

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1924 Building – Room 2R90, 100 Alabama Street, S.W.
Atlanta, Georgia 30303-3104

Secretary of Labor,

Complainant

v.

Turner Industries Group, LLC,

Respondent.

OSHRC Docket No. **10-2001**

Appearances:

Josh Bernstein, Esquire, Office of the Solicitor, U.S. Department of Labor, Dallas, Texas
For Complainant

Patrick Veters, Esquire & Jane Heidingsfelder, Esquire, Jones Walker, L.L.P., New Orleans, Louisiana
For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

Turner Industries Group, LLC, is a resident service contractor at a chemical plant owned by Georgia Gulf Chemicals and Vinyls, LLC, in Plaquemine, Louisiana. In February 2010, Turner worked with Georgia Gulf to replace equipment at the plant, in a procedure known as a "turnaround." After the equipment was replaced, the Occupational Safety and Health Administration (OSHA) received a complaint about potential chemical exposure during the turnaround. On May 12, 2010, OSHA compliance officer Dawn Galpion arrived at the Georgia Gulf plant and conducted an inspection of the worksite. As a result of her inspection, the Secretary issued two citations to Turner on August 31, 2010.

Item 1a of Citation No.1 alleges a serious violation of 29 C. F. R § 1910.119(h)(3)(ii), for failing to train its employees in the known potential fire, explosion or toxic release hazards related to his job and the process. Item 1b of Citation No.1 alleges a serious violation of 29 C. F. R. § 1910.119(h)(3)(iii), for failing to prepare a record which contained the identity of the

contract employee, the date of the training, and the means used to verify that the employee understood the training. The Secretary proposed a grouped penalty of \$ 5,000.00 for Items la and lb.

Item 2a of the Citation No.1 alleges a serious violation of 29 C. F. R § 1910.132(d)(2), for failing to verify that the required workplace hazard assessment had been performed through a written certification that identifies the workplace evaluated, the person certifying that the evaluation had been performed, and the date of the assessment. Item 2b of Citation No.1 alleges a serious violation of 29 C. F. R. § 1910.134(d)(1)(iii), for failing to identify and evaluate the respiratory hazards in the workplace. The Secretary proposed a grouped penalty of \$ 7,000.00 for Items 2a and 2b.

The Secretary withdrew Item 3 of Citation No.1 at the start of the hearing (Tr. 7). Item 4 of Citation No.1 alleges a serious violation of 29 C. F. R. § 1910.134(h)(4), for failing to ensure that respirators found to be defective were removed from service. The Secretary proposed a penalty of \$ 5,000.00 for Item 4.

Item 5 of Citation No.1 alleges a serious violation of 29 C. F. R. § 1910.1200(g)(8), for failing to ensure that material safety data sheets were readily accessible to the employees in their work area during each work shift. The Secretary proposed a penalty of \$ 5,000.00 for Item 5.

Prior to the hearing, the Secretary withdrew Item 1 of Citation No. 2 (Tr. 7). Item 2 of Citation No. 2 alleges an other than serious violation of 29 C. F. R. § 1910.134(h)(2)(1), for failing to store respirators to protect them from damage, contamination, dust, sunlight, extreme temperature, excessive moisture, and damaging chemicals. The Secretary proposed a penalty of \$ 0.00 for Item 2. Turner timely contested the citations. A hearing was held in this matter on August 10 and 11, 2011, in Baton Rouge, Louisiana. Turner stipulates the Commission has jurisdiction over the proceeding under § 10(c) of the Occupational Safety and Health Act of 1970 (Act), and that it is a covered business under § 3(5) of the Act (Tr. 9). The parties have filed post-hearing briefs.

Turner disputes the alleged violations and proposed penalties. The company argues the OSHA compliance officer relied upon factual misrepresentations made by several Turner employees when she recommended that citations be issued. Turner claims these were disgruntled employees who had met with private attorneys to explore a claim for damages

against Turner. Turner also contends there was no employee exposure to a chemical release that warranted significant medical treatment.

For the reasons discussed below, the court affirms Items 1a and 1b of Citation No.1, and assesses a grouped penalty of \$ 3,000.00 for the items. The court affirms Items 2a and 2b of Citation No.1, and assesses a grouped penalty of \$ 3,000.00 for the items. Item 5 of Citation No. 1 is affirmed, and a penalty of \$ 2,000.00 is assessed. Item 4 of Citation No. 1 and Item 2 of Citation No. 2 are vacated.

Background

Turner is a resident contract employer providing services for Georgia Gulf Chemical Vinyls plant in Plaquemine, Louisiana. Georgia Gulf has contracted Turner's services since October 2006 (Tr. 419). Turner employs approximately 350 employees at the plant (Tr. 334).

In February and March of 2010, Turner worked with Georgia Gulf to perform a "turnaround," during which they replaced a reactor vessel (designated as the R-201 Ethyl Dichloride (EDC) reactor vessel) in the Vinyl Chloride Monomer (VCM) Unit (Tr. 324-326). Georgia Gulf and Turner referred to the replacement of the R-201 reactor vessel as the "Red Zone" turnaround. Before the turnaround began, Georgia Gulf and Turner held a meeting on February 16, 2010, which was, according to Turner's turnaround supervisor, "a specialized safety review for a major job that was going to take place in a specialized area of the plant that is encompassed by this red zone" (Tr. 340). Approximately 100 employees attended the meeting.

The Red Zone turnaround began on February 23, 2010, and ended on March 18, 2010. The companies worked around the clock on the project, with the day shift operating from 7:00 a.m. to 7:00 p.m., and the night shift operating from 7:00 p.m. to 7:00 a.m. Approximately 40 Turner employees worked the night shift (Tr. 106).

The Red Zone area around the R-201 reactor vessel was marked by a red chain at ground level. The Red Zone extended vertically from the red chain, to encompass upper levels that employees worked on from scaffolding (Exhs. C-1a and C-1b). Work in the Red Zone triggered the requirement for employees to wear Level 2 personal protective equipment (PPE), which meant wearing "chemical suit, face shield and goggles and rubber boots and rubber gloves, taped legs and taped wrists any time you do any job across that chain, either up or down" (Tr. 56).

Level 2 PPE did not include the use of a respirator.

In order to replace the R-201 reactor vessel, Turner employees performed “line-breaking,” during which they would unbolt or break away pipe lines connected to the vessel (Tr. 38-39). Line-breaking was designated as Level 3 work. Level 3 PPE included all the PPE worn for Level 2, with the additional requirement of a respirator providing self-contained positive pressure fresh air (referred to as “fresh air”). Work in Level 3 PPE required management approval and supervision (Exhs. C-8 and C-9; Tr. 57, 76). Only employees wearing Level 3 PPE were permitted to engage in line-breaking. It was company policy to forbid Level 2 employees and Level 3 employees to work in the same area when Level 3 work was being performed (Tr. 292).

In 1996 (before Turner began working at the Georgia Gulf plant), Georgia Gulf experienced the unexpected release of the chemical Tris during a turnaround. Tris (which was equated with mustard gas at the hearing) combined with EDC, Ethyl Chloride, and Trichloroethane to create a mixture found in the R-201 Reactor bottom. The material safety data sheet (MSDS) for this mixture identifies “inhalation, skin and eye contact” as the primary routes of entry for potential adverse health effects (Exh. C-4). OSHA inspected the Georgia Gulf plant and issued citations for violations resulting from the release of Tris. Georgia Gulf abated the violations and agreed to eliminate future hazards by replacing the R-201 reactor vessel with one that produced lower quantities of Tris. Georgia Gulf also agreed to implement new safety precautions and increase its use of PPE when employees were potentially exposed to Tris.

After the 2010 turnaround was completed, an employee filed a complaint with OSHA claiming employees were exposed to hazardous chemicals while working in the Red Zone. On May 12, 2010, compliance officer Dawn Galpion began an inspection of the Red Zone site, focusing on Turner (Georgia Gulf was not a subject of inspection). Galpion held an opening conference, toured the site, took photographs, and interviewed employees. She requested documentation for some items (Tr. 219-220). Based upon her inspection, the Secretary issued the instant citations to Turner on August 31, 2010.

Citation No.1

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).

Turner stipulates that the standard cited in each item applies to the cited conditions (Tr. 216). Turner disputes the Secretary's charge that it failed to comply with the terms of any of the standards, and therefore disputes that its employees had access to any violative conditions or that it knew of violative conditions.

Item 1a: Alleged Serious Violation of § 1910.119(h)(3)(ii)

Item 1a of Citation No. 1 alleges:

The compliance officer became aware on or about July 9, 2010, that the employer (at the Georgia Gulf Chemicals and Vinyls, LLC, facility in Plaquemine, LA) did not ensure that all of the employees who were assigned to remove reactor vessels R-201 and V-207 were trained in the known potential toxic release hazards related to his/her job and the process. The reactor vessels R-201 and V-207 were part of the Vinyl Chloride Monomer Unit. This exposed employees to the hazard of being exposed to highly hazardous chemicals and chemical burns.

Section 1910.119(h)(3)(ii) provides:

The contract employer shall assure that each contract employee is instructed in the known potential fire, explosion, or toxic release hazards related to his/her job and the process, and the applicable provisions of the emergency action plan to the employee's job tasks.

Noncompliance with the Terms of the Standard

Compliance officer Galpion explained the reason she recommended the Secretary cite Turner for a violation § 1910.119(h)(3)(ii):

Turner did not instruct employees of all the possible hazards that they encountered during the actual removal of the vessel from service and replacing it. They addressed mainly just the Tris, mustard gas, that we've been talking about, in one big meeting. ... OSHA believed that Turner did not actually educate the employees on all of the hazards that they were likely to encounter during this turnaround.

(Tr. 221-222).

Turner counters that its February 16, 2010, meeting was held specifically to instruct its employees in the hazards related to the turnaround. The meeting lasted 60 to 75 minutes (Tr. 341). Turner's turnaround supervisor testified:

We had an informational meeting, kickoff meeting, we called it, prior to the shutdown of the reactor. We had it all planned out, everything laid out. Invited everyone that was going to be involved in it all the way from clientele, outside personnel, all of our personnel on-site that were on the list to work the project.

We gathered up at the central maintenance lunchroom. It was the biggest facility we had at the time. We all came in and, you know, basically told them what we were going to do. When we were planning on taking it out of service. Pretty much laid out the job scope and details of, you know, how we were going to do it. Gave an opportunity for anyone and everyone to ask questions that may be of some concerns and expressed the way were going to handle business.

(Tr. 424-425).

Although the supervisor focused more on the logistics of the turnaround, Georgia Gulf's manufacturing manager over the VCM Unit, testified safety training was an aspect of the meeting:

We treat that [Red Zone] area more conservatively than any other area in the entire complex. So we wanted to have the workers who were going to be performing that job understand why we take those specific and very detailed precautions. Then we covered what those precautions are, the specialized permitting that we have. That area itself is completely barricaded with clearly marked signs. No one enters that area of the plant without specialized permitting. There are specifically higher levels of personal protective equipment, PPE, required to do any work in that area of the plant. We talked about how we deconned just about anything and anyone that goes in and out of that area that does the work. There are stringent decontamination procedures associated with it.

We also talked about the symptoms that-and let me go back one step. The whole purpose of the extreme precautions that we take are due to this contaminant that is in our EDC process. That contaminant is referred to as Tris. It's a very unusual chemical that was actually discovered when an incident occurred in our plant. It was a discovery to our industry, and we shared what that component-that contaminant is and the hazards associated with it.

(Tr. 343).

The Secretary acknowledges Turner focused on Tris during the February 16 meeting, but contends it did not instruct its employees in all the possible hazards related to their work on the turnaround. She argues Turner violated § 1910.119(h)(3)(ii) because its training did not address the other chemical hazards present besides Tris, and because it did not address the hazards posed by having multiple process openings happening at one time, unlike normal operations.

As part of its safety training, Turner administered true/false quizzes to its employees. These quizzes were part of the periodic testing given at Turner's weekly safety meetings and were not specific to the turnaround. The quizzes each contained ten general true/false questions, and none of them addressed the particular hazards presented by the turnaround (Exh. C-7; Tr. 45-47,418).

At the February 16 meeting, Turner warned its employees to watch out for a black syrupy liquid, because it most likely would be Tris, which was dangerous (Tr. 51, 93). Turner provided no information regarding other chemicals that posed respiratory hazards they might be exposed to in the Red Zone (Tr. 52-53, 113, 126).

During the turnaround, Turner's employees worked with Ethylene Dioxide (EDC), a chemical that poses a respiratory hazard (Tr. 329). Georgia Gulf's MSDS for the R-201 reactor describes the hazards created by exposure to EDC:

Carcinogen Status

Ethylene Dichloride (EDC)-NIOSH recommends that EDC (1,2-dichloroethane) be handled in the workplace as if it were a carcinogen in man. Chlorinated organics in general are carcinogenic suspects. Oral, inhalation and dermal studies with rats and mice have indicated EDC is carcinogenic, neoplastic and an equivocal tumorigenic agent by RTECS criteria. (Exh. C-4, p.2).

Turner did not provide any information on February 16 regarding the hazards associated with EDC (Tr. 53, 136). The turnaround supervisor stated that "the whole purpose of the precautions we take are due to this contaminant...referred to as Tris" (Tr. 343). The record establishes Turner did not provide adequate instructions to its employees regarding potential hazards other than Tris.

Furthermore, not all of Turner's employees who worked in the Red Zone attended the February 16 meeting. One employee who worked for Turner until August 2010, when he was let

go during a reduction in force, testified Turner posted lists in each unit naming the employees who were assigned to the Red Zone (Tr. 172). The unit the former employee was working in did not post a list. The former employee stated:

I knew that another unit had posted a list, and I wanted to go look at it and see. It was just before lunchtime. I went to the PVC unit and saw the list, saw my name on it, working nights in the Red Zone turnaround. The meeting had already happened, and I had missed it and no one told me.

(Tr. 173-174).

The former employee told a Turner foreman that he had missed the meeting. The foreman apologized and told the employee he had not noticed his name on the turnaround list. The foreman told the employee to report for work in the Red Zone (Tr. 174).

The former employee reported to another Turner foreman. He told the other foreman he had missed the February 16 meeting. The foreman's response was, "Pretty much, 'Oh, well,' and 'Get to work'" (Tr. 75). Turner did not provide any Red Zone training to the former employee (Tr. 75).

Section 1910.119(h)(3)(ii) requires that the employer assure "that *each* contract employee is instructed" in the known hazards (emphasis added). The court counts 97 names on the "Red Zone Meeting" sign-in sheets (Exh. C-6), none of which is the former employee's. Turner does not dispute that the former employee missed the February 16 meeting, and was provided with no make-up safety instruction specific to the turnaround.

The Secretary has established Turner failed to comply with the requirements of Section 1910.119(h)(3)(ii).

Exposure

The record establishes that employees were exposed to chemical hazards on several occasions during the turnaround. Turner employee #1 worked in the Red Zone turnaround. At the time of the hearing, he was still working for Turner (Tr. 35). Employee #1 testified that every time he broke a line during the turnaround, "black syrupy stuff" would fall out (Tr. 39). Employee #1 stated, "I was under the impression the whole time that the chemicals were dead, so I didn't-anything that did come out, I thought it was neutralized" (Tr. 68).

Employee #2 also worked in the Red Zone turnaround, and he was also a current

employee at the time of the hearing (Tr. 123). He described an incident when he was on a scaffold, breaking a line, when "a lot of black tarry stuff" started coming out (Tr. 129). Employee #2 stated Turner had not explained the risks of the chemicals to which the Red Zone employees were exposed before the turnaround (Tr. 136).

The former employee testified that, while working in the Red Zone, he and some other employees "caught a whiff of something that made our eyes water, noses run, throat scratching, started coughing" (Tr. 179). On another occasion, a line break exposed them to a chemical substance. The former employee testified, "The guy working with me, he took off, kind of went around the corner and threw up. I caught a whiff of it, and it put me on my knees. And, I mean, it knocked me to my knees" (Tr. 181).

The Secretary has established Turner employees working in the Red Zone had access to the hazardous chemicals, but did not have adequate instructions on how to proceed when working around these chemicals.

Employer Knowledge

As the facilitator of the February 16 meeting, Turner was aware that it did not instruct its employees in all of the potential hazards to which they would be exposed in the Red Zone. Turner supervisors were present and observing work in the Red Zone the duration of the turnaround. Employee #1 testified:

Any time we would do any type of line-breaking, our supervisors would be standing in eyesight of us just to make sure that we didn't need anything, any extra tools or anything of that sort. They would be standing outside the Red Zone, outside the red chain, keeping in constant contact, eye contact with us, because it's hard to communicate with a mask.

(Tr. 40).

Supervisors were present when the line breaks released chemical substances that adversely affected the employees. The former employee told two Turner foremen that he had missed the February 16 meeting, yet neither of them attempted to provide safety instructions to the former employee.

The Secretary has established Turner had actual knowledge it was in noncompliance with 1910.119(h)(3)(ii). The Secretary charges the violation as serious. An employee exposed to a hazardous chemical for which he had not received adequate training would not know the

appropriate precautions to take. The employee could sustain serious injuries due to his lack of training. The violation is serious.

Item 1b: Alleged Serious Violation of § 1910.119(h)(3)(iii)

Item 1b of Citation No. 1 alleges:

The compliance officer became aware on or about May 12, 2010, that employer (at the Georgia Gulf Chemicals and Vinyls, LLC, facility in Plaquemine, LA) did not verify that employees understood the safety training related toxic release hazards while removing reactor vessels containing various highly hazardous chemicals. The reactor vessels R-201 and V-207 were part of the Vinyl Chloride Monomer Unit. This exposed employees to the hazard of being exposed to highly hazardous chemicals and chemical burns.

Section 1910.119(h)(3)(iii) provides:

The contract employer shall document that each contract employee has received and understood the training required by this paragraph. The contract employer shall prepare a record which contains the identity of the contract employee, the date of training, and the means used to verify that the employee understood the training.

Turner argues Item 1b is duplicative of Item 1a, and should therefore be vacated. The court disagrees that the items are duplicative. Violations may be found duplicative where the standards cited require the same abatement measures, or where abatement of one citation item will necessarily result in abatement of the other item as well. *Flint Eng. & Const. Co.*, 15 BNA OSHC 2052, 2056-2057 (No. 90-2873, 1997). Section 1910.119(h)(3)(ii) requires the employer to instruct each employee in the known potential hazards of the job. Section 1910.119(h)(3)(iii) requires the employer to prepare a record that documents the training, and asks for specific information to be included in the record. An employer could be in compliance with subsection (ii), but fail to record the information required by subsection (iii). Items 1a and 1b are not duplicative.

Noncompliance with the Terms of the Standard

Section 1910.119(h)(3)(iii) requires the employer to prepare a document that contains "the identity of the contract employee, the date of training, and the means to verify that the employee understood the training." The only documentation Turner provided were copies of the sign-in sheets from the February 16 meeting and of the true/false quizzes (Exhs. C-6 and C-7). These documents do not constitute a prepared record as contemplated by the cited standard. The quizzes are general in nature and fail to address all of the hazards potentially present in the Red Zone. In addition, there is no documentation for the former employee, who did not attend the meeting but who worked in the Red Zone.

The Secretary has established Turner failed to comply with § 1910.119(h)(3)(iii).

Exposure

Turner's failure to verify its employees understood the training resulted in the company's lack of awareness that its employees did not grasp the extent of the hazards in the Red Zone. Employee #1 could not explain specific information regarding the harmful effects of EDC or any other chemicals (Tr. 112-113). Employee #2 did not understand the potential hazards presented by chemicals in the Red Zone. He stated he was unaware of the symptoms associated with exposure to Tris (Tr. 132-133, 16). Employees were exposed to chemical hazards they did not understand and were not equipped to protect against.

Employee access to the chemical hazards is established.

Employer Knowledge

Turner was aware that it did not prepare a record containing the required information. Through its foremen, Turner knew it had not provided the former employee with any Red Zone training. The Secretary has established Turner had actual knowledge of the violative condition.

The Secretary has established Turner committed a serious violation of § 1910.119(h)(3)(iii).

Item 2a: Alleged Serious Violation of § 1910.132(d)(2)

Item 2a of Citation No. 1 alleges:

The compliance officer became aware on or about May 12, 2010, that employer (at the Georgia Gulf Chemicals and Vinyls, LLC, facility in Plaquemine, LA) did

not ensure that a workplace hazard assessment was performed and verified with a written certification prior to removing the R-201 Ethylene dichloride reactor vessel and associated vessels and piping, which considered the unique hazards associated with the vessel opening and removal. This exposed employees to the hazard of exposure to highly hazardous chemicals and chemical burns and /or blisters.

Section 1910.132(d)(2) provides:

The employer shall verify that the required workplace hazard assessment has been performed through a written certification that identifies the workplace evaluated; the person certifying that the evaluation has been performed; the date(s) of the hazard assessment; and, which identifies the document as a certificate of hazard assessment.

Noncompliance with the Terms of the Standard

During her inspection, Galpion asked for a copy of Turner's written certification of the required workplace hazard assessment. Turner provided her with a document created by Georgia Gulf entitled "VCM Liquid Phase Direct Chlorination Area Safe Work Program," dated August 4, 2005 (Exh. C-9). This program is Georgia Gulf's normal operating procedure in its VCM Unit. Nothing in the program addresses working in the Red Zone. Turner's safety supervisor at the Georgia Gulf plant conceded that Turner did not complete a written hazard assessment for the Red Zone turnaround (Tr. 380, 411).

Turner argues it relied on the expertise of Georgia Gulf to make the appropriate workplace hazard assessment. It contends it consulted Georgia Gulf's Safe Work Program when performing the turnaround because Georgia Gulf "knew better than Turner the job task hazards which required appropriate PPE" (Turner's brief, p. 10).

Turner's argument that it relied on Georgia Gulf's work program is a *post hoc* attempt to excuse its failure to comply with § 1910.132(d)(2). The standard requires that the assessment be documented as a written certification, which identifies itself as a certificate of hazard assessment. Georgia Gulf's program outlines its general operational procedure, and was created five years before the Red Zone turnaround took place.

Turner's own employee handbook provides:

27.2

The workplace must be assessed for hazards present, or likely to be present, to determine what type of PPE is required to safely perform each job. This is accomplished by completing the written Hazard Assessment Form. The assessment must be dated, must include the area or job task being evaluated, and must be signed by a designated company representative (a superintendent, supervisor, or safety representative who has attended Hazard Assessment Training.) The Job Safety Analysis must be used in conjunction with the assessment in order to provide the most effective hazard control possible.

(Exh. C-2, p. 127).

When confronted with his company's employee handbook at the hearing, the safety supervisor was asked if Turner failed to comply with its own policy on hazard assessment. Fuentes replied, "I guess so" (Tr. 413).

The Secretary has established Turner violated the terms of 1910.132(d)(2).

Exposure

Turner's failure to perform a hazard assessment resulted in its employees' exposure to chemicals in the Red Zone without the appropriate PPE. Employees dressed in Level 2 PPE (without fresh air) worked in proximity to employees engaged in Level 3 work (Tr. 146, 155, 179). Employee access to chemical hazards is established.

Employer Knowledge

Turner's employee handbook explicitly sets out the requirements for a workplace hazard assessment. It even refers to a written Hazard Assessment Form that must be signed by a supervisor. Turner was in the best position to know that it had not made the required assessment. Actual knowledge is established.

Employees working in the Red Zone were not wearing appropriate PPE at all times. Exposure to the chemicals in the Red Zone could have potentially injurious effects. The violation is serious.

Item 2b: Alleged Serious Violation of § 1910.134(d)(1)(iii)

Item 2b of Citation No. 1 alleges:

The compliance officer became aware on or about May 12, 2010, that employer (at the Georgia Gulf Chemicals and Vinyls, LLC, facility in Plaquemine, LA) did not evaluate the respiratory hazards associated with working near areas where line

and vessel openings were being performed on an Ethylene Dichloride reactor (R-201) and knockout vessel (V-207). The vessels were located in the Vinyl Chloride Monomer Unit. This condition exposed employees to the inhalation of highly hazardous chemicals.

Section 1910.134(d)(1)(iii) provides:

The employer shall identify and evaluate the respiratory hazard(s) in the workplace; this evaluation shall include a reasonable estimate of employee exposures to respiratory hazard(s) and an identification of the contaminant's chemical state and physical form. Where the employer cannot identify or reasonably estimate the employee exposure, the employer shall consider the atmosphere to be IDLH.

Noncompliance with the Terms of the Standard

Galpion requested copies of the results of sampling conducted by Turner to evaluate respiratory hazards in the Red Zone. Turner did not provide any sampling results to OSHA (Tr. 226).

Turner argues it did not need to comply with the standard because Georgia Gulf had placed passive monitors throughout the Red Zone to detect levels of various chemicals. Georgia Gulf's safety supervisor described the monitoring Georgia Gulf had in place:

We do a daily-on a shift basis, the first thing that's done is there's what we call an area sniff, and it's a walkthrough of the plant with a meter to determine if there is anything unusual in the air throughout the plant.

In addition to that, we have what we call area monitors that will pick up any hydrocarbons of which essentially all of or chemicals in the VCM process are called hydrocarbons. They're flammable hydrocarbons. So these fixed-point monitors are located throughout the plant and will alarm if they detect any hydrocarbons.

(Tr. 361).

Georgia Gulf's routine monitoring focuses on the lower explosive limits of chemicals in the VCM, and not on respiratory hazards to which employees in the Red Zone were exposed during the turnaround. Galpion testified regarding the difference:

[Georgia Gulf was performing] air monitoring by passive monitors throughout the unit looking for levels of vinyl chloride monomer, mostly explosive levels. There were-before permitting for people to do work in the area,

they would check to see if it was up at the explosive level of that chemical, the lower explosive limit or some percentage of the limit. ... Just checking the area, walking through with the monitor for explosives doesn't assess how much someone is actually breathing. And also, even if they were just looking for a really low threshold of explosives, that's magnitudes higher than the permissible exposure levels for many of the chemicals that they were working with or exposed to.

(Tr. 227-228).

Turner cannot rely on Georgia Gulfs monitoring for lower explosive limits as a substitute for its obligation to evaluate the respiratory hazards to which its employees are exposed. The cited standard also requires that the employer's evaluation "include a reasonable estimate of employee exposures to respiratory hazard(s) and an identification of the contaminant's chemical state and physical form." None of this information is provided by Georgia Gulf's monitoring.

Noncompliance with the terms of the standard is established.

Exposure

Turner's employees working in the Red Zone were exposed to chemicals released when lines were broken while switching out the R-201 reactor vessel. None of the employees who testified wore personal monitors during the process (Tr. 61-62, 131-132, 186). Employee access to hazardous chemicals is established.

Employer Knowledge

Turner was aware it was not evaluating the respiratory hazards to which its employees were exposed during the turnaround. Actual knowledge is established.

Employees were not using fresh air respirators while working near Tris and other hazardous chemicals. The potential adverse health effects of chemical exposure are serious. Item 2b was properly classified as serious.

Item 4: Alleged Serious Violation of § 1910.134(h)(4)

Item 4 of Citation No. 1 alleges:

The compliance officer became aware on or about July 7, 2010, that the employer (at the Georgia Gulf Chemicals and Vinyls, LLC, facility in Plaquemine, LA) did not ensure that the regulators for air-line respirators that were being used during the removal of the R-201 and V-207 vessels in the Vinyl Chloride Monomer Unit

were removed from service when they proved to be sticking and preventing air flow. This exposed employees to the hazard of exposure to highly hazardous chemicals through inhalation and skin absorption.

Section 1910.134(h)(4) alleges in pertinent part:

The employer shall ensure that respirators that fail an inspection or are otherwise found to be defective are removed from service, and are discarded or repaired or adjusted [.]

Noncompliance with the terms of the Standard

For Level 3 jobs in the Red Zone, Turner's employees were required to wear respirators. Turner provided pressure-demand respirators, which do not provide a continuous flow of air. All of the testifying employees who worked in the Red Zone said the respirators were difficult to use, and they sometimes turned a respirator in for another one in hopes it would work better (Tr. 77-78, 153, 187).

Galpion asked Turner about their procedure for removing defective respirators from service. She testified, "I was told there was a process that's supposed to happen but that in the Red Zone it had not happened that way, that they weren't actually tagged out and brought to the tool room and repaired or taken out of service" (Tr. 229). Galpion testified safety supervisor Fuentes told her that Turner's policy was to "remove malfunctioning respirators, put them in a special bag, tag them so they would not be used, and then moved into a tool room" (Tr. 267).

Turner's safety supervisor described Turner's procedure for handling defective respirators:

[If employees] were having an issue with a respirator, they were to report it to their supervisor that they were having issues. They also, if they did encounter an issue, the decon person would take and wrap it in a bag, tag it, and bring it to the tool room.

(Tr. 385-386).

Galpion asked Turner for documentation showing repairs made to respirators taken out of service, but the company did not provide any (Tr. 230). She determined the company was in violation of § 1910.134(h)(4):

I talked to several employees that talked about how they would be

returned to the same area and they would continuously get regulators that were still malfunctioning. And so during the walkaround, I had pulled aside the tool attendant because I was told that's who they would go to if they were going to be taken out of service. And I learned that none had been returned to the tool room from the Red Zone during that turnaround for him to send off for any repairs.

(Tr. 268).

In order to establish a violation of the cited standard, the Secretary must prove that a respirator that failed an inspection or was "otherwise found to be defective" was not removed from service. After reviewing the testimony of the three witnesses who used respirators during the turnaround, the court concludes that the Secretary failed to establish any of the respirators was defective.

It is clear that the three employees who testified disliked the type of respirator (pressure-demand) that Turner provided, and would have preferred to use constant-flow respirators. It is not clear, however, that the pressure-demand respirators were, in fact, defective. Rather, the employees found the respirators were uncomfortable and required more effort to use than constant-flow respirators. Their testimony demonstrates the respirators were not ideal, but were not actually defective:

Employee #1: I think there was a time or two on that particular respirator, that I would give it back to the foreman and he would give me another one because I didn't like the way that that was working, the way that particular one was working.

Q. And when you gave it back to the foreman, what would you explain to the foreman about why you were giving it back?

Employee #1: Because it—maybe it wasn't supplying a sufficient amount of air that I would like if I was taking a breath and it would feed the oxygen to me, and I'd say, "Let me try another one and we'll see how this was working," because Level 3 jobs, you want to be as comfortable as you can be inside these masks."

(Tr, 78-79).

Employee #2: It's like there was no positive flow. It was like whatever you take in, that's what you get. And if you get overheated, it wasn't letting a lot of air come to you. So pretty much it was miserable, you know.

Q. And, did you complain about this at all to any of your supervisors?

Employee #2: I don't recall.

(Tr. 133-134).

Q. [The pressure-demand respirators] are the ones generally used during the time period of the turnaround?

Employee #2: They need to take them out completely.

Q. Yeah. And I think [Employee #1] testified, in a perfect world, I think you and Chad and most of the folks prefer what I call free-flow.

Employee #2: Exactly.

Q. Okay. Notwithstanding your preference, were you able to do the work that you were expected to do in the Red Zone with that respirator that you used?

Employee #2: You can, but you were uncomfortable because of what you had on.

(Tr. 153).

The former employee: "[A]t times it was a struggle to get air into my lungs. I just would pull it through into the mask, but sometimes it would clog up while we were working. They weren't reliable.

(Tr. 187).

The former employee stated when he complained to his foreman about a respirator, the foreman said, "See if you can find a better one" (Tr. 188). Employees raised the issue of the respirators at a safety meeting, where they were told, "Turner spent a lot of money on these. This is what we have. This is what we're going to use" (Tr. 188).

There is no evidence any of the respirators used was defective. Employees tried the respirators before entering the Red Zone, and were able to switch to a more comfortable one if they found their first choice difficult to use.

The Secretary has failed to show that Turner was in violation of the cited standard. Item 4 is vacated.

Item 5: Alleged Serious Violation of § 1910.1200(g)(8)

Item 5 of Citation No. 1 alleges:

The compliance officer became aware on or about July 7, 2010, that the employer (at the Georgia Gulf Chemicals and Vinyls, LLC, facility in Plaquemine, LA) did not ensure that material safety data sheets were made accessible to employees on all shifts without them having to ask a management official.

Section 1910.1200(g)(8) provides:

The employer shall maintain in the workplace copies of the required material safety data sheets for each hazardous chemical, and shall ensure that they are readily accessible during each work shift to employees when they are in their work area(s). (Electronic access, microfiche, and other alternatives to maintaining paper copies of the material safety data sheets are permitted as long as no barriers to immediate employee access in each workplace are created by such options.)

Noncompliance with the Terms of the Standard

It is undisputed that Georgia Gulf kept copies of the applicable MSDSs in its control room, in its safety office, and in the guard shack (Tr. 253). Turner argues this is sufficient to meet the requirement that the MSDSs be “readily accessible during each work shift to employees when they are in their work area.”

Galpion testified that at some locations, the MSDSs were only available electronically, on Georgia Gulf’s (not Turner’s) computer system:

[The MSDSs] were located in the control room on the computer system. I had asked during the walkaround for a Georgia Gulf employee to show me how to pull these MSDSs. It required logging into a Georgia Gulf computer with a Georgia Gulf ID, finding the program, opening it, searching for the MSDS, and so forth, and then printing it out. So Turner employees don’t have access to them without a password, so they would have to ask someone else.

They were also located—paper copies were located in the Health and Safety Office which required a card—key card to get in and out of, which Turner employees don’t have. And also the guard shack, behind the counter in the back there is a counter top where they sign for things[.]

(Tr. 231).

Employee #1 testified that the one time he requested an MSDS, a supervisor provided it for him that same day (Tr. 86). Employee #2, however, had a different experience. He testified that, shortly before the turnaround began, he asked for the MSDS for Tris because he was concerned about exposure to it (Tr. 160). Employee #2 stated, “[Turner] didn’t know if they had to go on the computer and find out what were the symptoms for it. I didn’t make no big deal once they sort of explained it. But they couldn’t find it, you know” (Tr. 137-138).

The MSDSs were not readily available and were not located in the area where employees worked. Employees wanting to consult an MSDS were required to leave their work area and go to either Georgia Gulf’s control room or its safety office (the employees were unaware MSDSs

were located in the guard shack, which was remote from the Red Zone area). Turner employees did not possess either key cards or computer passwords to enable them to find the MSDSs on their own. An employee could request an MSDS from a supervisor, but there could be a delay in obtaining the MSDS or, as in Employee #2's case, the supervisor might fail altogether to provide it.

Turner's procedure for locating MSDSs does not meet the standard's requirement that they be readily accessible to employees. An employee seeking an MSDS must negotiate several steps to consult the document. This procedure unnecessarily delays the employees' access to the information.

The Secretary has established Turner failed to comply with the terms of the standard.

Exposure

Turner employees working in the Red Zone were exposed to hazardous chemicals. As established under Item 1a, their training in the hazards presented by these chemicals was inadequate. Without access to the MSDSs for the chemicals, the employees were not equipped to take appropriate action. Access to employee exposure is established.

Employer Knowledge

As the employer, Turner was aware of the procedure it had in place for employees to consult MSDS. Actual exposure is established.

The Secretary has proven a serious violation of § 1910.1200(g)(8). Item 5 is affirmed.

Citation No. 2

Item 2: Alleged Other Violation of § 1910.134(h)(2)(i)

Item 2 of Citation No.2 alleges:

The compliance officer became aware on or about July 23, 2010, that the employer (at the Georgia Gulf Chemicals and Vinyls, LLC, facility in Plaquemine, LA) did not ensure that the MSA facemasks for air-line respirators that were being used in the Vinyl Chloride Monomer Unit were stored in a manner to protect them from contamination, dust, and other damage. This exposed employees to the hazard of exposure to highly hazardous chemicals through inhalation and skin absorption as a result of using un-maintained face masks.

Section 1910.134(h)(2)(i) provides:

All respirators shall be stored to protect them from damage, contamination, dust, sunlight, extreme temperatures, excessive moisture, and damaging chemicals and they shall be packed or stored to prevent deformation of the facepiece and exhalation valve.

Noncompliance with the Terms of the Standard

During her walkaround, Galpion observed respirators on the ground in the shed where Turner kept its PPE for the turnaround (Tr. 232). Exhibit C-1k shows a respirator on the floor (Tr. 333). Galpion testified the respirator was not properly stored, and was subject to contamination from dust and other contaminants (Tr. 232).

Galpion did not begin her inspection of the Red Zone area until May 2010. The turnaround had been completed for several weeks by that time. There is no evidence that the respirator Galpion observed in the tool shed was one that was used by Turner during the turnaround. Turner's safety supervisor testified that Turner was not storing PPE in the tool shed at the time of the inspection, but that another contractor on the site was using it (Tr. 384).

Item 2 is vacated.

Penalty Determination

The Commission is the final arbiter of penalties in all contested cases. "In assessing penalties, section 17(j) of the OSH Act, 29 U. S. C. § 666(j), requires the Commission to give due consideration to the gravity of the violation and the employer's size, history of violation, and good faith." *Burkes Mechanical Inc.*, 21 BNA OSHC 2136, 2142 (No. 04-0475, 2007).

Turner employed approximately 350 employees at Georgia Gulf, and approximately 15,000 company-wide. There is no evidence OSHA had cited the company in the three years prior to Galpion's inspection. Turner has a good written safety program and demonstrated good faith in this proceeding (Tr. 334-336). The remaining element to be considered is the gravity of the violations. "Gravity is a principal factor in a penalty determination and is based on the number of employees exposed, duration of exposure, likelihood of injury, and precautions taken against injury." *Siemens Energy and Automation, Inc.*, 20 BNA OSHC 2196, 2201 (No. 00-1052, 2005).

Items 1a and 1b of Citation No 1-- §§ 1910.119(h)(3(ii) and (iii): The gravity of these grouped items is high. Turner's employees were working with hazardous chemicals during the turnaround. Turner's general safety training was not adequate to instruct the employees in the hazards to which they were exposed in the Red Zone. The turnaround supervisor testified, "Tris is not the type of chemical Turner normally expects to see during routine maintenance operations" (Tr. 432).

Contrary to the opening statement by counsel for Turner, the three testifying employees had not been working at Georgia Gulf during the 1996 Tris release, and they were not familiar with its characteristics.¹ Employee #1 began working for Turner in 2007 (Tr. 35), Employee #2 started in 2008 (Tr. 123). The former employee worked for Turner in 1993 and again in 1998, but not at the Georgia Gulf plant. He started back with Turner in 2010, and stayed on past the turnaround, until August of 2010 (after Galpion concluded her inspection) (Tr. 172-173, 190-191).

Without proper training, Turner's employees were exposed to hazardous chemicals without adequate information. It is determined that a penalty of \$ 3,000.00 is appropriate.

Items 2a and 2b of Citation No. 1--§1910.132(a)(2) and § 1910.134(d)(1)(iii): The gravity of these grouped items is high. Meeting the requirements of the cited standards was entirely in the control of Turner. The company chose to ignore its duties to conduct a workplace hazard assessment and to evaluate respiratory hazards. This neglect put Turner's employees at risk from hazardous chemicals as they worked in the Red Zone. A penalty of \$ 3,000.00 is appropriate.

¹ Turner's counsel stated:

The people who are being called today were working back at Georgia Gulf in 1996. They're aware there was a release of Tris. They were aware there were lawsuits. They were aware there was recovery. They were aware there was an OSHA fine in excess of \$ 100,000.00. And we're claiming, Your Honor, that in lieu of a lot of these individuals being let go at the end of the turnaround, that yes, they were motivated by, you know, "Maybe there's a check for us at the end of the day." . . . We think the historical context is absolutely a factor, given that most of these folks worked back in 1996. (Tr. 20).

In addition to the false assertion that the three employees who testified were working at the Georgia Gulf plant in 1996, the opening statement also incorrectly characterizes the employment status of the employees who worked in the Red Zone. None of them was "let go at the end of the turnaround." Two employees were still employed by Turner at the time of the hearing. The former employee had continued working through August 2010, six months after the turnaround was completed.

Item 5 of Citation No. 1--§ 1910.1200(g)(8): The gravity of this violation is moderate. Although MSDSs were not readily accessible, they were present at the plant, and employees could access them, with some effort. It is determined that a penalty of \$ 2,000.00 is appropriate.

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 hereby ORDERED that:

1. Items 1a and 1b of Citation No. I, alleging serious violations of §§1910.119(h)(3)(ii) and (iii), are affirmed, and a grouped penalty of \$ 3,000.00 is assessed;
2. Items 2a and 2b of Citation No. 1, alleging serious violations of §§ 1910.132(d)(2) and 134(d)(1)(iii), are affirmed, and a grouped penalty of \$ 3,000.00 is assessed;
3. Item 3 of Citation No. 1, alleging a serious violation of § 1910.134(g)(2)(ii)(B), was withdrawn by the Secretary. The item is vacated and no penalty is assessed;
4. Item 4 of Citation No.1, alleging a serious violation of § 1910.134(h)(4), is vacated, and no penalty is assessed;
5. Item 5 of Citation No.1, alleging a serious violation of § 1910.1200(g)(8), is affirmed, and a penalty of \$ 2,000.00 is assessed;
6. Item 1 of Citation No.2, alleging an other than serious violation of § 1910.1904.4(a), was withdrawn by the Secretary. The item is vacated and no penalty is assessed; and
7. Item 2 of Citation No.2, alleging an other than serious violation of § 1910.134(h)(2), is vacated, and no penalty is assessed.

/s/ Ken S. Welsch
KEN S. WELSCH
Administrative Law Judge

Date: February 6, 2011