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UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

ROBERT B. REICH, SECRETARY OF LABOR,	:	
	:	
Complainant,	:	
	:	
v.	:	OSHRC Docket No. 94-2545
	:	
MONTANA SULFUR AND CHEMICAL COMPANY,	:	
	:	
Respondent.	:	

SECRETARY'S NOTICE OF WITHDRAWAL OF CITATION

On December 22, 1995, Complainant, the Secretary of Labor, submitted a Petition for Discretionary Review pursuant to Rule 91 of the Rules of the Occupational Safety and Health Review Commission, 29 C.F.R. §2200.91, seeking review of the judge's vacation of Citation items 1(a) and 1(b), which alleged violation of 29 CFR §§1910.132(a) and 1910.134(b)(8). In his filing, the Secretary specified that the petition "should be regarded as protective in nature as the partial government shutdown has interrupted this office's normal analysis of the case and consultation with the Occupational Safety and Health Administration If review is directed but the Secretary, after further analysis and consultation, determines not to pursue an appeal, an appropriate document will be filed with the Commission."

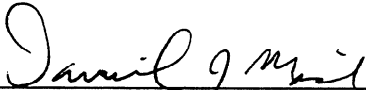
Accordingly, following the resumption of normal government activities, the Secretary engaged in further analysis and consultation regarding this case. The Secretary has now concluded that no further appeal of the judge's decision in this case is indicated. Accordingly, the Secretary hereby notifies the Commission that he hereby withdraws the citations in this case. See generally, Cuyahoga Valley Ry. Co. v. United Transportation Union, 474 U.S. 3 (1985) (Secretary of Labor retains prosecutorial discretion at all stages of litigation.)

Respectfully submitted,

J. DAVITT MCATEER
Acting Solicitor

JOSEPH M. WOODWARD
Associate Solicitor for
Occupational Safety and Health

DONALD G. SHALHOUB
Deputy Associate Solicitor for
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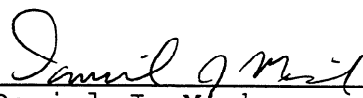


DANIEL J. MICK
Counsel for Regional
Trial Litigation
LAURA V. FARGAS
Attorney

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Secretary's Notice of Withdrawal of Citation was mailed postage pre-paid on this 19th day of March, 1996, to the following counsel of record:

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Daniel J. Mick
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United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
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SECRETARY OF LABOR
Complainant,

v.

MONTANA SULPHUR & CHEMICAL COMPANY
Respondent.

Phone: (202) 606-5100

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OSHRC DOCKET
NO. 94-2545

**NOTICE OF DOCKETING
OF ADMINISTRATIVE LAW JUDGE'S DECISION**

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on December 1, 1995. The decision of the Judge will become a final order of the Commission on January 2, 1996 unless a Commission member directs review of the decision on or before that date. **ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW.** Any such petition should be received by the Executive Secretary on or before December 21, 1995 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary
Occupational Safety and Health
Review Commission
1120 20th St. N.W., Suite 980
Washington, D.C. 20036-3419

Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
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Room S4004
200 Constitution Avenue, N.W.
Washington, D.C. 20210

If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 606-5400.

FOR THE COMMISSION

A handwritten signature in black ink, appearing to read "Ray H. Darling, Jr.", written over a horizontal line.
Ray H. Darling, Jr.
Executive Secretary

Date: December 1, 1995

DOCKET NO. 94-2545

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SECRETARY OF LABOR,

Complainant,

v.

MONTANA SULPHUR AND CHEMICAL
COMPANY,

Respondent.

OSHRC Docket No. 94-2545

APPEARANCES:

For the Complainant:

Tobias B. Fritz Esq., Office of the Solicitor, U.S. Department of Labor, Kansas City, Missouri

For the Respondent:

Richard J. Dolan, Esq., Goetz, Madden & Dunn, Bozeman, Montana

Before: Administrative Law Judge James H. Barkley

DECISION AND ORDER

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C., Section 651, *et seq.*, hereafter referred to as the Act).

Respondent, Montana Sulphur & Chemical Company (Montana), at all times relevant to this action maintained a worksite at 627 Exxon Road, Billings, Montana, where it was engaged in manufacturing chemicals, including liquefied hydrogen sulfide (Tr. 46). Montana has approximately 54 employees at its Billings site. Montana admits it is engaged in a business affecting commerce and is, therefore, subject to the requirements of the Act.

Pursuant to a 1994 inspection of Montana's worksite, the Occupational Safety and Health Administration (OSHA) issued Respondent citations, together with proposed penalties, alleging violations of the Act. By filing a timely notice of contest Respondent brought this proceeding

before the Occupational Safety and Health Commission (Commission).

Prior to the hearing, the parties entered into a stipulation and partial settlement agreement, disposing of all citation items with the exception of “serious” citation 1, items 1a and 1b. On May 9 and September 21, 1995, a hearing on those items remaining at issue was held in Billings Montana. The parties have submitted briefs on the issues and this matter is now ready for decision.

Alleged Violation of §1910.132(a)

Citation 1, item 1a alleges:

29 CFR 1910.132(a): Protective equipment was not used when necessary whenever hazards capable of causing injury and impairment were encountered:

(a) Montana Sulphur and Chemical Co.: Employees hooking up, loading, and unhooking, tank cars and rail cars from an 80 ton storage tank of hydrogen sulfide did not wear supplied air respirators.

The cited standard states:

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.

Facts

Montana maintains its stores of hydrogen sulfide within a contained system. The citation in this matter addresses the alleged hazard arising from a possible loss of containment during the process of hooking up, loading, and unloading the transport cars in which Montana moves its product.

Montana’s loading platform is located outdoors (Tr. 279). In loading its hydrogen sulfide transport cars, Montana employees are instructed to use the buddy system (Tr. 57, 218, 220, 280). The loading crew first secures the transport car, chocking the wheels and attaching electronic motion sensors to detect any unanticipated movement of the car (Tr. 373; Exh. R-65 through 67, R-100). The crew ascertains the direction of the wind (windsocks are located in the

loading areas), positioning themselves upwind of anticipated releases of gas¹ (Tr. 219, 230). The crew checks to ascertain that the transport's ball valve is not under pressure and is in the closed position (Tr. 358-360; Exh. R-45 through 47). The blind flange covering the transport's valve is "hot bolted," every other bolt released, and the gasket is cracked, allowing the pocket created between the ball valve and the flange to depressurize (Tr. 231-233, 381-82). The flange is then hooked up to loading lines from a storage tank. The loading lines make use of a system of manual and air actuated isolation valves located at the storage tank and tank car, as well as at intermediate locations (Tr. 392-397; Exh. R-101). Once hooked up the manifold system is pressurized by opening the isolating valves and allowing the hydrogen sulfide to flow into the line (Tr. 379-80, 396-99). The stop holding the ball valve closed is removed, and the valve opened to allow the hydrogen sulfide to flow into the transport car (Tr. 48-50, 223-25, 227).

During the loading operation the flow of hydrogen sulfide may be halted by a number of failsafe mechanisms. The air actuated valves on the loading lines may be automatically activated by the remote sensors on the railcar if any motion is detected (Tr. 398). Sudden flow excess cut-off devices located inside the car are activated by a sudden change in the flow of hydrogen sulfide (Tr. 386, 422-23).

Once loading is complete, the valves at the storage tank and tank car are shut off (Tr. 392, 426), and the line is depressurized to zero by opening a manifold valve to the "flare" where any hydrogen sulfide in the line is burned off (Tr. 376-77, 385; Exh. R-69). If the line fails to depressurize the operator knows that one of the valves at either the storage tank or the tank car is open or leaking (Tr. 413, 427-28). Prior to unhooking the loading lines, the depressurized segment of line is further isolated by means of backup valves downstream of the flare valve (Tr. 378).

It is undisputed that Montana does not require its employees to use respirators when making routine connections, including those involved in the loading of its transport cars (Tr. 52, 130). Fred Bell testified that respirators are required when employees are making or breaking

¹ Montana stores hydrogen sulfide in its liquid state. When released at normal temperatures and pressures, the liquid immediately converts to a gas (Tr. 60).

pipeline connections in the plant where there is no way of valving off the hydrogen sulfide, or where containment of a 10 to 15 foot pipeline containing hydrogen sulfide may be broken (Tr. 207).

Compliance Officer (CO) Doney testified that there is a high potential for a leak during the loading process (Tr. 53). Doney noted that hydrogen sulfide is highly corrosive when in contact with moisture, and that the flanges and the railcar itself could become corroded (Tr. 50). Doney stated that if the valves don't hold during the unbolting process, a release of highly toxic hydrogen sulfide gas could overpower Montana's employees, causing disorientation, and a fall from the top of the transport, or in greater concentrations, result in respiratory paralysis, coma and death (Tr. 50-51).

Respondent maintains, however, that there is only a remote possibility of leakage from the tankers during the loading process, and that established procedures would immediately alert employees to the presence of a leak. Fred Bell, Montana's regulatory coordinator (Tr. 164), testified that all employees are trained in the hazards of hydrogen sulfide and the proper methods of dealing with it (Tr. 172). Vern Luderman, Respondent's transportation foreman (Tr. 217), testified that the ball valves used on the transportation cars are encased in packing and totally encapsulated in a "safety kit" which guards against leaks in the packing caused by shrinkage (Tr. 224-25). The valve itself consists of a non-corrosive stainless steel ball (Tr. 263-64) seated in a "blowout-proof" stem (Tr. 225-26, 229). Luderman stated that any substantial leakage could only result from foreign matter on the ball, which could prevent a seal between the ball and its seating (Tr. 226, 234). Luderman stated that any, including normal seepage would be trapped between the valve body and the blind flange and would be limited to approximately a cup of gas (Tr. 227). That cupful of gas vents in between three to ten seconds when the gasket is cracked during normal loading operations (Tr. 233). The operators expect, and are trained to listen for the hiss of gas escaping through the flange (Tr. 233-34, 239-40). If the hiss continues beyond the 3 to 10 seconds, the operator knows the valve is not maintaining pressure and will immediately bolt up the blind flange (Tr. 234-241). Bolting up takes less than two seconds (Tr. 245). Any foreign matter can then be eliminated by removing the ball stop and rotating the ball with the blind flange in place (Tr. 227-228). If the seepage cannot be controlled in this manner,

employees would then don air masks, drain and purge the tank and overhaul the valve (Tr. 228).

Larry Zink, a Montana vice president, testified that the transport loading operation takes place approximately 200 times per year, over 10,000 operations have taken place since 1969 (Tr. 282). No one involved in the loading process at Montana has been injured by an unanticipated release of hydrogen sulfide since record keeping was instituted in 1976 (Tr. 119, 242, 291). Zink further stated that monitoring tests done in the breathing area of the loading crew typically ran from 0 to 1 part hydrogen sulfide per million (Tr. 300).

Montana is the only manufacturer and shipper of hydrogen sulfide in the United States (Tr. 430). Zink and Luderman opined that Montana's employees are not exposed to a significant hazard during its loading operations (Tr. 247, 278). Luderman testified that approximately 50% of Montana's customers use air masks when unloading transport cars from Montana, while the other 50% do not (Tr. 249). Montana itself recommends its consumers use "full face self-contained breathing apparatus. . . when making connections, sampling or checking/repairing leaks" (Tr. 277; Exh. C-4). Zink testified, however, that its recommendation is intended for the end user, who is neither trained, nor supervised by Respondent, and whose procedures Respondent is not familiar with and has no control over (Tr. 278). Montana's labeling does not state that full face masks are required (Tr. 278).

Discussion

Compliance with §1910.132(a) requires that personal protective equipment be provided only when the employer had actual knowledge of a hazard requiring the use of personal protective equipment or a reasonable person familiar with the situation, including any facts unique to the particular industry, would recognize a hazard warranting the use of such equipment. *Armour Food Co.*, 14 BNA OSHC 1817, 1987-90 CCH OSHD ¶29,088 (No. 86-247, 1990). The record established that the Secretary's only witness, the inspecting CO, had no prior familiarity with Montana's loading processes or equipment. The CO's testimony consisted of mere speculation that hazardous concentrations of hydrogen sulfide might be released in the event of human error or equipment failure. Montana witnesses familiar with the loading process, however, described a system of engineering and procedural controls which has been designed to maintain the confinement of hydrogen sulfide, and to detect and

prevent any uncontrolled release of gas.²

In *Armour, id.* the Commission suggested that the most revealing evidence of whether a reasonable person familiar with the industry would have recognized a hazard requiring personal protective equipment was “the practice of those persons most clearly familiar with the industry -- the employees.” *Id.* at 1820. In this case there is no evidence that any of Montana’s employees used, or believed that the hydrogen sulfide loading operation warranted the use of full face air supplied respirators. Rather Foreman Luderman, the only employee testifying, stated that air masks were unnecessary, and would impair the loading crew’s ability to perform their job, preventing them from hearing the hiss of venting gas (Tr. 245-46).

The Commission also stated in *Armour* that evidence that no employee had been injured while performing the cited task “strongly suggest[ed]” the absence of a recognizable hazard. Here, as in that case, the Respondent established that despite thousands of repetitions, no employee was ever injured during loading operations.

The significance of a potential hazard is a function of two variables, 1) the gravity of harm which would result from the event, and 2) the likelihood of the event taking place. *See, Pratt & Whitney Aircraft v. Donovan and OSAHRC*, 715 F.2d 57, 63 (2d Cir. 1983). The record establishes that the Secretary, in issuing the instant citation, seeks to avoid the undeniably grave, possibly fatal consequences of a conjectured loss of hydrogen sulfide containment in Montana’s loading operation. Complainant, however, fails to establish that, under the conditions cited, such a loss of containment is reasonably likely. Complainant established only that Montana can never completely eliminate every possibility of a failure in its containment system (Tr. 301-02). Complainant establishes the obvious; that human error and/or machine failure are always possibilities, however remote. The CO’s unsubstantiated and conclusional opinions fails, and in fact does not attempt to elevate that remote possibility

² The undersigned finds that evidence of the practices of Montana’s customers during unloading procedures is inapposite. *See, Grand Union Co.*, 3 BNA OSHC 1596, 1975-76 CCH OSHD ¶20,107 (No. 7031 & 7533, 1975)[industry practice of meat cutters in meat packing plant does not establish industry practice of meat cutters in retail stores].

to the level of a substantial or recognized risk.³

The Supreme court, relying on the legislative history of the Act, has held that the Act is intended to protect only against “significant risk[s], not ephemeral possibilities” of harm. *Industrial Union Department, AFL-CIO v. American Petroleum Institute*, 448 U.S. 607 (1980). The Secretary cannot extend the scope of OSHA “beyond the boundaries defined by Congress.” *Pratt & Whitney, supra* at 62. The undersigned finds that, based on the testimony and the demonstrative evidence in the record, Complainant failed to establish either the existence of a significant risk of harm, or that a reasonable person, apprised of the circumstances under which Montana’s transport cars are loaded, would recognize the need for air supplied respirators. The citation will be vacated.

Alleged Violation of §1910.134(b)(8)

Citation 1, item 1b alleges:

29 CFR 1910.134(b)(8): Appropriate surveillance of work area conditions and degree of employee exposure or stress was not maintained:

(a) Montana Sulphur and Chemical Co.: Employees loading tank cars and rail cars from an 80 ton storage tank of hydrogen sulfide did not wear personal monitors for hydrogen sulfide.

(b) Montana Sulphur and Chemical Co.: Employees working in the vicinity of the fin tubes where there was a hydrogen sulfide leak did not wear personal monitors for hydrogen sulfide.

The cited standard states that:

. . . When effective engineering controls are not feasible, or while they are being instituted, appropriate respirators shall be used pursuant to the following requirements.

* * *

(8) Appropriate surveillance of work area conditions and degree of employee exposure or stress shall be maintained.

³ Where an employer has developed engineering controls, work practices and training programs to deal with a particular hazard which is not the subject of a specification standard, it is the opinion of the undersigned, that the OSHA, in seeking additional protections under a general performance standard, must establish, as a threshold matter, that it is familiar with the employer’s practices, and point out specific deficiencies in those practices.

Facts

The probability of employee exposures to excessive levels of hydrogen sulfide during loading operations is discussed above. Stationary monitors are located no less than 21 feet from the outer surface of tank cars being loaded (Tr. 210).

On May 3, 1994, three employees were working 20 to 25 feet from the “fin tube,” or heat exchanger in the amine unit, building a catwalk and installing insulation (Tr. 80-81, 144-46). Bill Popelka, one of the Montana employees working on the catwalk, complained of dizziness (Tr. 147, 149). His supervisor immediately monitored the area in which the employee had been working and found no hydrogen sulfide in the area (Tr. 147-48). On May 4-5, Compliance Officer (CO) Brent Doney monitored a hydrogen sulfide leak in the amine unit fin tube (Tr. 44-45). Doney found concentrations of hydrogen sulfide between 18 and 20 parts per million in the immediate area of the fin tube (Tr. 45, 84). CO Doney stated that the TWA (time weighted average) exposure level established by OSHA for hydrogen sulfide is 20 parts per million, with a peak exposure ceiling of 10 minutes per 8 hour shift at 50 ppm (Tr. 83; §1910.1000, Table Z-2). Montana had a fixed monitor set to sound an alarm at 10 ppm in the area, approximately 30 to 50 feet from the leak (Tr. 65, 86, 210; Exh. R-44).

Doney stated that should the leak expand, employees working in the area could be overexposed to hydrogen sulfide gas before the fixed monitor registered the overexposure (Tr. 71). A personal monitor would warn the employee if he happened to walk into a pocket of hydrogen sulfide created by a localized leak (Tr. 74-75).

Montana does not require the use of personal monitors except for confined space entry, and where ongoing “borderline” concentrations of hydrogen sulfide are known to be present (Tr. 294). Monitors are, however, available to anyone in the plant (Tr. 211). Fred Bell, a chemist, and Montana’s lab manager, testified that large concentrations of hydrogen sulfide, several hundred parts per million could knock a man out before he had time to respond to a monitor (Tr. 212). Vern Luderman stated that the smell of hydrogen sulfide would alert a trained employee to the presence of lesser concentrations of the gas, a personal monitor may then be used to track down the source of the leak (Tr. 255-56). CO Doney noted, however, that hydrogen sulfide

rapidly diminishes the sense of smell at exposures between 50 to 100 ppm (Tr. 62-63).

In regards to the fin tube leak specifically, Montana's operations manager, Stuart Davis, (Tr. 143) testified that employees working on the fin tubes would use a personal monitor, but individuals merely in the amine unit are not required to wear them (Tr. 155). The leak in the fin tube was known to Montana, and was due to a leak in the packing. The leak had remained constant for some time and, in fact, did not expand in the 8 months before the fin tube was repaired during a routine shut down (Tr. 150, 160-61, 310-11). Davis testified that the fin tube operator checks his equipment every hour, when monitoring the fin tube, the operator would have a personal monitor with him (Tr. 160).

Montana was previously, in 1986, cited for violation of §1910.134(b)(8); "Employees working in and around the Hydrogen sulfide Unit, Amine Unit, NASH Unit, Sulfur Recovery Unit and hydrogen sulfide loading areas were not continuously monitored with either personal monitors, or stationary ambient monitors to determine their hydrogen sulfide exposure." In a 1988 settlement agreement Montana agreed that "personnel (sic) monitors will be in use by January 29, 1988 and the six continuous areas monitors will be installed by May 31, 1988. . . ." (Tr. 76-77).

David DiTommaso, OSHA's area director, testified that it was his understanding that under the 1988 settlement agreement, Montana employees would carry personal monitors "where there was a possibility of a hazardous leak of hydrogen sulfide gas" in the areas cited, including the Amine Unit and hydrogen sulfide loading areas (Tr. 325). DiTommaso admitted that there were "certainly operations and times where there is no hazard for release of hydrogen sulfide gas in those areas" (Tr. 324).

Discussion

Montana does not dispute the applicability of the cited standard, which is part of the respiratory plan required whenever "necessary to protect the health of the employee" under §1910.134(a)(2). *See, Pride Oil Well Service*, 15 BNA OSHC 1809, 1991-93 CCH OSHD ¶29,807 (No. 87-692, 1992).

Complainant argues that personal monitors are appropriate whenever there is a possibility of a hazardous hydrogen sulfide leak. Montana was aware of hydrogen sulfide releases in

unknown concentrations in both the cited areas; Complainant contends that continuous monitoring of the employees' breathing zones to ascertain the levels of those concentrations is appropriate.

Respondent maintains, however, that the stationary monitors in its amine unit, in addition to the training and intermittent use of personal monitors provided "appropriate" surveillance of hydrogen sulfide levels in both the loading process and in the fin tube area. Montana admits that large, unexpected hydrogen sulfide leaks have occurred in its facility, some of which have resulted in employees losing consciousness (Tr. 158-59). Zink testified, however, that Montana's monitoring was appropriate, because it had no reason to believe there was any potential for the release of hazardous concentrations of hydrogen sulfide in either the loading area or Amine Unit (Tr. 297). No hazardous hydrogen sulfide leaks were present at the time of the OSHA inspection.⁴

The evidence establishes that concentrations of hydrogen sulfide released during loading operations are controlled. Moreover, Montana did know, from past experience and breathing zone monitoring what concentrations of gas were present in the employees' breathing zones and that those concentrations were well below OSHA established limits.

In regard to employees exposed on the Amine Unit, Doney was asked whether a hypothetical set of facts, identical to those at issue in this case constituted a violation of the cited standard:

There is a leak in an area of H₂S that's measured less than 20 parts per million, and it is an outdoor situation, and some work needs to be done 20 to 25 feet away from that leak, and a person is sent in there to work and does not take a personal monitor along. Is that a violation?

CO Doney replied "probably not" (Tr. 88). Doney stated that his recommendation that employees on rounds and maintenance employees wear personal monitors was his personal opinion, and was not necessarily required by §1910.134(b)(8) (Tr. 101).

⁴ CO Doney admitted that Mr. Popelka's dizziness could not be attributed to hydrogen sulfide exposure (Tr. 94).

In both cases the record demonstrates that the level of surveillance in the cited work areas was appropriate to address expected hazards. The citation must be dismissed.

ORDER

1. Serious citation 1, item 1(a), alleging violation of §1910.132(a) is VACATED.
2. Serious citation 1, item 1(b), alleging violation of §1910.134(b)(8) is VACATED.



James H. Barkley
Judge, OSHRC

Dated: