UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
One Lafayette Centre
1120 20th Street, N.W. — 9th Floor
Washington, DC 20036-3419

FAX:
COM (202) 606-5050
FTS (202) 606-5050

SECRETARY OF LABOR, Complainant, v. SAFEWAY STORE NO. 914, Respondent.	OSHRC Docket No. 91-373

DECISION

BEFORE: FOULKE, Chairman; and MONTOYA, Commissioner.

BY THE COMMISSION:

At issue in this case is whether a retail grocery store in Loveland, Colorado operated by the Safeway food store chain ("Safeway") complied with the Secretary's hazard communication standard, 29 C.F.R. § 1910.1200 ("HCS"). The purpose of the HCS is to make employees aware of the hazards arising from chemicals used in the workplace and ensure that they have access to information regarding means of protecting themselves from such hazards. To this end, the standard requires that the employer establish a written "hazard communication program." This program must include an inventory of hazardous substances present in the workplace and must provide for product labels and material safety data sheets ("MSDS's") as well as means for training employees in the various components of the program. The Secretary alleges that Safeway failed to comply with these requirements with respect to two specific products used by its employees--a windshield washer manufactured by the Custom Chemical Company of Denver, Colorado under the trade name "Regal®" and a disinfectant, "J-80™ Sanitizer," produced by S.C. Johnson and Son of Racine, Wisconsin.

After inspecting the store on October 17, 1990, the Secretary on January 4, 1991, issued two citations alleging one serious and two willful violations of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act"). In his complaint the Secretary amended the citations to recharacterize the willful violations as serious violations, and subsequently, at the hearing, the Secretary moved to further recharacterize the violations as other than serious. The complaint also modified the citations with minor language changes which are not relevant to our disposition. As amended in the complaint, the citations charged that (1) employees were not given the information and training required by section 1910.1200(h)[1] (citation no. 1, item 1), (2) Safeway had not maintained a hazard communications program meeting the requirements of section 1910.1200(e)(1)[2] (citation no. 2, item 1), and (3) Safeway did not have MSDS's for hazardous chemicals used in the workplace, contrary to section 1910.1200(g)(1)[3] (citation no. 2, item 2).

Administrative Law Judge James A. Cronin, Jr. rejected Safeway's contention that citation no. 2 was untimely under 29 U.S.C. § 658(c), section 9(c) of the Act. Section 9(c) is a statute of limitations which provides that "[n]o citation may be issued . . . after the expiration of six months following the occurrence of any violation." Although the judge

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[1]Section 1910.1200(h), entitled "Employee information and training," requires that employees be informed of the requirements of the HCS and told of any hazardous chemicals in their work area. They must also be trained in how to detect those chemicals and protect themselves from the hazards.

[2]Section 1910.1200(e)(1) states that the employer must develop a written hazard communication program which describes how the employer intends to comply with the specific requirements set forth elsewhere in the standard dealing with product labels or other forms of hazard warnings (section 1910.1200(f)), MSDS's (section 1910.1200(g)), and employee training. In addition, section 1910.1200(e)(1) requires a list of the hazardous chemicals known to be present in the workplace.

In his complaint the Secretary also amended this citation item to allege in the alternative that Safeway failed to comply with section 1910.1200(e)(4), which requires that the employer make its program available on request to employees or their representatives and to the Secretary. Since the judge found a violation of section 1910.1200(e)(1), he declined to consider the alternative allegation. The Secretary does not contend that the judge erred by failing to affirm the alternative allegation. Therefore, it is not before the Commission for review.

[3]Section 1910.1200(g)(1) provides that the employer must have in its possession an MSDS, supplied by the manufacturer or importer, for each hazardous chemical used in the workplace. The MSDS must include, among other things, scientific and common names of the hazardous chemicals contained in the product, physical characteristics of those chemicals, the nature of the hazards presented and their effect on the human body, permissible exposure limits, safety precautions, and emergency and first aid procedures.

found that the Secretary's allegations were not time-barred, he concluded that the windshield washer was not subject to the HCS because it is a consumer product and therefore exempt from the standard. Accordingly, he found that Safeway had failed to comply with the HCS only with respect to the sanitizer. He also amended item 2 of citation no. 2 to allege noncompliance with section 1910.1200(g)(8), which requires that the employer maintain and make available to employees copies of MSDS's. He held that the parties had tried this issue by consent rather than the more general requirement of section 1910.1200(g)(1) that the employer have the relevant MSDS's in its possession.

Safeway excepted to the judge's disposition of the statute of limitations issue and to the judge's conclusion that the sanitizer is not exempt from the HCS as a consumer product. It also excepted to the judge's findings that it had failed to comply with the HCS and to his amendment of the Secretary's pleadings. The Secretary filed a cross-petition arguing that the judge improperly determined that Regal Windshield Washer was not covered under the standard. Review was directed on the issues both parties raised.[4] For the reasons that follow, we affirm the judge's decision.

SECTION 9(C) ISSUE

Safeway's position that citation no. 2 is barred under section 9(c) is based on an earlier citation issued on September 28, 1989 alleging that it failed to comply with section 1910.1200(e)(1) and (g)(1) following an inspection on August 23, 1989 at the same store that is involved in this case. The Secretary withdrew the prior citation on April 23, 1990, shortly after Safeway sent the Secretary's counsel a copy of its hazard communication program.

The Secretary's compliance officer, Peter Dailey, who had also conducted the earlier inspection, was asked to elaborate on the basis for the allegations resulting from that inspection. He testified that he was not provided with a written program and that he re-

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[4]The Secretary divided his arguments and in his initial brief presented his arguments on the issue on which he sought review while arguing the remaining issues, those on which the opposing party sought review, in his reply brief. Subsequent to the filing of the Secretary's briefs, the Commission held that presenting initial arguments in a reply brief is contrary to Commission Rule 93. *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2203, 1993 CCH OSHD ¶ 29,964, pp. 41,021-22 (No. 87-2059, 1993). Thereafter, the Commission explicitly stated that it would no longer accept such briefs. *Beta Constr. Co.*, 16 BNA OSHC 1435, 1436 n.1, 1993 CCH OSHD ¶ 30,239, p. 41,643 n.1 (No. 91-102, 1993), *petition for review filed*, No. 93-1817 (D.C. Cir. Dec. 3, 1993). Accordingly, if the Secretary's reply brief here had been filed after the Commission's decision in *Beta*, it would have been rejected and returned to the Secretary.

ceived no information indicating that Safeway had any type of unwritten program; that is, the charge in 1989 was not that Safeway's program was inadequate under section 1910.1200(e)(1) but that there was no program to begin with. As to the alleged noncompliance with section 1910.1200(g)(1)), he determined during the earlier inspection that there were no MSDS's whatever at the worksite; the allegation did not concern the provision of MSDS's for particular substances.

Safeway contends that because the 1989 and current citations both allege that Safeway did not have a hazard communication program meeting the requirements of the HCS and because both allege that MSDS's were not available, the violations were known to and charged by the Secretary in 1989, more than six months before the Secretary issued the citation which is now before us. Safeway also argues that the Secretary was already on notice of the deficiencies it subsequently alleged in the hazard communication program because it had received a copy of that program in April 1990, and it contends that the Secretary knew or reasonably should have known as of the 1989 inspection that Safeway did not have copies of MSDS's for the Regal and Johnson products at Store 914.

Judge Cronin interpreted section 9(c) of the Act to preclude the Secretary from issuing a citation more than six months after a violation has been abated or has ceased to exist. The judge also cited two cases in which the Commission held that the 6-month statute of limitations begins to run once the Secretary becomes aware or reasonably should have become aware of the violation's existence, *Kaspar Wire Works, Inc.*, 13 BNA OSHC 1261, 1986-87 CCH OSHD ¶ 27,882 (No. 85-1060, 1987) and *Sun Ship, Inc.*, 12 BNA OSHC 1185, 1186, 1984-85 CCH OSHD ¶ 27,175, p. 35,078 (No. 80-3192, 1985). The judge concluded that under this precedent, the Secretary would be barred from citing Safeway for not having had a hazard communication program prior to April 1990, which the judge considered to be the basis for the prior citation. The judge also concluded that the statute of limitations had run on any deficiencies in Safeway's program that were "facially apparent" in April 1990, but only for such deficiencies. As the judge put it, "[section] 9(c) does not impose an affirmative duty on the Secretary to conduct her investigations so as to ascertain that all possible violations relating to a general set of circumstances have been discovered, or forever forfeit her ability to regulate in that area."

Applying these principles, the judge held that the Secretary was foreclosed from citing Safeway under section 1910.1200(e)(1), as alleged in citation no. 2, item 1, for failing to describe what labeling method was being used and failing to provide a means for acquiring MSDS's as chemicals are introduced into the workplace. The judge reasoned that the Secretary knew or should have known of these two deficiencies when he reviewed Safeway's hazard communication program following the 1989 inspection. On the other hand, the judge concluded that because Safeway presented no evidence to show that the windshield washer and sanitizer were being used in April 1990 and prior thereto, the Secretary was not barred from now alleging that Safeway was in noncompliance with section 1910.1200(e)(1) by failing to include these substances on its list of hazardous chemicals. Similarly, the judge concluded that the Secretary could not reasonably have been aware of a lack of MSDS's specifically for the windshield washer and sanitizer during the earlier inspection. The judge also reasoned that the Secretary had no cause to investigate into the absence of MSDS's for particular substances once he determined that there were no MSDS's at all. Since item 2 of citation no. 2 alleging noncompliance with section 1910.1200(g)(1) is based on the absence of MSDS's for only the windshield washer and sanitizer, the judge concluded that it also is not time-barred by the prior inspection and citation.

Before us on review, the parties dispute whether the judge erred in his determination that the allegations at issue here are partially distinguishable from the charges resulting from the 1989 inspection. The Secretary argues that the judge properly decided the statute of limitations issue. Safeway, on the other hand, contends that there are no substantial differences between the two sets of charges and that the allegations at issue here are entirely time-barred under section 9(c).[5]

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[5]Although the judge's decision addresses the allegation in item 2 of citation no. 2 that Safeway did not comply with section 1910.1200(g)(1), rather than section 1910.1200(g)(8), to which the judge amended, Safeway contends that neither the charge as set forth in the current citation and complaint nor the amended allegation are timely under section 9(c). We note that the basis for the amended charge, failure of Safeway to have MSDS's readily accessible at the worksite, is identical to the citation and complaint in the original proceeding, which allege that MSDS's were not maintained at the workplace and that Safeway could have abated the violation by having MSDS's "readily available" to employees.

However, while the Secretary argues in support of the judge's reasoning, he also contends that the citations are not time-barred for a reason different than that advanced by the judge. The Secretary does not dispute that the alleged violation of section 1910.1200(e)(1) occurred when Safeway's employees first began using Regal® Windshield Washer and Johnson J-80™ Sanitizer in the store in question. Nevertheless, because section 1910.1200(e)(1) requires the employer to "maintain" as well as "develop" and "implement" a hazard communication program, that same violation *recurred* on each day thereafter that these products were present in the workplace but were not addressed in an adequate program. Similarly, in the Secretary's view a violation of section 1910.1200(g)(8) first occurred and then recurred on each day that those two substances were present without the appropriate MSDS's. Thus, the Secretary concludes that the situation here is one of individual causes of action which may be the subject of separate and subsequent citations. The Secretary cites *Central of Georgia R.R.*, 5 BNA OSHC 1209, 1977-78 CCH OSHD ¶ 21,688 (No. 11742, 1977), in which the Commission rejected an employer's argument that for purposes of section 9(c), a violation is said to have "occurred" only when the violative conditions *first* come into existence.

Safeway concedes that it has a continuing obligation to comply with the HCS, and it does not dispute that the allegedly violative conditions existed during the inspection in October 1990. Safeway contends, however, that the Secretary cannot issue a citation for a subsequent occurrence of a violation unless the violation had been previously abated.

Analysis

A violation of the Act for failure to comply with a standard is established whenever the following four elements exist: (1) the standard applies to the cited conditions, (2) the employer's conduct does not conform to the requirements of the standard, (3) employees are exposed to the cited conditions, and (4) the employer knew or could have known of those conditions. *Kraft Food Ingredients Corp.*, 16 BNA OSHC 1393, 1399, 1993 CCH OSHD ¶ 30,213, pp. 41,586-87 (No. 88-1736, 1993). As the Secretary correctly notes, the Commission has previously held that the Act does not preclude the Secretary from alleging any violation when each of these factors is present, so long as the citation is issued within six months of when the Secretary discovers, or reasonably should have discovered, that violative

conduct which is being cited. The Commission expressly so stated in *Central of Georgia*, on which the Secretary relies:

> For section 9(c) purposes, a violation of section 5(a)(2) of the Act "occurs" whenever an applicable occupational safety and health standard is not complied with and an employee has access to the resulting zone of danger. Therefore, it is of no moment that a violation *first* occurred more than six months before issuance of a citation, so long as the instances of noncompliance and employee access providing the basis for the contested citation occurred within six months of the citation's issuance.

5 BNA OSHC at 1211, 1977-78 CCH OSHD at p. 26,035 (emphasis in original).

More recently, the Commission applied this principle in *General Dynamics Corp., Elec. Boat Div.*, 15 BNA OSHC 2122, 1993 CCH OSHD ¶ 29,952 (No. 87-1195, 1993), which involved numerous allegations of incomplete or missing logs and supplementary reports of injuries and illnesses that employers are required to maintain under the Secretary's recordkeeping regulations in 29 C.F.R. Part 1904. The injuries and illnesses in question occurred in 1985, 1986, and January 1987. The Secretary conducted his inspection from January 29, 1987 to February 3, 1987 and issued his citation on July 29, 1987. The employer contended that it had been cited for specific, discrete errors in its recordkeeping, each of which occurred more than six months before the citations, and that the Secretary had failed to show that any violative act took place within the 6-month period. The Commission disagreed. Citing *Central of Georgia*, the Commission observed that it "has generally upheld the Secretary's authority to issue a citation for an unsafe condition that an OSHA compliance officer first discovers during an inspection made more than six months after the unsafe condition's creation." Because the recordkeeping standard requires that each log entry be retained for five years, the Commission concluded that the violations were in existence at the time of the inspection. *Id.* at 2127-28, 1993 CCH OSHD at p. 40,956-57. *See Johnson Controls, Inc.*, 15 BNA OSHC 2132, 2135, 1993 CCH OSHD ¶ 29,953, p. 40,965 (No. 89-2614, 1993) (recordkeeping infractions are not substantively different than other noncomplying conditions which must be abated and constitute ongoing violations until they are abated).

In *General Dynamics*, the Commission held that the Secretary acted in compliance with section 9(c) because he issued his citations within six months of when he became aware of the violations. As the Commission concluded, "[t]he obligation to correct any error or omission in . . . injury records runs until the error or omission is either corrected by the employer, or discovered or reasonably should have been discovered by the Secretary." 15 BNA OSHC at 2128, 1993 CCH OSHD at p. 40,956-57. The Commission had previously held that the 6-month period prescribed by section 9(c) begins to run from when the Secretary knew or should have known of the violative conditions. For example, in *Yelvington Welding Serv.*, 6 BNA OSHC 2013, 1978 CCH OSHD ¶ 23,092 (No. 15958, 1978), the Secretary conducted an inspection and issued a citation more than six months after an employee was fatally injured while making welding repairs under a fertilizer hopper that was not secured or blocked against movement. The Commission concluded that a citation alleging a violation of section 1904.8, which requires employers to report fatalities within 48 hours, was not time-barred because it was issued no more than two weeks after the Secretary learned of the fatality from state authorities.

Yelvington was cited in *Sun Ship*, one of the two cases on which Judge Cronin relied. In *Sun Ship* the employer refused to give its union and the Secretary copies of its injury and illness records which divulged the identity of individual employees. More than six months after the refusal occurred, the Secretary cited the employer for violations of the disclosure provisions of the recordkeeping regulation, 29 C.F.R. § 1904.7. Applying *Yelvington*, the Commission concluded that the statute of limitations began to run from when the Secretary became aware of the relevant facts, that is, from when it investigated the union's complaint and from when the employer informed the Secretary that it would not furnish the documents if the employees' names were revealed. The Commission applied the same reasoning in *Kaspar Wire Works*, the other case cited by Judge Cronin, which also involved the employer's failure to report an injury.

The cases on which Safeway and the judge rely, however, do not address the question of whether conditions which existed and could have been detected during a prior inspection may be the subject of citations issued more than six months later *if the Secretary conducts a*

subsequent inspection. It is well-settled that failure to issue a citation does not establish that the Secretary considers the employer to be in compliance and does not preclude the Secretary from citing the employer for the same or similar conditions in a subsequent enforcement proceeding. *Erie Coke Corp.*, 15 BNA OSHC 1561, 1569, 1992 CCH OSHD ¶ 29,653, p. 40,155 (No. 88-611, 1992), *aff'd*, 998 F.2d 134 (3d Cir. 1993); *Seibel Modern Mfg. & Welding Corp.*, 15 BNA OSHC 1218, 1223-24, 1991 CCH OSHD ¶ 29,442, pp. 39,679-81 (No. 88-821, 1991). *See Miami Indus.*, 15 BNA OSHC 1258, 1264, 1991 CCH OSHD ¶ 29,465, p. 39,742 (No. 88-671, 1991) (distinguishing a simple failure to issue a citation from affirmative representations by OSHA that it considers the employer in compliance), *aff'd in part without published opinion*, 983 F.2d 1067 (6th Cir. 1992). It would therefore be anomalous to conclude that if the Secretary conducts an inspection from which he could have ascertained the existence of violations, section 9(c) precludes him from conducting another inspection at a later time and alleging equivalent violations *based on his findings at the subsequent inspection*. On the contrary, the purpose of a statute of limitations is simply to ensure that claims are prosecuted while the events are still fresh, and witnesses and evidence can be obtained. *Yelvington*, 6 BNA OSHC at 2016, 1978 CCH OSHD at p. 27,907. Indeed, the Commission suggested in *General Dynamics* that section 9(c) would not bar the Secretary in a situation such as that which is present in this case:

> We assume that the Secretary would not use his resources to inspect the same records repeatedly for different violations. Multiple citations of essentially the same conditions, even in different plants, have resulted in vacation of those citations on the ground of harassment. . . . A second citation regarding the same records could also be questioned on grounds of res judicata or collateral estoppel.

15 BNA OSHC at 2128 n.12, 1993 CCH OSHD at p. 40,957 n.12 (citing *Continental Can Co., USA v. Marshall*, 603 F.2d 590, 596 (7th Cir. 1979) (relitigating an issue over and over again in multiple proceedings constitutes harassment)). In other words, section 9(c) merely requires that the Secretary act with reasonable diligence once the facts pertaining to the conduct in question come to the Secretary's attention through an inspection or investigation. The fact that the Secretary may have had the opportunity to become aware of similar violative conduct and issue a citation during an earlier inspection does not prohibit future

citations issued within six months after conduct constituting a violation is discovered during a *subsequent* inspection or within six months after the Secretary knew or should have known of the violative conditions as a result of a subsequent inspection. Although issuance of such a citation might be improper for other reasons such as estoppel or harassment, Safeway does not advance such arguments here.[6]

Since citation no. 2 at issue here was issued within six months of the violative conduct which was discovered during the inspection on October 17, 1990, this case does not present a situation in which the Secretary acted in a dilatory manner by failing to cite the employer within six months after acquiring facts sufficient to support a citation. We therefore conclude that citation no. 2 is not untimely under section 9(c) *regardless* of whether the conditions set forth in that citation are identical or substantially similar to the conditions which were cited following the 1989 inspection. Accordingly, while the judge properly rejected Safeway's argument, we conclude that he erred in the reasons he gave for his decision.

CONSUMER PRODUCTS EXEMPTION

The Windshield Washer

Section 1910.1200(b)(6)(vii) provides that the HCS does not apply to

> [a]ny consumer product or hazardous substance, as those terms are defined in the Consumer Product Safety Act (15 U.S.C. 2051 *et seq.*) and Federal Hazardous Substances Act (15 U.S.C. 1261 *et seq.*) respectively, where the employer can demonstrate it is used in the workplace in the same manner as normal consumer use, and which use results in a duration and frequency of exposure which is not greater than exposures experienced by consumers[.]

The Secretary contends that the judge erred in concluding that the windshield washer met the requirements of this exception. Safeway contends that the judge erred in holding that it failed to show that the sanitizer was available to or used by consumers. We affirm the judge.

Regal® Windshield Washer is sold in the store, and Safeway permits its employees to take items off the shelf for use in their work duties. Although the container label and

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[6]We note parenthetically that an estoppel argument would be difficult to sustain on the facts in this case. Safeway represents that it had asked that the earlier citations be dismissed with prejudice. In his notice of withdrawal, however, the Secretary stated that the withdrawal was without prejudice. The judge's order approving the withdrawal does not state that the withdrawal is with prejudice. Under Commission Rule 102, governing withdrawal of citation items, withdrawal is without prejudice unless otherwise specified. *Stripe-A-Zone, Inc.*, 9 BNA OSHC 1040, 1980 CCH OSHD ¶ 24,912 (No. 79-2380, 1980).

MSDS introduced into evidence indicate that it is intended to be used in the windshield washer reservoirs of automobiles, there is no dispute that Safeway's employees use the product to clean the glass on scanners at the checkout counters. The scanner glass is about the size of a large book and is cleaned as often as four times a day. Two employees, however, also testified for Safeway that they used the windshield washer to clean windows at their homes. William Allison stated that he would clean about eight windows, each approximately 30 inches by 30 inches in size, all taking about 15 to 20 minutes, while Rebecca Chambers testified that she would clean about twelve windows, including a large living room window, all requiring about one and a half to two hours. Two other employees stated that they used the windshield washer at home only in the reservoirs of their automobiles.

There is no dispute that the windshield washer contains methyl alcohol. This chemical is listed as a toxic or hazardous substance under Subpart Z of Part 1910, which regulates employee exposure limits for toxic and hazardous substances. Safeway's expert witness, a physician, Dr. Gary Krieger, stated that methyl alcohol, or methanol, is found in antifreeze, paints, and varnishes, and is commonly used as a window cleaner and paint remover. He was familiar with the scanners in the store and testified that cleaning an area of that size would not be likely to cause any "significant" harm and would result in lesser exposure to methyl alcohol than using the product as a window cleaner at home because windows tend to be larger than the store scanners.

On these facts, the judge found that the windshield washer is a hazardous chemical to which the HCS applies because it contains a substance which the Secretary regulates under Subpart Z. The judge noted that section 1910.1200(d), entitled "Hazard determination," provides in paragraph (3)(i) that the chemicals listed in Subpart Z shall be treated as hazardous for purposes of the HCS. However, he concluded that the windshield washer came within the consumer products exception despite the fact that it is marketed for use only in automobiles. He reasoned that "consumers do not always use products solely in the intended manner and for the intended purpose" and that use of the windshield washer as a window cleaner in the home "is reasonably predictable given its primary function as a glass cleaner." The judge also observed that there was no evidence to show that Allison and

Chambers, the two employees who used the windshield washer to clean windows in their homes, were not "normal consumers" or that their use of the windshield washer was "idiosyncratic." He also relied on Dr. Krieger's testimony that Safeway's use of the windshield washer did not result in exposure any greater than that experienced by consumers.

The Secretary concedes that a product on sale at the store is a consumer product under section 1910.1200. The Secretary contends, however, that employees did not use the windshield washer in the same manner as would the normal consumer. The Secretary notes that when he amended the consumer products exception set forth in the HCS, he stated that:

> The key elements of concern to OSHA are . . . that the consumer product be used in the same manner as a consumer would use it (*and therefore as intended by the manufacturer when preparing the label information*), and that the duration and frequency of exposure be essentially the same as would be experienced by a consumer (and thus the label warnings would provide adequate protection.) A broader exemption . . . would not be appropriate to protect workers from occupational exposures *that were not anticipated by the manufacturer when the labels, and thus the protective measures, were developed.*

52 Fed. Reg. 31,863 (1987) (emphasis added). He also points out that two other employees testified that they used the windshield washer only for its intended purpose. Furthermore, the Secretary contends that the judge erred in finding from Dr. Krieger's testimony that the exposure to Safeway's employees was not greater than that experienced by consumers. The Secretary asserts that the relevant factor under the exemption is not the quantity of the substance being used but the duration and frequency of the exposure. Since Safeway's employees use the Regal cleaner in the store on a daily basis, but only clean their windows at home infrequently, according to the Secretary, the frequency of use by a normal consumer is clearly less than that of a Safeway employee.

Analysis

We adopt the judge's finding that while methyl alcohol is a hazardous substance subject to the HCS, the consumer product exception applies to the windshield washer at issue here. Contrary to the Secretary's argument, we do not construe the exception to be necessarily limited by the manner or purpose for which a manufacturer markets a product.

Similarly, we do not agree that the "duration and frequency" provision of the exception requires that the exposures of employees and consumers be quantified and equated to the point of exact mathematical precision. When the portion of the preamble to the standard on which the Secretary relies is read in the context of other remarks in the preamble, it is clear that the exception is not as strict or as limited as the Secretary argues here. Although the Secretary in the preamble did refer to the manufacturer's intention, he also stated as follows:

> OSHA has been interpreting the [HCS] as not being applicable to consumer products *when used as a consumer would use them*. OSHA is now adding this interpretation to the rule itself, stating that where such consumer products are used in the workplace in a manner *comparable to the normal conditions of consumer use* . . . the chemical would not have to be included in the employer's hazard communication program. . . . "OSHA recognizes that there may be situations where worker exposure is significantly greater than that of consumers, and that under these circumstances, substances which are safe for contemplated consumer use may pose unique hazards in the workplace." [Citation omitted]. However, to the extent that workers are exposed to the substances *in a manner similar to that of the general public*, there is no need for any HCS requirements.
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> . . . Where an employer is uncertain whether the duration and frequency of exposure to these products is *comparable* to consumer use, an employer should obtain or develop the material safety data sheet and make it available to employees.

Id. at 31,862 (emphasis added).

Where a standard is susceptible to different interpretations, the Commission will consider statements made in the preamble to the standard as the most authoritative guide to the standard's meaning. *American Sterilizer Co.*, 15 BNA OSHC 1476, 1478, 1992 CCH OSHD ¶ 29,575, pp. 40,015-16 (No. 86-1179, 1992). Consistent with the statements in the preamble to the amended HCS, the Commission in *Ford Dev. Corp.*, 15 BNA OSHC 2003, 2006 n.7, 1992 CCH OSHD ¶ 29,900, p. 40,798 n.7 (No. 90-1505, 1992), *petition for review filed*, No. 93-3090 (6th Cir. Jan. 29, 1993), held that in order to qualify for the exception, an employer need only demonstrate that its employee's use and exposure is "comparable" to that of a consumer.

We therefore conclude that the judge did not err in his holding that the exception may apply where the consumer use of a product is different from that intended by the manufacturer, so long as it is reasonably predictable that the product might be used in that manner. We find no basis in the record to reject his finding that a consumer could reasonably assume that a product meant for cleaning automobile windshields would be suitable for other glass surfaces as well. We also conclude on the facts here that the frequency with which Safeway's employees used the windshield washer is sufficiently similar to the frequency of consumer use to satisfy the terms of the exception. While we do not assign dispositive weight to the opinion testimony of Safeway's expert, Dr. Krieger, we find that it supports the conclusion that Safeway's use of the windshield washer is comparable to consumer use.

The Sanitizer

According to its label, J-80™ Sanitizer, which contains ammonium chlorides, is used for disinfecting food processing equipment and work areas in stores and commercial restaurants and kitchens. Maurice Berry, loss control manager for Safeway's Denver division, stated that the sanitizer is used in the meat department, and two employees, Paul Trinidad and Patricia Williams, testified that they used or had used the sanitizer to clean or disinfect displays or work areas.

Dr. Krieger was familiar with ammonium chlorides but not with the Johnson product itself. He conceded that ammonium chlorides are irritants but testified that such compounds are commonly used as disinfectants and antiseptics in medical facilities or in the home for treating wounds and also appear in many products sold widely in pharmacies. The concentration of chlorides shown on the label (1.29 percent for each of two types of ammonium chlorides) is generally consistent with the range of concentration found in consumer products, which is normally between .01 and 1.5 percent.

As he did in the case of the windshield washer, the judge found that the sanitizer contains chemicals which are hazardous within the meaning of the HCS. The judge noted that chemicals which are irritants are expressly defined as hazardous chemicals within the scope of the HCS under section 1910.1200(c). Unlike the windshield washer, however, the judge held that Safeway had failed to establish "a normal consumer use" of the sanitizer or

any substantially similar product. He reasoned that because the sanitizer contained 1.29 percent of each of two types of ammonium chlorides, its actual concentration of hazardous chemicals was 2.58 percent, which the judge considered to be "far higher" than the solutions of those chemicals generally available to and used by consumers.

Arguing in support of the judge's decision, the Secretary asserts that products intended for medicinal or medical use clearly are not used for the same purposes as a disinfectant for equipment or machinery used to handle food. On the other hand, Safeway contends, based on Dr. Krieger's testimony, that the consumer exposure is greater than that of its employees. It also argues that it used the sanitizer only once every three years, although the record does not show that to be the case.[7]

Analysis

Although we agree with the judge that the sanitizer is not exempt from the HCS, we conclude that the judge misinterpreted Dr. Krieger's testimony. Contrary to the judge's factual findings, Dr. Krieger testified that ammonium chlorides generally are present in a range of up to 1.5 percent. He did not say that the normal consumer concentration would not exceed a total of 1.5 percent for *all* the types of chlorides in the product. In fact, he specifically stated that a weight of 1.29 percent for *each* of the active ingredients is "very typical." However, the product exception is not satisfied merely because the concentration of hazardous chemicals in the sanitizer is similar to that in consumer products. While it is clear that Safeway uses the sanitizer for the same purpose as other commercial enterprises, as a disinfectant or antiseptic in food preparation areas, Safeway's evidence does not show that consumers use the sanitizer or analogous consumer products containing ammonium

[7]Employee Trinidad, who had been working at the store for three years, used the sanitizer on one occasion two or three months before the inspection. Employee Williams had used it less than six times during the 18 years she had been employed. Safeway's evidence does not establish the actual frequency with which the sanitizer was used.

chlorides[8] for that or a similar purpose. Accordingly, the judge properly found that the sanitizer is not exempt from the HCS.

EMPLOYEE INFORMATION AND TRAINING (§ 1910.1200(h))[9]

The parties stipulated that prior to the inspection, employees participated in a safety training program consisting of a videotaped presentation and the distribution of an employee handbook on chemical hazards. The videotape instructs employees that they are to read MSDS's for any product they use. Safeway's Denver division office issued memos stating that all employees are to: view the videotape, be instructed on MSDS's and how to obtain them,

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[8]The Secretary argues that Safeway did not show that the sanitizer is customarily sold to consumers or used by consumers at their homes. The Secretary also contends that Dr. Krieger's testimony that the chemicals contained in the sanitizer are also found in products used in the home is irrelevant to the question of whether the sanitizer itself is exempt.

In view of our disposition, we do not now decide whether the consumer products exception in section 1910.1200(b)(6)(vii) requires a showing that the actual commercial product being used by the employer is also used by consumers under the terms set forth in the exception or whether the exception can apply to any product containing the same chemicals. We note, however, that by its plain terms the exception includes both a "consumer product" *or* a hazardous substance. Section 1910.1200(c) also defines the term "hazardous chemical" to mean any *chemical* which is a physical or health hazard. Under the substantive provisions of the HCS the employer is required to provide labels for the containers of "hazardous chemicals" (section 1910.1200(f)) or to have MSDS's for the "hazardous chemical" (section 1910.1200(g)).

[9]The standard requires as follows:

> **§ 1910.1200 Hazard Communication.**
>
> . . . .
>
> (h) *Employee information and training.* Employers shall provide employees with information and training on hazardous chemicals in their work area at the time of their initial assignment, and whenever a new hazard is introduced into their work area.
>
> (1) *Information.* Employees shall be informed of:
>
> (i) The requirements of this section;
>
> (ii) Any operations in their work area where hazardous chemicals are present; and,
>
> (iii) The location and availability of the written hazard communication program, including the required list(s) of hazardous chemicals, and material safety data sheets required by this section.
>
> (2) *Training.* Employee training shall include at least:
>
> (i) Methods and observations that may be used to detect the presence or release of a hazardous chemical in the work area. . . .[;]
>
> (ii) The physical and health hazards of the chemicals in the work area;
>
> (iii) The measures employees can take to protect themselves from these hazards. . . .[;] and,
>
> (iv) The details of the hazard communication program developed by the employer, including an explanation of the labeling system and the material safety data sheet, and how employees can obtain and use the appropriate hazard information.

and receive training in other aspects of hazard communication. Attached to the employee handbook is a form which certifies that the employee has "participated in a training safety program about hazardous chemicals." Safeway introduced into evidence a number of these forms signed by various employees. Dailey agreed that the videotape essentially parallels Safeway's employee handbook and that the handbook "does address training requirements." Dailey's inspection report from his earlier inspection in August 1989 states that Safeway had conducted training "in the past."

The two employees who had used the sanitizer testified regarding their training. Trinidad stated that when he was initially hired, he had been given material to read and had seen the videotape, although he considered the instruction "boring." He thought that he had been given the employee handbook but was not sure. There was a question and answer session after the videotape. Trinidad felt that the employees already "pretty much understood" what they were being told in training. However, he had not been given any training specifically regarding the sanitizer or any information regarding possible health hazards from that product. When he used the sanitizer, he followed the directions on the label that the sanitizer must be diluted one ounce per gallon of water. While Trinidad knew what an MSDS is, he stated that he didn't need an MSDS. Williams testified that she had received hazard communication training but could not remember whether she had been given any information regarding the sanitizer. Williams did say, however, that she did not think that management was aware that she had used the sanitizer. Another employee, Madeline Pape, was not sure what an MSDS is and had never seen one in the store. On the other hand, Maurice Berry, loss control manager for Safeway's Denver division, stated that Safeway provides training on the sanitizer and that instructions on how to use it are posted in the meat department where it is used.

The judge noted that section 1910.1200(h) specifically requires that employees be trained with respect to the chemicals they use in their work area. The judge weighed the testimony of Trinidad and Williams against that of Berry and found it more likely than not that Safeway failed to provide information and training on the sanitizer to its employees who used it. In weighing the testimony, the judge faulted Berry for not having "first-hand" knowledge of the training and for not providing details regarding the training provided. The

judge also concluded that since Safeway had not introduced the instructions posted in the meat department, he was unable to conclude that they contained the information required by the standard.

While the Secretary argues in support of the judge's decision, Safeway asserts that it provided training to all employees, pointing out that all employees testified to that effect and that Dailey had been given written materials comprising the hazard communication program. Safeway also asserts that Berry's testimony is sufficient to show training specifically with regard to the sanitizer, and it argues that Williams and Trinidad stated that they "did examine manufacturer's data" before using the sanitizer.

Analysis

The test on review of a judge's factual findings is whether a preponderance of the evidence supports those findings. *Worcester Steel Erectors, Inc.*, 16 BNA OSHC 1409, 1417-18, 1993 CCH OSHD ¶ 30,232, p. 41,634 (No. 89-1206, 1993). We conclude that the evidence preponderates in favor of the judge's finding that Safeway did not provide the requisite information and training to its employees handling or using the sanitizer. We also note that the record does not support Safeway's contention that Williams and Trinidad were given sufficient written documentation to comply with the information and training provisions of the standard. Williams' testimony does not show that she reviewed any written material regarding the sanitizer, and Trinidad only looked at the mixing instructions on the product label, and not the MSDS. Indeed, the fact that Trinidad evidently was under the misimpression that MSDS's are not needed supports a finding that he was not properly trained. *Cf. ARA Living Centers of Texas, Inc.*, 15 BNA OSHC 1417, 1992 CCH OSHD ¶ 29,552 (No. 89-1894, 1991) (access to product information alone does not satisfy the training requirements of section 1910.1200(h)).

DEVELOPMENT AND IMPLEMENTATION OF THE HAZARD COMMUNICATION PROGRAM (§ 1910.1200(e)(1))[10]

Dailey testified that there were three deficiencies in Safeway's program under section 1910.1200(e)(1). First, upon reviewing Safeway's hazard communication program consisting of all the written materials he had received, Dailey determined that the list of hazardous chemicals was incomplete because it did not include the windshield washer and the sanitizer. Second, because Safeway did not maintain an inventory of products in use, its program did not set forth a means by which Safeway could ensure that it had acquired the MSDS for a particular chemical before it put that chemical into use. He conceded that the employee handbook informs employees that they may obtain copy of an MSDS "simply by asking for one" and that if Safeway does not have one, it will ask the supplier or manufacturer to provide one. He did not consider Safeway's program deficient for failing to describe how employees could obtain MSDS's. However, he criticized Safeway for having no mechanism for taking an inventory or any other means to identify those products it used so that it could ensure that it had an MSDS for each such product. Lastly, Safeway had not identified the system of labeling on which it intended to rely. Dailey conceded that the handbook states that chemicals must have labels indicating the nature of the hazard and giving instructions for handling the material, and he agreed that the labels on the sanitizer satisfied the labeling

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[10]The standard provides:

> **§ 1910.1200 Hazard communication.**
>
> . . . .
>
> (e) *Written hazard communication program.* (1) Employers shall develop, implement, and maintain at the workplace, a written hazard communication program . . . which at least describes how the criteria specified in paragraphs (f), (g), and (h) of this section for labels and other forms of warning, material safety data sheets, and employee information and training will be met, and which also includes the following:
>
> (i) A list of the hazardous chemicals known to be present using an identity that is referenced on the appropriate material safety data sheet . . . .
>
> . . . .
>
> (f) *Labels and other forms of warning.* (1) The chemical manufacturer, importer, or distributor shall ensure that each container of hazardous chemicals . . . is labeled, tagged or marked with the following information:
>
> (i) Identity of the hazardous chemical(s);
>
> (ii) Appropriate hazard warnings; and
>
> (iii) Name and address of the chemical manufacturer, importer, or other responsible party.
>
> . . . .
>
> (6) The employer may use signs, placards, process sheets, batch tickets, operating procedures, or other such written materials in lieu of affixing labels to individual stationary process containers, as long as the alternative method identifies the containers to which it is applicable and conveys the information required . . . to be on a label.

requirements of section 1910.1200(f). However, the handbook failed to make clear the system of labeling Safeway would use in the event it received a product without a label.

Berry testified that in determining what MSDS's must be at a particular store, Safeway conducts an initial inventory and provides MSDS's for any product which it feels an employee may use. Although he felt that no MSDS was needed for the windshield washer because it was exempt as a consumer product, he did not contradict Dailey's testimony that Safeway's inventory did not include either the windshield washer or the sanitizer.[11]

The judge found a violation of section 1910.1200(e)(1) solely on the basis that the Johnson sanitizer was not included on Safeway's inventory of hazardous chemicals. The judge found the evidence on this point undisputed. He did not address, and made no findings regarding, the other two deficiencies to which Dailey testified.

The Secretary relies on Dailey's testimony in support of the judge's finding of noncompliance with section 1910.1200(e)(1). The Secretary also asserts that the evidence shows that Safeway's program was deficient for not setting forth a means to insure that MSDS's are available for each product in use and for not specifying the labeling system. The Secretary points out that section 1910.1200(e)(1) specifically requires the employer to describe how it will meet the criteria set forth in section 1910.1200(f) for labeling. The Secretary also claims that the program failed to describe a means by which employees could obtain MSDS's; however, as indicated above, Dailey did not consider the program deficient on this ground.

Safeway concedes that its list of hazardous chemicals did not include the windshield washer or sanitizer and relies instead on its contention that these products are exempt from the HCS. Safeway also claims that Dailey's objection that the program failed to ensure that it would have the MSDS's for hazardous substances used in the store is inconsistent with Dailey's testimony that he was not alleging that employees were unable to obtain MSDS's on request. Lastly, Safeway notes that Dailey testified that the alleged violation was based

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[11]Berry did say that Safeway's managers had testified in another proceeding that they keep a log of what products employees use, but he did not identify the proceeding, and Safeway did not request that the record in that case be admitted into evidence here. Assuming that Berry was referring to another case involving Safeway also decided by Judge Cronin, *Safeway Store No. 576*, 91 OSAHRC 41/A11 (1991) (ALJ), we note that Judge Cronin's decision in that case does not address the matter of the log of products used.

on the absence of a system for labeling products that were received without labels, and it contends that therefore its program was not deficient with respect to the two products at issue here because they bore manufacturer's labels.

Analysis

Because it is undisputed that the sanitizer was not included on the list of hazardous chemicals, we affirm the judge's decision. As to the other deficiencies on which the Secretary's allegation is based, we find from Berry's unrebutted testimony that in Safeway's program Safeway did in fact have a means for identifying those products for which it would need MSDS's. Although Dailey may not have seen any documentation of that method in the written materials he received, the Secretary is not alleging that Safeway violated the standard because it failed to make its method known to the Secretary. Lastly, we also find on the record that Safeway's instructions in the videotape shown to employees, which was admitted into evidence, adequately describe its procedures for product labeling. Among other things, the videotape addresses the use of hazard warning signs for work areas and also informs employees of what action they are to take in the event they encounter a container of a chemical which has no label. *See Syntron, Inc.*, 11 BNA OSHC 1868, 1983-84 CCH OSHD ¶ 26,841 (No. 81-1491-S, 1984) (reliance on videotape as basis for decision).

Accordingly, we find that Safeway's hazard communication program was deficient only because of its failure to include the sanitizer on the inventory or list of hazardous chemicals and was not deficient in the other two aspects to which Dailey testified.

FAILURE TO HAVE MSDS'S AVAILABLE
(§ 1910.1200(g)(1) Amended to section 1910.1200(g)(8))[12]

Dailey asked Dave Harms, the store manager, for MSDS's for the windshield washer and sanitizer. Although Harms produced MSDS's for some substances, he was unable to find

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[12]The two sections provide:

> **§ 1910.1200 Hazard communication.**
>
> . . . .
>
> (g) *Material safety data sheets.* (1) Chemical manufacturers and importers shall obtain or develop a material safety data sheet for each hazardous chemical they produce or import. Employers shall have a material safety data sheet for each hazardous chemical which they use.
>
> . . . .
>
> (8) The employer shall maintain copies of the required material safety data sheets for each hazardous chemical in the workplace, and shall ensure that they are readily accessible during each work shift to employees when they are in their work area(s).

the data sheets for those two products. Berry testified that no MSDS was available for the cleaner because Safeway regarded it as an exempt consumer product and that the MSDS for the sanitizer was available in Safeway's division office in Englewood, Colorado, about 50 miles away. According to Berry, an employee who requests an MSDS will receive it either by facsimile transmission ("FAX") if the need for the MSDS is urgent or by next day delivery through Safeway's internal mail system. However, on cross-examination, Berry admitted that no MSDS would be released after the division office closes at 6:00 p.m. whereas store 914 is open until at least 9:00 or 10:00 p.m.

In a very brief discussion, the judge found that a violation of section 1910.1200(g)(8) had been tried by consent and that Safeway had failed to comply with this section because MSDS's were "inaccessible" to employees working weekends or evenings. The judge did not address section 1910.1200(g)(1) and did not make any findings with respect to that section.

Safeway argues before us that it did not try a violation of section 1910.1200(g)(8) by consent. While Safeway concedes that it questioned Berry regarding the means by which MSDS's would be made available to employees, it contends that by doing so it did not demonstrate consent to try a violation of section 1910.1200(g)(8) but rather introduced that evidence as a defense to a charge of not having MSDS's in its possession under section 1910.1200(g)(1). Safeway also notes that neither party addressed section 1910.1200(g)(8) in their posthearing briefs, thereby indicating, in Safeway's view, that neither party understood that section to be in issue.

As to the merits, Safeway asserts that neither section 1910.1200(g)(1) nor section 1910.1200(g)(8) require that the MSDS be physically present at the workplace itself, and Safeway asserts that on the facts here, it could make an MSDS available quickly enough to meet the requirements of the standard. Safeway relies on a decision by a Commission judge in a case involving another grocery store chain, *Price Chopper Supermarkets*, No. 90-552 (Dec. 26, 1990) (ALJ), *rev'd*, 15 BNA OSHC 1518, 1992 CCH OSHD ¶ 29,608 (1992). In that decision, Administrative Law Judge Michael H. Schoenfeld held that the employer's practice of keeping its OSHA log and summary of occupational injuries and illnesses in a central office and furnishing a copy within two days to any employee upon request complied with the recordkeeping regulation at 29 C.F.R. § 1904.2(a) because the employer had made

the log and summary "available." Safeway also contends that two cases in which the Commission held that MSDS's were not readily accessible, *Thomas Lindstrom Co.*, 15 BNA OSHC 1353, 1991 CCH OSHD ¶ 29,526 (No. 90-1084, 1991) and *Super Excavators, Inc.*, 15 BNA OSHC 1313, 1991 CCH OSHD ¶ 29,498 (No. 89-2253, 1991), are distinguishable because the employers in those cases did not have FAX capability.

In his brief on review, the Secretary contends that an amendment to section 1910.1200(g)(8) "comfortably" conforms to the evidence. In his reply brief, the Secretary recognizes that trial by consent exists only where the parties "squarely recognize" that they are trying an unpleaded issue, but he contends that this test was met because Safeway itself introduced the relevant evidence when it asked Berry questions about Safeway's efforts to make MSDS's accessible to employees. The Secretary further points out that in following up this line of inquiry during his cross-examination of Berry, he adduced the testimony that the MSDS's were not readily accessible at off-hours, evidence which goes beyond the simple question of whether Safeway failed to have MSDS's in its possession for those chemicals it used.

On the merits, the Secretary argues that the judge properly found that MSDS's were not "readily accessible" as that phrase is used in section 1910.1200(g)(8). The Secretary states that the judge's decision is consistent with the preamble to the standard and with an enforcement directive the Secretary issued shortly after the inspection at issue here.

Analysis

1. Amendment Issue

The provision alleged in the citation and complaint, section 1910.1200(g)(1), merely requires an employer to "have" an MSDS for each hazardous chemical that it uses. The location where the employer keeps the required MSDS's, and their availability to employees in work areas, are not elements of a violation of this provision. Rather, such factors are relevant only to section 1910.1200(g)(8). As the Secretary correctly notes, the test for determining trial by consent under Fed. R. Civ. P. 15(b) is whether the parties clearly know that the evidence is directed toward an unpleaded issue. *Armour Food Co.*, 14 BNA OSHC 1817, 1824, 1987-90 CCH OSHD ¶ 29,088, p. 38,885 (No. 86-247, 1990). Since the parties here introduced evidence relevant only to section 1910.1200(g)(8), and not relevant to the

originally-cited section 1910.1200(g)(1), we conclude that they understood that they were litigating the issue of a violation of section 1910.1200(g)(8). *McWilliams Forge Co.*, 11 BNA OSHC 2128, 2130, 1984-85 CCH OSHD ¶ 26,979, p. 34,669 (No. 80-5868, 1984).

However, the elements of a violation of section 1910.1200(g)(8) are not unpleaded issues in the circumstances presented here. Although the Secretary charged that Safeway failed to comply with section 1910.1200(g)(1), it is clear from the outset of the proceeding that the gravamen of the Secretary's case was the unavailability of the MSDS's *at the specific store*. The citation itself, for instance, alleged that Safeway did not have MSDS's "on hand" for the hazardous substances used in the store. The complaint alleged that Safeway could have abated the violative conditions by "obtaining and *maintaining at the workplace* MSDSs for each hazardous chemical used at the workplace" (emphasis added). Safeway's own counsel in fact asked the following question of Dailey: "And with respect to (G)(1), the violation that you're alleging is that the two [MSDS's] were not present *at the store*" (emphasis added), to which Dailey replied in the affirmative. As the Secretary points out, Safeway made no objection that the violation as thus described went beyond the pleadings.[13]

Therefore, in our view, the question presented here is not trial by consent of an unpleaded issue because the issue of failing to have MSDS's available at the specific worksite was pleaded and was understood by both parties to be the pleaded issue. The question, rather, is one of amending the cited standard to conform to the real basis for the violation. *See Morrison-Knudson Co./Yonkers Contrac. Co., A Joint Venture*, 16 BNA OSHC 1105, 1118, 1993 CCH OSHD ¶ 30,048, p. 41,275 (No. 88-572, 1993) (discussion of amendment which does not materially alter the Secretary's case), *petition for review filed*, No.

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[13]For these reasons, we reject Safeway's contention that it introduced evidence of its means for providing employees with access to MSDS's which were maintained off-site only as a defense to or in mitigation of a charge under section 1910.1200(g)(1). There is simply no basis in the record to support such a position.

As Safeway points out, the Secretary did not mention section 1910.1200(g)(8) in his posthearing brief. However, the Secretary's brief argued that the specific location of MSDS's and their accessibility to employees is an element of a violation of section 1910.1200(g)(1). While the Secretary's view of the meaning of section 1910.1200(g)(1) is incorrect, his posthearing brief is consistent with the factual basis for the charge as set forth in the citation and complaint.

93-1385 (D.C. Cir. June 15, 1993). We conclude that an amendment to section 1910.1200(g)(8) is proper because it does not alter the factual allegations set forth in the citation. *Coastal Pile Driving, Inc.*, 6 BNA OSHC 1133, 1977-78 CCH OSHD ¶ 22,375 (No. 15043, 1977).

2. Merits of the Violation.

We further conclude that Judge Cronin properly found Safeway in noncompliance with section 1910.1200(g)(8). In reversing the judge's decision in *Price Chopper*, on which Safeway relies, the Commission interpreted the term "available" used in the recordkeeping standard to mean "present or ready for immediate use." The Commission expressly held that the standard does not permit a delay of up to two days in employee access to the log and summary. 15 BNA OSHC at 1520, 1992 CCH OSHD at p. 40,084.

In *Price Chopper*, the Commission stated in dicta that use of FAX could comply with the standard, citing the Secretary's program directive under the HCS. *Id.* at 1520 n.3, 1992 CCH OSHD at p. 40,083 n.3. However, the mere availability of FAX is not sufficient to establish compliance with the requirement of section 1910.1200(g)(8) that MSDS's be "readily accessible during each work shift" if the FAX is itself delayed. As the program directive states,

> This provision requires MSDSs or electronically accessible MSDSs to be maintained on site. Readable copy of MSDS(s) must be available on-site. This may be accomplished by use of computers with printers, microfiche machines, and/or telefax machines, any of which would meet the intent of the standard. The key to compliance with this provision is that employees have no barriers to access to the information and that *MSDSs be available during the workshift*. . . .
>
> . . . Employees must have access to the MSDSs and be able to get the information when they need it, in order for an employer to be in compliance with the rule.

OSHA Instruction CPL 2-2.38C, *Inspection Procedures for the Hazard Communication Standard, 29 CFR 1910.1200, 1915.99, 1917.28, 1918.90, 1926.59, and 1918.21*, 2 BNA OSHR Ref. File 31:9502, :9524 (Oct. 22, 1990) (emphasis added). Similarly, the preamble to the HCS emphasizes the need for prompt access to MSDS's: "In order for the MSDS to serve as a source of detailed information on hazards, it must be located close to the workers, and

readily available to them during each workshift." 48 Fed. Reg. 53,337 (1983). Thus, as the Commission indicated in *Super Excavators*, the Secretary has acknowledged that making MSDS's *immediately available* through "a facsimile transmitting machine or other device" would comply with the standard. 15 BNA OSHC at 1315, 1991 CCH OSHD at p. 39,803. Because a request for an MSDS received after its division office had closed for the evening would not be honored until at least the next day, we conclude, as did the judge, that Safeway has not complied with the requirement of section 1910.1200(g)(8). *See Thomas Lindstrom* (where MSDS's were kept at a central office 10 to 45 minutes from the worksite, Commission rejected the employer's contention that MSDS's are reasonably accessible if they can be supplied at any time during the work shift).

Accordingly, we conclude that the judge did not err in his disposition of the issues before him. The judge assessed no penalties for the other than serious violations of the HCS, and neither party takes exception to the judge's assessment. Therefore, for the reasons set forth above, we affirm his decision.

Edwin G. Foulke, Jr.
Chairman

Velma Montoya
Commissioner

Dated: December 16, 1993

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
One Lafayette Centre
1120 20th Street, N.W. — 9th Floor
Washington, DC 20036-3419

PHONE:
COM (202) 606-5100
FTS (202) 606-5100

FAX:
COM (202) 606-5050
FTS (202) 606-5050

SECRETARY OF LABOR,	:	
Complainant,	:	
v.	:	Docket No. 91-0373
SAFEWAY STORE NO. 914,	:	
Respondent.	:	

NOTICE OF COMMISSION DECISION

The attached decision by the Occupational Safety and Health Review Commission was issued on December 16, 1993. **ANY PERSON ADVERSELY AFFECTED OR AGGRIEVED WHO WISHES TO OBTAIN REVIEW OF THIS DECISION MUST FILE A NOTICE OF APPEAL WITH THE APPROPRIATE FEDERAL COURT OF APPEALS WITHIN 60 DAYS OF THE DATE OF THIS DECISION.** See Section 11 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 660.

FOR THE COMMISSION

Ray H. Darling, Jr.

December 16, 1993
Date

Ray H. Darling, Jr.
Executive Secretary

Docket No. 91-0373

NOTICE IS GIVEN TO THE FOLLOWING:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Ave., N.W.
Washington, D.C. 20210

Tedrick Housh, Esq.
Regional Solicitor
Office of the Solicitor, U.S. DOL
Federal Office Building, Room 2106
911 Walnut Street
Kansas City, MO 64106

James J. Gonzales, Esquire
Rachel A. Yates, Esquire
Holland & Hart
555 Seventeenth Street, Suite 2900
Post Office Box 8749
Denver, CO 80201

James A. Cronin, Jr.
Administrative Law Judge
Occupational Safety and Health
Review Commission
Room 250
1244 North Speer Boulevard
Denver, CO 80204-3582

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1825 K STREET N.W.
4TH FLOOR
WASHINGTON D.C. 20006-1246

FAX:
COM (202) 634-4008
FTS 634-4008

SECRETARY OF LABOR
Complainant,
v.

SAFEWAY STORE #914
Respondent.

OSHRC DOCKET
NO. 91-0373

NOTICE OF DOCKETING OF ADMINISTRATIVE LAW JUDGE'S DECISION

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on December 6, 1991. The decision of the Judge will become a final order of the Commission on January 6, 1992 unless a Commission member directs review of the decision on or before that date. ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW. Any such petition should be received by the Executive Secretary on or before December 26, 1991 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

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

Executive Secretary
Occupational Safety and Health
Review Commission
1825 K St. N.W., Room 401
Washington, D.C. 20006-1246

Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Avenue, N.W.
Washington, D.C. 20210

If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 634-7950.

FOR THE COMMISSION

Ray H. Darling, Jr.

Date: December 6, 1991

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 91-0373

NOTICE IS GIVEN TO THE FOLLOWING:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Ave., N.W.
Washington, D.C. 20210

Tedrick Housh, Esq.
Regional Solicitor
Office of the Solicitor, U.S. DOL
Federal Office Bldg., Room 2106
911 Walnut Street
Kansas City, MO 64106

James J. Gonzales, Esquire
Rachel A. Yates, Esquire
Holland & Hart
Suite 2900
555 Seventeenth Street
Denver, CO 80202

James A. Cronin
Administrative Law Judge
Occupational Safety and Health
Review Commission
Room 250
1244 North Speer Boulevard
Denver, CO 80204 3582

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UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. SAFEWAY STORE NO. 914, Respondent.	OSHRC DOCKET NO. 91-0373

APPEARANCES:

For the Complainant:
Evert H. Van Wijk, Esq., Kathleen Butterfield, Esq., Office of the Solicitor, U.S. Department of Labor, Kansas City, MO

For the Respondent:
James J. Gonzales, Esq. and Rachel Yates, Esq., Holland & Hart, Denver, CO

DECISION AND ORDER

Cronin, Judge:

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C. Section 651 et seq.; hereafter called the "Act").

At all times relevant to this matter, respondent, Safeway Store No. 914 (Safeway), maintained a workplace at 2321 West Eisenhower, Loveland, Colorado, where it was engaged in retail grocery sales. Respondent admits it employs approximately 98 workers and is engaged in a business affecting commerce. Respondent, therefore, is an employer within the meaning of the Act.

On October 17, 1990, an Occupational Safety and Health Administration (OSHA) Compliance Officer (CO) conducted an inspection of Safeway Store No. 914 (Tr. 38). As a result of that inspection Safeway was issued citations on January 4, 1991, alleging a "serious" violation of 29 CFR §1910.1200(h) and "willful" violations of 29 CFR §§1910.1200 (e)(1), and (g)(1), together with total proposed penalties of $16,800.00.

By filing a timely notice of contest to all citations, Safeway brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

On April 15, 1991, the Secretary filed a Complaint recharacterizing the alleged violations of §1910.1200(e)(1) and (g)(1) as "serious," withdrawing all allegations concerning the use of Formula 409, and alleging, as an alternative to §1910.1200(e(1), a violation of §1910.1200(e)(4).

On August 13, 1991, a hearing was held in Denver, Colorado. At the hearing, this Judge granted the Secretary's motion to reclassify all three citations as "other than serious." The parties have submitted briefs, and this matter is now ready for decision.

Alleged Violations

Citation 1, item 1 alleges:

29 CFR §1910.1200(h): Employees were not provided information and training as specified in 29 C.F.R. §1910.1200(h)(1) and (2) on hazardous chemicals in their work area at the time of their initial assignment and whenever a new hazard was introduced into their work area:

The employer did not adequately provide information and training for employees exposed to hazardous chemicals/substances in the workplace such as; Regal Windshield Washer Cleaner, Johnson J-80 Sanitizer, and Formula 409.

The cited standard provides:

Employee information and training. Employers shall provide employees with information and training on hazardous chemicals in their work area at the time of their initial assignment, and whenever a new hazard is introduced into their work area.

Citation 2, item 1 alleges:

29 CFR §1910.1200(e)(1): Employer had not developed or implemented a written hazard communication program which at least describes how the criteria in 29 CFR §1910.1200(f),(g) and (h) will be met:

(a) The employer had not developed a complete hazard communication program for hazardous chemicals/substances such as but not limited to: Regal Windshield Washer cleaner, Johnson J-80 Sanitizer, and Formula 409.

The cited standard, in pertinent part, provides:

Written hazard communication program. (1) Employers shall develop, implement, and maintain at the workplace, a written hazard communication program for their workplaces which at least describes how the criteria specified in paragraphs (f),(g), and (h) of this section for labels and other forms of warning, material safety data sheets, and employee information and training will be met, and which also includes the following:

(i) A list of the hazardous chemicals known to be present using an identity that is referenced on the appropriate material safety data sheet (the list may be compiled for the workplace as a whole or for individual work areas); and, ...

Citation 2, item 2 alleges:

29 CFR §1910.1200(g)(1): Employer did not have a material safety data sheet for each hazardous chemical which is used in the workplace:

(a) The employer did not have a material safety data sheet on hand for each hazardous substance/chemical used in the workplace such as: Regal Windshield Washer and Johnson J-80 Sanitizer.

The cited standard provides:

Material safety data sheets. (1) Chemical manufacturers and importers shall obtain or develop a material safety data sheet for each hazardous chemical they produce or import. Employers shall have a material safety data sheet for each hazardous chemical which they use.

The standard at 29 CFR §1910.1200(e)(4) provides:

The employer shall make the written hazard communication program available, upon request, to employees, their designated representatives, the Assistant Secretary and the Director, in accordance with the requirements of 29 CFR 1910.20(e).

Issues

1. Whether citation 2, items 1 and 2 are barred by the statute of limitations provided in §9(c) of the Act?

2. Whether Regal Windshield Washer Cleaner and/or Johnson J-80 Sanitizer are hazardous chemicals as defined by the Hazard Communication Standard at §1910.1200 et seq.?

3. Whether Safeway established that Regal Windshield Washer and/or Johnson J-8 come within the consumer product exemption at §1910.1200 (b)(6)(vii)?

4. Whether the Secretary has shown, by a preponderance of the evidence, that Safeway was in violation of §1910.1200(h) on October 17, 1990.

5. Whether the Secretary has shown, by a preponderance of the evidence, that Safeway was in violation of §1910.1200(e)(1) on October 17, 1990.

a) In the alternative, whether the Secretary has shown that Safeway was in violation of §1910.1200(e)(4).

6. Whether the Secretary has shown, by a preponderance of the evidence, that Safeway was in violation of §1910.1200(g)(1) on October 17, 1990.

Statute of Limitations

As a result of his prior inspection on August 23, 1989, of Safeway Store No. 914, the inspecting CO, Peter Dailey, concluded that respondent had no hazard communication standard (Tr. 105). On September 28, 1989, the Secretary issued citations alleging violation of §1910.1200(e)(1), stating that no written hazard communication program "was available." The Secretary's complaint additionally alleges under the 1200(e)(1) charge that Safeway had not developed or implemented a comprehensive program (Stipulation, Tr. 37-38; Ex. J-1, J-2). In 1989, Safeway also was cited for violation of §1910.1200(g)(1), based on allegations that no material safety data sheets (MSDSs) were maintained at Store #914 (Stipulation, Tr. 37-38; Ex. J-1, J-2).

On April 20, 1990, Safeway mailed to complainant a copy of its hazard communication program which the parties had been "discussing for settlement purposes" (Stipulation, Tr. 39; Ex. C-6). The September 1989 complaint was withdrawn by the Secretary on April 23, 1990 (Ex. J-3), and this case was dismissed by this Judge on May 22, 1990.

Safeway contends that the Secretary knew or should have known of the alleged deficiencies in Safeway's hazard communication form after the inspection in September 1989 and receipt of Safeway's hazard communication program in April 1990. According to respondent, the Secretary, therefore, knew, or should have known, by April 1990 of all of the facts which

later formed the basis of the alleged violations of 1200(e)(1), (e)(4) and (g)(1) in 1991. Respondent argues that under the circumstances the Secretary's allegations of those violations in this case are time barred by the statute of limitations provided in section 9(c) of the Act.

Section 9(c) provides that "[n]o citation may be issued after the expiration of six months following the occurrence of any violation." In effect, this section bars the Secretary from issuing a citation more than six months after a violation has been abated or has ceased to exist.

Additionally, the Commission applies the so-called "discovery rule" to existing violations, whether discrete or continuing, by holding that the six month statute of limitations under section 9(c) commences to run on an existing violation once the Secretary knows or should have known of the violation's existence. Sun Ship, Inc., 12 BNA OSHC 1185, 1186 (No. 80-3192, 1985); Kaspar Wire Works, Inc., 13 BNA OSHC 1261, 1262 (No. 85-1060, 1987).[1]

Compliance Officer Dailey testified that he recommended issuance of the 1991 §1910.1200(e)(1) citation based on his belief that Safeway's hazard communication program was incomplete because it did not specify how containers of hazardous

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[1] In an earlier decision, Yelvington Welding Service, 6 BNA OSHC 2013 (No. 15958, 1978), the Commission also held that the running of the statute of limitations is tolled when the employer's conduct prevents the Secretary of learning of a violation's existence. That holding, however, has no application here because there is no indication that Safeway attempted to conceal the alleged violations in 1989 or 1990.

chemicals were to be labeled, did not contain a complete list of the hazardous chemicals used in the workplace, specifically Regal Windshield Washer and Johnson J-80 sanitizer, and did not include procedures for obtaining MSDSs for hazardous chemicals when they are introduced into the workplace.

Clearly, Commission precedent bars the Secretary from citing Safeway on charges that it had no hazard communication program prior to April 1990, the basis of the 1989 citation. The §9(c) limitations period also has run on violations relating to deficiencies that were facially apparent in Safeway's program in April 1990, because the Secretary knew or should have discovered those deficiencies upon receiving and reviewing a copy of the program. Thus, the Secretary is barred from citing Safeway for any failure to include provisions describing how the labeling requirements of the standard will be met or how MSDSs for new hazardous chemicals will be obtained.

Commission precedent, however, does not prevent the Secretary from later enforcing OSHA standards against an employer for violations which may have existed during a prior inspection but were not readily apparent to the Secretary. Stated somewhat differently, §9(c) does not impose an affirmative duty on the Secretary to conduct her investigations so as to ascertain that all possible violations relating to a general set of circumstances have been discovered, or forever forfeit her ability to regulate in that area.

There is no evidence in this record that the Secretary knew or had reason to know that Regal Windshield Washer and Johnson J-80 were in use in Store #914 in April 1990, or prior thereto. The Secretary, therefore, had no reason to know that the list of hazardous chemicals contained in the April 1990 program was incomplete. The Secretary, then, is not barred from issuing a citation in 1991 for an alleged violation of §1910.1200(e)(1) based on the alleged failure to list Regal Windshield Washer and Johnson J-80 Sanitizer on its inventory of hazardous chemicals.

For the same reason, the Secretary is not barred from charging Safeway in 1991 with a violation of §1910.1200(g)(1) for its alleged failure to have MSDSs for those chemicals at the store. When the 1989 citation for violation of that regulation was issued, the CO believed that respondent had no MSDSs at the worksite and that was the basis of the charge. At that time, the Secretary had no reason to investigate further. Because the Secretary had no reason to know about the Regal Windshield Washer and the Johnson J-80 prior to the 1990 inspection, the Secretary is not barred from issuing the 1991 1200(g)(1) charge.

Nor is the amendment of the Secretary's citation by the complaint to charge in the alternative an allegation of violation of §1910.1200(e)(4) barred by the statute of limitations. Respondent's failure to make Safeway's complete written hazard communication program available to the Secretary's CO, upon

request, constitutes a distinct, discrete violation, arising out of a completely different factual basis than the alleged subsection (e)(1) and (g)(1) violations. The statute of limitations on respondent's failure to provide the requested program began to run at the time of the CO's request and the date of the inspection, October 17, 1990. Sun Ship Inc., supra.

Because the complaint's alleged violation of subsection (e)(4) in the alternative has a completely distinct factual basis, than the (e)(1) charge, the (e)(4) charge does not relate back to the date of the citation. See Rule 15(c) Federal Rules of Civil Procedure. The complaint, however, was filed on April 15, 1991 and, thus, comes within the six month statute of limitations that began to run on the date of the request, October 17, 1990.

Applicability of §1910.1200

The term "hazardous chemical" is defined at 29 C.F.R. §1910.1200(c) as "any chemical which is a physical hazard or a health hazard." According to 29 C.F.R. §1010.1200(d)(3)(i), chemical substances which are listed in 29 C.F.R. Part 1910, Subpart Z, Toxic and Hazardous Substances, shall be treated as hazardous. Also, mixtures which have not been tested as a whole are assumed to present the same hazards as do their components which comprise one percent or greater of the mixture. 29 C.F.R. 1910.1200(d)(5)(ii).

Regal Windshield Washer contains 1.29 percent methanol, a chemical substance listed in Subpart Z. Regal Windshield Washer, therefore, is a "hazardous chemical" as a matter of law (Tr. 202, 215; Ex. C-4).

Johnson J-80 Sanitizer contains 1.29 percent n-Alkyl Dimethyl Benzyl Ammonium Chlorides and 1.29 percent n-Alkyl Dimethyl Ethyl-Benzyl Ammonium Chlorides (Tr. 200; Ex. C-3). Although ammonium chlorides are not listed in Subpart Z, the Secretary maintains they are hazardous chemicals because they are "irritants." By definition, the term "health hazard" includes chemicals which are "irritants." See 29 C.F.R. §1910.1200(c) According to Appendix A to the Hazard Communication Standard, an irritant is a hazardous chemical and is defined as a "chemical * * * which causes a reversible inflammatory effect on living tissue by chemical action at the site of contact."

The Hazard Communication Standard requires chemical manufacturers and importers to consider the available scientific evidence in evaluating chemicals. Evidence of hazardous effects that meets the criteria established in Appendix A for health hazards must be reported on the MSDS. 29 C.F.R. §1910.1200(d)(2); Appendices A and B. Employers, on the other hand, need not conduct an independent evaluation of each chemical in their workplace, but may rely on the manufacturer's MSDS. 29 C.F.R. §1910.1200(d)(1), Appendix B.

Under the heading, Health Hazard Data, the MSDS for Johnson J-80 Sanitizer states that "[d]irect contact of product with eyes can cause irritation. Direct contact of product with skin can cause irritation. . .. Product spray, mist fog or vapor may cause irritation to nose, throat and lungs if adequate ventilation is not employed." (Ex. C-3). In this Judge's view, a chemical manufacturer's identification of a health hazard on the MSDS is prima facie evidence that a chemical is hazardous for purposes of the Act. Because the MSDS for Johnson J-80 identifies it as a skin and eye irritant, it is prima facie evidence that it is a hazardous chemical for purposes of the Act.

Respondent conducted no independent evaluation of Johnson J-80. Respondent, however, introduced the opinion of its expert, Dr. Gary Kreiger, that the ammonium chlorides in Johnson J-80 Sanitizer are not hazardous chemicals for the purposes of the standard (Tr. 210). Dr. Kreiger, however, admitted in effect that undiluted Johnson J-80 is an alkaline solution with a pH of 8 to 9, and its contact with the eye could result in a "reversible inflammatory effect" (Tr. 214-218).

Based on the MSDS and Dr. Kreiger's admission, this Judge finds that Johnson J-80 is an irritant and a hazardous chemical for purposes of the Act.

Consumer Product or Hazardous Substance Exception

Subsection (b)(6)(vii) establishes an exception to the application of §1910.1200 for:

> Any consumer product or hazardous substance, as those terms are defined in the Consumer Product Safety Act (15 U.S.C. 2051 et seq.) and Federal Hazardous Substance Act 15 U.S.C. 1261 et seq.) where the employer can demonstrate it is used in the workplace in the same manner as normal consumer use, and which use results in a duration and frequency of exposure which is not greater than exposures experienced by consumers.

During the October 17, 1990, inspection, Safeway employee Louise Crouch told CO Dailey that she used Regal Windshield Washer to clean her scanner glass throughout the day (Tr. 49-50). Another employee, Rebecca Chambers, testified at the hearing that she used undiluted Regal in a spray bottle a couple of times a day to clean checkstand scanners at work (Tr. 236-240).

Regal Windshield Washer fluid clearly is a consumer product available off-the-shelf at Safeway and other retail outlets (Tr. 63, 131, 138-139, 249). Regal's product label identifies it as an "all season anti-freeze and cleaner," which "cuts road grime, salt, bugs and dirt for better vision." "Use" directions instruct that the fluid be diluted with two parts water in summer and used only in well ventilated areas. (Ex. C-1). Safeway employees, William Allison and Rebecca Chambers, testified that they use the Regal in their homes, not only to fill their cars' windshield washer reservoirs, but to fill squirt bottles for cleaning window panes in their homes (Tr. 220-221, 234-235). Mr.

Allison has used Regal in this manner for a couple of years (Tr. 224).

Dr. Krieger testified that methanol, the hazardous ingredient in Regal Windshield Washer, is a common ingredient in antifreeze, and paint and varnish removers (Tr. 191). Dr. Krieger stated that a checker spraying Regal onto a 8-1/2"x11" scanner would be exposed to significantly smaller quantities of methanol than would a consumer adding anti-freeze to his car, cleaning paint brushes, or cleaning larger areas of glass, i.e. windows at home (Tr. 196-199).

The Secretary concedes that Regal is a consumer product, but contends that the product is not used by Safeway in the same manner as by normal consumers, and results in exposures greater than those of the normal consumer.

This Judge disagrees. Consumers do not always use products solely in the intended manner or for their intended purpose. Although Regal is not specifically intended for use as a household window cleaner, its use for such purpose is reasonably predictable given its primary function as a glass cleaner. Nothing in the record indicates that Mr. Allison or Ms. Chambers are not normal consumers or that their use of the Regal Windshield Washer was idiosyncratic.

Dr. Krieger's opinion that the Safeway checkers' use of Regal Windshield Washer did not result in exposures greater than those experienced by consumers also was unrefuted.

The respondent has demonstrated that Regal Windshield Washer falls within the exemption for consumer products provided by subsection (b)(6)(vii). The requirements of §1910.1200 et seq., therefore, are not applicable to Regal, and all allegations concerning it are vacated.

Johnson J-80 Sanitizer is a "hazardous substance" under the Federal Hazardous Substance Act, which covers "any substance or mixture of substances which . . . is an irritant." 15 U.S.C. 1261(f)(1)(A)(iii). The consumer exemption, however, does not apply to Johnson J-80 Sanitizer.

Respondent introduced no evidence that Johnson J-80 Sanitizer was available to or used by household consumers. Moreover, the label from the J-80 indicates that the product is intended for "Commercial Markets" (Ex. C-2). Dr. Krieger, however, did testify that products containing ordinary ammonium compounds, the general class of compounds to which n-Alkyl Dimethyl Benzyl Ammonium Chloride and n-Alkyl Dimethyl Ethyl-Benzyl Ammonium Chlorides belong, are available to consumers. Dr. Krieger stated that the ordinary ammonium compounds appear not only in solutions used by restaurants for cleaning utensils and equipment, but in disinfectants, and germicides for home wound cleansing (Tr. 200-201). Dr. Krieger stated that home germicidals contain anywhere from .01 to 1-1/2 percent concentrations of the compounds (Tr. 201-202). Johnson J-80 Sanitizer, of course, contains 1.29

percent each of Benzyl and Ethyl-Benzyl Ammonium Chlorides (Tr. 202; Ex. C-3).

This Judge finds that respondent failed to establish a normal consumer use of Johnson J-80 or any substantially similar product. Respondent's expert testified that products available for home use normally contain between .01 to 1-1/2 percent concentrations of ammonium compounds. Apparently, Dr. Krieger believed that Johnson J-80 fell within that range (Tr. 209). But Johnson 1-80, in fact, contains a total of 2.58 percent, far higher than the customary concentrated solutions available to and used by consumers. Although the J-80 is diluted before use, respondent's employees must perform the dilution, at which time they are exposed to the full strength solution.

On this record, respondent has failed to prove that Johnson J-80 comes within the exemption provided by 29 C.F.R. §1910.1200(b)(6)(vii).

Alleged Violation of §1910.1200(e)(1), and §1910.1200(e)(4) in the Alternative

Subsection (e)(1) requires that employers develop, implement and maintain at the workplace, a written hazard communication program which includes, among other things, a list of the hazardous chemicals known to be present in the workplace.

Johnson J-80, which is a" hazardous chemical," was used by Safeway No. 914 employees. Patricia Williams, a Safeway employee, testified that she used Johnson J-80 for sanitizing the lids of bulk bins in the bulk food area. Ms. Williams

would dilute approximately a quarter of a teaspoon of J-80 in a 32 oz. spray bottle filled with water before spraying it on the lids (Tr. 169-170). Paul Trinidad testified that within two or three months of the October 17 inspection he diluted a couple of capfuls of J-80 into a paint can size tub of water and used it on a rag to clean a display (Tr. 155-161).

It is undisputed that Johnson J-80 Sanitizer, a non-exempt hazardous chemical, does not appear on respondent's MSDS inventory, the only listing of hazardous chemicals found in Safeway's program (Tr. 85, 134; Ex. C-6).

Respondent, therefore, is found in violation of subsection (e)(1) on October 17, 1990, and citation 2, item 1 is affirmed. Because the respondent is found to have violated the originally cited standard, there is no need to consider the alternative allegation of a subsection (e)(4) violation.

Alleged Violation of §1910.1200(g)(1)

The cited standard requires the employer to have an MSDS for each hazardous chemical it uses. The subsection goes on to prescribe that the MSDSs must be readily accessible to employees during each work shift. 29 C.F.R. §1900.1200(g)(8). The CO testified that at the time of the inspection an MSDS was not available for Johnson J-80 Sanitizer at the workplace (Tr. 113-114).

Respondent maintains that during the course of their training, employees are given instructions for obtaining MSDSs for any product in the store from Safeway's Loss Control

office (Tr. 249). Maurice Ray Berry, Safeway's Loss Control Manager, testified that an MSDS for Johnson J-80 was available in that office (Tr. 249). Upon request, Loss Control would send a copy of the MSDS, by Fax or delivery truck to the requesting store (Tr. 249). The Loss Control office keeps normal office hours, however, and requests received after hours would be recorded on voice mail and no action taken until the next morning (Tr. 256).

Retention of MSDSs at a distant location where they are inaccessible to employees working weekends or evenings, clearly fails to comply with the strictures of subsection (g)(8), which require MSDSs to be readily accessible.

Because an alleged violation of §1910.1200(g)(8) was tried by the implied consent of the parties, Item 2, of Citation 2, is amended to conform to the evidence to allege a violation of §1200(g)(8). As amended, item 2 is affirmed.

Alleged Violation of §1910.1200(h)

The cited standard requires employers to train employees on the specific hazardous chemicals which they will encounter in their work area. Employees must be informed of any operations in their work area where hazardous chemicals are present (§1910.1200(h)(1)(ii)) and trained at least as to the physical and health hazards associated with, and the measures which may be taken to protect themselves from, exposure to those chemicals (§1910.1200(h)(2)(ii) and (iii)).

The Secretary concedes that Safeway employees participated in a chemical hazard safety training program, which included a video and handbook generally explaining chemical hazards (Tr. 244-246, Ex. C-6, R-9, R-10, R-11). The Secretary, however, contends that employees be using Johnson J-80 Sanitizer received no information specifically concerning that product.

Paul Trinidad testified that although he received chemical hazard training upon being hired, he was not given any information regarding the possible health hazards of Johnson J-80 (Tr. 164-165).

Patricia Williams also received general training, but could not recall whether Johnson J-80 had been specifically mentioned (Tr. 171).

Respondent contends that employees were instructed to read the MSDS for any product they used in their work (Tr. 268). But as previously found, no MSDS for Johnson J-80 was available at the worksite.

Maurice Berry testified, on cross-examination, without elaboration, that training on Johnson J-80 is provided as part of the training program (Tr. 257) and that instructions for the proper use of J-80 are posted in Safeway's meat department (Tr. 257). But Mr. Berry's mere assertion that training was provided cannot be credited in the absence of any evidence that Mr. Berry had first hand knowledge of Store No. 914's training with respect to Johnson J-80 and without any details as to the specific training provided.

Respondent also failed to introduce the meat department's use instructions for J-80. Without them, this Judge cannot conclude that the "instructions" contain the hazard information required by subsection (h). Moreover, there is no evidence that Safeway made these instructions available to Mr. Trinidad.

Based on the testimony of employee Trinidad and the fact that Store #914 had no MSDS on hand for Johnson J-80, this Judge finds that more probably than not Safeway did not provide information and training on Johnson J-80 to all of its employees using the chemical. Respondent is found in violation of §1910.1200(h) on October 17, 1990, and citation 1, item 1 is affirmed.

Penalties

The determination of what constitutes an appropriate penalty is within the discretion of the Review Commission. Long Manufacturing Co. v. OSHRC, 554 F.2d 902 (8th Cir. 1977). In determining the penalty, the Commission is required to give due consideration to the size of the employer, the gravity of the violation and the employer's good faith and history of previous violations. The gravity of the offense is the principle factor to be considered. Nacirema Operating Co., 1 BNA OSHC 1001, (No. 4, 1972).

Respondent employs approximately 98 employees. The Secretary introduced no evidence of bad faith or of any previous violations by respondent. The citations are all classified as

"other than serious," and only two employees were exposed, intermittently, and briefly, to the proven hazard. Also, no penalties for the amended "other than serious" violations were proposed by the Secretary.

Because this record fails to establish the appropriateness of any penalty, the violations will be affirmed without penalty.

Findings of Fact

All findings of fact relevant and necessary to a determination of the contested issues have been found specially and appear in the decision above. See Rule 52(a) of the Federal Rules of Civil Procedure. Proposed Findings of Fact that are inconsistent with this decision are denied.

Conclusions of Law

1. Section 9(c) of the Act did not time bar the complainant from issuing a citation on January 4, 1991, charging violations of §1910.1200(e)(1) and (g)(1).

2. Section 9(c) of the Act did not time bar the complainant on April 15, 1991 from amending the citation of January 4, 1991 by charging a violation of §1910.1200(e)(4) in the alternative.

3. Regal Windshield Washer Cleaner and Johnson J-80 Sanitizer are hazardous chemicals as defined by the Hazard Communication Standard at §1910.1200 et seq.

4. Regal Windshield Washer comes within the exemption at §1910.1200(b)(6)(vii) and is not subject to the application of the Hazard Communication Standard.

5. Johnson J-80 Sanitizer does not come within the exemption at §1910.1200(b),(6)(vii) and is subject to the application of the Hazard Communication Standard.

6. Respondent was in violation of §1910.1200(h) on October 17, 1990.

7. Respondent was in violation of §1910.1200(e)(1) on October 17, 1990.

8. Respondent was in violation of §1910.1200(g)(8) on October 17, 1990.

ORDER

1. An other than serious violation of §1910.1200(h), is AFFIRMED, without penalty.

2. An other than serious violation of §1910.1200(e)(1), is AFFIRMED, without penalty.

3. An other than serious violation of §1910.1200(g)(8), is AFFIRMED, without penalty.

James A. Cronin, Jr.
Judge OSHRC

Dated: November 25, 1991