United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR, Complainant, v. WHITE WAVE, INC., Respondent.	OSHRC DOCKET NO. 03-0962

APPEARANCES:

For the Complainant:
Oscar L. Hampton, III Esq., Office of the Solicitor, U.S. Department of Labor, Kansas City, Missouri

For the Respondent:
James J. Gonzales, Esq., Holland & Hart LLP, Denver, Colorado

Before: Administrative Law Judge: Sidney J. Goldstein

DECISION AND ORDER

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C. Section 651-678; hereafter called the "Act").

Respondent, White Wave, Inc. (White Wave), at all times relevant to this action maintained a place of business at 6123 Arapahoe Road, Boulder, Colorado, where it was engaged in manufacturing soyfood products. Respondent admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

On February 26, 2003, the Occupational Safety and Health Administration (OSHA) conducted an inspection of White Wave's Boulder work site. As a result of that inspection, White Wave was issued citations alleging violations of the Act together with proposed penalties. By filing a timely notice of contest White Wave brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

On December 5, 2003, a hearing was held in Denver, Colorado At the hearing the Secretary withdrew "other than serious" citation 3, item 1, which alleged a violation of 1910.95(e) (Tr. 5). Serious citation 1, item 1c, alleging a violation of Section 1910.133(a)(1) was dismissed in Complainant's post

hearing brief. The parties have submitted briefs on the matters remaining at issue and this matter is ready for disposition.

Alleged Violations of §1910.132(d)

Serious citation 1, item 1a alleges:

29 CFR 1910.132(d)(1): The employer did not assess the workplace to determine if hazards are present, or are likely to be present, which necessitate the use of personal protective equipment (PPE):

a) White Wave, Inc. @ 6123 Arapahoe Rd. in Boulder, CO: On or before February 26, 2003 the employer did not ensure that the workplace hazard assessment was complete in that the task of handling and pouring Daybright Bleach was not included, which necessitated the use of personal protective equipment. This condition exposed employees to eye and skin irritation.

Serious citation 1, item 1b alleges:

29 CFR 1910.132(d)(2): The employer did not verify that the required workplace hazard assessment has been performed through a written certification which included the requirements as outlined in 29 CFR 1910.132(d)(2):

a) White Wave, Inc. @ 6123 Arapahoe Rd. in Boulder, CO: On or before February 26, 2003 the employer did not verify that the required workplace hazard assessment had been performed through a written certification. This condition exposed employees to eye and skin irritation through contact with chemicals, such as but not limited to, Daybright Bleach.

Facts

OSHA Compliance Officer (CO) Todd Zentner testified that on February 26, 2002 he spoke with Charles Turner, an employee who worked both in White Wave's formulations and tempeh cooker area, regarding his use of Daybright Bleach in the course of his work (Tr. 17, 212). Approximately four times a week Turner adds half of a one gallon bottle of bleach to a stainless steel "hopper;" He then fills the hopper with 20-25 gallons of water and attaches it to a steam kettle in the area. A pump then moves the solution into the steam kettle to sanitize it (Tr. 18-19, 41, 221, 225; Exh. R-11, R-21, p. 61). Zentner stated that Turner told him he didn't measure out the bleach, but poured the bleach directly into the hopper, indicating that he turned his head to protect himself from any backsplash (Tr. 21-22, 41-42).

Zentner testified that bleach, which is comparable to the Clorox one would buy at any grocery store, contains sodium hyperchloride, an eye and skin irritant (Tr. 22, 98; R-9). The concentrations in which the bleach was used were lower than those used by ordinary consumers of such bleach (Tr. 111-12). Zentner stated that White Wave's use of the bleach differed from that of an ordinary consumer in that Turner

poured the bleach directly from the bottle into the hopper, creating a splashing hazard (Tr. 127).[1] Though he did not view the operation, Zentner believed there was a splash hazard based on Turner's indication that he turned his head to protect his eyes. The CO felt, therefore, that PPE was required for performance of the task (Tr. 20, 34, 126-28, 311-12).

At the hearing, Turner testified that when sanitizing the hopper, he poured a measured 2-½ cups of bleach into the hopper, using a 2-cup container with a handle and spout (Tr. 222-24, 227, 271). Turner did not believe that the operation posed any hazard requiring gloves or goggles, though he did wear gloves and safety glasses at all times in the tempeh area (Tr. 229-30). Turner stated that he did not and, in fact, could not turn his head due to a medical condition (Tr. 231).

In his deposition, William Holden, White Wave's plant manager during the relevant periods, stated that he conducted a hazard assessment as part of an abatement certification completed in 2000 (Tr. 28-29; Exh. R-4, R-21, p. 58-59). According to Holden, Daybright bleach did not appear on the hazard assessment because there was nothing unusual about the bleach (Exh. R-21, p. 59-60). Holden was familiar with the operation in the tempeh room, but was not aware of any injuries to employees resulting from their exposure to bleach. He had no reason to believe there was any need for workers sterilizing the tempeh cooker to use personal protective equipment (Exh. R-21, p. 62-63).

Neither White Wave's February 2000 abatement certification, nor its October 2002 Hazard Assessment and PPE Selection include any reference to the use of bleach for sterilizing the hopper (Tr. 22-26, 28-29, 31-32; Exh. R-5). According to Zentner, the assessment should have included a reference to the use of bleach in the tempeh hopper, a requirement that gloves, eye and face protection be used when performing the task, and the signature of the individual performing the assessment (Tr. 27, 32).

Discussion

The cited standards provide:

> (d)(1) The employer shall assess the work place to determine if hazards are present, or are likely to be present, which necessitate the use of personal protective equipment (PPE). If such hazards are present, or likely to be present, the employer shall: (i) select, and have each affected employee use, the types of PPE that will protect the affected employee from the hazards identified in the

[1] Respondent argues that §1910.1200(b)(6) *Scope and application* at subparagraph (ix) exempts the cited bleach from coverage under the Hazard Communication Standard (HCS), stating that:

> Any consumer product or hazardous substance. . . where the employer can show that it is used in the workplace for the purpose intended by the chemical manufacturer or importer of the product, and the use results in a duration and frequency of exposure which is not greater than the range of exposures that could reasonably be experienced by consumers when used for the purpose intended.

§1910.1200(b)(6) refers only to coverage under the HCS. It does not reference §1910.132, nor does §1910.132 reference the scope section of the HCS. Whether Daybright bleach is an exempt consumer product under the HCS is irrelevant to this analysis.

hazard assessment; (ii) communicate selection decisions to each affected employee; and (iii) select PPE that properly fits each affected employee.

NOTE: Non-mandatory Appendix B contains an example of procedures that would comply with the requirement for a hazard assessment.

(2) The employer shall verify that the required workplace hazard assessment has been performed through a written certification that identifies the workplace evaluated; the person certifying that the evaluation has been performed; the dates(s) of the hazard assessment; and which identifies the document as a certification of hazard assessment.

Section 1910.132(d) requires that the employer determine if hazards are present or likely to be present in the work place that necessitate the use of personal protective equipment (PPE). The evidence establishes that White Wave conducted such a hazard assessment. Complainant maintains, however, that Respondent failed to include sterilization of the tempeh cooker with bleach in its hazard assessment. The uncontradicted deposition of White Wave's plant manager establishes that Respondent considered the task, but found no hazard requiring the use of PPE. The cited standard does not require the documentation of every determination made while conducting the hazard assessment. It requires only that hazards requiring PPE be identified. Thus, there can be no violation of the cited standard if the Secretary fails to show the existence of such a hazard by a preponderance of the evidence. In this case, the CO never saw the cited operation performed, and relied solely on inferences he made after interviewing Charles Turner. At the hearing, however, Turner testified that pouring bleach into the tempeh hopper posed no splash hazard. On this record this judge cannot find a violation of §1910.132(d). Citation 1, item 1a, is vacated.

Insofar as the October 2002 hazard assessment did not identify the individual certifying the evaluation, a violation is established. Citation 1, item 1b is affirmed as a *de minimis* violation, however. Though in technical noncompliance with the standard, White Wave's departure from strict compliance bears such a negligible relationship to employee safety or health as to render inappropriate the assessment of a penalty or the entry of an abatement order. *See; Chao v. Symms Fruit Ranch, Inc.*, 242 F.3d 894 (9th Cir. 2001); *Cleveland Consolidated, Inc.*, 13 BNA OSHC 1114, 1987-90 CCH OSHD ¶27,829 (No. 84-696, 1987).

Alleged Violation of §1910.134

Serious citation 1, item 2 alleges:

29 CFR 1910.134(c)(1): A written respiratory protection program with worksite specific procedures, as specified in subparagraphs (c)(1)(i) through (ix) of this section, was not established and implemented where respirators(s) were necessary to protect the health of the employee or whenever respirator(s) were required by the employer:

a) White Wave, Inc. @ 6123 Arapahoe Rd. in Boulder, CO: On or before February 26, 2003 a written respiratory protection program with worksite specific procedures, as specified in subparagraphs (c)(1)(i) through (ix) of this section, was not established and implemented whenever respirators were required by the employer, in that the employer required the use of a North 7700 half-face negative pressure, air-purifying respirator during the addition of chicken mix. Employees were exposed to dust from the addition of food ingredients.

Facts

CO Zentner testified that, during his interview, Turner told him that he was required to wear a ½ face, tight fitting, negative pressure, air-purifying respirator while adding dry powers to the mixer in the formulation area (Tr. 51-52, 55, 88, 280-81). Turner further told him that he could be dismissed for not wearing the respirator (Tr. 52). The CO did not believe that the respirator was necessary given the exposures found in the area; however, he stated, a respirator program is required whenever the employer requires the use of such PPE (Tr. 52-54). Zentner testified that White Wave neither determined whether the respirator was necessary before requiring the use of the PPE, nor implemented a respiratory protection program to ensure its proper use (Tr. 49, 53).

At the hearing Turner testified that as part of his job in White Wave's formulation area, he pours powdered products into a tub, which is part of a machine that mixes the ingredients, weighs them out and packages the resulting product (Tr. 215). According to Turner, White Wave requires him to wear some kind of mask to cover his nose and mouth while working in formulations (Tr. 216, 285, 287-88). Turner stated that when he first started working in the area he used a paper dust mask (Tr. 216, 276). Shortly thereafter Bill Holden, the plant manager, offered to provide him with a ½ mask respirator with disposable filters (Tr. 216, 218, 275). Turner felt that the ½ mask did a better job of keeping out the dust particles, and decided to continue using it (Tr. 216-17). White Wave provided him with, but did not require him to use, the ½ mask respirator (Tr. 134, 217).

White Wave's October 2002 Hazard Assessment Respondent identifies dust as a risk present in the formulations area (Tr. 84-85; Exh. R-5). The assessment states that dust masks shall be used when mixing dry ingredients (Tr. 86-87). CO Turner stated that if a dust mask, rather than a respirator, was required in the formulation area, there would be no violation of the cited standard (Tr. 82).

Discussion

The cited standard provides:

> In any work place where respirators are necessary to protect the health of the employee or wherever respirators are required by the employer, the employer shall establish and implement a written respiratory protection program with work site-specific procedures.

White Wave's 2002 Hazard Assessment identifies dust as a hazard in the formulations area, and specifies that a dust mask be worn when mixing dry ingredients. Complainant admits that no respirators were necessary to protect the health of employees in formulations and that, had only a dust mask been required, there would be no violation. The citation in this case was based upon CO Zentner's understanding that employee Turner was required to wear the ½ mask negative pressure respirator, an understanding which Turner disputed at the hearing. According to Turner, he was only required to wear some kind of dust mask. It was Turner's choice to wear the ½ face air purifier.

In order to prove a violation of section 5(a)(2) of the Act, the Secretary must show, *inter alia,* that the cited standard applies. *See, e.g. Southwestern Bell Tel. Co.,* 19 BNA OSHC 1097, 1098, 2000 CCH OSHD ¶32,198, p. 48,747 (No. 98-1748, 2000), *aff'd. without published opinion*, No. 00-60814 (5th Cir., Nov. 22, 2000). The evidence in this case establishes that White Wave's employee Turner was not required, but voluntarily chose to wear the cited ½ mask respirator. The cited standard is inapplicable to the facts established at the hearing. That conclusion is bolstered by §1910.134(c)(2)(i) of the respirator standard, which provides:

> An employer may provide respirators at the request of employees or permit employees to use their own respirators, if the employer determines that such respirator use will not in itself create a hazard . . . .
>
> (ii) In addition, the employer must establish and implement those elements of a written respiratory protection program necessary to ensure that any employee using a respirator voluntarily is medically able to use that respirator, and that the respirator is cleaned, stored and maintained so that its use does not present a health hazard to the user.

Section 1910.134(c)(2)(i) is plainly applicable to the facts in this case. An employer who does not implement an appropriate written respiratory protection program, but makes respirators available for its employees' voluntary use, is correctly cited under subparagraph (c)(2)(ii). *See, Luna Tech, Inc.,* __ BNA OSHC __, 2002 CCH OSHD ¶32,618, Nos. 00-0617 & 00-1908, 2002). As the Secretary did not move to amend the citation to allege a violation of the applicable standard, this item will be vacated.

Alleged Violations of §1910.1200(h)

Repeat citation 2, item 1 alleges:

29 CFR 1910.1200(h)(1): Employees were not provided effective information and training as specified in 29 CFR 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.

a) White Wave, Inc. @ 6123 Arapahoe Rd. in Boulder, CO: The employer did not ensure employees were provided effective information and training pertaining to hazardous chemicals used in the workplace. This condition exposed employees to skin and eye irritation from contact with chemicals such as, but not limited to, Daylight Bleach.

Facts

Zentner testified that Turner told him he had not received training in the use of Daylight Bleach (Tr. 57). At the hearing, Turner testified that the day he was hired by White Wave, he went through an orientation program that included training in hazard communication, and was informed about the hazards associated with chemicals he would be working with, including bleach (Tr. 213, 268, 290). Kathryn Speidel, White Wave's quality assurance supervisor, testified that Respondent documents the hazard communication training all employees receive during orientation (Tr. 302, Exh. R-1, R-23, R-24). On June 6, 2002, Charles Turner signed off on White Wave's new employee packet, indicating that he had received the hazard communication orientation (Tr. 303; Exh. R-8).

As noted above, employee Turner uses bleach approximately four times a week adding between 2 and 1/2 cups and one half of a one gallon bottle of bleach to a stainless steel hopper (Tr. 18-19, 41, 221, 225; Exh. R-11, R-21, p. 61). The bleach is comparable to the Clorox one would buy at any grocery store (Tr. 22, 98; R-9), and the concentrations in which the bleach was used were lower than those used by ordinary consumers of such bleach (Tr. 111-12).

Discussion

As noted above, §1910.1200(b)(6) *Scope and application* at subparagraph (ix) exempts from coverage:

> Any consumer product or hazardous substance. . . where the employer can show that it is used in the workplace for the purpose intended by the chemical manufacturer or importer of the product, and the use results in a duration and frequency of exposure which is not greater than the range of exposures that could reasonably be experienced by consumers when used for the purpose intended.

White Wave's evidence establishes that employees in the tempeh department did not use bleach significantly more frequently than a consumer with a lot of laundry. This judge references OSHA's August 15, 1991 clarification of the cited exception, which states, *inter alia*, that although it is the employer's burden to demonstrate that the cited product is used in the same frequency or duration as would be expected at home, "it is essential that OSHA establish through employee interviews that the worker did in fact repeatedly clean sinks[, for instance,] throughout his or her work shift in a manner that any reasonable person would agree resulted in exposures significantly greater than those of a consumer," to rebut any initial offer of proof. (Exh. C-1).

Because White Wave's use of bleach did not exceed the range of exposures that could reasonably be experienced by consumers using the same kind of bleach, this item is VACATED.

ORDER

1. Serious citation 1, item 1a, alleging violation of §29 CFR 1910.132(d)(1) is VACATED.

2. Citation 1, item 1b, alleging violation of §29 CFR 1910.132(d)(2) is AFFIRMED as a *de minimis* violation.

3. Serious citation 1, item 2, alleging violation of §29 CFR 1910.134(c)(1) is VACATED.

4. Repeat citation 2, item 1, alleging violation of §29 CFR 1910.1200(h)(1) is VACATED.

/s/
Sidney J. Goldstein
Judge, OSHRC

Dated: February 23, 2004