



United States of America  
**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**  
1120 20th Street, N.W., Ninth Floor  
Washington, DC 20036-3457

SECRETARY OF LABOR,

Complainant,

v.

THE CINCINNATI GAS & ELECTRIC CO.,

Respondent.

OSHRC Docket No. 01-0711

and

LOCAL UNION 1347, INTERNATIONAL

BROTHERHOOD OF ELECTRICAL WORKERS,

Authorized Employee Representative.

### **DECISION**

Before: RAILTON, Chairman; STEPHENS and ROGERS, Commissioners.

BY THE COMMISSION:

Cincinnati Gas & Electric Co. (“CG&E”) operates a coal-fired electrical power generation plant at Beckjord Station in New Richmond, Ohio. As a result of a complaint, the Occupational Safety and Health Administration (“OSHA”) conducted an inspection of the Beckjord Station plant and issued CG&E a seven-item serious citation alleging violations of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (“the Act”). All but one of these items was settled prior to the hearing in this case. Administrative Law Judge Nancy Spies vacated that item, finding that the general housekeeping standard cited by the Secretary, 29 C.F.R. § 1910.22(a)(1),<sup>1</sup> was preempted by the more specific coal-handling

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<sup>1</sup> Section 1910.22(a)(1) provides: “All places of employment, passageways, storerooms, and service rooms shall be kept clean and orderly and in a sanitary condition.”

standard, 29 C.F.R. § 1910.269(v)(11)(xii).<sup>2</sup> For the reasons that follow, we affirm the judge.

### **Background**

The Secretary alleges that CG&E violated section 1910.22(a)(1) at the Beckjord Station plant because it allowed accumulations of combustible coal dust to build up “on horizontal surfaces in areas of the facility in and around equipment including, but not limited to, the burner lines, mills and associated equipment.” Although the citation did not identify a specific hazard presented by the accumulated coal dust, the compliance officer (“CO”) testified that he recommended a citation under the housekeeping standard because the combustible dust could become airborne in the event of a primary explosion, the source of which he did not identify, and could ignite in the form of a secondary explosion. In vacating the citation, the judge acknowledged that the housekeeping standard could be cited for explosion hazards, *see, e.g., Bunge Corp. v. Secretary of Labor and OSAHRC*, 638 F.2d 831 (5th Cir. 1981), but held that under 29 C.F.R. § 1910.5(c)(1),<sup>3</sup> the coal-handling standard specifically governed the hazard of coal dust explosions cited here and preempted the general housekeeping standard.

### **Discussion**

Under the specific factual circumstances here, we reach the same conclusion as the judge, but for somewhat different reasons. Section 1910.5(c)(1), which governs the question of which standard applies here, provides that a specific standard preempts a general one only if “a condition, practice, means, methods, operation, or process” is already dealt with by the specific standard. *L.R. Willson & Sons, Inc. v. Donovan*, 685 F.2d 664, 669 (D.C. Cir. 1982).

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<sup>2</sup> Section 1910.269(v)(11)(xii) provides: “Where coal-handling operations may produce a combustible atmosphere from fuel sources or from flammable gases or dust, sources of ignition shall be eliminated or safely controlled to prevent ignition of the combustible atmosphere. NOTE: Locations that are hazardous because of the presence of combustible dust are classified as Class II hazardous locations. See 1910.307 of this part.”

<sup>3</sup> Section 1910.5(c)(1) provides: “If a particular standard is specifically applicable to a condition, practice, means, method, operation, or process, it shall prevail over any different general standard which might otherwise be applicable to the same condition, practice, means, method, operation, or process....”

*See also McNally Constr. & Tunneling Co.*, 16 BNA OSHC 1879, 1880, 1993-95 CCH OSHD ¶ 30,506, p. 42,167 (No. 90-2337, 1994) (citations omitted), *aff'd without pub. op.*, 71 F.3d 208 (6th Cir. 1995). A general standard is not preempted by a specific standard when it provides meaningful protection to employees beyond that afforded by the more specific standard. *Bratton Corp.*, 14 BNA OSHC 1893, 1896, 1987-90 CCH OSHD ¶ 29,152, pp. 38,991-92 (No. 83-132, 1990).

The hazard addressed by the coal-handling standard is an explosion produced by a “combustible atmosphere” in a coal-handling operation. The hazard that was described by the CO, which the Secretary terms a “secondary” explosion hazard, is also an explosion produced by a combustible atmosphere. The Secretary maintains that a secondary explosion poses a distinct hazard at the Beckjord Station plant since it could occur only after a primary explosion first disturbs or displaces the accumulations of combustible coal dust, then ignites the airborne dust with its flames or burning residue. We do not exclude the possibility that the Secretary could make that showing in the appropriate case. Here, however, the Secretary has failed to identify any means by which a primary explosion would occur at the Beckjord Station plant, let alone any means other than a primary explosion by which an accumulation of coal dust in the plant would become airborne and ignite. Indeed, the CO never determined whether ignition sources had been controlled in the cited area of the Beckjord Station plant. Under the Secretary’s theory of the case, such a determination would be necessary to assess the first link in the chain of causation leading to a potential secondary explosion. Since we have no information about the degree of compliance with section 1910.269(v)(11)(xii), we are unable to determine to what extent there are distinct primary and secondary explosion hazards in this case and whether compliance with the general housekeeping standard would provide meaningful protection from the alleged secondary explosion hazard beyond that provided by compliance with the specific coal-handling standard.

In light of this large void in the record, we are unable to make any determination about the nature of any secondary explosion hazard here. Accordingly, on this record, we simply cannot assess whether the cited standard, section 1910.22(a)(1), would fill any gap

potentially left from the application of section 1910.269(v)(11)(xii). Thus, on this record, we can only conclude that the hazard of an explosion from a combustible atmosphere has been specifically addressed by the coal-handling standard. Under these circumstances, we must conclude that this more specific standard preempts the general housekeeping standard cited here.

Our conclusion is not altered by the fact that the Commission has previously recognized that secondary explosions can pose a distinct hazard in grain handling facilities. *See A.E. Staley Manuf. Co.*, 19 BNA OSHC 1199, 1217, 2000 CCH OSHD ¶ 32,220, p. 48,913 (No. 91-0637, 2000), *aff'd*, 295 F.3d 1341 (D.C. Cir. 2002). Unlike the standard addressing hazards in grain handling facilities, there are no sources cited here by the Secretary – including the preamble, the compliance directives, and various industry publications – that identify primary and secondary explosions as distinct hazards in coal-handling operations. *Compare, e.g.*, 59 Fed. Reg. 4320, 4423 (January 31, 1994) (preamble to coal and ash handling provision of electric power generation, transmission, and distribution standard), *with* 59 Fed. Reg. 15,339 (April 1, 1994) (final decision statement to the grain handling facilities standard), *and* 52 Fed. Reg. 49,592 (December 31, 1987) (preamble to grain handling facilities standard). Even though a 2000 Technical Information Bulletin (“TIB”) referred to by the Secretary discusses the occurrence of primary and secondary explosions at a power plant in Michigan, it does not characterize such explosions as distinct hazards. Indeed, as the judge noted, the only standards mentioned in the TIB are the Michigan equivalent to sections 1910.269, 1910.147 and the general duty clause. While the TIB does refer to diligent housekeeping to limit coal dust accumulations, it does not identify section 1910.22(a)(1) as the means of compliance. Although we do not exclude the possibility that the Secretary could establish a distinct hazard in the appropriate case, she has not done so here.

Finally, we find no merit in the Secretary’s claim that “OSHA incorporated section 1910.269(a)(1)(iii) to explicitly provide that the provisions of section 1910.269 applied ‘in

addition to what’s already in Part 1910 as a whole.’”<sup>4</sup> According to the Secretary, this means that absent a specific exemption for compliance with the Part 1910 provisions, section 1910.269(v)(11)(xii) applies “in conjunction with, not in lieu of, ... 1910.22(a)(1)” because “OSHA overrode the limitation that 1910.5(c)(1) otherwise would have placed on the application of Part 1910 horizontal standards.” The Commission rejected a similar argument in *McNally, supra*, and its companion case, *KM & M, A Joint Venture*, 16 BNA OSHC 1886, 1993-95 CCH OSHD ¶ 30,507 (No. 89-3403, 1994), *aff’d without pub. op.*, 70 F.3d 115 (6th Cir. 1995). In both of those cases, the Commission found the phrase, “[t]his paragraph applies in addition to the general requirements for electrical safety which are found in Subpart K of this part[.]” to be no “more than a saving clause” and held that section 1910.5(c)(1) still governed the inquiry as to which standard applied.<sup>5</sup> See *McNally*, 16 BNA OSHC at 1883, 1993-95 CCH OSHD at p. 42,170; *KM & M*, 16 BNA OSHC at 1887, 1993-95 CCH OSHD at p. 42,174. We find section 1910.269(a)(1)(iii) to be just such a savings clause and reach the same conclusion here.<sup>6</sup>

We therefore find that the specific standard, section 1910.269(v)(11)(xii), as applied

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<sup>4</sup> Section 1910.269(a)(1)(iii) provides: “This section applies in addition to all other applicable standards contained in this part 1910. Specific references in this section to other sections of part 1910 are provided for emphasis only.”

<sup>5</sup> Other standards have similar scope provisions stating that other relevant standards apply in addition to the subject standard. For example, like the standard here, the grain handling facilities standard includes a provision at 29 C.F.R. § 1910.272(a) that states that the rule “applies in addition to all other relevant provisions of part 1910....” Yet, unlike the standard here, the grain handling facilities standard specifically includes extensive housekeeping requirements. See section 1910.272(j).

<sup>6</sup> We note that CG&E argues that the compliance directive to section 1910.269, OSHA Instruction CPL 2-1.18A, *Enforcement of the Electrical Power Generation, Transmission, and Distribution Standard*, confirms that there was an agreement between OSHA, the Edison Electric Institute and the International Brotherhood of Electrical Workers, that the coal-handling standard would exclusively govern coal explosions in power plants. Although the parties may have negotiated the CPL to clarify provisions of the new rule that were in dispute, the record contains no specific evidence to indicate that such an agreement was made as to section 1910.269(v)(11)(xii).

in this case, preempts the application of the general housekeeping standard, section 1910.22(a)(1). Accordingly, the judge's decision vacating Item 1 of Citation 1 is affirmed.

SO ORDERED.

/s/ \_\_\_\_\_  
W. Scott Railton  
Chairman

/s/ \_\_\_\_\_  
James M. Stephens  
Commissioner

/s/ \_\_\_\_\_  
Thomasina V. Rogers  
Commissioner

Dated: April 26, 2005

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.

The Cincinnati Gas & Electric Co.,

Respondent,

and

Local Union 1347, I.B.E.W.,

Authorized Employee  
Representative.

OSHRC Docket No. **01-0711**

**Appearances:**

Mary Anne Garvey, Esq., Paul Spanos, Esq., Office of the Solicitor, U. S. Department of Labor, Cleveland, Ohio  
For Complainant

Stephen C. Yohay, Esq., James F. Laboe, Esq., Arent Fox, Washington, D.C.  
For Respondent

Stephen Feldhaus, IBEW, Local 1347, Cincinnati, Ohio  
For Authorized Employee Representative

Before: Administrative Law Judge Nancy J. Spies

**DECISION AND ORDER**

The Cincinnati Gas & Electric Company (CG&E) operates Beckjord Station, a coal-fired electrical power generation plant in New Richmond, Ohio. Following an inspection conducted by Occupational Safety and Health Administration (OSHA) compliance officer John Collier, the Secretary issued a seven-item citation to CG&E on March 19, 2001. The inspection resulted from a complaint filed by Local 1347 of the International Brotherhood of Electrical Workers (IBEW), which was accorded party status in this proceeding. The parties settled items 2 through 7 prior to the hearing. The settlement agreement will be incorporated into the Order following this decision.

Item 1 alleges a serious violation of § 1910.22(a)(1) of the Occupational Safety and Health Act of 1970 (Act) for failing to keep all places of employment, passageways, storerooms, and service rooms clean

and orderly and in a sanitary condition. The citation alleges that CG&E allowed accumulations of combustible dust to build up on horizontal surfaces in areas of the facility in and around equipment.

A hearing was held in this matter on December 12, 13, and 14, 2001. The parties have filed post-hearing briefs. CG&E contends that § 1910.22(a)(1) is not applicable to the cited conditions because it is a general standard that is preempted by a more specific standard, § 1910.269, which addresses “Electric Power Generation, Transmission and Distribution.” CG&E also argues that, even if the cited standard is applicable, the Secretary failed to prove that CG&E violated the terms of § 1910.22(a)(1). In addition, CG&E claims that OSHA’s methods for collecting dust samples and for testing them were flawed, and thus that the laboratory results for the samples should be excluded from evidence.

For the reasons stated below, item 1 of the citation is vacated.

### **Background**

On January 24, 2001, compliance officer Collier initiated a complaint inspection at CG&E’s Beckjord Station, located on 800 acres approximately 22 miles east of Cincinnati (Tr. 20-21, 540). The Beckjord Station has six steam turbines and four combustible turbines that, at peak capacity, are capable of generating 1,200 megawatts of electricity. At peak capacity, the plant burns 11,000 tons of bituminous coal each day (Tr. 505-506).

Collier inspected the pulverized fuel system and videotaped the boiler area of the plant (or “burner” area) where CG&E burns pulverized coal to power the turbines which generate electrical energy (Exh. C-1). The plant has six boilers (or “burners”), each one of which has five mills (or “pulverizers”). Before the coal is fed into the burners, it is milled into a very fine dust to facilitate burning. The coal then travels from the pulverizer through duct work, known as “burner lines,” to the boiler (Tr. 23-24).

The videotape shows accumulations of dust on various horizontal surfaces in the facility. Visible accumulations are present on structural steel members, burner lines, duct work, a handrail, a temporary platform, electrical boxes, and a distribution box (Tr. 28-39). Collier took measurements of the accumulated dust at various points ranging from 1/16 of an inch to 5 3/4 of an inch (TR. 52-53).

Collier collected four samples of coal dust from four locations: from the top of a hot air duct, from the # 5 burner, from an exhaust distribution box, and from a temporary platform on unit # 4. Collier sent the samples to OSHA’s laboratory in Salt Lake City, Utah (Exhs. C-6, C-7, C-9, and C-11; Tr. 47).



Based on Collier's inspection and the dust sample results from OSHA's laboratory, the Secretary issued the citation that gave rise to the present case.

### **The Citation**

The Secretary has the burden of proving her case by a preponderance of the evidence.

In order to establish a violation of an occupational safety or health standard, the Secretary has the burden of proving: (a) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, (c) employee access to the violative conditions, and (d) the employer's actual or constructive knowledge of the violation (*i.e.*, the employer either knew or, with the exercise of reasonable diligence could have known, of the violative conditions).

*Atlantic Battery Co.*, 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

In order to establish that a violation is "serious" under §17(k) of the Act, the Secretary must establish that there is a substantial probability of death or serious physical harm that could result from the cited condition. In determining substantial probability, the Secretary must show that an accident is possible and the result of the accident would likely be death or serious physical harm. The likelihood of the accident is not an issue. *Spancrete Northeast, Inc.*, 15 BNA OSHC 1020, 1024 (No. 86-521, 1991).

### **Item 1: Alleged Serious Violation of § 1910.22(a)(1)**

Section 1910.22(a)(1) provides:

All places of employment, passageways, storerooms, and service rooms shall be kept clean and orderly and in a sanitary condition.

The citation alleges:

Accumulations of combustible dust had built up on horizontal surfaces in areas of the facility in and around equipment including, but not limited to, the burner lines, mills and associated equipment.

The Secretary agreed at the outset of the hearing that § 1910.22(a)(1) is a general standard, for which the Secretary bears the burden of proving the cited conditions created a hazard (Tr. 11).

### **Applicability**

Section 1910.22(a)(1) has been found applicable to the hazard of fire and explosion due to excessive accumulations of grain dust. *Bunge Corporation v. Secretary of Labor*, 638 F.2d 831 (5th Cir. 1981); *Farmers Cooperative Grain and Supply Company*, 10 BNA OSHC 2086 (No. 79-1177, 1982). Rejecting the argument that the housekeeping standard applies only to hazards of hygiene and tripping, the

Commission has found that “the standard is directed not merely to sanitation but to all hazards arising from poor housekeeping.” *Pratt & Whitney Aircraft*, 9 BNA OSHC 1653, 1659 (No. 13401, 1981). Therefore, the standard on its face is applicable to the cited conditions at CG&E’s Beckjord Station.

CG&E argues, however, that a standard more specific to the cited conditions than that cited by the Secretary exists. Preemption of a general standard by a more specific standard is governed by § 1910.5(c)(1), which provides:

If a particular standard is specifically applicable to a condition, practice, means, method, operation, or process, it shall prevail over any different general standard which might otherwise be applicable to the same condition, practice, means, method, operation, or process.

Therefore, CG&E argues, under § 1910.5(c)(1), the more specific standard preempts cited § 1910.22(a)(1), and item 1 should be vacated. “[A] vertical regulation within an industry supersedes a general horizontal regulation. Regardless, where the vertical regulation does not address material in the horizontal regulatory scheme, the latter applies.” *Trinity Marine Nashville, Inc. v. OSHRC*, 275 F.3d 423, 428 (5th Cir. 2001).

CG&E argues that the hazard of coal dust explosions is governed by the vertical standard § 1910.269, specifically § 1910.269(v)(11)(xii), which provides:

(11) *Coal and ash handling.*

...

(xii) Where coal-handling operations may produce a combustible atmosphere from fuel sources or from flammable gases or dust, sources of ignition shall be eliminated or safely controlled to prevent ignition of the combustible atmosphere.

NOTE: Locations that are hazardous because of the presence of combustible dust are classified as Class II hazardous locations. See § 1910.307 of this part.

The Secretary promulgated § 1910.269 in 1994 in order to provide protection to “[e]mployees performing operations or maintenance work on electric power generation, transmission, or distribution installations.” 59 Fed. Reg. 4320, 4322 (1994). The provisions contained within § 1910.269 are based upon the National Electrical Safety Code (NESC).

The application section of the standard at § 1910.269 provides, at § 1910.269(a)(1)(i):

This section covers the operation and maintenance of electric power generation, control, transformation, transmission, and distribution lines and equipment. These provisions apply to:

(A) Power generation, transmission, and distribution installations, including related equipment for the purpose of communication or metering, which are accessible only to qualified employees;

NOTE: The types of installations covered by this paragraph include the generation, transmission, and distribution installations of electric utilities, as well as equivalent installations of industrial establishments. Supplementary electric generating equipment that is used to supply a workplace for emergency, standby, or similar purposes only is covered under subpart S of this part. (See paragraph (a)(1)(ii)(B) of this section.)

(B) Other installations at an electric power generating station, as follows:

(I) Fuel and ash handling and processing installations, such as coal conveyors.

In 1997, the Secretary issued OSHA Directive CPL 2-1.18A, which addresses “Enforcement of the Electrical Power Generation, Transmission, and Distribution Standard” (Exh. R-10). Under “Appendix B Clarification of Major Issues” the OSHA Directive attempts to clarify § 1910.269(v)(11)(xii):

Paragraph (v)(11)(xii) requires the control of ignition sources in coal- and ash-handling areas where a combustible atmosphere might be produced. The note following this paragraph refers to the requirements for electrical installations in hazardous (classified) locations contained in § 1910.307. The note is intended as a reference only, and § 1910.269(v)(11)(xii) is not intended to add to or subtract from the duties required under § 1910.307 for electrical utilization installations.

Section 500-2 of the National Electric Code reads, in part, as follows:

**Location and General Requirements.** Locations shall be classified depending on the properties of the flammable vapors, liquids or gases, or combustible dusts or fibers that may be present and the likelihood that a flammable or combustible concentration or quantity is present. . .

Each room, section, or area shall be considered individually in determining its classification.

This guidance must be used in classifying possible hazardous (classified) locations for determining compliance with § 1910.269(v)(11)(xii) and § 1910.307.

The Note in § 1910.269(v)(11)(xii) incorporates by reference § 1910.307, which requires employers to control ignition sources in hazardous locations, depending on how the location is classified. Section 1910.399(a) defines the six different classifications of the locations. The definition of a Class II, Division 2, location describes the areas at issue in the Beckjord plant:

A Class II, Division 2, location is a location in which: (a) combustible dust will not normally be in suspension in the air in quantities sufficient to produce explosive or ignitable mixtures, and dust accumulations are normally insufficient to interfere with the normal operation of electrical equipment or other apparatus; or (b) dust may be in suspension in the air as a result of infrequent malfunctioning of handling or processing equipment, and

dust accumulations resulting therefrom may be ignitable by abnormal operation or failure of electrical equipment or other apparatus.

NOTE: This classification includes locations where dangerous concentrations of suspended dust would not be likely but where dust accumulations might form on or in the vicinity of electrical equipment. These areas may contain equipment from which appreciable quantities of dust would escape under abnormal operating conditions or be adjacent to a Class II, Division 1, location, as described above, into which an explosive or ignitable concentration of dust may be put into suspension under abnormal operating conditions.

The hazard that § 1910.269(v)(11)(xii) contemplates is an explosion caused by the ignition of “a combustible atmosphere [produced by] . . . dust.” Section 1910.269(v)(11)(xii) requires abatement in the form of controlling ignition sources. Under the Secretary’s interpretation, § 1910.22(a)(1) requires abatement in the form of eliminating or controlling the accumulations of coal dust. Despite the differing forms of abatement, the hazard explicitly addressed by § 1910.269(v)(11)(xii) is the same as the hazard for which the Secretary issued the citation for violating § 1910.22(a)(1) to CG&E. Collier described the hazard created by the coal dust he observed accumulated on the horizontal surfaces at the Beckjord plant to be (Tr. 53):

The potential for the dust that we had measured and sampled throughout the walk-around inspection, for that dust to become airborne. It was combustible dust, and for that dust to become airborne and ignited in the form of a secondary explosion and resultant injuries to be death or physical harm to employees who work in the area.

When determining whether a more specific standard preempts a general standard, the type of hazard addressed is more determinative than the form of abatement proposed. *Bratton Corporation*, 14 BNA OSHC 1893, 1896 (No. 83-132, 1990). General standards remain applicable only “where general standards provide meaningful protection to employees beyond the protection afforded by” the more specific standards. *Id.* at 1895 (No. 83-132, 1990).

The Secretary has the burden of proving that a cited standard is applicable to a cited condition. In the present case, she has failed to demonstrate that the general housekeeping standard that she cited provides meaningful protection beyond the protection afforded by § 1910.269(v)(11)(xii)’s control of ignition sources. Collier testified that he made no effort to determine whether CG&E had eliminated or controlled ignition sources in compliance with § 1910.269(v)(11)(xii) (Tr. 81).

The Secretary points to *Bunge Corporation* in support of its argument that § 1910.22(a)(1) is the appropriate standard to cite for a combustible dust hazard. At the time the Fifth Circuit affirmed the Commission’s finding that the accumulation of grain dust violated § 1910.22(a)(1), a more specific

standard did not exist. The court explicitly states that promulgating a more specific regulation would encourage a higher standard of safety than would enforcing the general housekeeping regulation (638 F.2d at 836):

OSHA is currently undertaking a rulemaking concerning grain elevator dust explosions and accumulations. While a specific rulemaking may be preferable, OSHA is by no means obligated to countenance dangerous conditions pending the promulgation of a regulation that specifically addresses one of the hazards that the condition generates.

In the present case, a more specific standard was in place at the time of Collier's inspection. Collier testified that he did not recommend citing § 1910.269(v)(11)(xii) because he thought that standard applies only to coal-handling areas, which did not include the areas cited at Beckjord Station.<sup>1</sup> It is noted that the Secretary did not pursue this argument in her post-hearing brief. Collier stated that § 1910.269(v)(11)(xii) "referred to coal-handling areas . . . I did not consider it to be a coal-handling area . . . . [W]e felt that standard applied to coal-handling areas only and not to general housekeeping in areas outside of the coal-handling areas" (Tr. 65).

Section 1910.269(v)(11)(xii) actually refers to "coal-handling operations," not areas. The standard requires the elimination or controlling of ignition sources "[w]here coal-handling operations may produce a combustible atmosphere from . . . dust." "Coal-handling" is not defined in the standard, but the plain meaning of the phrase indicates an operation in which coal is being loaded, unloaded, conveyed, or moved in some manner that generates coal dust. Whether coal was handled in an area or not, it would be difficult to argue that the accumulated coal dust throughout the facility did not come from coal-handling operations. It would defy common sense to regulate ignition sources in areas where coal is actually handled, but to ignore areas where coal is not handled but where dust generated in the coal-handling areas created the potential for a combustible atmosphere.

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<sup>1</sup> Collier also stated that he did not recommend citing CG&E for the violation of § 1910.269(v)(11)(xii) because he believed that § 1910.307, which is referenced in § 1910.269, does not "apply to the power generation transmission industry" (Tr. 77). Collier identified § 1910.302(a)(2)(iv) as the provision that "exempts that facility [Beckjord Station] from the 300 standards" (Tr. 119-120). That section provides: "The provisions of §§ 1910.302 through 1910.308 of this subpart do not cover. . . [i]nstallations of communication equipment under the exclusive control of communication utilities, located outdoors or in building spaces used exclusively for such installations." Nothing in the record supports Collier's assertion that this exemption applies to the facility at issue. The Secretary does not raise this issue in her post-hearing brief. Collier's argument is rejected.

The Secretary adduced a copy of a Technical Information Bulletin (TIB), issued in 2000, entitled “Potential for Natural Gas and Coal Dust Explosions in Electrical Power Generating Facilities” (Exh. C-27). OSHA issued the TIB following a 1999 fatal power plant explosion in Michigan. The TIB notes that “Poor housekeeping allowed coal dust to accumulate throughout the facility (e.g., on floors, ledges, structures, beams and equipment.)” and recommends the following (Exh. C-27; p. 3): “Coal dust accumulations must be recognized as a serious hazard and housekeeping must be performed with diligence to control and/or limit coal dust accumulations.”

OSHA published the TIB on November 6, 2000, and posted it on the Internet later that month (Tr. 836-837).

The Secretary argues that the TIB gave notice to the electrical utility industry that it was subject to being cited under § 1910.22(a)(1) for accumulations of coal dust that could create a combustible atmosphere. As CG&E points out, however, nowhere in the TIB is § 1910.22(a)(1) mentioned. The TIB asserts that the regulatory requirements applicable to the hazard were Michigan’s state plan equivalent of OSHA’s § 1910.269 (Tr. 847-849). A TIB posted on the Internet is insufficient to override the well-established doctrine of preemption codified in § 1910.5(c)(1).

The Secretary cited CG&E because the accumulated coal dust could produce a combustible atmosphere that could ignite and cause an explosion. This is precisely the hazard addressed by § 1910.269(v)(11)(vii), which is more specific than the general housekeeping standard cited by the Secretary. Section 1910.269(v)(11)(xii) preempts § 1910.22(a)(1). Item 1 is vacated.

### **Findings of Fact and Conclusions of Law**

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

### **ORDER**

Based upon the foregoing decision, it is hereby ORDERED that:

Item 1 of the citation, alleging a violation of § 1910.22(a)(1) is vacated, and no penalty is assessed.

In accordance with the partial settlement agreement entered into by the parties, items 2 through 7 of the citation are disposed of as follows:

1. Item 2, alleging a violation of § 1910.269(d)(2)(ii), is vacated, and no penalty is assessed;

2. Items 3 and 4, alleging violations of §§ 1910.269(d)(2)(iii) and (iv) respectively, are combined into one violation of § 1910.269(d), which is affirmed, and a penalty of \$2,125.00 is assessed;
3. Item 5, alleging a violation of § 1910.269(d)(3)(ii), is affirmed, and a penalty of \$2,125.00 is assessed;
4. Item 6, alleging a violation of § 1910.269(d)(8)(ii), is vacated, and no penalty is assessed;  
and
5. Item 7, alleging a violation of § 1910.269(v)(1), is vacated, and no penalty is assessed.

/s/  
NANCY J. SPIES  
Judge

Date: August 19, 2002