



United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR,

Complainant,

v.

OSHRC Docket No. 02-2160

MOTIVA ENTERPRISES, LLC, and its
successors,

Respondent.

APPEARANCES:

Howard Radzely, Solicitor of Labor; Joseph M. Woodward, Associate Solicitor for Occupational Safety and Health; Alexander Fernández, Deputy Associate Solicitor for Occupational Safety and Health; Daniel J. Mick, Counsel for Regional Trial Litigation; Peter J. Vassalo, Attorney for the Secretary of Labor, U.S. Department of Labor, Washington, DC.

For the Complainant

Arthur G. Sapper, Esq.; McDermott, Will and Emery, Washington, DC; Elizabeth K. Hay, Esq., Senior Attorney, Shell Oil Company, Houston, Texas, Of counsel

For the Respondent

DECISION

Before: RAILTON, Chairman, ROGERS, Commissioner, and THOMPSON, Commissioner.

BY THE COMMISSION:

For review before the Commission is a decision by Administrative Law Judge Michael H. Schoenfeld affirming citations issued to Motiva Enterprises, LLC (Motiva) for violations of 29 C.F.R. § 1910.119, the process safety management (PSM) standard for highly hazardous chemicals. The only issue to be decided, based on the parties' stipulated record, is whether the PSM standard applies to the conditions at Motiva's propane distribution terminal. For the reasons given below, we reverse the judge and vacate the citations.

BACKGROUND

On November 4, 2002, the Occupational Safety and Health Administration (OSHA) issued Motiva two citations for alleged serious and “other than serious” violations of the PSM standard at its propane refinery and distribution terminal in Delaware City, Delaware.¹ OSHA proposed a total penalty of \$2,500. Motiva timely contested the citations, and the parties submitted the case to the judge on a stipulated record. Motiva concedes that the PSM standard applies to the equipment in its propane refinery. Pursuant to the parties’ stipulation, Motiva only disputes the Secretary’s claim that the PSM standard applies to the conditions at its Delaware City distribution terminal. Motiva stipulated to all other elements of a violation, as well as the characterization and penalties proposed for the citation items.

According to the stipulations, Motiva’s “Commercial Marketing and Distribution Division” runs the distribution terminal, which dispenses and sells propane on a wholesale basis. The distribution terminal is adjacent to Motiva’s propane refinery, which is run by Motiva’s “Refining Division.” The refinery is separated from the terminal by a cyclone fence. Seven storage tanks store propane at the refinery until the propane is dispensed at the distribution terminal. Each of the seven propane storage tanks in the refinery connects to a pipe that transports the propane over the cyclone fence and into the distribution terminal.

The distribution terminal contains two loading islands where customers wishing to purchase propane park their tanker trucks. After parking next to an island, the driver of the truck exits the vehicle and attaches a loading hose to the tanker truck. The driver then walks to the end of the loading island and inserts a key card containing the customer’s account information into an outdoor computer. Using the computer’s key pad, the driver enters numbers representing the amount of propane desired and then activates the loading pump. Once activated, the loading pump propels propane from one of the seven storage tanks located in the refinery, through a connected pipe leading over the cyclone fence, and into the distribution terminal, where a loading hose dispenses the propane into the tanker truck.

¹ The sections of the PSM standard under which Motiva was cited are: 29 C.F.R § 1910.119(f)(1) (requiring an employer to develop and implement written operating procedures); § 1910.119(g)(3) (requiring an employer to record the means by which it verifies that employees receive adequate training); § 1910.119(j)(2) (requiring an employer to establish and implement written procedures to maintain the on-going mechanical integrity of the process equipment); and § 1910.119(c) (requiring an employer to develop a written plan of action regarding employee participation).

During this procedure, upwards of 39,000 pounds of propane may flow over a period of 30 minutes from the propane storage tank to its final repository in the tanker truck. While the several pipes that run from the refinery's storage tanks to the distribution terminal do not have the combined capacity to contain 10,000 pounds of propane, each of the refinery's seven storage tanks (that feed propane to the distribution terminal) has the capacity to store up to 100,000 pounds of propane, and normally contains more than 10,000 pounds of propane at any given time.

DISCUSSION

By its terms, the PSM standard applies to:

- (ii) A process which involves a flammable liquid or gas ... on site in one location, in a quantity of 10,000 pounds ... or more....

29 C.F.R. § 1910.119(a)(1)(ii). In his decision, the judge concluded that the conditions at the cited terminal fell under the PSM standard based on his findings that: (1) the movement of the propane from the propane storage tanks, through the pipes, and into the tanker trucks constituted a "process"; and (2) the minimum amount of propane—which the parties agree is a flammable gas—could be found either in the tanker trucks at the distribution terminal or in the propane storage tanks at the refinery.

We agree with the judge that the stipulated record establishes that the cited activities involve a quantity of 10,000 pounds of propane, the threshold amount identified in § 1910.119(a)(1)(ii). We base this on the stipulated fact that each of the seven storage tanks in the refinery normally contains at least 10,000 pounds of propane. We do not rely, as the judge did, on the amount of propane contained in the tanker trucks to meet the 10,000-pound threshold quantity. Not only did the parties stipulate that the tanker trucks are not subject to regulation by the Occupational Safety and Health (OSH) Act, but on review the Secretary refers to the judge's reliance on the amount of propane contained in the tanker trucks as error, albeit harmless.²

We cannot agree, however, with the judge's ultimate conclusion that the cited distribution terminal is subject to the requirements of the PSM standard. Section 1910.119(a)(1)(ii) expressly requires that a "process" involving a flammable gas or liquid in a quantity of 10,000

² The stipulation provides: "The tanker truck, its movements and propane loading are regulated by the U.S. Department of Transportation (DOT) and are not subject to the OSH Act within the meaning of [s]ection 4(b)(1) of the OSH Act, 29 U.S.C. § 653(b)(1)."

pounds or more be “on site” and “in one location” in order to be covered by the PSM standard. Yet, the judge made no findings in his decision that any of the activities involving the propane storage tanks in the refinery and the pipes connecting them to the distribution terminal were “on site” and “in one location.”

The Secretary’s case is equally lacking. Indeed, the Secretary has failed not only to address the meaning behind the terms “on site” and “in one location” – two important elements of the PSM standard – but also to show how these elements are established on this record. The Secretary contends only that the “process” alleged here is “on site in one location” because the refinery storage tanks connect to pipes leading into the distribution terminal, and because the standard’s definition of “process” states that interconnected vessels shall be considered a single process, citing to a section of the preamble for support. Her view, however, effectively reads the terms “on site” and “in one location” out of the standard. Because these terms were expressly included in the provision, they must have some meaning apart from the separately defined “process.” *See Smith Steel Casting Co.*, 15 BNA OSHC 1001, 1007, 1991-1993 CCH OSHD ¶ 29,314, p. 39,366 (No. 80-2322, 1991) (consolidated) (as a basic rule of statutory construction, a standard should be read as “a harmonious whole, and every word or phrase should be given meaning to the extent possible”). *Compare* 29 C.F.R. § 1910.119(a)(1)(ii) (“on site” and “in one location” are elements in determining whether the PSM standard applies to a process involving a flammable liquid or gas) *with* 29 C.F.R. § 1910.119(a)(1)(i) (“on site” and “in one location” are not elements in determining whether the PSM standard applies to a process involving a hazardous chemical).

That meaning, however, is not found in the preamble to the PSM Final Rule. *See* Process Safety Management of Highly Hazardous Chemicals; Explosives and Blasting Agents (PSM Final Rule), 57 Fed. Reg. 6355, 6372 (Feb. 24, 1992) (codified at 29 C.F.R. § 1910). The preamble section upon which the Secretary relies is *not*, as she asserts, OSHA’s explanation of the terms “on site” or “in one location,” but OSHA’s clarification of the definition of “process.” PSM Final Rule, 57 Fed. Reg. at 6363. In fact, nowhere in the preamble does OSHA explain how the terms “on site” and “in one location” should be applied to determine whether a process involving flammable liquids or gases should be covered by the PSM standard. PSM Final Rule, 57 Fed. Reg. at 6356-6417.

The Secretary promulgated the PSM standard in response to a number of accidents involving spills or releases of hazardous chemicals that resulted in major disasters. The Preamble to the PSM Final Rule specifically noted the 1984 Bhopal, India accidental release of methyl isocyanate resulting in more than 2,000 deaths, the 1989 Phillips 66 Chemical Plant accident resulting in 24 deaths and 132 injuries, and the 1990 Arco Chemical incident resulting in 17 deaths, among others. *See* PSM Final Rule, 57 Fed. Reg. at 6356. The Preamble to the PSM Final Rule described the problem the standard would address as follows:

After the 1984 Bhopal, India incident involving an accidental release of methyl isocyanate which resulted in more than 2000 deaths, OSHA determined that it was necessary to immediately investigate U.S. producers and users of methyl isocyanate. This investigation indicated that while the chemical industry is subject to OSHA's general industry standards, these standards do not presently contain specific coverage for chemical industry process hazards, nor do they specifically address employee protection from *large* releases of hazardous chemicals.

OSHA standards do exist for employee exposure to certain specific toxic substances ..., and hazardous chemicals are covered generally by other OSHA standards such as the Hazard Communication Standard, § 1910.1200. While these standards do address hazardous chemicals, they focus on routine or daily exposures and while in many cases they also address emergencies such as spills, OSHA believes that they do not address the precautions necessary to prevent *large accidental releases* that could result in *catastrophes*.

PSM Final Rule, 57 Fed. Reg. at 6356-6357 (emphasis added). Thus, the express purpose of the PSM standard is to set forth “requirements for preventing or minimizing the consequences of *catastrophic* releases of toxic, reactive, flammable, or explosive chemicals.” 29 C.F.R. § 1910.119. Accordingly, in drafting the standard the Secretary created a framework to address the hazards presented by such releases of chemicals, including provisions designed both to prevent releases and to ameliorate their effects.

The legislative history of the standard has relevance in helping to give context to the meaning of “on site” and “in one location.” In this case, however, the Secretary has failed to provide an adequate explanation of what these terms mean and she agreed to a stipulated record that lacks detail that could help resolve the issues.

In regard to the Secretary's failure to provide an adequate explanation of the meaning of the conjunctive requirement that a process be "on site" and "in one location", since the Secretary is the policymaking actor here (*Martin v. OSHRC (CF&I)*, 499 U.S. 144 (1991)), we will leave it to her in the first instance to tell us what she thinks these words mean. We will allow her to first "grapple[] with" the meaning of these terms and offer an "authoritative interpretation." *See Akzo Nobel Salt Inc. v. FMSHRC*, 212 F.3d 1301 (D.C. Cir. 2000). Any such subsequent interpretation offered in a future case will be reviewed under "standard deference principles." *Id.* In this case, however, she has failed to articulate an appropriate framework, and that is one reason her case here fails.³

The parties agreed to a stipulated record that lacks detail that could help resolve the issues. Specifically the record fails to address whether the distance from the refinery's propane storage tanks to the distribution terminal was such that a release in one of the refinery's storage tanks could involve the distribution terminal. Indeed, the Secretary points to no evidence that clearly establishes the distance between these two areas; our attempts to determine the distance based on the record before us results in a rough estimate at best, and it is not for the Commission to fill gaps in the Secretary's case.

Even if the distance between the refinery's propane storage tanks and the distribution terminal were known, the record lacks evidence that based on the combustible nature of propane and the distance between the propane storage tanks and the distribution terminal, a release in one of the refinery's propane storage tanks could involve the distribution terminal. Conversely, there is nothing in the record to show that an event originating at the distribution terminal could affect the refinery's propane storage tanks. Evidence on this subject might have assisted the Commission in determining whether the cited activities were "on site" and "in one location." Without such evidence and without any explanation from the Secretary, given the record in this case, there is simply no way the Commission can determine whether the PSM standard applies to the cited distribution terminal.

We also do not believe that a determination as to whether the refinery and the terminal are separate operations needs to be made. Motiva's argument that the terminal and the refinery

³ Given our disposition of this matter, we need not address whether the Secretary met her burden of proving that the combination of activities at issue here constituted a "process" under the PSM standard.

are separate operations seems to raise a defense. However, as with the Secretary's case, the Respondent simply does not provide enough information for us to make any determination concerning whether the refinery and the terminal are separate entities. Motiva would apparently have us determine that they are two entities. On this record, however, we cannot make that determination.

Accordingly, we reverse the judge's decision and vacate the citations.

SO ORDERED.

/s/ _____
W. Scott Railton
Chairman

/s/ _____
Thomasina V. Rogers
Commissioner

/s/ _____
Horace A. Thompson, III
Commissioner

Dated: September 22, 2006

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR,

Complainant,

v.

MOTIVA ENTERPRISES, LLC,

Respondent.

DOCKET No. 02-2160

Appearances: Mark V. Swirsky, Esq.
Office of the Solicitor
U. S. Department of Labor
Philadelphia, PA
For Complainant

Arthur G. Sapper, Esq.
McDermot, Will & Emery
Washington, DC
For Respondent

Before: Michael H. Schoenfeld,
Administrative Law Judge

DECISION AND ORDER

Background and Procedural History

This case arises under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651 - 678 (1970) ("the Act").

Having had its worksite inspected by a compliance officer of the Occupational Safety and Health Administration ("OSHA"), Motiva Enterprises, LLC, ("Respondent"), was issued two citations alleging one serious violation and one other-than-serious violation of the Process Safety Management Standard ("PSM Standard") at 29 C.F.R. § 1910.119. A civil penalty of \$ 2,500 was

proposed. Respondent timely contested the citations. By agreement of the parties, and with the approval of the Administrative Law Judge, the parties have submitted this matter for a decision on the record pursuant to Rule 60, 29 C.F.R. § 2200.60.¹ The parties have filed a document entitled “Parties’ Stipulations and Statement of Undisputed Material Facts” (“Stipulation”) with supporting attachments. They have also each filed a supporting memorandum as well as a reply or response to the memorandum filed by the opposing party.

Discussion

The sole issue between the parties is whether the PSM standard applies to the cited facility. Inasmuch as Respondent operates both propane storage tanks and a propane marketing terminal which are immediately adjacent to one another and are both essential and integral to the continuous course of action of selling, dispensing and loading propane into tanker trucks, I conclude that the cited propane marketing terminal is a constituent part of an “activity involving a highly hazardous chemical.” Accordingly, the PSM standards apply to the propane marketing terminal.

The essential facts are neither complex nor disputed.²

Respondent, through two different divisions, owns and operates both a group of seven propane storage tanks and a propane marketing terminal at its Delaware City Refinery. The properties are immediately adjacent to one another and are separated by a cyclone fence. Propane stored in the tanks is fed through a series of pipes above and over customers’ tanker trucks which pull up at loading islands at the terminal where they are loaded with propane for sale, distribution and/or use elsewhere. Each of the seven storage tanks usually contains more than 10,000 pounds

¹ Commission Rule 60, 29 C.F.R. § 2200.61, provides:

§2200.61 *Submission without hearing*. A case may be fully stipulated by the parties and submitted to the Commission or Judge for a decision at any time. The stipulation of facts shall be in writing and signed by the parties or their representatives. The submission of a case under this rule does not alter the burden of proof, the requirements otherwise applicable with respect to adducing proof, or the effect of failure of proof. Motions for summary judgment are covered by Fed.R.Civ.P.56.

² The Parties’ Stipulations and Statement of Undisputed Material Fact is attached and incorporated fully. It is, of course, more detailed than the discussion in the text above.

of propane and has a capacity of 100,000 pounds of propane. The pipes within the terminal, however, do not have the capacity to contain 10,000 pounds of propane at any one time. While the amount of propane within a tanker truck varies, during the loading of a single tanker truck, about 39,000 pounds of propane will flow through the pipes and accumulate in the tanker truck within a period of approximately thirty (30) minutes.

The Secretary has the burden of demonstrating by a preponderance of the evidence that the cited standard applies.³

The parties agree that the applicability of the PSM standards rests upon whether the activity cited constitutes “a process” involving more than 10,000 pounds of propane.⁴ The parties offer differing interpretations of the definition of “process” found at 29 C.F.R. § 1910.119(b), which states;

“Process” means any activity involving a highly hazardous chemical including any use, storage, manufacturing, handling, or the on-site movement of such chemicals, or combination of these activities. For purposes of this definition, any group of vessels which are interconnected and separate vessels which are located such that a highly hazardous chemical could be involved in a potential release

³ The other essential elements of proving a section 5(a)(2) violation are covered by the Stipulation. They are: (2) noncompliance with the terms of the standard, (3) employee exposure or access to the hazard created by the noncompliance, and (4) that the employer knew, or with the exercise of reasonable diligence could have known, of the condition. *Astra Pharmaceutical Products, Inc.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981); *Dun-Par Engineered Form Co.*, 12 BNA OSHC 1949 (No. 79-2553), *rev'd & remanded on other grounds*, 843 F.2d 1135 (8th Cir. 1988), *decision on remand*, 13 BNA OSHC 2147 (1989).

⁴ The application provision of the PSM Standard states in part:
§1910.119 Process safety management of highly hazardous chemicals.

* * *

(a) *Application.*

(1) This section applies to the following:

* * *

(ii) A process which involves a flammable liquid or gas (as defined in 1910.1200(c) of this part) on site in one location, in a quantity of 10,000 pounds (4535.9 kg) or more

shall be considered a single process.

(“PSM Definition.”) The essential difference between the Secretary and Respondent lies in determining what constitutes “on-site” handling of propane.

The Secretary seeks to define “process” in terms of including all interconnected aspects of a particular activity. The Secretary argues that the storage, movement and loading is a single process of “handling” to which the standard applies, even though it is stipulated that “the tanker truck, its movements and propane loading...are not subject to the (OSH) Act”⁵ because they are regulated by the U.S. Department of Transportation, and even though the terminal piping, by itself, does not and cannot contain more than 10,000 pounds of propane at any one time.

The Secretary maintains that the preamble to the publication of the cited standard (57 F.R. 6356 *et. seq.*) (February 24, 1991) as well as a number of published letters of interpretation (which are included in the record in this matter) support her application of the standard under the facts of this case. The Secretary is correct in her analysis.

First and foremost, the PSM Definition is abundantly clear on its face. It is axiomatic that there is no need to offer, seek or rely upon convoluted alternative rationales or to engage in micro-parsing where, as here, a definition is unambiguous. Indeed, Respondent concedes that its propane terminal is covered by the first sentence of the definition. (Respondent’s Motion of Judgment on Stipulated Record, p. 8; Respondent’s Reply to Secretary’s Motion, p.8) Second, Respondent’s analytical framework, relying as it does on the argument that the second sentence of the PSM Definition controls the outcome of this matter, does not qualify as a *recumbentibus*.. Not only is the first sentence clear on its face, but it is apparent from the language of the PSM Definition and its history that the second sentence does not modify or limit the meaning of the first, but rather adds to or further explains the first. The definition as a whole is more one concerned with “activity,” than with a particular location. Further, the use of “any” to modify “activity” then in the first sentence creates broad coverage. The second sentence serves to shed light on the focus of the standard being directed towards the “activity” rather where that activity takes place. The regulatory description of the rationale for the addition of the second sentence to the standard as it was originally

⁵ Section 4(b)(1) of the Act, 29 U.S.C. § 653(b)(1), exempts working conditions whose occupational safety and health aspects are regulated by a agency other than OSHA.

proposed⁶ is consistent with the Secretary's position. Moreover, the distinction between process and location is also consistent with the material in the proposed standard's preamble immediately preceding the specific discussion of the sentence added to the process definition. In excluding from coverage "normally unoccupied remote" facilities the Secretary relied on two factors; the sporadic presence of employees and, more importantly, the geographic characteristics of the excluded facility - requiring that it be both "not contiguous with" and "geographically remote from all other buildings, processes or persons." (57 F.R. 6404, February 24, 1991.)⁷ In sum, the Secretary knew and made use of the difference between concepts of activity and location. There was no intent and there is no language supporting the view that the second sentence restricts or limits the first sentence of the definition of "process." (See, 57 F.R. 6371-72, February 24, 1991.)

Several other arguments made by Respondent bear mentioning briefly. The fact that the pipes themselves do not together have the capacity to contain 10,000 pounds of propane at any one time is inconsequential. The threshold amount is reached by either the amount in the storage tanks on the immediately adjacent and contiguous property owned, operated and controlled by Respondent or by the amount in each tanker truck being loaded which, even though not regulated by OSHA, nonetheless places at the terminal up to 39,000 pounds of propane. Respondent's argument that the lack of a stipulation that the pipes and tanks constitute a single process is fatal to the Secretary's case is incorrect. The application of a definition to a given or arrived at set of facts is an act of reasoning and is a legal conclusion, or, perhaps, a mixed finding of fact and conclusion of law. Where a case is submitted on the record, or indeed after a hearing, an administrative law judge relies not only on stipulated facts but, as the finder of fact, also arrives at factual findings based upon reasonable inferences arising from the established facts. In this case, the established facts give rise to the reasonable inference that the acts of storing propane, moving propane from tanks to terminal and the filling of propane tanker trucks, constitutes a single process. In addition, Respondent's claim that the tanker trucks cannot be the basis of coverage under the PSM standard in this case is

⁶ Published at 55 F.R. 29150 (July 17, 1990).

⁷ Indeed, the Secretary completed the discussion of the change to the definition of "normally unoccupied remote facility" by commenting that adding the second sentence to the definition of "process" at issue here was "made to eliminate unnecessary words...and to clarify the intent of the definition."

rejected. First, even without considering the amounts of propane in the trucks, the terminal in this case is neither remote nor distant from tanks containing amounts exceeding the threshold for coverage. Second, even if the trucks are not covered by OSHA regulations, DOT regulations have not been shown to cover the working conditions of Respondent's employees in and around the terminal. Under Respondent's theory, Respondent's employees in and about the terminal would remain without coverage. Third, the interpretation letter relied upon by Respondent (Letter from H. Berrien Zettler to John Anicello of February 4, 1994) (Attachment I) is neither applicable nor binding. If anything, it is consistent with coverage where, as here, there is a single process and the threshold amount is present within close proximity. Finally, Respondent's "fair notice" argument is rejected in light of the unambiguity and clarity of the PSM coverage provision and in light of the extensive materials contained in public documents available both at the time of and since its publication.

FINDINGS OF FACT

The Parties' Stipulations and Statement of Undisputed Material Facts is incorporated herein in its entirety. It contains all facts necessary for a determination of all relevant issues. Fed. R. Civ. P. 52(a). All arguments, proposed findings of fact and conclusions of law inconsistent with this decision are hereby rejected.⁸

⁸ Complainant's Motion to Strike or, in the Alternative, to Include Supplemental Declaration in the Record is DENIED.

CONCLUSIONS OF LAW AND ORDER

1. Respondent was, at all times pertinent hereto, an employer within the meaning of section 3(5) of the Occupational Safety and Health Act of 1970, 29 U. S. C. §§ 651-678 (1970).

2. The Occupational Safety and Health Review Commission has jurisdiction over the parties and the subject matter.

3. The Process Safety Management Standards apply to the conditions cited in citations issued to Respondent on or about November 4, 2002.

4. Respondent was in noncompliance with the standards as cited in the citations.

5. The noncompliance detailed by Items 1a and 1c of Citation 1 were serious violations of section 5(a)(2) of the Act, 29 U.S.C. § 654(a)(2), within the meaning of section 17(k) of the Act, 29 U.S.C. § 666(j). Respondent's noncompliance with the standards cited in Item 1b of Citation 1 and Item 1 of Citation 2 were other-than-serious violations.

6. A single civil penalty of \$2,500 is assessed for the violations identified in Citation 1, Items 1a and 1c. No civil penalty is assessed for the violations identified in Citation 2.

7. Respondent shall abate all violations within 120 days of the date of this Order.

/s/ _____
Michael H. Schoenfeld
Judge, OSHRC

Date: July 7, 2003
Washington, D.C.