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. HOLLY SPRINGS BRICK AND TILE CO., & BICKERSTAFF CLAY PRODUCTS CO., INC., Respondents.	Docket Nos. 90-3312 & 91-229 (consolidated)

ORDER

On December 30, 1992, counsel for Holly Springs Brick and Tile Co. and Bickerstaff Clay Products Co. filed a motion to consolidate the above-referenced cases pursuant to Rule 9 of the Commission's Rules of Procedure, 29 C.F.R. § 2200.9. The Commission majority granted that motion on January 28, 1993.

On September 21, 1993, the Secretary filed a "Notice of Withdrawal of Citation Item" in which he withdrew Citation No. 1, Item 2, the only item at issue on review, in *Bickerstaff Clay Products Co.*, Docket No. 91-229. Therefore, no issues remain in that case.

Accordingly, on the Commission's own motion pursuant to Rule 10 of the Commission's Rules of Procedure, 29 C.F.R. § 2200.10, *Bickerstaff Clay Products Co.*, Docket No. 91-229, is severed from this proceeding, and the judge's decision as to that docket

number is deemed a final order of the Commission. *Holly Springs Brick and Tile Co.*, Docket No. 90-3312, remains pending before the Commission on review.

Edwin G. Foulke, Jr.
Chairman

Velma Montoya
Commissioner

Dated: September 29, 1993

NOTICE OF ORDER

The attached Order by the Occupational Safety and Health Review Commission was issued and served on the following on September 29, 1993.

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

George Palmer, Esq.
Associate Regional Solicitor
Office of the Solicitor, U.S. DOL
Suite 201
2015 2nd Avenue North
Birmingham, AL 35203

W. Scott Railton, Esq.
Reed Smith Shaw & McClay
8251 Greensboro Dr., Suite 1100
McLean, Virginia 22102

Edwin G. Salyers
Administrative Law Judge
Occupational Safety and Health
Review Commission
Room 240
1365 Peachtree Street, N.E.
Atlanta, GA 30309-3119

FOR THE COMMISSION

Ray H. Darling, Jr.
Executive Secretary

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.
BICKERSTAFF CLAY PRODUCTS, INC.
Respondent.

OSHRC DOCKET
NO. 91-0229

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 July 30, 1992. The decision of the Judge will become a final order of the Commission on August 31, 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 August 19, 1992 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: July 30, 1992

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 91-0229

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

George Palmer, Esq.
Assoc. Regional Solicitor
Office of the Solicitor, U.S. DOL
Suite 201
2015 - 2nd Avenue, North
Birmingham, AL 35203

W. Scott Railton, Esq.
Reed, Smith, Shaw & McClay
1200 18th Street, N.W.
Washington, DC 20036

Edwin G. Salyers
Administrative Law Judge
Occupational Safety and Health
Review Commission
Room 240
1365 Peachtree Street, N.E.
Atlanta, GA 30309 3119

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number is deemed a final order of the Commission. *Holly Springs Brick and Tile Co.*, Docket No. 90-3312, remains pending before the Commission on review.

Edwin G. Foulke, Jr.
Chairman

Velma Montoya
Commissioner

Dated: September 29, 1993

The Respondent, Bickerstaff Clay Products Company, operates a brick plant in Columbus, Georgia, where it produces a variety of brick products. The principal raw material used to produce the bricks is clay, which is obtained by Respondent from its own clay mines as well as independent producers who supply the clay pursuant to contracts with Respondent (Tr. 130). Bricks are made by mixing clay with water and running this mixture through an extruder, where the individual bricks are formed. The bricks then begin a drying process which culminates in a tunnel kiln where peak temperatures can reach 2100° Fahrenheit. During this latter process, the bricks are "vitrified," (*i.e.*, hardened). They are then cooled, graded and bundled for shipment to Respondent's customers (Tr. 121. 122).

On November 20, 1990, Compliance Officers Demetrius Critopoulos and Leigh Jackson arrived at Respondent's plant and held an opening conference with Richard Bickerstaff, the Company's Chairman of the Board, and Jay Freeman, the Governmental Affairs Manager (Tr. 10). During the course of this conference, Respondent's officials were advised that the purpose of the inspection was to verify whether or not the Company provided MSDSs for the brick it produced to its "downstream" customers (Tr. 14). Mr. Bickerstaff replied that MSDSs were not provided (Tr. 19, 25). He later explained Respondent's position that brick is an "article" as that term is defined in the standard and that Respondent is, therefore, excluded from the requirement to develop and supply MSDSs for this product to "downstream" customers.

The Secretary's position that bricks produced by Respondent contain a hazardous chemical is predicated upon the contents of Exhibit C-1, which is the MSDS for "Ball Clay." This exhibit contains the information that this substance "contains 5-30% free crystalline silica quartz (SiO2)." Respondent concedes the fact that ball clay is used in its production process, but maintains such use is limited to the production of a "slurry coating," which is an ingredient applied to the exterior of particular brick to add color and improve texture (Tr. 120). According to Respondent, the use of ball clay in its production process is sporadic (Tr. 98, 101-102, 115). The compliance officers took no samples of Respondent's bricks for chemical analysis, nor did they make any further attempts to ascertain the chemical content

of other clays ordinarily used by Respondent to produce its products,[2] but were content to rest their case solely on Exhibit C-1.

The Hazard Communication standard was promulgated pursuant to Section 6(b)(7) of the Act, which provides:

> (7) Any standard promulgated under this subsection shall prescribe the use of labels or other appropriate forms of warning as are necessary to insure that employees are apprised of all hazards to which they are exposed, relevant symptoms and appropriate emergency treatment, and proper conditions and precautions of safe use or exposure.

Section 1910.1200(a) provides:

> (a) *Purpose.* (1) The purpose of this section is to ensure that the hazards of all chemicals produced or imported are evaluated, and that information concerning their hazards is transmitted to employers and employees. This transmittal of information is to be accomplished by means of comprehensive hazard communication programs, which are to include container labeling and other forms of warning, material safety data sheets and employee training.

In its post-hearing brief, Respondent does not challenge the proposition that crystalline silica quartz is a hazardous chemical. Indeed, Section 1910.1200(c) defines the term "hazardous chemical" as "any chemical which is a physical hazard or a health hazard." This section defines "health hazard" as "a chemical for which there is statistically significant evidence based on at least one study conducted in accordance with established scientific principles that acute or chronic health effects may occur in exposed employees." A "chemical" is broadly defined as "any element, chemical compound or mixture of elements and/or compounds." Section 1910.1200(d)(3) establishes a requirement that toxic substances listed in Subpart Z of 29 C.F.R. §1910 must be treated as hazardous chemicals for purposes of the HCS. Since ball clay contains crystalline silica quartz, a substance which is listed in Subpart Z, the Respondent was obligated to comply with the standard when this substance was used in its production process unless it is entitled to an exemption under the "article"

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[2] The principal clay used in Respondent's brick production is "uchee clay" which is obtained locally (Tr. 117). There is no evidence in the record that Respondent has ever tested this clay for chemical content, nor has it developed an MSDS for this substance (*Id.*). While this case must be decided on the facts presented in the evidence, this court suspects that all clay used in brick production contains some element of silica (See Tr. 111-116).

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1365 PEACHTREE STREET, N.E., SUITE 240
ATLANTA, GEORGIA 30309-3119

PHONE:
COM (404) 347-4197
FTS 257-4086

FAX:
COM (404) 347-0113
FTS 257-0113

SECRETARY OF LABOR, Complainant, v. BICKERSTAFF CLAY PRODUCTS CO., Respondent.	OSHRC Docket No. 91-229

Appearances:

Cynthia Welch Brown, Esq.
Office of the Solicitor
U. S. Department of Labor
Birmingham, Alabama
For Complainant

W. Scott Railton, Esq.
Reed, Smith, Shaw & McClay
Washington, DC
For Respondent

Before: Administrative Law Judge Edwin G. Salyers

DECISION AND ORDER

This case arises under the provisions of the Occupational Safety and Health Act of 1970 (29 U.S.C. § 651, *et seq.*) and presents the question of whether a brick manufacturer whose finished products contain a modicum of crystalline silica quartz must provide its customers with material safety data sheets (MSDS) as required by the Act's Hazard Communication Standard (HCS) (29 C.F.R. § 1910.1200).[1]

[1] In the Secretary's citation, Respondent was also charged with a violation of 29 C.F.R. § 1910.106(d)(3)(ii). However, Respondent did not contest this item, which now has become a final order of the Commission by operation of law.

provision of the standard. *See Hilton-Davis Chemical Co.*, 13 BNA OSHC 1182, 1987 CCH OSHD ¶ 27,872 (No. 86-494, 1987).

This court has considered, but rejects, Respondent's argument that the Secretary failed to meet her burden of proof based upon its contention that ball clay was infrequently or sporadically used in Respondent's production process. This circumstance does not obviate Respondent's obligation to comply with the HCS provisions whenever it uses a hazardous chemical in its production process and this it did not do.

Respondent bases its defense upon two arguments:

(1) That it is not a chemical manufacturer and was improperly cited as a distributor, and

(2) That brick is an "article" as defined in the standard and Respondent is, therefore, exempt from the requirement of the HCS.

Respondent's first contention that it is not a chemical manufacturer and was improperly cited as a distributor is an exercise in convoluted logic. Respondent argues that the Secretary's failure to cite under 1200(g)(1) constitutes a recognition by the Secretary that brick is not considered by OSHA to be a chemical, and since brick is the product produced by Respondent, it cannot be considered a chemical manufacturer. This theory overlooks the fact that the clay used in producing the brick contains a hazardous chemical which becomes an integral part of the brick and thereby triggers application of the HCS. *Hilton Davis, supra.*

Respondent was cited under the provisions of 29 C.F.R. § 1200(g)(7), which provides:

> Distributors shall ensure that material safety data sheets . . . are provided to other distributors and employees.

The term "distributor" is defined as "a business, other than a chemical manufacturer or importer, which supplies hazardous chemicals to other distributors or to employers" Section 1910.1200(c). Respondent's operations in producing and distributing brick which contain silica quartz clearly fall within this definition. In any event, the HCS requires that MSDSs be furnished to "downstream" users whether the supplier be a manufacturer, an importer, or a distributor. These terms are not mutually exclusive.

In this case, Respondent was in possession of an MSDS which put it on notice that ball clay contained a hazardous chemical. It was obligated under the HCS to communicate this information to its customers unless otherwise exempt from this requirement.

Respondent's second argument that the cited regulation is inapplicable because brick is an "article" presents a more plausible argument in view of the record made in this case. Section 1910.1200(b)(6)(iv) exempts "articles" from application of the HCS provided, of course, the employer's product can be so classified. The term "article" is defined in Section 1200(c) as follows:

> . . . a manufactured item: (i) Which is formed to a specific shape or design during manufacture; (ii) which has end use function(s) dependent in whole or in part upon its shape or design during end use; and (iii) which does not release, or otherwise result in exposure to a hazardous chemical, under normal conditions of use.

It is clear in the record that the bricks produced by Respondent fit the provisions specified in Parts (i) and (ii) of the definition, and the Secretary agrees (Tr. 139-140). The issue for resolution is whether this record established that the bricks in question would "release, or otherwise result in exposure to a hazardous chemical, under normal conditions of use."

The preamble to the HCS states that "the purpose of the articles exemption is to ensure that items which may contain hazardous chemicals, but in such a manner that employees won't be exposed to them, not be included in the hazard communication programs. Examples of such items would be nuts and bolts or tools" 48 Fed. Reg. 53,293 (November 25, 1983). This exemption is also discussed in OSHA Instruction CPL 2-2.38C (October 22, 1990), which specifically excludes brick used in construction from classification as an "article," "since, under normal conditions of use, bricks are cut or sawed, thereby resulting in exposure to crystalline silica." *Id.* This position was officially conveyed to Respondent in a letter dated July 24, 1989 (Exh. R-2) from the OSHA Assistant Regional Administrator which recited:

> While we agree with you that the "brick" as a whole is an "Article" as defined under the standard, 29 CFR 1926.59. . . this is subject to change when the "brick" must be cut or sawed to size. When cut or sawed the "brick" is likely

to expose employees to dust, either nuisance dust and/or dust containing quartz material.

The interpretation of a standard by the promulgating agency is entitled to deference and is controlling unless "clearly erroneous or inconsistent with the regulation itself." *Udall v. Tallman*, 87 S. Ct. 792 at 801 (1965). More recently, the Supreme Court has held that this Commission is bound by the Secretary's interpretation of her own standards when such interpretation is "reasonable":

> It is well established "that an agency's construction of its own regulations is entitled to substantial deference." *Lyng v. Payne*, 476 U.S. 926, 939 (1986); accord, *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965). In situations in which "the meaning of [regulatory] language is not free from doubt," the reviewing court should give effect to the agency's interpretation so long as it is "reasonable," *Ehlert v. United States*, 402 U.S. 99, 105 (1971), that is, so long as the interpretation "sensibly conforms to the purpose and wording of the regulations," *Northern Indiana Pub. Serv. Co. v. Porter County Chapter of Izaak Walton League of America, Inc.*, 423 U.S. 12, 15 (1975). Because applying an agency's regulation to complex or changing circumstances calls upon the agency's unique expertise and policymaking prerogatives, we presume that the power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking powers. *See Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 566, 568 (1980).

Martin v. OSHRC, 111 S. Ct. 1171, 1175 (1991). *See also Erie Coke Corp.*, 15 BNA OSHC 1561, 1992 CCH OSHD ¶ 19,652 (No. 88-611, 1992).

The evidence on the crucial question is contained in the testimony of two witnesses. C. O. Critopoulos, at the time of the inspection, had been employed by OSHA for only three months and was in a trainee status (Tr. 11). He holds degrees in both chemistry and chemical engineering (Tr. 12). Prior to obtaining employment with OSHA, he held a position with the Environmental Protection Agency (EPA) and on one occasion while so employed, he had conducted an inspection of a brick plant in North Carolina to determine that company's compliance with air emission standards (Tr. 37, 38). During his career with EPA and OSHA, he has had some opportunities to observe the use of brick on construction sites. He has seen brick being "dry cut" on some of these occasions (Tr. 43) and "could see the dust coming off from it" (Tr. 48). He was unable to quantify these occasions and was not aware of any tests conducted by OSHA to determine the content of the brick dust

allegedly produced when dry-sawing occurs (Tr. 70). He appears to agree with Respondent's position that no dust is created when a brick is sawed using a wet process (Tr. 55).

Richard H. Bickerstaff is Respondent's Chairman of the Board and has been in the brick business for 53 years (Tr. 119). He is familiar with the way bricklayers utilize brick on a construction site (Tr. 124) and testified that the need to break or cut brick under normal conditions is "negligible" (Tr. 125). When brick is broken with a hammer, no dust is released (Tr. 127). On those occasions when brick must be sawed, a wet process is used which eliminates any dust; and this is the process that has been in general use "over the last good many years" (Tr. 126). While he concedes that dry saws were used in the distant past and that this process did create dust, it was his testimony that this method of cutting brick in recent times is a "rarity" that has gone "out of style" (Tr. 126, 127, 135).

In deliberating the conclusion to be reached on the "article" question, the court recognizes the principle that an employer claiming an exemption from application of a standard bears the burden of proof on this issue. *Stephenson Enterprises, Inc.*, 4 BNA OSHC 1702, 1976 CCH OSHD ¶ 21,120 (No. 5873, 1976). In this court's opinion, the Respondent has met that burden in this case. The testimony of Mr. Bickerstaff was clear and convincing that current procedures in use by bricklayers at construction sites do not release, or otherwise expose employees to, a hazardous chemical. His experience and familiarity with the brick industry throughout his lifetime enhances his credibility over that of the Secretary's witness. Accordingly, it is concluded that Respondent's brick containing ball clay is appropriately classified as an "article" under the facts of this case, and Respondent is exempt from application of the HCS.[3]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing will serve as the findings of fact and conclusions of law as required by Rule 52 of the Federal Rules of Civil Procedure.

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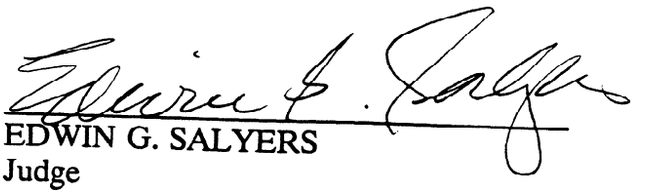
[3] In her brief, the Secretary cites *General Carbon v. OSH Review Commission,* 860 F.2d 479 (D.C. Cir. 1988), which reached a contrary result. That case is readily distinguishable from the case at bar, since the employer conceded in *General Carbon* that hazardous chemicals (copper and graphite) were released in the "downstream" use of its product and that the employees using this product were exposed to these hazardous chemicals. *Id.* at 485.

ORDER

It is hereby ORDERED:

That Item 2 of "other" Citation No. 1 is vacated.



EDWIN G. SALYERS
Judge

Date: July 21, 1992

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1365 PEACHTREE STREET, N.E., SUITE 240
ATLANTA, GEORGIA 30309 3119

PHONE:
COM (404) 347-4197
FTS 257-4066

FAX:
COM (404) 347-0113
FTS 257-0113

SECRETARY OF LABOR,	
Complainant,	
v.	OSHRC Docket No. 91-229
BICKERSTAFF CLAY PRODUCTS CO.,	
Respondent.	

Pursuant to the provisions of section 556 of the Administrative Procedures Act (5 U.S.C. 556), the undersigned hereby certifies to the Occupational Safety and Health Review Commission the record in this proceeding, consisting of the following:

1. Those documents forwarded to the undersigned by notice dated March 8, 1991, from the Commission;
2. All documents issued by or filed with the undersigned in this matter numbered J-8 through J-26;
3. The original of the transcript of hearing which totals 142 pages;
4. Complainant's exhibits C-1 and C-2, and Respondent's exhibits R-1 and R-2, which were introduced at the hearing; and
5. The undersigned's decision in this matter dated July 21, 1992.

Edwin G. Salyers

EDWIN G. SALYERS
Judge

Date: July 21, 1992