
SECRETARY OF LABOR,	:	
	:	
Complainant,	:	
	:	
v.	:	OSHRC Docket No. 99-2198
	:	
COPPERHEAD CHEMICAL COMPANY,	:	
	:	
Respondent,	:	
	:	
PACE LOCAL # 2-0719,	:	
	:	
Authorized Employee	:	
Representative	:	

REMAND ORDER

This case is before the Commission after Petitions for Interlocutory Review filed by the Secretary and the Authorized Employee Representative (PACE) were granted. The parties have now filed a Stipulation of Settlement, and the Secretary and PACE have also filed a Joint Motion to Remand Matter for Settlement (Joint Motion). In the Joint Motion, the Secretary and Pace have withdrawn their Petitions for Interlocutory Review.

Having reviewed the record, and based upon the withdrawal of the Petitions for Interlocutory Review by the Secretary and PACE, the Joint Motion is granted. This case

is remanded to the Administrative Law Judge for consideration of the Stipulation of Settlement.
So Ordered.

Date: November 15, 2000

/s/

Thomasina V. Rogers
Chairman

/s/

Gary L. Visscher
Commissioner

/s/

Stuart E. Weisberg
Commissioner

99-2198

NOTICE IS GIVEN TO THE FOLLOWING:

Daniel J. Mick, Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Ave., N.W.
Washington, DC 20210

Catherine Oliver-Murphy, Regional Solicitor
Myrna A. Butkovitz, Attorney
Maria L. Spitz, Attorney
Office of the Solicitor, U.S. DOL
Suite 630E, The Curtis Center
170 S. Independence Mall West
Philadelphia, PA 19106-3306

W. Scott Railton, Esq.
Paul J. Waters, Esq.
Reed Smith Hazel & Thomas LLP
8251 Greensboro Drive, Suite 1100
McLean, VA 22102-3844

Joan G. Hill, Esq.
PACE International Union
P.O. Box 1475
Nashville, TN 37202

Elizabeth Bettinger, President
PACE Local #2-0719
2218 Mahantongo Street
Pottsville, PA 17901

Michael H. Schoenfeld
Administrative Law Judge
Occupational Safety and Health
Review Commission
1120 20th Street, Suite 990
Washington, D.C. 20036-3419

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR,
Complainant,

v.

COPPERHEAD CHEMICAL COMPANY,
Respondent.

PACE LOCAL # 2-0179,
Authorized Employee Representative.

Docket No. 99-2198

ORDER

Respondent's Motion For Summary Judgment, the Secretary's opposition thereto and Respondent's reply have been considered. For the following reasons, Respondent's motion is GRANTED IN PART AND DENIED IN PART.

In the absence of a specific Commission Rule as to summary judgment, Rule 56 of the Federal Rules of Civil Procedure applies by virtue of Commission Rule 2, 29 CFR § 2200.2. The Federal Rule provides in pertinent part;

[t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

The inquiry is whether a fair minded jury could return a verdict for the [movant] on the evidence presented. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) citing *Brady v. Southern Ry. Co.*, 320 U.S. 476, 479-480 (1943). The Commission has long recognized that summary judgment is not appropriate where material facts are in dispute. *Van Buren-Madawaska Corp.*, 13 BNA OSHC 2157 (No. 87-214, 1989).

I Citation I, Items 1-3, Process Hazard Analysis

Respondent was cited under three subsections of 29 CFR § 1910.119(d) which provides, in pertinent part:

Process safety information. In accordance with the schedule set forth in paragraph (e)(1) of this section, the employer shall complete a compilation of written process safety information before conducting any process hazard analysis required by the standard.

The three items allege that the compilation of safety information about a product identified as SDM7 was insufficient in three specific areas.

The standard was issued on February 24, 1992. Paragraph (e)(1) sets forth the dates by which various percentages of initial hazard process analyses were to have been completed. The requirements culminate in subparagraph (iv) which requires that "[a]ll initial hazard process analyses shall be completed by May 26, 1997."

Respondent posits the following facts. Copperhead Chemical Company was created as a company in August 1997. It contracted with ICI Explosives in October 1997 to purchase some of the assets of ICI. The purchase was intended to exclude liabilities, obligations and duties owed by the seller. When ICI was the owner, it had done a timely compilation of written process safety information regarding the manufacture of a product known as SDM7. There is no dispute that SDM7 is or its constituent ingredients contain a "highly hazardous chemical" covered by the process safety management standard (PSM), 29 CFR § 1910.119. Based on these facts, Respondent argues that it cannot be held to be in violation of the cited standard because:

[t]here is absolutely no language of any kind in the PSM standard imposing a duty on a company that buys a facility, like Copperhead, to review and recompile all of the process safety information that ICI had a duty to compile before May 26, 1997.

(Resp. Reply, p. 2). Thus, reasons Respondent, if there were any violation at all, it occurred on or before May 26, 1997 and was perpetrated by ICI. Respondent's argument is correct.

While the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651 - 678, generally holds a respondent responsible for safety and health hazards within its control arising from an earlier owner's failure to comply with applicable standards, the cited standard under consideration here required that the phase of compiling process safety information be conducted and completed no later

than May 26, 1987. The Secretary, in arguing that the compiling of information was not done correctly, looks to an entity (Respondent) which had no interest in the compiling of the materials nor control over its methodology at any time during its compilation. The activities required of employers under the standard were in fact performed and completed by ICI on or before the deadline set forth in the standard. If they were improperly performed in violation of the standard, the breach can be regarded as continuing only where the respondent cited had the duty to compile the material required by the standard. Once the activity of compilation was completed within the prescribed time period it was a completed and finalized action. If the process by which the compilation was performed was flawed as alleged in the cited items, nothing can now be done to repeat the process since the deadline for its completion has long past. This interpretation also gives meaning to the standard's first sentence, describing the activity as performing "an initial process hazard analysis." There can be only one "initial" analysis. Respondent does not now and never did have a duty to perform the initial process hazard analysis. This is not a case where there is a continuing duty to comply with a standard. Thus, the Commission's precedent regarding so-called "continuing violations" is not applicable.¹ Respondent is correct in its argument that "the cited standard does not require Respondent to 'recompile all of the safety processes' done by the previous owner." That duty is imposed by another standard, the one at 29 CFR § 1910.119(e)(6), which provides:

(e)(6) At least every five (5) years after the completion of the initial process hazard analysis, the process hazard analysis shall be updated and revalidated by a team meeting the requirements in paragraph (e)(4) of this section, to assure that the process hazard analysis is consistent with the current process.

Inasmuch as Respondent could not possibly have violated the subsections of the standard at 29 CFR 1910.119(d) as alleged in items 1, 2 and 3 of Citation 1, issued to it on or about October 19, 1999, Respondent's motion for summary judgement as to those items is GRANTED. Accordingly, Items 1, 2 and 3 of Citation 1 issued to Respondent are VACATED.

¹ Respondent's argument that its contract with ICI for the transfer of assets insulates it from any OSHA violations which may have existed at the time of the transfer and which still existed at the time of the inspection is rejected. An employer cannot absolve itself of its responsibilities under the Act by contract. Any remedy Respondent may have against ICI must be found in another forum.

II Citation I, Item 4, Management of Change

Respondent was also cited, in item 4 of Citation 1, for an alleged violation of 19 CFR § 1910.119(l)(2)(ii), in that:

[The e]mployer made two changes to the mixing process of SDM7 premix (different material pump and increased mixing time) and did not have all of the information necessary to fully assess the impact of the changes on the safety of the process.

The cited standard requires employers to "implement written procedures to manage changes ("except for 'replacements in kind.')

Respondent maintains in its motion that no change in the process occurred which would have triggered the requirements of the standard. As argued by the Secretary, however, whether the use of a different pump was a "change" or a "replacement in kind" is an issue of material fact not resolved by the motion and opposition thereto. Accordingly, Respondent's motion for summary judgement as to Citation 1, item 4 is DENIED.

Dated:

8/8/00
Washington, D.C.

/s/_____

Michael H. Schoenfeld
Judge, OSHRC

CERTIFICATE OF SERVICE

This is to certify that a copy of the Order was mailed to the parties listed below by first class mail on August 8, 2000.

99-2198

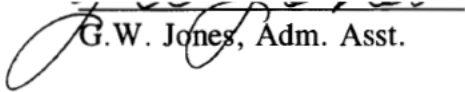
Catherine Oliver Murphy, Regional Solicitor
U.S. Department of Labor
Office of the Solicitor
Suite 630E, The Curtis Center
170 S. Independence Mall West
Philadelphia, PA 19106-3306
Attention: Maria L. Spitz, Esquire
Myrna Butkovitz, Esquire

W. Scott Railton, Esquire
Paul J. Waters, Esquire
Reed Smith Hazel & Thomas LLP
8251 Greensboro Drive, Suite 1100
McLean, VA 22102-3844

Jennifer Schultz, Industrial Hygienist
Boyd D. Young, President
PACE International Union
P O Box 1475
Nashville, TN 37202

Elizabeth Bettinger, President
PACE Local # 2-0719
2218 Mahantongo Street
Pottsville, PA 17901

/s/


G.W. Jones, Adm. Asst.

Post Office Address:
Judge Michael H. Schoenfeld
OSHRC
One Lafayette Centre
1120 20th Street, N.W.
Room 990
Washington, D.C. 20036-3419
(202) 606-5405 FAX (202) 606-5409