and its requirements applies to the Ansul Sentry ABC fire extinguishers at its worksite. Therefore, Items 1 and 2 of Citation No. 1 are vacated.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

ORDER

Based upon the foregoing decision, it is ORDERED that:

1. Item 1, Citation 1, alleging a violation of 29 CFR § 1910.1200(e)(1)(i) is vacated; and
2. Item 2, Citation 1, alleging a violation of 29 CFR § 1910.1200(g)(8) is vacated.

/s/

Date: December 9, 2014

HEATHER A. JOYS
Administrative Law Judge
Atlanta, Georgia