United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3419

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SECRETARY OF LABOR
Complainant,
v.
AMERICAN COMMERCIAL VEHICLES
Respondent.

OSHRC DOCKET
NO. 95-1074

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 August 30, 1996. The decision of the Judge will become a final order of the Commission on September 30, 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 September 19, 1996 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:

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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

Ray H. Darling, Jr/SKA

Date: August 30, 1996

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 95-1074

NOTICE IS GIVEN TO THE FOLLOWING:

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SECRETARY OF LABOR, Complainant,	:	
v.	:	OSHRC Docket No. 95-1074
AMERICAN COMMERCIAL VEHICLES, Respondent.	:	

Appearances:

Heather A. Joys, Esquire
Office of the Solicitor
U. S. Department of Labor
Cleveland, Ohio
For Complainant

Bernadette Bollas Genetin
Krugliak, Wilkins, Griffiths
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Canton, Ohio
For Respondent

Before: Administrative Law Judge Nancy J. Spies

DECISION AND ORDER

American Commercial Vehicles Company (ACV) manufactures semi-truck cabs for Volvo at ACV's plant in Orrville, Ohio (Tr. 189). ACV assembles and paints the cabs (Tr. 16). On March 7, 1995, Occupational Safety and Health Administration compliance officer, Carolyn Donovan, inspected ACV's plant in response to employee complaints (Exhs. C-1, C-2; Tr. 16). As a result of Donovan's inspection, the Secretary issued two citations to AVC on June 2, 1995. Citation No. 1 contained 11 items and Citation No. 2 contained 2 items.

Prior to the hearing, the Secretary and ACV agreed to settle all but one of the items. The parties' "Partial Stipulation and Settlement Agreement," filed May 18, 1996, is hereby incorporated into this decision and order, and is attached as Appendix "A."

Left for decision is item 2 of Citation No. 1, which alleges a serious violation of § 1910.134(d)(2)(ii). That standard provides:

> (ii) The compressor for supplying air shall be equipped with necessary safety and standby devices. A breathing air-type compressor shall be used. Compressors shall be constructed and situated so as to avoid entry of contaminated air into the system and suitable in-line air purifying sorbent beds and filters installed to further assure breathing air quality. A receiver of sufficient capacity to enable the respirator wearer to escape from a contaminated atmosphere in event of compressor failure, and alarms to indicate compressor failure and overheating shall be installed in the system. If an oil-lubricated compressor is used, it shall have a high-temperature or carbon monoxide alarm, or both. If only a high-temperature alarm is used, the air from the compressor shall be frequently tested for carbon monoxide to insure that it meets the specifications in paragraph (d)(1) of this section.

The Secretary alleges that ACV violated § 1910.134(d)(2)(ii) in two respects: (1) ACV's compressor was located so as to allow contaminated air (from fork lift exhaust emissions and other chemicals) to enter its system, and (2) ACV substituted a filter not designed for the air-purifying system for the correct filter.

Background

ACV uses compressed air for two purposes: to operate pneumatically-powered tools and to supply breathing air for painters working in spray painting booths. ACV operates four compressors which are located in a central room on the first floor of the plant. Three of the compressor supply air for pneumatically-powered tools. The fourth supplies breathing air to painters working inside of the spray painting booths. This fourth compressor is a Gardner-Denver oil-lubricated compressor, which uses approximately 450 cubic feet per minute (cfm) of air (Exh. ALJ-2; Tr. 23, 163-165).

The compressed air produced by the fourth compressor for use in the finish painting operations is sent first through an oil separator and filtration system within the compressor room, and then through a minus 43 degree dew point dryer, or desiccator. The air then travels through 150 to 200 feet of pipe, through a particulate filter and into a holding tank in the ceiling. The pipe branches off and the air is sent down one of two separate pipes along opposite sides of the finishing paint booth. Before being delivered to the painters in the paint booth, the air goes through an MST filtering system (Exh. ALJ-2; Tr. 103-104, 165-170). Painters in the finishing booth wear

3M supplied air hoods that seal around the painters' necks. The air feeds directly into the hood and no respirator is worn inside the painter's hood (Tr. 61, 74).

Charles Martin, called as a witness by the Secretary, is the president of MST. He is a licensed engineer, and he designed the MST system used by ACV at its Orrville plant (Tr. 94-95). Martin testified that the MST system, model number RP 050B MST, is a 50 cfm carbon monoxide removal system for purifying standard industrial compressed air for breathing applications. The system consists of four stages. The first and second stages are contained in a single chamber called the MST prefilter. The air first passes through a particulate filter which removes dust, rust and scale. The second stage of the prefilter is a coalescing filter which removes oil and water mist (Exh. ALJ-1; Tr. 94-96). The coalescing filter condenses this mist into larger droplets which are then expelled by gravity out of the lower portion of the filter (Tr. 99). When functioning properly, the prefilter produces air which is 99.97% free of liquid contaminants and particles (Exh. ALJ-1; Tr. 108, 112).

The third stage of the system contains an odor-absorbing activated charcoal which removes taste, odor, and hydrocarbon gases, including oil fumes. The fourth stage is a low temperature catalyst that converts carbon monoxide into carbon dioxide (Exh. ALJ-1; Tr. 96).

Each MST unit is also equipped with a carbon monoxide monitor. The monitor provides a continuous readout of carbon monoxide levels. Both audible and visual alarms alert the operator if dangerous levels of carbon monoxide are reached (Exh. ALJ-1; Tr. 62-63, 75).

Immediately upon leaving the compressor, the air is hot and holds more water, hydrocarbon gases or gaseous oil contaminants. Although the bulk of these contaminants is removed by the filters at the compressor, these air contaminants cannot all be removed because of the air temperature. As the air moves away from the compressor, it cools and the water and oil in the air condense. The MST system removes this additional water and oil as well as hydrocarbon gases and carbon monoxide to produce grade D quality breathing air (Exh. ALJ-1; Tr. 101).

Martin testified regarding the proper maintenance procedures for the MST system. All four stages are to be changed at the same time. For this reason, MST sells the stages in a single kit. MST recommends that this procedure be followed because, as the prefilter becomes saturated, and thus less effective, water and oil carry over to the third and fourth stages. These latter stages absorb the

material. If the third and fourth stage continue to be used in this condition, they may deliver toxins to the air stream (Tr. 97-99).

Item 2: Alleged Serious Violation of § 1910.134(d)(2)(ii)

The Secretary has the burden of proving the violation of § 1910.134(d)(2)(ii).

> To establish a violation of the standard, the Secretary must show by a preponderance of the evidence that: (1) the cited standard applies, (2) its terms were not met, (3) employees had access to the violative condition, and (4) the employer knew or could have known of it with the exercise of reasonable diligence. *See e.g., Walker Towing Corp.*, 14 BNA OSHC 2072, 2074, 1991 CCH OSHD 29,239, p. 39,157 (No. 87-1359, 1991).

Seibel Manufacturing & Welding Corporation, 15 BNA OSHC 1218, 1221-1222 (No. 88-821).

ACV does not dispute element (1), that § 1910.134(d)(2)(ii) applies to the cited conditions. The standard applies to oil-lubricated compressors for supplying air, which is what is at issue in the present case.

Element (2) requires that the Secretary prove that the terms of the standard were not met. The Secretary contends that ACV failed to meet that portion of § 1910.134(d)(2)(ii), which provides:

> Compressors shall be constructed and situated so as to avoid entry of contaminated air into the system and suitable in-line air purifying sorbent beds and filters installed to further assure breathing air quality.

Contaminated Air

The Secretary argues that ACV violated this section of the standard by permitting a pipe-cutting operation to be conducted inside of the compressor room, in the path of the air flow. Among the chemicals used in the pipe-cutting operation was Hercules Dark Cutting Oil. The material safety data sheet (MSDS) for Hercules Dark Cutting Oil states that this substance poses a potential hazard in that its produces carbon monoxide and oxides of sulfur upon decomposition (Exh. C-5; Tr. 26-28). ACV asserts, to the contary, that the operation was not conducted at that location.

The Secretary also contends that ACV violated § 1910.134(d)(2)(ii) by allowing the use of propane-powered fork lifts in and around the area of the compressor room. The exhaust from the fork lifts contain carbon monoxide (Tr. 29). At the time of the inspection, the compressor room had a garage-type door which was opened periodically (Tr. 180). ACV denies that exhaust from fork

lifts could have presented a hazard to the employees' breathing air in the circumstances of ACV's plant operation.

The Secretary points out that the carbon monoxide alarms went off on numerous occasions prior to Donovan's inspection (Tr. 63, 75-76). The Secretary argues that this is proof that carbon monoxide was entering the MST system. ACV disputes the reason that the alarm was activated.

The Secretary's proof regarding the pipe-cutting operating is insufficient to sustain a finding of a violation. While Donovan observed the pipe-threading machine stored in the compressor room, she did not observe the machine in operation. Donovan testified on cross-examination that she did not know how often ACV used the pipe-threading machine, she did not know if the machine was used in the six months prior to her inspection, and she did not know if the machine was actually used in the compressor room (Tr. 39-40). The Secretary adduced no other evidence establishing that the pipe-threading machine was used in the compressor room.

The Secretary also adduced no evidence establishing that use of the pipe-threading machine in the compressor room created a hazard. The Secretary alleges that carbon monoxide could be released from the dark cutting oil if the oil were heated to a sufficient temperature to decompose. However, there was no evidence as to what that temperature was or to what temperature the pipe-threading machine raised cutting oil when it was in use (Tr. 41-42). The Secretary failed to prove that the presence of the pipe-threading machine created a hazard.

With regard to the exhaust emissions from the fork lifts, the Secretary has also failed to establish by a preponderance of the evidence that the presence of the fork lifts created a hazard. Donovan testified that she saw one propane-powered fork lift driven past the compressor room (Tr. 44-45).

Scott Spreng, ACV's safety supervisor, testified that fork lifts on the assembly side of the plant, where the compressor room door was located, are all electric. Although Spreng had seen propane-powered fork lifts go past the compressor room door, he had never seen a fork lift idle there (Tr. 148-149). Spreng further testified that, even if a propane-powered fork lift would have been left idling by the door, the door was kept closed when no one was entering or exiting the room (Tr. 150, 180). Two larger air compressors, used to power the pneumatic tools, are located between the door and the compressor that supplied breathing air. Each of these larger air compressors takes in air at

the rate of 700 cubic feet per minute. These larger compressors would have absorbed most of any contaminated air that arguably could have entered the compressor room from the door (Tr. 149, 180).

Spreng and Jay Faulhaber, ACV's plant engineer, testified without contradiction that when carbon monoxide alarms had been triggered in the past, it was by the use of two-way radios. The fork lift operators, the foremen, and the maintenance people had two-way radios. Anyone walking by one of the MST units who would "key the mike" to a two-way radio would trigger the carbon monoxide monitor alarm. The MST units were sent back to MST where additional grounding and radio shielding were installed so that two-way radios would not trigger the alarms (Tr. 142-170). Faulhaber testified that, since ACV has three separate MST units that each receive breathing air from the same air compressor, all three alarms should go off if carbon monoxide is in the system. This has never happened (Tr. 184-185).

The Secretary lastly alleges that carbon monoxide must have entered the MST system because on two separate occasions, employees became ill while breathing the supplied air in the spray-painting booth. Spray painter William J. Young, Jr., testified that on February 28, 1995, he and his partner, noticed a foul smell when they put on their hoods. Young complained to his supervisor, Chuck Bowen, who told him that the MST system's filters had been changed earlier that day. Young and his partner put on their hoods and began painting. Young felt dizzy and nauseated, and left the booth. Young was examined by an on-site medic, then taken the hospital (Tr. 78).

On March 10, 1995, ACV painter Alan L. Cornelius had a similar experience. While painting in the booth, Cornelius noticed a funny smell. He became light-headed, numb, and dizzy. Cornelius's partner also became ill and fell to his knees. Both men left the booth and were taken outside to get some fresh air. Both employees were taken to the hospital (Tr. 66).

The four employees who were taken to the hospital in these two incidents were given blood gas tests. None of the employees tested positive for carbon monoxide (Exh. R-2; Tr. 67). There is no evidence that the employee's physical discomfort was caused by carbon monoxide in the MST system.

The Secretary has failed to prove that ACV situated its compressor so as to allow entry of contaminated air. The record does not establish that ACV's pipe-threading machine or its fork lifts created the threat of contaminated air entering into its compressor.