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SECRETARY OF LABOR,  
Complainant,  
v.  
OXFORD MINING, INC.,  
Respondent.

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OSHRC Docket No. 98-0057

***DECISION***

Before: ROGERS, Chairman; EISENBREY, Commissioner.

BY THE COMMISSION:

Oxford Mining, Inc. (“Oxford”) was under contract with JTM Industries, Inc. (“JTM”) to perform reclamation work at the East 40 Mine (“E-40 mine”) at Reynolds Metals Company’s Hurricane Creek Mine Project in Bauxite, Arkansas. Following an inspection by the Occupational Safety and Health Administration (“OSHA”) on July 18, 1997, the Secretary of Labor (“the Secretary”) issued to Oxford one citation with two items, alleging serious violations of personal protective equipment and training standards based on work in and around the E-40 mine. In addition, the Secretary issued to JTM one citation with two items, alleging violations of the same standards, based on the same working conditions. Administrative Law Judge Nancy J. Spies affirmed all items of the citations issued to Oxford and JTM and, with regard to Oxford, assessed a penalty of \$1300.

In *JTM Industries, Inc.*, OSHRC Docket No. 98-0030, which we also issue today, we vacated the citation issued to that company, finding that, pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.*, the Mine Safety and Health Administration has regulatory authority over the area in and around the E-40 mine under the circumstances of that case, and that OSHA’s authority is thereby preempted under section 4(b)(1) of the Occupational Safety and Health Act of 1970 (“OSH Act”), 29 U.S.C. § 653(b)(1).<sup>1</sup> Because

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<sup>1</sup>Section 4(b)(1) provides:

Nothing in this Act shall apply to working conditions of employees with

the citation issued to Oxford alleges violations pertaining to the same working conditions in and around the E-40 mine, in the present case we also find that OSHA's authority over the cited conditions is preempted under section 4(b)(1) of the OSH Act, for the reasons stated in *JTM Industries, Inc.* Accordingly, we vacate the OSHA citation issued to Oxford.

/s/  
Thomasina V. Rogers  
Chairman

/s/  
Ross Eisenbrey  
Commissioner

Date: December 14, 2001

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respect to which other Federal agencies . . . exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health.

Secretary of Labor,  
Complainant,

v.

OSHRC Docket No. **98-0057**

Oxford Mining, Inc.,  
Respondent.

Appearances:

Madeleine T. Le, Esquire  
David C. Rivela, Esquire  
U. S. Department of Labor  
Office of the Solicitor  
Dallas, Texas  
For Complainant

Carl B. Carruth, Esquire  
McNair Law Firm, P.A.  
Columbia, South Carolina  
For Respondent

Before: Administrative Law Judge Nancy J. Spies

**DECISION AND ORDER**

Oxford Mining, Inc. (Oxford), contests a citation issued to it by the Secretary on November 14, 1997. The Secretary issued the citation as a result of an inspection conducted by the Occupational Safety and Health Administration (OSHA) at the Hurricane Creek Mine Project in Bauxite, Arkansas, in July 1997.

Item 1 of the citation alleges a serious violation of § 1910.132(a), for failure to provide appropriate personal protective equipment to its employees. Item 2 of the citation alleges a serious

violation of § 1910.1200(h)(3)(iii), for failure to train employees in measures they can take to protect themselves from exposure to hazardous chemicals.

Also on November 14, 1997, the Secretary issued a citation alleging violations of the same standards to JTM Industries, Inc., with whom Oxford had subcontracted on the Hurricane Creek Mine Project. Both Oxford and JTM contested the citations, and the cases were consolidated by order of the undersigned on May 27, 1998, for purposes of hearing.<sup>2</sup>

Oxford disputes OSHA's jurisdiction over the worksite, asserting an affirmative defense under § 4(b)(1) of the Occupational Safety and Health Act of 1970 (Act). For the reasons set out below, Oxford's affirmative defense is rejected, and items 1 and 2 of the citation are affirmed.

#### Background

At one time Reynolds Metals Company operated numerous open pit bauxite mines at its Hurricane Creek Mine Project in Bauxite, Arkansas (Tr. 603). The bauxite ore excavated from the mines was used in the production of aluminum. The specific worksite at issue in this case is designated as the E-40 site. The E-40 site is a 330-acre site that includes an abandoned bauxite mine pit and the areas adjacent to the pit (Tr. 335).

To remove the bauxite ore, Reynolds stripped away the overburden of soil and rocks that covered the natural deposit of bauxite. Reynolds removed the overburden (called "spoil") from the mine pit and piled it up in spoil piles at an area north of the E-40 mine known as Four Lakes. Reynolds then blasted over the bauxite ore that had been uncovered and removed it from the mine pit by a dragline, loaded it onto trucks, and hauled it to Reynolds's processing plant in Euclid, Arkansas. Reynolds extracted the last bauxite from the E-40 pit in February 1983 (Exh. C-5, Tr. 600).

On June 6, 1994, Reynolds contracted with JTM to perform reclamation services at the E-40 mine pit. On August 12, 1994, JTM subcontracted with Oxford to fill the E-40 pit and to construct haul roads to the E-40 site. In August 1994, Oxford began performing reclamation services (Exh. R-8).

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<sup>2</sup> To avoid confusion, the cases were severed for purposes of decision.

In addition to the Hurricane Creek Mine Project, Reynolds also operated a waste treatment facility near Arkadelphia, Arkansas, known as the Gum Springs Facility. At the Gum Springs Facility, Reynolds treated spent pot liners used in the primary aluminum reduction process. Reynolds gave the spent pot liner the trade name “Alroc.”<sup>3</sup> Reynolds wanted to find a commercial use for Alroc, which was being disposed of in a landfill at the Gum Springs Facility. Reynolds had a number of haul roads on which haul trucks traveled between the Four Lakes spoil piles and the E-40 site. In June and July 1995, Reynolds first used Alroc to surface a test road (Exh. C-5; Tr. 348).

In April 1996 Reynolds began placing Alroc from Gum Springs in the E-40 mine pit in thin layers between thicker layers of mine spoil to reduce the acidity of the mine spoil leachate from the pit. The Alroc was alkaline and would help to neutralize the acidity of the leachate from the mine spoil. The Alroc was also used on the haul roads to keep the haul trucks from getting stuck and to use a fill material for the pit to help neutralize the mine spoil (Exh. C-5; Tr. 347).

From 1994 to 1997, approximately 151,770 cubic yards of Alroc were shipped from the Gum Springs Facility to the E-40 site. While working at the Hurricane Creek Mine Project, employees of both Oxford and JTM regularly handled Alroc. The number of onsite employees at the site varied from 50 to 100. Reynolds employed three of these employees. JTM employed five (Tr. 617). The rest of the employees worked for Oxford (Exh. C-5).

In January 1997, leachate water concentrations from the Gum Springs landfill indicated elevated levels of arsenic, fluoride, cyanide, and pH. The Environmental Protection Agency (EPA) conducted interstitial ground water sampling from bore holes at Gum Springs and Hurricane Creek. After the sampling, Reynolds and the Arkansas Department of Pollution Control and Ecology reached a consent agreement on June 30, 1997, to restrict the use and disposal of Alroc. The agreement became effective on August 23, 1997 (Exh. C-5).

Oxford began removing Alroc from the haul roads in June 1997. OSHA began its inspection of the E-40 site on July 18, 1997.

Preemption Under § 4(b)(1) of the Act

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<sup>3</sup> It is also known as “kiln residue” and was referred to by some witnesses at the hearing as “ash.”

Oxford argues that the E-40 site is exempt from the requirements of the Occupational Safety and Health Act because, under § 4(b)(1) of the Act, the Mine Safety and Health Administration (MSHA) preempts OSHA's jurisdiction. This is an affirmative defense and Oxford has the burden of proving that such preemption occurred.

Section 4(b)(1) of the Act provides:

Nothing in this Act shall apply to working conditions of employees with respect to which other Federal Agencies, and State agencies acting under section 274 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2021), exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety and health.

In order to establish an affirmative defense under § 4(b)(1), the employer must show that an agency other than OSHA has the statutory authority to regulate the health and safety of workers and that the other agency exercises its statutory authority in such a manner as to exempt the cited working conditions. *Northwest Airlines, Inc.*, 8 BNA OSHC 1982 (No. 13647, 1980).

The OSH Act authorizes the Secretary of Labor to set mandatory occupational safety and health standards for businesses affecting interstate commerce. *See* 29 U.S.C. § 653(b)(1). The Act, however, exempts from the statute's reach employees who are regulated by other federal agencies. 29 U.S.C. § 653(b)(1). A two-step analysis is used to determine whether OSHA jurisdiction has been preempted: (1) whether a regulation has been promulgated by a state or federal agency other than OSHA; and (2) whether the regulation promulgated covers the specific "working conditions" at issue.

*Bush & Burchett, Inc.*, 117 F. 3d 932, 936 (6th Cir. 1997) (footnote and citation omitted).

The Mine Safety and Health Act (MSH Act) itself provides little clear-cut guidance on the jurisdictional issue in this case. The MSH Act does not specifically address reclamation work or work with hazardous waste. It is ambiguous as to the duration of MSHA's jurisdiction over abandoned mine sites.

The Secretary attempted to bolster its position that OSHA has jurisdiction over the E-40 site by proffering the deposition testimony of Doyle Fink, district manager for MSHA.<sup>4</sup> Fink stated that,

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<sup>4</sup> The deposition of Doyle Fink was taken by the Secretary on December 29, 1998, to supplement the record in this case. Fink's deposition testimony will be cited as "Fink (continued...)"

in his opinion, MSHA did not have jurisdiction over the E-40 site. His testimony failed to establish a legal basis for determining jurisdiction.

Fink is employed as district manager in MSHA's Dallas, Texas, office and he supervises MSHA inspectors in six states, including Arkansas (Fink deposition, p. 5). Fink referred to the Memorandum of Understanding between MSHA and OSHA<sup>5</sup>. The Memorandum addresses each agency's jurisdiction with regard to milling and preparation processes, which are not at issue here. Fink admitted that the Memorandum of Understanding does not mention reclamation work. He stated that the Memorandum uses the MSH Act's definition of "coal or other mine," so that it provides no clarification beyond the MSH Act's definition (Fink deposition, pp. 13-14). Fink admitted that his opinion that MSHA did not have jurisdiction over the E-40 pit was an accommodation to MSHA's personnel shortages (Fink deposition, p. 25). The Secretary failed to adduce any evidence that Fink had the authority to determine which agency had jurisdiction over the E-40 site.

Determination of who had proper jurisdiction over the E-40 site must be decided based on the MSH Act's definition of a mine. If the E-40 site is a mine, then MSHA promulgated regulations that covered the site and MSHA has jurisdiction. If the E-40 site does not qualify as a mine, then MSHA did not promulgate regulations that covered the site and OSHA has jurisdiction. As the discussion below will show, MSHA's definition of what constitutes a "mine" has been the subject of considerable litigation.

Section 3(h)(1) of the MSH Act defines "coal or other mine" as:

(A) an area of land from which minerals are extracted in nonliquid form or, if in liquid form, are extracted with workers underground, (B) private ways and roads appurtenant to such area, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams, and tailings ponds,

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<sup>4</sup>(...continued)

deposition, p. --." A copy of Fink's deposition is entered into the record as Exhibit J-59 in the case file.

<sup>5</sup> "The interagency agreement was originally reported in 39 Fed. Reg. 27,382 (1974). . ." *Donovan v. Carolina Stalite Co.*, 734 F. 2d 1547, 1550, footnote 4 (D.C. Cir. 1984).

on the surface or underground, used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits in nonliquid form, or if in liquid form, with workers underground, or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals, and includes custom coal preparation facilities. In making a determination of what constitutes mineral milling for purposes of this chapter, the Secretary shall give due consideration to the convenience of administration resulting from the delegation of one Assistant Secretary of all authority with respect to the health and safety of miners employed at one physical establishment.

Courts addressing the issue of MSHA jurisdiction have recognized § 3(h)(1)'s "sweeping definition" of a mine in accordance with the MSH Act's legislative history. "[I]t does not matter if what is included in the definition fails to conform to the conventional concept of mining." *Cyprus Industrial Minerals Co. v. MSHA*, 664 F.2d 1116, 1118 (9th Cir. 1981). In *Donovan v. Carolina Stalite Co.*, 734 F. 2d 1547, 1554 (D.C. Cir. 1984), the D. C. Circuit Court of Appeals quotes the Senate Report, which has been influential in the interpretation of the jurisdictional application of the MSH Act:

The Senate Report also said: "The Committee notes that there may be a need to resolve jurisdictional conflicts, but it is the Committee's intention that what is considered to be a mine and to be regulated under this Act be given *the broadest possibl[e] interpretation*" [S.Rep. No. 181, 95th Cong., 1st Sess. 14 (1997), U.S. Code Cong. & Admin. News 1977, 34013414] (emphasis added). Close jurisdictional questions are to "be resolved in favor of inclusion of a facility within the coverage of the Act." *Id.*

*See also, Marshall v. Stoudt's Ferry Preparation Co.*, 602 F.2d 589 (3d Cir. 1979), and *Harman Mining Corp. v. Federal Mine Safety and Health Review Commission*, 671 F 2d 794 (4th Cir. 1981).

MSHA's broad jurisdiction remains in place even if MSHA has reduced or suspended its enforcement activities. In *Daniel Construction Co.*, 12 BNA OSHC 1748, 1751 (No. 82-668, 1986), the Review Commission affirmed the administrative law judge's finding that MSHA preempted OSHA's jurisdiction under § 4(b)(1), despite evidence that MSHA had no resources to enforce its standards in that case. "The exemption . . . was applied even though at the time of the inspection the other agency was not enforcing its regulations."

As noted above, Fink testified that MSHA did not want jurisdiction over the E-40 site because MSHA has limited resources and personnel shortages (Fink deposition, p. 25). The case law holds that these considerations are irrelevant in a judicial determination of jurisdiction. “Any oversight of the adequacy of another agency’s enforcement activities is beyond the scope of a permissible inquiry under section 4(b)(1).” *Pennsuco Cement and Aggregates, Inc.*, 8 BNA OSHC 1378, 1381 (No. 15462, 1980).

The Secretary cites two cases in support of its position that MSHA’s broad coverage does not extend to the E-40 site. In *Lancashire Coal Co. v. MSHA*, 968 F. 2d 388 (3rd Cir. 1992), the issue was whether a coal silo that collapsed during reclamation work done at an abandoned coal preparation plant came under the jurisdiction of MSHA. The collapse occurred in 1989. The coal silo had not been used since 1971. The administrative law judge ruled that the silo was within the jurisdiction of MSHA. The Federal Mine and Safety Review Commission upheld the judge’s decision. The Third Circuit Court of Appeals set aside the Review Commission’s decision, finding that MSHA did not have statutory jurisdiction under the MSH Act over the abandoned coal silo at the time it issued the citations.

The court noted that the MSH Act “refers to three different mining activities: ‘extracting’ minerals; ‘milling’ minerals; and ‘preparing coal or other minerals.’” *Id. at 390*. Section 3(h)(1)(C) includes within the definition of “mine” structures “used in, or to be used in, or resulting from” the work of extracting coal; that is, the past, present, and future tenses are covered. However, only structures “used in, or to be used in” the milling of or preparing coal are included in the definition of a “mine.” The statute does not include the words “resulting from” before the words “the work of preparing coal.”

The court noted that the language of the statute led to an anomalous result, and turned to the legislative history of the MSH Act for aid in determining the meaning of section 3(h)(1):

In analyzing the legislative history, it is important to note that there was both a Senate and a House version of the bill that became the Federal Mine Safety and Health Act, and that these versions defined “mine” slightly differently.

*Id. at 391.*

The court concluded the legislative history:

does not explain Congress's use of distinct bases for those definitions. The Secretary attempts to explain the distinction by contending that the words "resulting from" were inadvertently omitted from section 3(h)(1) in connection with coal preparation structures. . .

We agree that inadvertent omission may be a plausible explanation for the distinction between sections 3(h)(1) and 3(h)(2). But the legislative history is simply not clear enough to demonstrate that Congress intended the words in section 3(h)(1) to be construed as covering the abandoned silo at issue in this case.

*Id.* at 392.

The court's analysis demonstrates that *Lancashire* does not provide unqualified support for the Secretary's position in the present case. The activity at issue in *Lancashire* is "the work of preparing coal," whose structures the court determined were not covered by the phrase "resulting from." Coal preparation is not at issue here.

Oxford argues that *Lancashire* actually supports its position because the court follows § 3(h)(1)(C) and finds MSHA jurisdiction over "lands, excavations, [etc.] . . . used in, or to be used in, or resulting from the work of extracting . . . minerals." Oxford argues that, since at one time Reynolds extracted bauxite from the E-40 site, the E-40 site as a whole resulted from the work of extracting minerals and thus is under MSHA's jurisdiction. Oxford's reliance on *Lancashire* is also misplaced. *Lancashire* deals with a structure (a coal silo), covered under § 3(h)(1)(C). At issue here are haul roads, which are not covered under section (C) of the statute.<sup>6</sup>

The Secretary cites *Bush & Burchett, Inc. v. Reich*, 117 F. 3d 932 (6th Cir. 1997), in support of its position because in that case the Sixth Circuit Court of Appeals limited MSHA's jurisdiction, under § 3(h)(1)(B), over "private ways and roads appurtenant to [an area of land from which minerals are extracted]."

In *Bush & Burchett*, the owner of a coal mine contracted with the respondent to build a bridge to connect the mine to a railroad loadout facility, located on the opposite side of a river. The contract between the owner and the respondent provided that, upon completion, the bridge and connecting

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<sup>6</sup> The citation identifies the location where the exposure occurred as "in and around the E-40 pit." The hearing focused on the employees' exposure to Alroc while they were working on the haul roads. The haul roads are what will be considered by the undersigned in determining the jurisdictional issue.

haul road would be conveyed to the state of West Virginia to become part of the state highway system.

During the construction of the bridge, two of respondent's employees were killed when a boom crane collapsed on top of a pier where they were standing. The day following the fatalities OSHA sent a compliance officer to the site to investigate, after the OSHA area office had conferred with the MSHA area office, and both had determined that MSHA did not have jurisdiction at the accident site. BBI argued that MSHA's jurisdiction preempted OSHA's jurisdiction. The Occupational Safety and Health Review Commission affirmed the citations. The Sixth Circuit affirmed the decision of the Review Commission.

BBI argued that the bridge work came under the definition of a "mine" by virtue of § 3(h)(1)(B), because the public road being constructed was "appurtenant to" a coal mine. In rejecting this argument, the Sixth Circuit emphasized that the road connecting the bridge to the mine was public, thus it did not come under the § 3(h)(1)(B) "private ways" specification.

Although BBI's position is not wholly without merit, since the Act is to be given a very broad reading, we cannot accept BBI's reading of § 802(h)(1)(B). Not only does the statute not compel such a reading, but also such a reading is contrary to common sense. Without some limitation on the meaning of "roads appurtenant to," MSHA jurisdiction could conceivably extend to unfathomable lengths since any road appurtenant to a mine that connects to the outside world would necessarily run into yet other roads, thus becoming one contiguous road. Because of the potential reach of MSHA jurisdiction if the definition in § 802(h)(1)(B) is left unfettered, "private ways and roads" cannot simply mean "any road." Otherwise, there could conceivably be no limit to MSHA jurisdiction, a result Congress clearly did not intend.

*Id.* at 937.

The present case is distinguishable from this aspect of *Bush*. The haul roads constructed by Oxford and JTM were private ways, and there is no danger that finding they are "appurtenant to" the E-40 pit could extend MSHA's jurisdiction to "unfathomable lengths." The haul roads constructed by Oxford and JTM ran between the E-40 pit and the spoil piles at Four Lakes (Exh. R-9). The haul roads surfaced with Alroc were all used in connection with the reclamation of the E-40 mine pit (Tr. 349).

While *Bush* supports Oxford's position in this regard, it fails to support it in another crucial aspect. The problem of the use of voice tenses surfaces in *Bush*, as it did in *Lancashire*. Read together, § 3(h)(1)(A) and (B) state that a "mine" is "an area of land from which minerals *are* extracted . . . [and] private ways and roads appurtenant to such area[.]" The definition is in the present tense. In order to be considered a mine, the area of land in question must currently be undergoing extraction of minerals. Bauxite was last extracted from the E-40 site in 1983.

Oxford argues that the three tenses used in § 3(h)(1)(C) apply to the haul roads, so that they are "resulting from the work of extracting" minerals. BBI made the same argument in *Bush*, claiming that the bridge was a structure resulting from the work of extracting minerals. The Sixth Circuit rejected this argument, stating "[I]t is not clear from the statute or legislative history that Congress intended to include roads within the meaning of 30 U.S.C. § 802(h)(1)(C), since Congress specifically dealt with roads in § 802(h)(1)(B)." *Id.* at 939.

The Sixth Circuit's analysis is reasonable. As noted in *Lancashire* and other decisions, the MSH Act's definition section is not a model of clarity. The use of the different tenses in different sections of the statute can lead (and have led) to confusion. The most straightforward reading of the statute, however, appears to be that the use of the qualifying phrase "used in, or to be used in, or resulting from, the work of extracting" minerals applies only to those items listed in (C), and not to (A) and (B).<sup>7</sup> The haul roads were constructed years after the last bauxite extraction had occurred. They were constructed for two reasons: to provide access to the reclamation project and to test whether Alroc was suitable as roadbed material.

Based upon this reasoning, the undersigned concludes that the haul roads were not under MSHA's jurisdiction at the time of the OSHA inspection. Bauxite was no longer being extracted from the E-40 site. Thus, the haul roads did not constitute a "mine" within the meaning of § 3(h)(1) of the MSH Act.

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<sup>7</sup> Oxford attempts to insert its reclamation work under (C) by arguing that the haul roads were constructed on *lands* (one of the items listed in (C)) resulting from the extraction of the mineral bauxite. Oxford's argument reads (B) out of the statute. The argument is rejected.

OSHA's jurisdiction was not preempted under § 4(b)(1) by MSHA. OSHA properly had jurisdiction over the E-40 site at the time of the OSHA inspection.

#### 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).

#### Item 1: Alleged Serious Violation of § 1910.132(a)

The Secretary alleges that Oxford committed a serious violation of § 1910.132(a), which provides:

Protective equipment, including personal protective equipment for eyes, face, head, and extremities, protective clothing, respiratory devices, and protective shields and barriers, shall be provided, used, and maintained in a sanitary and reliable condition wherever it is necessary by reason of hazards of processes or environment, chemical hazards, radiological hazards, or mechanical irritants encountered in a manner capable of causing injury or impairment in the function of any part of the body through absorption, inhalation or physical contact.

#### Applicability of the Standard

Oxford argues that the Secretary failed to prove the existence of a hazard to employees of sufficient severity to warrant the use of PPE. Oxford contends that Alroc contains mild irritants not capable of causing substantial injury or impairment to employees. "The broad personal protective equipment standard at section 1910.132(a) applies to the facts of the case if a reasonable person familiar with the circumstances, including facts unique to an industry, would recognize a hazardous condition requiring the use of personal protective equipment." *Lukens Steel Company*, 10 BNA OSHC 1115, 1123 (No. 76-1053, 1981).

Oxford's employees experienced symptoms associated with exposure to a highly alkaline material such as Alroc. Employees working at the site complained that the Alroc irritated their skin,

especially when they were sweating (Tr. 127). Employees experienced severe headaches while working with Alroc (Tr. 22, 84, 116).

JTM employees Jim Boulder and Rickie Nutt testified that they did not develop rashes or have any other adverse reactions to working with Alroc (Tr. 457, 470). Oxford argues that the absence of reaction to Alroc in these employees, as well as the failure on the Secretary's part to prove a causal connection between Alroc and the other employees' rashes and headaches, results in a failure of proof for the existence of a hazard that would require the use of PPE.

The fact that not all employees developed rashes or headaches does not establish that a hazard did not exist. People have differing sensitivities to environmental irritants. The fact that one employee may have a higher tolerance for a hazardous substance than another employee does not render the substance any less hazardous.

The dispositive evidence on this issue is the MSDS for Alroc (Exh. C-6). As noted in the discussion of item 2, it details the signs and symptoms of exposure, and lists the medical conditions aggravated by exposure. The MSDS recommends the use of PPE when working with Alroc. A reasonable person familiar with the MSDS who knew that his employees were working daily with Alroc, to the extent that they were regularly coated with dust from the Alroc, would have required the use of PPE. Section 1910.132(a) applies to the cited conditions.

Oxford also argues that (Oxford's brief, pp. 42-43):

the subject of eye protection is covered by a more specific standard which was not cited. The standard, 29 CFR § 1910.133 specifically addresses the need for eye protection and because it is more specific, it preempts §1910.132(a) and renders § 1910.132(a) inapplicable to eye protection. It should be noted that § 1910.133(a) requires eye protection to protect against the hazards of flying particles, molten metal, liquid chemicals, acids, or caustic liquids, chemical gases or vapors, or potentially injurious light radiation. Mere dust particles, alkaline or not, do not require eye protection. Therefore, the use of eye protection is not properly an issue.

Oxford is correct in its recitation of the hazards that § 1910.133(a) was designed to protect against. "Mere dust particles" are not included among those hazards. The cited standard § 1910.132(a), however, requires the use of personal protective equipment (PPE) for eyes "wherever it is necessary by reason of hazards of processes or environment, [and] chemical hazards[.]" Therefore, § 1910.132(a) addresses the hazard of exposure of the employees' eyes to the hazardous

chemical Alroc more specifically than does § 1910.133(a). Section 1910.133(a) does not preempt § 1910.132(a), and the use of eye protection is properly an issue in this case.

Noncompliance with the Standard

Compliance officer William Cole testified that the PPE needed to protect employees from the hazards of Alroc were “Tyvek suits for your skin exposure; protective gloves that prevent the material from being on the hands; boots and eye protection, such as goggles or some kind of perhaps safety glasses with a face shield to keep the dust off of the face and eye area” (Tr. 203).

Oxford did not provide PPE to its employees and did not require its employees to wear PPE (Tr. 35-36, 82). Oxford employees wore street clothing, such as jeans and tee-shirts, to work in (Tr. 31).

The record establishes that Oxford did not require its employees to wear appropriate PPE when working with Alroc. Its employees wore short sleeved shirts that exposed their arms to contact with the Alroc dust. Oxford was in noncompliance with § 1910.132(a).

Employee Exposure

Oxford’s employees were exposed to Alroc on a daily basis (Tr. 17, 67, 72, 89, 98, 124).

Employer Knowledge

Oxford was aware that it did not require its employees to wear any PPE.

The Secretary has established a violation of § 1910.132(a). The hazard created by failure to comply with the standard is that employees experienced exposure to the chemical irritants in Alroc. The violation is classified as serious.

Item 2: Alleged Serious Violation of § 1910.1200(h)(3)(iii)

The Secretary alleges that Oxford committed a serious violation of § 1910.1200(h)(3)(iii), which provides:

Employee training shall include at least:

...

(iii) The measures employees can take to protect themselves from [the physical and health hazards of the chemicals in the work area], including specific procedures the employer has implemented to protect employees from exposure to hazardous chemicals, such as appropriate work practices, emergency procedures, and personal protective equipment to be used[.]

The Secretary alleges the following violative conduct for this item in the citation:

For employees engaged in job operations in and around the E-40 Mine Reclamation Area, the employer did not conduct hazard communication training which included measures employees could take to protect themselves from chemical hazards associated with exposure to road bed materials and Alroc (treated pot liner). Bulk analysis of these materials indicated a pH of 11.5.

#### Applicability of the Standard

Oxford argues that § 1910.1200(h)(3)(iii) does not apply to the cited conditions because the Secretary failed to prove that Alroc is a hazardous substance.

Section 1910.1200(c) defines “hazardous chemical” as “any chemical which is a physical hazard or a health hazard.” Its definition of “health hazard” includes “chemicals which are. . . irritants. . . and agents which damage the lungs, skin, eyes, or mucous membranes.”

The material safety data sheet (MSDS) for Alroc states that Alroc has a tested pH of 11.2 to 11.5 (Exh. C-6). OSHA’s analysis of bulk samples of Alroc taken at the site show a pH of 11.5 (Exh. C-8). The MSDS includes the following items in the section titled “Health Hazards” (Exh. C-6):

**Acute**--Avoid skin and eye contact. This product is alkaline and may produce skin and eye irritation. If dust exposure is kept below the TLV’s for nuisance dust, fluoride should not represent a health hazard.

**Chronic**--Overexposure to fluoride may cause increased bone density. Dermatitis may occur from prolonged skin contact.

**Signs and Symptoms of Exposure**--Eye, skin or respiratory tract irritation.

**Medical Conditions Generally Aggravated by Exposure**--Pre-existing upper respiratory and lung diseases such as, but not limited to, bronchitis, emphysema, and asthma.

The MSDS warns employees working with Alroc to wear goggles and a face shield “as appropriate” and to wear rubber or cloth gloves “as necessary.”

The Secretary has established that Alroc is properly classified as a hazardous chemical. The MSDS states that exposure to Alroc can irritate the eyes, skin, or respiratory tract. The definition of “health hazard” encompasses such irritants. Section 1910.1200(h)(3)(iii) applies to the Alroc at the worksite.

#### Noncompliance with the Standard

Oxford claims that it provided training to its employees on working with Alroc. Two Oxford employees, Scotty Peebles and Charles Rhoades, testified they were given no information about Alroc. The employees stated that Oxford never instructed them on specific procedures to prevent exposure to Alroc (Tr. 21-22, 80-82).

Oxford submitted training sheets signed by Peebles and Phoades as evidence that its employees received hazardous communication training (Exhs. R-1, R-2, R3). Peebles explained that the training forms were given to him by Oxford's secretary, Alfreda Beaugard, who asked him to sign the form. She did not train him and was not qualified to do so (Tr. 51). Exhibit R-1 has Beaugard listed as the person who administered the training to Peebles. Peebles stated that Oxford's safety meeting consisted of signing "a yellow notebook piece of paper with your name on it and that was it" (Tr. 44). Rhoades testified that about half a year after he began working for Oxford, a scraper caught on fire at the site. After the fire, Oxford's employees were called to a meeting where they were given a folder with sheets that Oxford asked the employees to sign and return (Tr. 104). Rhoades testified that Exhibit R-3 was one of the documents that he signed at that meeting. Rhoades stated that his supervisor, Denny Tom, said, "This covers us" (Tr. 108). Rhoades said he received no information about Alroc at that meeting (Tr. 107).

The Secretary has established that Oxford did not train its employees in the hazards of dealing with Alroc. Oxford was in noncompliance with § 1910.1200(h)(3)(iii).

#### Employer Exposure

Oxford employees were exposed to Alroc the day of the OSHA inspection. Rhoades testified that after OSHA finished air monitoring, Oxford employees were ordered to dig up Alroc that had been deposited in the mine pit (Tr. 88).

Oxford's employees were exposed to Alroc on a daily basis. Peebles stated, "I loaded it on trucks. I walked over it. I parked my vehicle on it. I ate lunch on it. You know, once it was there it was everywhere. It was all over the job" (Tr. 17).

Oxford's employees were also exposed to Alroc when building, maintaining, and operating on Alroc - surfaced roads on the E-40 site (tr. 17, 67, 89, 98, 124). Whenever employees operated vehicles on the Alroc-surfaced roads large quantities of Alroc dust were raised into the air. At times

the dust would become so thick that it would be impossible for the employees to see where they were driving (Tr. 72, 89-90, 98, 126-127).

The Secretary has established that Oxford's employees were exposed to Alroc.

Employer Knowledge

Oxford was aware that Alroc is a hazardous chemical and that Oxford was not providing the required training. The company had the information from the MSDS identifying Alroc as a skin, eye, and lung irritant.

The Secretary has established that Oxford committed a violation of the cited standard.

The hazard created by Oxford's failure to provide adequate training to its employees is that they would fail to use proper personal protective equipment when working with Alroc, possibly resulting in irritations of their eyes, skin, or lungs. The violation is classified as serious.

Penalty Determination

The Commission is the final arbiter of penalties in all contested cases. Under § 17(j) of the Act, in determining the appropriate penalty, the Commission is required to find and give "due consideration" to (1) the size of the employer's business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the history of previous violations. The gravity of the violation is the principal factor to be considered.

The record does not establish the size of Oxford's business. No evidence or prior violations or of bad faith was adduced. The gravity of the violations is low. The exposure was nearly constant while many Oxford employees were at the site, but the harmful effects of the Alroc to which they were exposed were mild. It is determined that the appropriate penalty for item 1 and item 2 is \$650.00 each.

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:

1. Item 1 of the citation, alleging a serious violation of § 1910.132(a), is affirmed and a penalty of \$650.00 is assessed; and

2. Item 2 of the citation, alleging a serious violation of § 1910.1200(h)(3)(iii), is affirmed and a penalty of \$650.00 is assessed.

/s/

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NANCY J. SPIES  
Judge

Date: December 13, 1999