VY LACTOS LABORATORIES, INC.
OSHRC Docket No. 31
Occupational Safety and Health Review Commission
February 21, 1973

Before MORAN, Chairman: VAN NAMEE and BURCH, Commissioners

OPINIONBY: VAN NAMEE

OPINION:

VAN NAMEE, COMMISSIONER: This matter is before the Commission upon a direction for review issued pursuant to section 12(j) of the Occupational Safety and Health Act of 1970 (29 U.S.C.A. 651, et seq., hereinafter "the Act"). Following a hearing Judge William J. Broz vacated a citation for an alleged serious violation of section 5(a)(1) of the Act.

The Secretary had in substance alleged that Respondent exposed its employees to an atmosphere containing hydrogen sulfide gas in such concentration as to be incapable of supporting life, while not providing the employees with personal protective equipment and requiring them to use the equipment. This exposure, sans equipment, according to the Secretary, constituted a recognized hazard within the meaning of section 5(a)(1).

In vacating the citation Judge Broz did not consider the question of whether the alleged conditions constituted a "recognized hazard" as the terms are used in section 5(a)(1). Instead, he predicated his disposition of the case upon his interpretation of the knowledge requirement for a serious violation as prescribed by section 17(k) of the Act. He specifically concluded that Respondent did not, and could not with the exercise of reasonable diligence, know of the presence of lethal concentrations of hydrogen sulfide gas in its workplace.

We have reviewed the record, the Judge's decision, and the briefs of the parties. We conclude that the Judge did not err in acting to vacate the citation; however, we do not agree with his stated reasons for taking the action.

Respondent is a manufacturer of concentrates to be used in the production of feed for livestock and poultry. To that end, Respondent buys fish solubles in slurry form for use in its business. The slurry comprises a mixture of proteinaceous fish material in a water diluted solution of sulfuric acid. Sulfuric acid is employed in the slurry to prevent or impede bacteriological decomposition of the fish material.

Sometime during the night of July 15-16, 1971, a shipment of fish solubles was discharged into a holding pit at Respondent's workplace. It appears that the slurry overflowed into a basement and covered the floor to a height of 31 inches. The basement was pumped out leaving a residue standing at a height of about 3 inches. Employees were then sent in to clean up the basement. The employees descended the basement steps and almost immediately experienced extreme difficulty in breathing. Two employees succumbed and rescue efforts were immediately attempted by other employees. None of the employees were equipped with personal protective equipment; i.e., self-contained oxygen systems. Ultimately, firemen equipped with such systems removed five employees from the basement. Three of the employees were dead and two were unable to testify at this hearing due to the protracted effects of the incident.

At trial, the parties assumed that the deaths and injuries resulted from hydrogen sulfide gas. Their area of factual disagreement centered on the question of the manner in which the gas was generated. Thus, the Secretary attempted to prove that the gas was generated through bacteriological decomposition of the fish solubles. Respondent countered with a theory that the gas was generated by a chemical reaction occurring as an incidental result of an attempt made to provide ventilation to the basement.

The area of factual disagreement had its counterpoint in law. Thus, the question to which the foregoing evidence of causation was directed is whether Respondent knew, or should have known, of the hazard that existed in its workplace. However, the violation charged was that Respondent violated section 5(a)(1); i.e., the general duty requirement. n1 Accordingly, the threshold question to be determined is whether the presence of hydrogen sulfide gas constituted a "recognized hazard" causing or likely to cause death or serious physical harm to Respondent's employees.

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n1 Section 5(a)(1): Each employer --

(1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;

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On the record developed in the case this question must be answered in the negative. The most favorable evidence for the Secretary's position on the threshold question was adduced by way of expert testimony. Respondent's expert admitted as scientific principle that the gas would be a by-product of the decomposition of proteinaceous material. His knowledge, however, was based solely upon his study of textural materials and was not related to work experience gained in Respondent's workplace or shown to be known in Respondent's industry. On the other hand it was his experience that no hazard of this kind existed in the workplace. He had not in his experience previously encountered

the situation which gave rise to the citation. Obviously, an expert in a particular scientific field will have personal knowledge of scientific principles that go beyond his work experience. Knowledge of this type, however, is insufficient to establish a "recognized hazard" unless it is also commonly known in the cited employer's industry or to the public at large. Neither of the last named elements were established through Respondent's expert nor through any other evidence adduced in the case.

In this regard one of the Secretary's experts merely showed that hydrogen sulfide gas could be generated as the result of the decomposition of protein material in fish slurry. His testimony was based on tests made after the events which gave rise to the citation and therefore, at best, only establish the conceded fact that the deaths and serious physical injuries were caused by the gas. Another expert witness testified as to the dangerous properties of the gas and to the fact that it could be found in sewers. However, neither the fact that it is dangerous n2 nor the fact that it occurs in sewers establishes that it is a recognized hazard, because such facts do not establish that it is recognized to be such by Respondent's industry or by the public in general.

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n2 There is no question that hydrogen sulfide gas can be and is dangerous to life. Moreover, a consensus standard, USAS 737.2-1966, established the acceptable concentration for hydrogen sulfide at 20 ppm. for an eight hour, five day week. We note that the Secretary has not in 29 C.F.R. Part 1910 promulgated a standard for hydrogen sulfide.

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Finally, at trial the Secretary attempted to ascertain Respondent's knowledge about deaths occurring in the fishing industry from hydrogen sulfide gas generated by the decomposition of fish slurry. The basis for the question was to show Respondent's personal knowledge obtained after the date of the alleged violation. The Judge properly sustained Respondent's objection since such post facto knowledge could have no bearing on the question of whether Respondent recognized the hazard prior to the date of the alleged violation. Moreover, the question under section 5(a)(1) is not whether Respondent personally recognized the hazard. Rather, the question is whether the hazard is recognized by the industry of which Respondent is a part. The facts of this case do not show Respondent to be engaged in the business of fishing, and we cannot say that evidence relevant to the knowledge of the fishing industry may be imputed to manufacturers of fish concentrates.

Accordingly, we conclude that the Secretary has failed to prove the existence of a "recognized hazard" in Respondent's place of employment. It is therefore ORDERED that the decision to vacate the citation for violation of section 5(a)(1) of the Act be and the same is hereby affirmed.

DISSENTBY: BURCH

DISSENT:

BURCH, COMMISSIONER, dissenting: I dissent.

The majority opinion rests upon the premise that the production of hydrogen sulfide gas as a product of decomposition of the proteinaceous material used in respondent's business is not a recognized hazard.

The majority states ". . . the question under section 5(a)(1) is not whether Respondent personally recognized the hazard. Rather, the question is whether the hazard is recognized by the industry of which Respondent is a part." I must disagree.

The majority would have us believe that respondent's actual knowledge of a hazardous condition is irrelevant unless it is shown to be a condition acknowledged as hazardous by the industry.

I have searched the legislative history of the Act in vain for any indication that Congress intended that an employer's actual knowledge of hazards existing in his work place is to be ignored in determining whether a particular condition is a "recognized hazard."

On the contrary, Congressman Steiger, one of the foremost proponents of the bill stated in debate:

If we are to include any sort of general-care duty in this legislation, . . ., we should also limit its terms so that persons upon whom it would impose a duty are not unjustly held accountable for situations of which they are completely unaware. (Emphasis added.)

Legislative History of the Occupational Safety and Health Act of 1970, Committee Print, Government Printing Office, 1971, p. 992, hereinafter "Leg. Hist."

Subsequently, the House adopted the phrase "readily apparent" hazard.

In argument for his amendment to change "readily apparent" to "recognized" hazards, Congressman Daniels said:

Our modified General Duty does, however, differ in important respects from the General Duty provisions in the Steiger substitute.

The first difference is that my amendment protects against "recognized" hazards while the Steiger substitute only protests "readily apparent" ones. A recognized hazard is a condition that is known to be hazardous, and is known not necessarily by each and every individual employer but is known taking into account the standard of knowledge in the industry. In other words, whether or not a hazard is "recognized" is a matter for objective determination, it does not depend on whether the particular employer is aware of it.

I am afraid that "readily apparent" as used in the substitute means apparent without investigation, even though a prudent employer would investigate under the circumstances. A danger, in other words, may be recognized as such in the industry, but may not be apparent to an employer who is ill-informed and does not choose to investigate the danger of the situation. That is not sufficient protection for employees. (Emphasis added.)

Leg. Hist., p. 1007.

While it may be argued that the above quote supports the position of the majority, analysis of Congressman Daniels' remarks shows that his objection to the use of "readily apparent" hazards was a fear that it would exclude ". . . an employer who is ill-informed and [who] does not choose to investigate the danger of the situation . . ." from the general duty of section 5(a)(1). Thus, it appears obvious that Congress, in adopting the language urged by him, intended that where an employer has failed to inform itself of conditions generally recognized in its industry to be hazardous that it would still be responsible to its employees for a safe work place under section 5(a)(1). No amount of strained reading of the Legislative History or of the Act can persuade me that Congress intended by the adoption of "recognized" hazards to allow an employer with actual knowledge, regardless of the standard of knowledge in its industry, to subject its employees to unsafe work places. From my reading of the Legislative History, I conclude that the condition existing at respondent's work place was a recognized hazard within the meaning of section 5(a)(1) of the Act.

Fish slurry is highly proteinaceous and in decomposing, it emits hydrogen sulfide gas. Hydrogen sulfide is "a colorless, transparent gas with a characteristic rotten-egg odor at low concentrations. At higher concentrations it has a sweetish odor and, at still higher concentrations, the odor may not be detected. n3 Hydrogen sulfide is also recognized as an extremely toxic and irritating gas. In sufficiently high concentrations it can cause instant death by reducing the oxygen carrying capacity of the blood. Free hydrogen sulfide in the blood depresses the nervous system so that in acute poisoning, death is due to respiratory failure and asphyxiation. In lesser concentrations hydrogen sulfide is irritating to the eyes and respiratory tract. The eye irritation -- conjunctivitis, pain, lacrimation, and photophobia -- may persist for several days. Respiratory tract symptoms include coughing, pain in breathing, and pain in nose and throat. n4

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n3 USA Standards Institute, USAS-Z37.2-1966.

n4 Ibid.

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Respondent concedes that the employees were victims of asphyxiation and poisoning from exposure to a heavy concentration of hydrogen sulfide gas. Respondent also admits that it is aware of the dangers of heavy concentrations of hydrogen sulfide and that hydrogen sulfide is a product of the decomposition of proteinaceous material in fish slurry. The primary questions of fact on this record are the manner in which the hydrogen sulfide was generated and whether or not its presence is a recognized hazard.

Respondent asserts that it had no reason to provide protection against the hazard of excessive hydrogen sulfide because it had never before experienced an accident of this nature. I am convinced that respondent has been more fortunate than wise.

The dangers in exposure to concentrations of hydrogen sulfide gas are too serious and too well known not to provide some means of protecting employees who might be exposed. n5 While the basement area was not a place where employees usually worked, this indicates only that employees were not routinely exposed to the danger. It does not establish that the circumstances had not occurred before.

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n5 I note that the majority opinion, f.n. 2, states ". . . the Secretary has not in 29 C.F.R. Part 1910 promulgated a standard for hydrogen sulfide." My colleagues have overlooked 29 C.F.R. 1910.93, Table G-2.

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Respondent's assertion that it could not know of a potentially dangerous condition until an employee was injured or killed is patently unmeritorious. Respondent was on notice that a potentially dangerous situation existed in that area of the basement. Respondent's engineer testified that three weeks before the accident he went into the basement where he noticed enough liquid on the floor to cover his shoes. He also noticed bubbles on the floor "busting up." About half an hour later, the engineer began getting a headache and an hour later took four aspirins. The headache persisted throughout the day and the day following. The smell was so noxious that, early the following week, this same employee reported the condition to respondent's production manager. The Judge found that, thereafter, one of the decedents fixed the sump pump. He concluded that the condition had been corrected. However, according to the engineer, on Friday of the same week, after the pump had been repaired, the liquid was still in the basement, and he said that it smelled like rotten eggs, not fish or molasses -- the other substances used in respondent's manufacturing process -- and "it would kind of burn your eyes." These symptoms correspond to the effects of medium concentrations of hydrogen sulfide gas. This employee also testified that, about five weeks before the fatal accident, he had told the production manager in the presence of the foreman, that something was going to have to be done ". . . about that basement, it's getting so bad in the hallway there you can hardly stand it to go back and get pit readings."

Considering the danger of hydrogen sulfide poisoning I conclude that respondent failed to meet its statutory duty under section 5(a)(1) by failing to investigate an employee complaint concerning a foul smelling atmosphere, especially in an enclosed area such as the back basement. Respondent offered no evidence that it either investigated the above complaints or corrected the situation after July 9, the last day the engineer worked before the accident.

I must infer, unlike the Judge, that the condition continued and existed on July 15 and 16, when an adjacent pit overflowed fish slurry into the basement.

The Judge agreed with respondent's theory that the gas was a result of a chemical reaction which had nothing to do with the decomposition of fish slurry. He based this conclusion on his finding that "no one was overcome or in any difficulty until [one of the deceased employees] cut the hole with the blow torch" shortly before the employees were overcome. (Op. p. 22.) Respondent's chemist theorized that a chemical reaction could have occurred when heated iron sulfide, which might have been produced by cutting a hole in the ceiling of the basement through a metal plate with an acetylene torch, fell into the fish slurry which contained sulfuric acid. We do not agree with the Judge's uncritical acceptance of this theory.

It is far more reasonable to conclude that the deceased employee would not have cut a hole in the ceiling of the back basement unless some considerable discomfort already existed. If he sought only to ventilate because of some slight unpleasant odor, i.e., a fish smell to which all respondent's employees was accustomed, it would appear logical to use available fans that had been used previously to ventilate the basement. Moreover, respondent's theory is inconsistent with undisputed evidence that it takes 30 minutes for the chemical reaction to take place, yet the record shows that the employees lost consciousness, the president was notified, and the fire department called within 10 to 15 minutes of the time the deceased employee was observed using the acetylene torch.

An Industrial Hygiene Engineer for the State of Iowa, testifying as an expert witness for the complainant, opined that hydrogen sulfide, as a bacterial decomposition by-product, existed in "scum" in the basement. He testified that the influx of fish slurry would have changed the acidity so as to create a condition favorable to the release of the gas, and that the movement of the men would have encouraged the release and spread of the gas. This opinion is consistent with the findings he made at the site, is uncontradicted by empirical evidence, and alone constitutes substantial evidence upon which the Commission's decision may rest. Secretary of Labor v. Dale M. Madden Construction, Inc.,

From all of the above, it is patently absurd to conclude that respondent was unaware of the potentially dangerous situation in its work place. Respondent's chief chemist admitted that he was aware that hydrogen sulfide gas is a decomposition product of proteinaceous material. The majority opinion dismisses this admission as ". . . based solely upon his study of textural (sic) materials and was not related to work experience gained in Respondent's work place. . . ." The House Conference Report, Leg. Hist., p. 1217, defines "recognized hazards" as ". . . the type that can be readily detected on the basis of the basic human senses." I find it impossible to believe that respondent was unaware of the presence of hydrogen sulfide. This gas is the basic ingredient of the "stink bomb" beloved of all high school chemistry students and in low concentrations has an unforgettable odor.

I conclude that substantial evidence on the record as a whole establishes that the fact that hydrogen sulfide gas was present in the back basement was made known to respondent at least two weeks before the date of the accident. The fish slurry, containing proteinaceous material and sulfuric acid, was introduced into the back basement on July 15 and 16, 1971. The decaying material, when subjected to a number of employees moving around in the liquid, released the gas into the atmosphere in lethal amounts.

I believe that respondent failed to provide any protection whatever against a hazard which is well known to be inherent in respondent's production process and of which it had actual knowledge, thus violating section 5(a)(1) of the Act.

I would affirm the Secretary's citation and proposed penalty.

[The Judge's decision referred to herein follows]

BROZ, JUDGE, OSAHRC: The Respondent, Vy Lactos LaBoratories, Inc., has a manufacturing plant located in Des Moines, Iowa. It manufactures concentrates for livestock and poultry feeds. In the manufacture of its products it uses fish solubles, molasses and grain carriers.

On July 16, 1971, three employees died and two others were seriously injured, all by reason of being exposed to lethal doses of some gas, allegedly hydrogen sulfide. As of August 9, 1971, the Department of Labor, through its Area Director, issued a Citation for Serious Violation of Section 5(a)(1) of the Occupational Safety and Health Act, and on the same day issued a Notification of Proposed Penalty of $750. The said Citation is as follows:

Employees not provided with, or required to use, personal protective equipment, were assigned to work in enclosed basement area containing an atmosphere contaminated with Hydrogen Sulfide gas [or other gases] n1 in a concentration so great as to be hazardous and incapable of supporting human life, constituting a recognized hazard causing death or serious physical harm to said employees.

Vy Lactos Laboratories, Inc., notified the Department of Labor that it would contest the citation and penalty. The case thus came under the jurisdiction of the Occupational Safety and Health Review Commission for hearing, and the undersigned was assigned and delegated to hear the case, make report and render a decision. The hearing was held at Des Moines, Iowa, January 19 and 20, 1972, with all parties represented and present.

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n1 The bracketed "or other gases" was an amendment allowed January 12, 1972, pursuant to complainant's motion to amend.

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THE LAW

The Occupational Safety and Health Act was enacted by Congress December 29, 1970. It provided that it was to take effect 120 days after enactment, or as of April 27, 1971.

Section 5(2)(1) and (2) of the Act is as follows:

Sec. 5(a) Each employer --

(1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;

(2) shall comply with occupational safety and health standards promulgated under this Act.

Section 6 of the Act and other sections indicate and provide that as soon as practicable the Secretary of Labor shall promulgate standards by adopting any national or federal standards or by promulgating any revision or modification of such standards.

As of April 27, 1971, the Secretary did promulgate or adopt certain national standards as Occupational Safety and Health Standards, some of which would have application to this particular case if they had been or were effective as of July 16, 1971. However, by specific provision these standards were to be effective 90 days after publication. Such standards were published May 29, 1971. Thus, such standards became effective August 27, 1971. The question and controversy rises whether such standards are or were applicable to the present case. It would seem quite clear that the standards were not effective on July 16, 1971 as a part of the Act or as a part of the standards or regulations adopted thereunder and the hearing examiner will so find.

This immediately raises the issue as to whether, because no standards or definite guidelines for the employer were in effect as of July 16, 1971, the Act itself was ineffective and unenforceable as of that date because its provisions were too vague and incomplete. Clearly the Act contemplates that the Secretary shall, as soon as practicable, adopt standards which will then become a part of the law under that Act.

In almost every act passed by Congress which is to be administered by a governmental agency, provision is made under guidelines in such act for the Secretary, Commissioner, etc., to promulgate regulations and, in some cases, standards for the purpose of providing for the carrying of the legislation into effect and interpreting its provisions in some detail. This is a permissible and recognized extension of the legislative process. Such regulations or standards have the force and effect of law until challenged by some party and a court of competent jurisdiction sets such regulation aside or modifies its effect by finding that such regulation or standard does not properly reflect or interpret the law as enacted by Congress. Here, then, there was clearly something left for the Secretary to do in adopting standards. Such standards had not been put into effect by the Secretary on or before July 16, 1971.

While the hearing examiner agrees that it would have been much easier for all parties concerned, including the hearing examiner, to deal with the case if regulations and standards had been in effect, he does not believe that the Act was thereby and as of July 16, 1971, inoperative or inapplicable, either generally or with respect to the specific accident and tragedy which occurred.

The Act itself does not use the word "negligence." The Respondent in its brief indicates that in an employer-employee relationship, where injuries result within the course of the employment, negligence is generally considered a factor in cases dealing with such incidents. The Complainant, in its brief, indicates a standard of duty or level of care such as a reasonable and prudent man or employer should have exercised to know "of the hazard" and that, upon knowing, he should taken measures to protect his employees from consequent harm. This is in effect suggesting the old common-law rule. This rule is perhaps better stated in a quote from a well-recognized source, 53 Am Jur 2d, Master and Servant, Sec 142, p 209. This particular excerpt is as follows:

Section 142. Degree and standard of care.

The negligence of the employer which is the basis of his liability for injury to his employee at common law is measured by general principles of the law of negligence. It is the duty of the master to exercise ordinary or reasonable care commensurate with the nature of his business to protect his servant from the hazards incident to it, and the employer is bound to exercise this degree of diligence in providing his employee with safe tools, appliances, machinery, and working places. While expressions vary somewhat in different cases, it is generally agreed that the standard of care is that exercised by the average prudent individual under similar circumstances. Since these concepts are relative rather than absolute, the circumstances of each case are of controlling importance, and it is for the jury, under proper instructions from the court, to determine in the particular case whether the conduct of the parties was such as would be expected of reasonable prudent men under a similar state of affairs.

However, there appears to be more to the common-law rule which is applicable and which is also set out in the same source at Page 213:

Section 146. Foreseeability of harm. The common-law liability of an employer for negligent injuries to his employee is limited to those circumstances in which the employer could have foreseen and prevented the harmful occurrence. In determining the question whether responsibility for an injury to an employee is to be attributed to an employer or to the employee himself, responsibility on the part of the employer is to be found in action or non-action accompanied by knowledge, actual or implicit, of the probable results of his conduct. Knowledge then, or opportunity by the exercise of reasonable diligence to acquire knowledge of the peril which subsequently resulted in injury to the employee is fundamental to responsibility on the part of the employer.

Thus it appears necessary that the situation which is dangerous or which proved to be dangerous was known to exist or by the exercise of reasonable diligence could have been foreseen by the employer. Actually, both parties quote Section 18(k) of the Act, which is as follows:

For purposes of this section, a serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place or employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

It would appear to the hearing examiner that within these basic concepts, findings can be made and decision rendered. It is, therefore, necesary to examine physical facts and the sworn testimony in some detail.

THE EVIDENCE

The hearing examiner will attempt to review the facts without necessarily interpreting their meaning or making findings at this point. It appears that the Vy Lactos plant in Des Moines has been in operation for at least some twenty years. Mr. Willard E. Rogerson testified that he is and had been president of Vy Lactos for at least ten years; that the main business of Vy Lactos is the manufacturing of concentrates for livestock and poultry feeds; and that the main ingredients are molasses, fish solubles and grain carriers. He also testified that the products of the Des Moines plant were sold in Iowa and in three or four of the surrounding states. The molasses and grain carriers do not play an important part in the issues herein, while the fish solubles are important to the case.

Boris Kviesitis, the company chemist, whose testimony will be reviewed later, testified as to fish solubles. This material originates largely in the Gulf of Mexico. Generally this consists of the innards and guts of fish or that part of the fish which is discarded when the preliminary preparation of fish for food is made. This material has a certain amount of water mixed with it. The material is shipped up the Mississippi, and when it arrives at Iowa or Illinois ports it is in the form of a fish slurry, which means that the material has decomposed, or at least turned into a liquid slurry form. Naturally this type of material, and especially where there is decomposition, would smell. The decomposition apparently takes place mostly in the protein part of the material as a result of bacteriological decomposition. Hydrogen sulfide is given off, perhaps along with some other gases. The material was described as having a smell akin to rotten eggs. By the time it reaches local ports or the manufacturing plant, it is in liquid or semi-liquid forms such that it can be pumped into tank trucks and from the trucks into pits or tanks in the plant. To prevent decomposition, or at least to slow it down prior to processing, a small amount of sulfuric acid is injected or mixed with the fish slurry to prevent or at least slow down the bacteriological decomposition.

The plant at Des Moines has tanks or pits where the raw fish slurry and perhaps molasses are stored prior to being processed. These are in the basement of the building. The first floor was not particularly described, but there was specific testimony that it contained a pre-mixing room. It would appear that the second floor was the processing part of the plant. Fish solubles are removed from the pits by pumps connected by pipes which extend into the pits. These pumps are located in a back basement, which is approximately 14 feet by 24 feet in area and perhaps 11 feet to 12 feet to the ceiling from the floor thereof. This basement is entered by a flight of stairs. Apparently at the time of the accident there were at least two pumps and motors in the basement, the pumps and motors being at about knee level. Since there is no natural drain from the basement, the said basement also had a sump pump to pump water or materials that might have been spilled or used in the basement. This basement also had small openings near the ceiling from the various pits. At least the testimony was certain that there was a small opening near the ceiling between said basement and Pit Number 7. It would also appear that there might have been a pipe passing through this opening.

This basement in which the tragedy occurred was not generally used as a place where employees worked on any regular basis. Certain employees would come occasionally to this basement to check the pumps and the motors or to repair the same or to clean the basement when necessary. It would appear that at times some material spilled over from the tanks, some of which on some occasions consisted of fish solubles, at least in part. The testimony generally did not indicate that the spillover into the basement prior to July 16, 1971 was ever of any great quantity. The testimony also indicated that employees had been cleaning tanks in which fish solubles had been stored over the many years in which the plant was in operation, and that they had been cleaning and occasionally visiting the said basement over the same period without ever having come in contact with a lethal dose of gas, and that no serious injury had ever occurred to any employee over that period because of the inhalation of any gaseous material such as hydrogen sulfide.

Sometime in the night of July 15 or early morning of July 16, a truck owned by the Knappen Molasses Company delivered a shipment of fish solubles. The Knappen Company, since March 3, 1971, apparently has become the owner of the majority of the stock of Vy Lactos. However, Vy Lactos Laboratories, Inc. still continues as a separate corporation, with Willard E. Rogerson as its president. Apparently this tank shipment of fish solubles coming from a Mississippi River port was not noticed or reported to the night man on duty at the plant. The truck driver connected the tank truck with Pit Number 7 and dumped his load. As a result, Pit Number 7 overflowed, and it overflowed through the hole at the top of the ceiling of the basement above described, into the said back basement area. When this was discovered on the morning of July 16, there were approximately 31 inches of the fish soluble liquid or slurry in the said basement. Naturally this covered the motors and pumps and the sump pump. It had to be removed. Therefore, a hose was put into the basement and into the liquid by way of the basement stairs, and the liquid was pumped out down to about three inches which still remained on the basement floor. Not much is known as to who or what employee was concerned with the pumping out of this 31 inches of material. Someone did have to place the hose into the material down the basement steps. Counsel on both sides had much to say as to whether such individual or individuals placing the hose would go down the steps to the edge of the slurry or whether someone pushed the hose from the top of the steps down into the slurry, and the attorney for the complainant states that there is not proof that anyone did go down the steps to the edge of the slurry. This may be true, but there is also no proof that they or he did not go down to the edge of the slurry. If the hearing examiner were to make a guess, he would be inclined to believe that a responsible employee in placing the hose would have gone down the steps to somewhere near the edge of the slurry to get the job well done. The important point to notice here is that at the time the hose was placed in the material, which was some time in the morning of July 16, there was no outcry of any employee being in trouble or of having inhaled a lethal dose of hydrogen sulfide or some other gas.

After the material had been taken out down to three inches, several of the employees were directed to go to the basement to clean and repair the pumps and motors and also apparently to clean up the remaining mess. It was at this time and while they were in process of

attempting to do this work that the lethal dose of gas was encountered. At approximately eleven o'clock in the morning of July 16, Mr. Rogerson was advised that some man or men were in trouble in the basement. Subsequently, and before it was all over, three men were dead and two seriously injured by gas. Mr. Rogerson testified that when he went to the area at this time and got perhaps a fourth or a third of the way down the stairs he began to grow a little dizzy from the gas. The testimony of some of the other persons or employees perhaps would give the picture in better detail.

John Pfrimmer stated that he was an employee of Vy Lactos and operated a "block machine" which processes mineral blocks and phenothiazine blocks. He testified that he had been an employee 15 years; that during that time he had entered the basement many times; that on occasion he had seen a small amount of liquid on the floor, but that it looked more like feed and water and molasses; that there may have been some fish solubles, but that he had never seen any "green gunk" such as was on the floor on July 16. He first became aware of the difficulty when a fellow employee, Stanley M. McGowan, ran by and informed him that men were in trouble in the basement. Pfrimmer then went to the basement area, and specifically to the top of the said stairway. He observed some men lying in the basement at or near the bottom of the stairs. McGowan and Pfrimmer thereupon went down the steps to help. The first employee that they tried to help was a man by the name of Jack Simmer. He was lying on his back at the foot of the stairway and possibly part way on it. They got Simmer by the arms, but they could not get him out because they could not breathe. A rope was secured and other efforts were made. McGowan was overcome in trying to get the men out and was in the basement area. A fire rescue unit came, and firemen wearing gas masks or oxygen masks entered the basement. Five men, either dead or unconscious, were removed from the basement and taken to the hospital. Three of the men, Kelly, McGowan and Latta, were dead.

Another employee, Lee Stiles, who could fix the approximate time the tragedy occurred, stated that it was "approximately twenty minutes to eleven" when he was passing along a hallway near to the basement and heard "people or groans in the back basement." Stiles testified that he went to the top of the basement stairs and saw Kelly and Simmer trying to pull Latta out, and then saw Kelly and Simmer fall into the liquid on the floor. Simmer had fallen face forward into the liquid. Stiles went down and pulled him over and pulled Kelly against a barrel, but then he had to leave because he could not breathe. Stiles testified that a short time prior to hearing the groans and finding the men in the basement, he had seen Kelly cutting a hole 10 to 12 inches in diameter with an acetylene torch in an iron plate which covered an opening in the ceiling of the said basement, or which actually was a part of the floor of the room directly above the said basement. This room above the basement was a mixing room, or as later described, a pre-mixing room. Although the attorney for the Respondent in his brief claims that Kelly was cutting this hole for the purpose of ventilation, there is no testimony or evidence in the record to show why Kelly was cutting the hole; and while it would be logical to surmise that he was doing it for purposes of ventilation, there is no direct evidence as to what and why Kelly did cut this hole with a blowtorch some time shortly before the witness became aware that not only Kelly but the other employees were in trouble or had been overcome in the basement.

In any case, there had been no outcry and no notice of any men being overcome or in difficulty until after Kelly had cut the hole. Whether or not the cutting of the hole had any connection with the lethal dose of hydrogen sulfide or other gas encountered, will be developed by the testimony of other witnesses and evaluated in the hearing examiner's reconciliation of the facts. The hole cut in the iron plate by Kelly with a torch, on the basis of its diameter of 11 to 12 inches, had a circumference of about 33 to 36 inches.

Joseph W. Klinsky testified that he was a resident of Iowa City, Iowa; that he was an industrial hygiene engineer for the State Hygienic Laboratory, which is a department of the University of Iowa at Iowa City; that he had been at the University about 16 years and as an industrial engineer since 1966. Prior to that he had been employed by various firms in environmental atmosphere work. He testified that he was a graduate of Iowa State University at Ames, Iowa with a major in chemical engineering. He is a member of various scientific societies and seemed to be well qualified. On July 16 he was requested by the Safety Director for the State of Iowa to investigate the occurrence at Vy Lactos Laboratories. Mr. Klinsky and some of his assistants arrived at the Vy Lactos plant at approximately 3:30 in the afternoon of July 16. He and his associates took samples of the slurry or material about three inches in depth on the basement floor. They also took atmospheric samples and some tests as to air movement. The samples of slurry were secured and the tests were made largely through the hole which Kelly had cut in the iron plate. The witness testified that when he arrived there was a metal cover over the hole. It appears that a greater concentration of hydrogen sulfide was found near the floor of the basement in the area below the hole which would not be too far removed from the bottom of the basement stairs; that at a level of about five feet from the bottom of the basement floor, or at "approximately the breathing zone" of a normal man, the amount of oxygen was "substantially normal"; that the highest amount of hydrogen sulfide that was found was about 30 parts per million. The witness and another chemist in later testimony indicated that 30 parts per million would cause smarting of the eyes and some minimal discomfort, especially over a longer period of time, but would not be lethal in any case; that 70 to 150 parts per million would cause "slight symptoms after several hours"; and that 500 parts per million, even for a short period, would cause a great deal of difficulty, and over a longer period could cause death. If as much as 1000 parts per million were present, severe injury and almost instantaneous death would occur from being in this type of atmosphere. A great many questions were asked, and a great deal of testimony was given by Mr. Klinsky as to bacteriological action in various types of material and specifically in fish slurry, and the amount thereof; how putrefaction was controlled by injection of sulfuric acid; and the rate of biological action in the production of hydrogen sulfide under various conditions. The gist of the testimony indicated that production of hydrogen sulfide by bacterial action would not ordinarily be an instantaneous process but that it would take place over some period of time, since it depended upon the growth of bacteria. The witness, Mr. Klinsky, further testified that the process of bacteriological action could be accelerated to some extent by motion of the fish slurry when it was transferred or poured or injected suddenly into another container or place, such as would be true where the fish slurry ran from Pit Number 7 through the hole in the ceiling on the floor of the said basement. Testimony seemed to be rather inconclusive that such conditions produced the amount of concentration of hydrogen sulfide between the time that the fish slurry ran over into the basement, or even specifically between the time that the slurry was pumped out in the morning and the time when the employees encountered the lethal dose. At least it was inconclusive that it could have occurred by bacteriological action, even accelerated by movement and overflow of the said slurry into the basement.

Mr. Klinsky was of the opinion that hydrogen sulfide was the essential ingredient of the lethal dose which killed the men. He further testified that he believed there were a number of circumstances which, together, caused the concentration of the lethal dose of hydrogen

sulfide to occur when and where it did. He did not take into consideration the chemical reaction theory later advanced by the witness Boris.

The testimony of Russell Tennill, an employee of 22 years, needs to be considered, especially since the Complainant's attorney has drawn conclusions from this testimony, and to which testimony and conclusions the Respondent's attorney has objected rather forcefully. Mr. Tennill was not present at the plant on July 16. He had gone on vacation on July 9 and did not come back until after July 16. He testified that about two weeks before July 9 he inspected the said back basement; that there was an inch or two of liquid, presumably fish slurry, greenish in color, on the floor. He walked through it to get to the sump pump, which he found did not work. The material on the floor had a bad smell and Tennill testified that after a short time he became a little dizzy and his eyes smarted and that after he left his head ached. He reported the situation in the basement, and upon checking in the next day or two he found that the same condition still existed. A day or two later, on inquiry, he was told that Kelly had fixed the sump pump and that the basement had been cleaned up. It should be noted that Tennill suffered no severe ill effects; that according to his testimony Kelly went into the basement and fixed the sump pump; that there is no testimony or evidence that Kelly suffered any ill effects; and that no other persons, so far as the record shows, were overcome or suffered ill effects by the condition or conditions existing and described by Tennill.

All witnesses except one were called by the complainant, including Willard E. Rogerson. The Respondent called one witness, Boris Kviesitis. Because of difficulty with pronouncing the name, the Respondent's attorney suggested that he be referred to as Boris. Boris has training as a chemist with a Master's Degree in agricultural chemistry and technology. He testified that he was employed by other firms in like capacity until he came to work for Vy Lactos some twenty years ago. He testified that he was a chemical engineer; that he was employed at Vy Lactos as chief chemist; and that he was in charge of quality control, product development and research. He testified that he had been present at the plant when Klinsky and his aides took samples and made tests; that he had discussed and debated with Mr. Klinsky the tests and the results thereof; that he had gone with Mr. Klinsky to the laboratory in Iowa City; that a part of the test material was given to him; that he conducted his own tests; and finally that he saved a part of the test material by refrigeration. He stated that further testing on his part did not indicate a great release of hydrogen sulfide by bacterial action; that he did not agree or disagree with Mr. Klinsky's theories, at least not until approximately two weeks before the hearing; that he had found the theories arrived at by Mr. Klinsky as to what caused the lethal dose of hydrogen sulfide inconclusive, or conversely that such facts and test results as Mr. Klinsky had at hand did not substantiate his findings or justify his conclusions or his theory as to what caused the lethal dose of hydrogen sulfide. This included not only consideration of bacteriological action but movement of the slurry also. He testified that he was not satisfied with any of the theories of what had happened. He, therefore, had read and studied and talked with other scientists in an effort to arrive at some logical or acceptable theory. His studies indicated to him that iron sulfide was a substance which was a source of hydrogen sulfide, and upon being mixed with a weak or diluted solution of sulfuric acid was supposed to give off or produce very substantial quantities of hydrogen sulfide. He also found that iron sulfide could be made by fusing iron and sulfur together. Boris had the iron particles or dust at hand. However, in his laboratory he did not have any sulfur at hand. However, he knew that phenothiazine, a greenish, powder-like substance which was used by Vy Lactos in its pre-mixing room in the processing of its products, contained a high degree of sulfur. Therefore, in his laboratory, he took about half a teaspoon of iron powder and mixed it with about half a teaspoon of phenothiazine. He then fused this in his laboratory furnace at about one thousand degrees and made iron sulfide. He then placed the iron sulfide thus made in a weak solution of sulfuric acid. He stated that even this small amount gave off such a concentrated amount of hydrogen sulfide that it drove him and his assistants out of the laboratory. He then remembered something else, and this was that the phenothiazine powder normally would be on the floor of the pre-mixing room in amount as much as one-sixteenth of an inch, or perhaps more; and that Kelly in cutting the hole in the iron plate in the floor of the mixing room had used a torch where the heat would approach one thousand degrees. He therefore theorized that when the torch was applied to the iron plate it resulted in the cutting or melting of a strip of metal around the circle; that the phenothiazine on the floor on the iron plate fused with the iron to produce iron sulfide; that this iron sulfide then dropped into the slurry below; that this slurry contained a weak solution of sulfuric acid which had been mixed with it for preservative purposes; and that as a result a chemical reaction occurred, much the same as had occurred in his laboratory, wherein the iron sulfide, upon being mixed with a weak solution of sulfuric acid, gave off great quantities of hydrogen sulfide. He testified that the particles would have dropped into perhaps a slightly greater area than the size of the hole in the iron plate, but in the general area near the foot of the stairs. On cross-examination, he was asked whether it would not have been normal for Kelly to brush away any such powder and also whether the action of the torch would not have served to blow away the phenothiazine if such there were on the iron plate. Boris testified that while phenothiazine normally was a green powder, that on the floor of the mixing room it would have a certain amount of molasses and oil mixed with it so that it would not be mobile and that, in fact, when the floor was cleaned the phenothiazine had to be scraped off by employees. As noted above, the testimony was that the hole which Kelly cut was somewhere between 11 and 12 inches in diameter. Thus the circumference of the hole around which the torch cut would be somewhere between 33 and 36 inches. Presuming that the torch cut out iron, perhaps one-eighth or three-sixteenths of an inch in width, with at least one-fourth inch thickness, this would mean a considerable amount of molten iron or iron sulfide dropped into the slurry below. Just how much of this iron would have fused with the phenothiazine into iron sulfide, of course, is problematic. Boris pointed out that since a half-teaspoonful of iron powder plus a half-teaspoonful of phenothiazine fused together into iron sulfide produced such a dramatic amount of hydrogen sulfide when this amount of iron sulfide was mixed with a weak solution of sulfuric acid, the amount of iron sulfide that would have been dropped into the slurry could also have produced a rather dramatic amount of hydrogen sulfide.

RATIONALE

The standards adopted by the Secretary and which became effective August 27, 1971, obviously were not in effect on July 16, 1971, when the tragedy occurred at Vy Lactos. They were not a part of the Act as such, and the hearing examiner will so find. However, as noted above, the Act is not rendered inoperative thereby. Certainly it would have been much easier for all parties to deal with this case if standards and regulations, including a definition of a "recognized hazard", had been a part of the Act on July 16.

The hearing examiner, before making findings and conclusions, must evaluate and weigh the evidence as it relates to the duty and level of care and reasonable diligence which the Respondent exercised or should have exercised to protect the employees from serious physical harm or death.

Generally, the hearing examiner must first examine the evidence to determine if in fact a dangerous situation or hazard was present prior to the accident on July 16 which at any time could have resulted in serious physical harm or death of an employee.

The place of employment at Vy Lactos has some features which are undesirable but which are a natural part of the work and are known to the employee when he hires out and during his work on the job. There is a certain amount of smell and perhaps some occasional discomfort to the eyes connected with this work, which cannot be avoided. A clothing salesman would not be faced with this problem. This, however, has nothing to do with any assumed risk theory and really very little to do with the vital issues of the present case.

The facts appear to be that Vy Lactos had been in the same business for 20 years prior to July 16, 1971; that during that time no employee or other person had ever suffered severe physical harm or death by coming into contact with a lethal dose of hydrogen sulfide or other gas. The premises were regularly inspected by insurance companies having insurance policies covering both the physical plant and the employees.

The said back basement is not a regular or usual place of employment. It contains pumps and motors and is visited only occasionally by certain employees who check the equipment and less occasionally by employees who clean up the place.

As noted above, the Complainant introduced testimony, over the objection of the Respondent, by one Tennill as to his activities and observations some two or three weeks prior to July 16 in an effort to prove that a dangerous condition existed prior to July 16. Tennill was on vacation on July 16. Some two or three weeks prior thereto he had inspected the said basement, which, as noted above, had some inch or two of foul-smelling, greenish liquid on the floor, presumably containing some fish slurry. He walked through it and tried to start the sump pump. The most he could come up with was some dizziness, some smarting of the eyes, and a headache after he had left the basement. It appeared that he reported the condition and that later Kelly, the man who lost his life on July 16, repaired the sump pump and cleaned up the place. Tennill, over a period of 15 years, had on occasion inspected the said back basement and on occasion had cleaned it up without any injury. However, counsel for the Complainant argues that this shows the existence of a dangerous condition existing in the plant and cites legal precedent for the proposition that if a dangerous condition existed at some time prior, under the same conditions it would be presumed to exist at the time of the incident causing death or injury. There is nothing wrong with the legal proposition in the citation. The difficulty would seem to be that the Complainant has not demonstrated by said testimony that a dangerous condition existed. Rather to the contrary, it would seem to indicate that a dangerous condition did not exist and therefore, applying the legal principle, it did not exist prior to the incident on July 16. Testimony of other witnesses does not indicate the presence of a dangerous condition.

Before arriving at any findings or conclusions as to whether, with the exercise of reasonable diligence, the Respondent could have known or foreseen the danger or the probability of serious physical harm and death to employees, the hearing examiner must further consider the evidence.

The question of adequate ventilation arises. Had there been some kind of vent, even such as Kelly made, it could be argued that the gas might have dissipated and all that followed would not have occurred; but hydrogen sulfide is heavier than air and would have remained unless some sort of fan was present to move it. The fact is that no one was overcome or in any difficulty until Kelly cut the hole with the blow torch. The lethal dose of gas was present immediately thereafter near the bottom of the stairs where the deaths occurred. No further review of how the men died is necessary.

Klinsky's theories that the lethal dose of hydrogen sulfide gas occurred in concentration of anything like 700 parts per million because of bacteriological action and movement of the slurry are uncertain and do not present the certain and sufficient evidence necessary to support such conclusion or conclusions. They do indicate that there very probably was some increase in hydrogen sulfide gas in the basement and the actions of Kelly and the other men would seem also to indicate this. However, no dangerous condition or lethal dose can be shown to have existed until Kelly cut the hole.

This brings us to the theory espoused by Boris Kviesitis. Boris agreed with what Klinsky's tests had shown on the instruments or in the laboratory. Like tests of his own showed him the same results. In addition he had run tests on the material and found that the amount of hydrogen sulfide products released by bacterial action was rather minimal. He testified that at the time his deposition was taken by John Weiss, Labor attorney, some three weeks before the hearing, he did not agree or disagree with the theories advanced by Mr. Klinsky, but that such theories, based upon evidence available at that time, were inconclusive as to why the lethal dose of hydrogen sulfide had occurred.

While the theory proposed by Boris seems at first glance to be somewhat unusual, it does have substance and he does have scientific support for it. It fits in well as to time and place. Perhaps, as Klinsky indicated, the lethal dose was due to a combination of circumstances. However, there is no good reason not to believe that at least a part of the molten metal that dropped from the torch was iron sulfide and that, as it fell into a weak solution of sulfuric acid, by chemical action it gave off considerable quantities of hydrogen sulfide. Also, there probably was some hydrogen sulfide already present so that this all added to the concentration, which had to be at least 700 parts per million and probably more like 1000 parts per million, to cause the sudden deaths.

However, sustaining one theory or another is not the finding or conclusion in which the hearing examiner is primarily interested. It only leads up to whether the lethal dose of hydrogen sulfide could have been foreseen. The hearing examiner believes that the evidence indicates rather clearly that the incident, the physical harm and the deaths occurred because of an unusual and unexpected set of circumstances which the Respondent, in the exercise of reasonable diligence, could not have foreseen; and that prior to July 16, 1971, the Respondent was not operating a place of employment which was dangerous, nor was there a substantial probability of some condition present causing serious physical harm or death to an employee. The question also arises as to the need for furnishing gas or oxygen masks. It appears that if the Respondent could have reasonably foreseen the concentration of gas that caused the severe physical harm and deaths, he could then have foreseen the need for the masks.

The Complainant has the burden of proof. The Complainant has not sustained his burden of proof. This has not been due, however, to lack of effort or ability of the attorney for the Complainant to adduce and present all of the evidence available.

FINDINGS AND CONCLUSIONS

The hearing examiner has carefully considered the evidence and finds:

1. That the standards adopted or promulgated by the Secretary as of April 27, 1971 and published May 29, 1971 did not become effective until August 27, 1971; and that, therefore, the said standards were not effective as of July 16, 1971 or applicable as a part of the Act to the conditions, injuries and deaths at the Respondent's plant on said date.

2. That the Act as of July 16, 1971 was nevertheless operative without such standards and regulations, and specifically that Sec 5(a)(1) and Sec 17(k) of the Act were applicable to the conditions, injuries and deaths at the Respondent's plant as of that date.

3. That the record indicates much published material as to standards of safety and protection of employees from injury was available or should have been vailable to the Respondent.

4. That the level of care or duty of the employer Respondent in providing protection to its employees was dependent upon (1) whether the Respondent in the exercise of reasonable diligence should have known of the presence of some dangerous condition, if such there were, which was likely at any time to cause death or serious physical harm to its employees; (2) whether the Respondent in the exercise of reasonable diligence should have foreseen the substantial probability of a circumstance or set of circumstances occurring which would cause death or serious physical harm; and (3) knowing or having foreseen, whether the Respondent took effective preventive measures.

5. That, as agreed by the parties, hydrogen sulfide was the gas causing death and injury in this case.

6. That the said back basement where the deaths occurred was not a place where employees usually worked, but was rather a place which a small number of employees visited occasionally.

7. That the evidence does not show the existence of a dangerous or unsafe condition or the presence of an amount of hydrogen sulfide such as would be likely to cause death or serious physical harm to any employee at any time prior to July 16, 1971.

8. That no substantial evidence has been offered or introduced that gas or oxygen masks were ever used or needed by the employees of the said plant prior to July 16, 1971.

9. That the dumping by a transport truck of an excess amount of fish slurry into Pit Number 7 in the early morning of July 16, while it was somewhat unexpected, is not shown to have been directly responsible for the lethal dose of hydrogen sulfide.

10. That while the said basement floor was covered with 31 inches of fish slurry on the morning of July 16, there is no evidence that any lethal dose of hydrogen sulfide was present, and that rather the contrary appears to be true.

11. That there is no certain evidence the lethal dose of gas occurred immediately after the slurry had been pumped down to 3 inches; and that injury and death occurred from the lethal dose of gas only shortly after one Kelly cut a hole with a blow torch in an iron plate directly above the said basement near the stairs where the deaths occurred.

12. That the testimony and theories of Joseph W. Klinsky, while they no doubt reflect acceptable testing procedures, almost admittedly do not supply the necessary evidence that the lethal dose of hydrogen sulfide was the result of bacteriological action plus movement of the slurry; but that they do indicate that some increase of hydrogen sulfide was present in the basement after the slurry was pumped down to three inches and before the hole was cut.

13. That the testimony and theory of the witness Boris that the cutting of the hole in the iron plate caused a significant amount of hydrogen sulfide to be formed and injected into the atmosphere of the basement by chemical action when the molten iron or iron sulfide dropped into the slurry on the floor of the basement, cannot be wholly rejected; and that the same provides the only tenable theory offered as to the sudden appearance of a lethal dose of hydrogen sulfide.

14. That the Respondent in the exercise of reasonable diligence could not have foreseen the necessity of providing protective equipment such as gas or oxygen masks for the use of employees; and that the evidence fails to show that such equipment, even if available, would have been used by employees on July 16, 1971 or would have prevented the deaths and serious physical harm from occurring.

15. That the hearing examiner, on the basis of each and all of the above findings, must conclude and find that the deaths and serious physical harm to employees at the Respondent's plant on July 16, 1971 occurred as a result of unusual and unexpected circumstances; that the Respondent in the exercise of reasonable diligence could not have foreseen or anticipated the probability of death and serious physical harm to employees from hydrogen sulfide gas; that likewise the Respondent could not have foreseen the necessity of providing gas or oxygen masks; that the evidence is insufficient to support the allegations of the Citation; and that the Complainant has failed to sustain his burden of proof.

HEARING EXAMINER'S DECISION

WHEREFORE, it is the decision of the hearing examiner that Vy Lactos Laboratories, Inc., the Respondent, has not violated Sec. 5(a)(1) of the Occupational Safety and Health Act as alleged and charged in the Citation for Serious Violation filed herein by the Complainant.

Accordingly, it is hereby ordered that the Citation for Serious Violation and the Proposed Penalty be and the same are hereby dismissed and set aside; and that this case be and hereby is closed, subject only to review, reopening and appeal as provided for by the Act.