UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

Secretary of Labor, Complainant, v. Petro Hunt, LLC, Respondent.	OSHRC DOCKET NO. 11-0873

Appearances:

Susan J. Willer, Esq., Office of the Solicitor, U.S. Department of Labor, Kansas City, Missouri
For Complainant

Steven R. McCown & Malone Lankford, Littler Mendelson, Dallas, Texas
For Respondent

Before: Administrative Law Judge Patrick B. Augustine

DECISION AND ORDER

Procedural History

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to Section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* ("the Act"). The Occupational Safety and Health Administration ("OSHA") conducted an inspection of a Petro Hunt ("Respondent") worksite near Keene, North Dakota on October 15, 2010. As a result of the inspection, OSHA issued a Citation and Notification of Penalty ("Citation") to Respondent alleging one violation of the Act. Citation 1, Item 1 alleges that Respondent violated 29 C.F.R. § 1910.132(a) and proposes a penalty of $5,390.00. Respondent timely contested the citation, and a trial was held on November 29 and 30 in Denver, Colorado. Both parties have filed post-trial briefs.

Jurisdiction

The Court finds the Act applies and the Commission has jurisdiction over this proceeding pursuant to § 10(c) of the Act, 29 U.S.C. § 659(c). Further, the record establishes that, at all times relevant to this matter, Respondent was an employer engaged in a business affecting commerce within the meaning of § 3(5) of the Act, 29 U.S.C. § 652(5). *Slingluff v. OSHRC*, 425 F.3d 861 (10th Cir. 2005).

Background

Respondent is an oil and gas company that has operations nationwide, including, as it pertains to this case, oil and gas production sites in North Dakota. (Tr. 148, 193). Respondent has 200 well sites in the region covering western North Dakota, eastern Montana, and northeast Wyoming. (Tr. 193). Many of these well sites are located in what is known as the Williston Basin, which is an area of substantial oil and gas production located in northwestern North Dakota. (Tr. 272). The particular well site at issue in this case is the Jonsrud production facility, which, at the time of the inspection, was a relatively new facility that produced approximately 300 barrels of oil per day. (Tr. 202).

Oil production facilities bring well fluid to the surface. Well fluid is typically a combination of oil, water, and gas. (Tr. 64). The fluid contained at the wellhead of a production facility is under a great amount of pressure. (Tr. 232). In order to control that pressure, oil production facilities like Jonsrud utilize a choke, which controls the rate at which fluid is extracted from the well and can be adjusted to allow more or less fluid to pass through the system. (Tr. 223). Once the fluid passes through the choke, it enters into a series of low pressure vessels known as the treater-separator unit, which uses heat and gravity to separate the gas, oil, and water. (Tr. 64, 216, 223). Heat is supplied to the fluid through the use of a fire

tube, which is a heating unit placed inside the treater-separator unit and bolted from the outside.[1] (Tr. 66–68). Once separated, the oil and water are directed to the tank battery. (Tr. 64). The tank battery at the Jonsrud site has five tanks, one which stores water and the other four store the oil until it is ready to be sold. (Tr. 154). Depending on the location, the gas is either sent to a sales line or to a flare pit, where it is burned up with an igniter. (Tr. 221).

On October 14, 2010, Wade Signalness and his trainee, Jay Garmin, traveled to the Jonsrud site as a part of their daily work duties, which included traveling to as many as twenty-five (25) production sites, some of which were visited twice a day. (Tr. 173). While at the Jonsrud site, Garmin, under the supervision of Signalness, gauged the level of crude oil in the storage tanks. (Tr. 177–78). Gauging is the process of measuring how much crude oil is in a storage tank. (Tr. 168–69). The oil is measured by a gauger/pumper (Signalness), who climbs the stairs to the top of tank battery, opens a thief hatch at the top of the tank, and uses a measuring tape to determine whether the tanks need to be switched. (*Id.*). Signalness also checked the treater and other equipment inside the treater shed, and did not note anything unusual during his inspection. (Tr. 179).

Approximately five minutes after leaving the Jonsrud site, Signalness and Garmin noticed black smoke coming from the well site. (Tr. 181–82). They turned around, drove back to the well site, and discovered that the treater shed and the components contained in it were engulfed in fire. (Tr. 181–83). The Keene Fire Department had already arrived and was working to contain the fire. (Tr. 182). The well was closed in by a local farmer who used to be a consultant in the oil field. (Tr. 158, 160).

On October 14, 2010, OSHA received a referral from the Sherriff's Department indicating that there had been a fire at the Jonsrud site. (Tr. 56). The Area Director, Tom

1. It should be noted that the fire tube is not always lit. During the warmer months the ambient temperature is typically adequate to separate the oil and water. (Tr. 228).

Deutscher, assigned Compliance Safety and Health Officers ("CSHO") Scott Overson and Travis Clark to inspect the well site. (Tr. 57). On October 15, 2010, CSHO Overson and CSHO Clark conducted an inspection of the Jonsrud oil production facility. During that inspection, the CSHOs discovered that Garmin, the trainee, was wearing Flame Resistant Clothing ("FRC") and that Signalness was not. (Tr. 184–85). It was also discovered that Respondent did not require its employees to wear FRC. (Tr. 185). As a result of the inspection, OSHA issued one citation to Respondent pursuant to 29 C.F.R. § 1910.132(a).

The Alleged Violation – 29 C.F.R. § 1910.132(a)

Complainant alleges in Citation 1, Item 1 that:

> On or about October 14, 2010, and at times prior to that date at oil well production sites including but not limited to, Jonsrud 151-96-3B-10-2H, for employees gauging tanks and working around hydrocarbon pressure vessels where fire and explosion hazards were present or likely to be present, they were not provided and required to wear fire-retardant clothing.

The cited standard provides:

> Protective equipment, including personal protective equipment for eyes, face, head, and extremities, protective clothing, respiratory devices, and protective shields and barriers, shall be provided, used, and maintained in a sanitary and reliable condition wherever it is necessary by reason of hazards of processes or environment, chemical hazards, radiological hazards, or mechanical irritants encountered in a manner capable of causing injury or impairment in the function of any part of the body through absorption, inhalation or physical contact.

Findings of Fact and Conclusions of Law

To establish a *prima facie* violation of the Act, Complainant must prove by a preponderance of the evidence that: (1) the standard applies to the cited condition; (2) the terms of the standard were violated; (3) one or more of the employees had access to the cited condition; and (4) the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition. *Ormet Corporation*, 14 BNA OSHC 2134, 1991 CCH OSHD ¶ 29,254 (No. 85-0531, 1991).

A violation is "serious" if there was a substantial probability that death or serious physical harm could have resulted from the condition. 29 U.S.C. § 666(k). Complainant need not show that there was a substantial probability that an accident would actually occur; she need only show that if an accident had occurred, serious physical harm or death could have resulted. *Whiting Turner Contracting Co*., 13 BNA OSHC 2155, 1989 CCH OSHD ¶ 28,501 (No. 87-1238, 1989). If the possible injury addressed by the cited standard is death or serious physical harm, a violation is serious. *Phelps Dodge Corp. v. OSHRC*, 725 F.2d 1237, 1240 (9th Cir. 1984); *Dec-Tam Corp.*, 15 BNA OSHC 2072, 1993 CCH OSHD ¶ 29,942 (No. 88-0523, 1993).

Applicability of 29 C.F.R. § 1910.132(a)

Section 1910.132(a) is a general performance standard, which is broadly worded to apply to numerous hazardous conditions or circumstances. *See Trinity Industries, Inc.*, 15 BNA OSHC 1481 (No. 88-2691, 1992). "If the duty to comply with the standard is not defined, it could run the risk of being almost indefinitely applicable." *Id.* Due to the far-reaching and broad nature of this standard, in order to prove that the standard applies, Complainant must establish "either that the employer had actual notice of a need for protective equipment or that a reasonable person *familiar with the circumstances surrounding the hazardous condition* would recognize that such a hazard exists." *Weirton Steel Corp.*, 20 BNA OSHC 1255 (No 98-0701, 2003) (emphasis added). "[E]xternal, objective criteria, such as the knowledge and perceptions of a reasonable person, may define the requirements of the standard in a given situation." *Id.* A court may also consider evidence of industry custom and practice in order to determine whether a reasonable person familiar with the circumstances would perceive a hazard; however, such evidence is "not necessarily dispositive." *Id.*; *Lukens Steel Co.*, 10 BNA OSHC 1115 (No. 76-1053, 1981). "Also allowed for consideration is evidence of accidents, evidence of industrial safety standards or recommendations, or opinion testimony from persons experienced in performing the work or

familiar with the working conditions." *Trinity*, 15 BNA OSHC 1481.

This case presents an issue of first impression; namely, determining the effect of Complainant's memorandum regarding the use of Fire Resistant/Retardant Clothing ("FRC") in oil and gas operations.[2] Put briefly, the FRC memo states that engineering and administrative controls may be insufficient to protect oil and gas workers from the hazard of hydrocarbon flash fires and that the general industry standard[3] for personal protective equipment ("PPE") will be cited if employers in the oil and gas industry fail to provide and require the use of FRC.

Complainant argues that the putative hazard in this case is a hydrocarbon flash fire, which she claims is well-documented in the oil and gas industry. (Tr. 298). According to Complainant's expert, James Loftin, a flash fire is "a rapidly moving flame front through a diffuse fuel such as combustible dust or vapors of an ignitable liquid. . . . [It's] a very quick exposure . . . limited by the amount of oxygen and fuel that's present." (Tr. 373, C-17). According to the American Petroleum Institute ("API"), a flash fire requires three elements: oxygen, an ignition source, and a diffuse fuel. (Tr. 373, C-16 at p. 17). The API has published standards in order to classify locations at petroleum facilities for the installation of electrical equipment. (C-16 at p. 12). The purpose of these classifications is to properly identify areas where flammable liquids, gases, or vapors may be present such that electrical installations can be designed to prevent a fire or explosion. (C-16). For the purposes of this case, the important API classification is the Class I, Division 2 location, which is applicable to the treater-separator unit at the Jonsrud site. (Tr. 89). Class I, Division 2 locations are:

> Locations (1) in which volatile flammable liquids or flammable gasses are handled, processed or used, but in which the liquids, vapors or gases normally will be confined within closed containers or closed systems from which they can escape only in case of accidental rupture or breakdown of such containers or systems, or in case of abnormal operation of equipment; (2) in which ignitable

2. Hereinafter, the Court shall refer to Complainant's memorandum as the FRC memo.
3. *See* 29 C.F.R. § 1910.132(a).

> concentrations of gases of vapors normally are prevented by positive ventilation, and that might become ignitable through failure or abnormal operation of the ventilating equipment . . . .

(C-16 at p. 20). So classified, the treater-separator unit represents a potential, albeit unlikely, fuel source for a flash fire in that valves may fail or pipes may leak. (Tr. 155). When coupled with the presence of a fire tube that heats the oil-gas-water mixture, there is arguably the potential for a flash fire.[4] Complainant contends that the fire at the Jonsrud production facility may have been the product of this combination of fuel and ignition source.

Complainant also contends that the potential for flash fires exists during the gauging process.[5] (Tr. 75). During the gauging process, an employee must open a thief hatch at the top of the storage tank and lower a weighted measuring tape into the tank in order to measure the level of the accumulated oil. (Tr. 150–51). Over time, hydrocarbon vapors can accumulate at the top of the tank. (Tr. 150, 209). Once the tank is opened, those vapors can be released into the air. If an employee is carrying a static charge with him, it is possible that the combination of the vapor and the static charge can result in a flash fire. (Tr. 103).

In light of the potential hazards mentioned above, Complainant contends that a reasonable employer in Respondent's position would have recognized the potential for flash fires, which rendered the use of FRC necessary. In support of this contention, Complainant relies on a number of factors, including: (1) OSHA's stated position in the FRC memo—published six months prior to the Jonsrud fire—that concludes FRC is necessary in oil and gas operations; (2) the previously mentioned API document (API 500) and the National Fire Protection Agency's ("NFPA") publications (NFPA 2112 & 2113), which include national consensus standards regarding flash fires and the use of FRC;[6] (3) prior engineering control

4. It should be noted, however, that according to the API, "the potential source of ignition is understood to be an electrical installation operating at energy levels or at temperatures sufficient to cause ignition." (C-16 at p. 17).
5. No testimony was provided regarding the API's classification of the storage tanks.
6. None of these national consensus standards has been explicitly adopted by Complainant, incorporated into the

failures at other sites owned by Respondent; (4) letters of interpretation issued by OSHA with respect to the FRC memo; and (5) frequent discussions that were held among Respondent's safety managers and the industry generally regarding the use of FRC. Complainant argues that Respondent—armed, as it were, with the above-listed information—failed to perform an adequate hazard assessment, which would have led it to conclude that FRC was necessary at its oil and gas production facility. In addition to the above, Complainant asserts that the Court should give deference to her interpretation of the standard pursuant to the Supreme Court case of *Martin v. OSHRC (CF&I Steel)*, 499 U.S. 144, 145–46 (1991) (Secretary's interpretation of a standard, even when embodied in a citation, is entitled to deference so long as it is reasonable).

Respondent contends that it did not have actual knowledge of a hazard that required the use of FRC, nor would a reasonable person, familiar with the particular circumstances that exist at the Jonsrud plant, conclude that such a hazard existed. Respondent's primary argument is that, after conducting a thorough hazard assessment, it instituted a comprehensive system of engineering and administrative controls that rendered the use of FRC unnecessary. The engineering controls included: (1) flare assemblies to burn off gas resulting from the treater-separator process;[7] (2) pop-off valves that release pressure from the treater-separator unit and direct the excess gas to the flare pit; (3) diked areas or berms that contain any liquid spills; (4) fiberglass water tanks and lightning rods; (5) chokes to control the flow of well fluid to the treater-separator unit; (6) fiberglass lines that collect the gas blanket from the top of the tanks and direct it towards the flare pit; (7) physical separation between elements that may cause explosions, such as the pilot lights and the tanks; (8) grounded tanks to release static electricity; (9) thermostats that control the gas going to the pilot light; (10) clearing of weeds and vegetation

Act, nor was any expert testimony introduced that indicated these standards are recognized by the industry. (Tr. 382–83).

7. The flare assembly is a line that generally ends at the edge of the well production property and uses an automatic sparking device to burn up the excess gas. (Tr. 221–22). On some locations, however, the gas is directed to a sales line. (*Id.*).

as possible fuel sources; (11) fences to keep out grazing animals; and (12) windsocks on sites that contain hydrogen sulfide gas. (Tr. 221–28, 251–52). The administrative controls included rules, policies, and training to protect employees from the risk of fire, such as: (1) procedures for lighting the treater; (2) protocols for gauging tanks, including the use of a grounding cord to prevent the build-up of static electricity; (3) safety meetings to review safe work practices; and (4) an extensive on-the-job training program that can last up to six months. (Tr. 168, 227–32, R-1).

With respect to the purported hazard of flash fires at the Jonsrud site, Respondent contends that the fire was not a flash fire because it did not involve a diffuse fuel. In addition, Respondent's witnesses testified that it has no record of a flash fire occurring at any of its facilities, nor is there any record of a fire-related injury in the two years leading up to the issuance of the subject citation. (Tr. 164, 439–40).

Finally, Respondent argues, Complainant has, through the application of the FRC memo, created a specific standard by concluding that all oil and gas facilities—production, drilling, and well servicing—regardless of the particular circumstances or controls that are in place, are required to provide and ensure the use of FRC. Respondent contends that this constitutes improper rulemaking, as neither the FRC memo, nor its complimentary letters of interpretation went through the process of notice and comment. Further, Respondent asserts that the FRC memo does not fall under any of the Administrative Procedure Act ("APA") exceptions for interpretations or general statements of policy. *See* 5 U.S.C. § 553 *et seq.*

While the parties seem to believe that the primary question in this case is whether Respondent failed to comply with the standard, the Court views the dispute as one of applicability. As with most cases involving the general industry PPE standard, the concern is that it is so broad that it can be applied almost indefinitely. *See, e.g.*, *Trinity Industries, Inc.*, 15

BNA OSHC 1481, *Weirton Steel Corp.*, 20 BNA OSHC 1255. That is why the test for determining whether the standard applies is concerned with either the actual knowledge of Respondent or the perceptions of a reasonable person "familiar with the circumstances surrounding the hazardous condition." *Id.* At a purely superficial level, the test for applicability would seem an easy one. Flash fires, or at the very least just plain fires, are a hazard endemic to the oil and gas industry, and FRC is an appropriate measure to employ in order to prevent, or at least mitigate, the harm resulting from exposure to that hazard. The question of whether the standard applies, however, cannot be determined in a vacuum. *See Lukens Steel Co.*, 10 BNA OSHC 1115 ("To determine whether the standard provides fair notice, the Commission considers the standard in light of the specific facts of the case. It does not look exclusively at the text of the standard."). The operative question in this case is whether FRC is "*necessary* by reason of hazards of processes or environment at the Jonsrud plant." *See* 29 C.F.R. § 1910.132(a) (emphasis added). Thus, in order to properly address the question of whether the PPE standard applies, the Court must address specific facts such as the FRC memo and its subsequent letters of interpretation; guidance previously issued by OSHA with respect to the issue of PPE; other national consensus standards applicable to flash fires and FRC; the knowledge of Respondent; and, of course, the particular circumstances at the Jonsrud site.

The FRC Memo

The FRC memo was issued by Complainant on March 19, 2010. It is addressed to regional administrators and state plan designees regarding OSHA's "Enforcement Policy for Flame-Resistant Clothing in Oil and Gas Drilling, Well Servicing, and Production-Related Operations." (C-17). The stated purpose of the FRC memo is to clarify OSHA's policy for citing the general industry standard for PPE for failure to provide and use FRC in oil and gas operations, which OSHA claims is necessary in order to resolve the "inconsistent use" of FRC

among oil and gas companies. (C-17). Based on inspection history, consensus standards, scientific evidence, accident and injury data, OSHA has found that certain oil and gas operations present the potential for flash fire hazards. In recognition of the above-referenced case law, the FRC memo also states that:

> Where FRC is not being used by workers in these operations, a citation under 29 C.F.R. [§] 1910.132(a) requires evidence that the employer had actual notice of a need for protective equipment, or that a reasonable person familiar with the circumstances, such as facts unique to the industry, would have recognized a hazardous condition warranting the use of that equipment.

(C-17).

The heart of the FRC memo discusses the nature of flash fire hazards and the fact that they are inherent to the oil and gas industry. In support of this determination, the FRC memo cites to the NFPA 2112 and 2113 documents, which are general industry standards for FRC and the selection thereof. OSHA indicates that the oil and gas industry in particular has a history of burn-related injuries and fatalities due to flash fires when engineering and administrative controls have failed and which could have been prevented, or at least mitigated, if FRC was being used. (C-17). Examples of engineering control failures include hydraulic failure, power disruption, gauge equipment error, and valve failure, each of which may be the result of inadequate design, installation, inspection, testing, and maintenance. (C-17). Examples of administrative control failure include deviations from standard operating procedures and failure to close valves or activate the emergency shutdown system, which could result from a failure to adequately develop, implement, audit, and enforce procedures. (C-17). In light of the purported hazard and the potential for controls to fail, "OSHA *has concluded* that employers *are required* to provide and ensure the use of FRC during certain operations as discussed below." (C-17) (emphasis added). The 'operations discussed below' include, as it pertains to this case, production-related operations such as: line breaking or valve changes, gauging, transfer of hydrocarbons,

maintenance operations, tank heating, using open flame, and start-up operations.

Two letters of interpretation ("LOI") were issued after the publication of the FRC memo. In response to a letter from Dr. Lee Hunt, President of the International Association of Drilling Contractors, OSHA issued its first LOI ("LOI One") on October 19, 2010, which clarified that the FRC memo "is an enforcement policy document intended for use by OSHA compliance officers . . . so they can evaluate the need for employers to provide and require the use of FRC" during certain oil and gas operations. (R-5-J at p. 55). LOI One goes on to say that when an employer uses a hazard assessment or some other method to determine the need for FRC, CSHOs will evaluate the adequacy (i.e., whether it is comprehensive and robust) of the hazard assessment in determining whether to issue citations when employees are not provided with or wearing FRC at oil and gas operations. Among the factors to be considered are the adequacy and implementation of engineering and administrative controls. LOI One concludes that "where the potential for flash fires exists, failure to protect employees against such hazards, *may result* in a citation for violating 29 CFR [§] 1910.132(a)." (R-5-J at p. 56) (emphasis added). The second letter of interpretation ("LOI Two") merely reiterates that the FRC memo sets forth OSHA's position that FRC is required in certain applications associated with oil and gas well drilling, servicing, and production related operations. (C-18).

Characterization of the FRC Memo

On its face, the FRC memo appears to be a policy directive that is to be used by regional offices to determine whether a violation of § 1910.132(a) has occurred at an oil and gas operation. Complainant urges this Court to characterize the FRC memo as an interpretation of the standard, for which she should be entitled to deference. Respondent, however, contends that the FRC memo is nothing short of a standard itself, in that it purports to transform a performance standard for PPE into a specific requirement that FRC be provided. In that regard, because it has

not been subject to notice and comment rulemaking, Respondent contends that it does not have the force and effect of law.

The APA defines a "rule" to include "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy . . . ." 5 U.S.C. § 551(4); *see also Simpson, Gumpertz & Heger, Inc.*, 15 BNA OSHC 1851 (No. 89-1300, 1992). Notice and opportunity for comment is required for the promulgation of a rule except for "interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice." 5 U.S.C. § 553(b)(3)(A).[8] According to the Act, a standard is defined as a rule that "requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment." 29 U.S.C. § 652(8). The determination of whether a pronouncement is a standard is made by reference to its "basic function." *Chamber of Commerce of the U.S. v. Dep't of Labor*, 174 F.3d 206, 209 (D.C. Cir. 1999). If the basic function of a pronouncement is to "address[] . . . a specific and already identified hazard" and is not a "purely administrative effort designed to uncover violations," then the rule is a standard. *Louisiana Chemical Ass'n v. Bingham*, 657 F.2d 777, 782 (5th Cir. 1981). It has been noted that the Act's definition of a standard "simply posits a distinction between new legal obligations and enforcement of obligations that have long been in place." *Steel Erectors Ass'n of America, Inc.*, 636 F.3d 107, 116 (4th Cir. 2011). A policy/enforcement directive, on the other hand, "merely reiterat[es] the requirements of an existing standard for enforcement purposes." *Id.* at 114.

Applying the foregoing framework, the Court concludes that the FRC memo constitutes a new standard. The FRC memo is clearly labeled as an "Enforcement Policy", which would appear to put it soundly within the APA exception from notice and comment rulemaking. That

8. The Act also requires that standards be subject to notice and comment rulemaking. *See generally* 29 U.S.C. § 655.

said, although the FRC memo pays lip service to longstanding Commission precedent regarding the proof required to establish a violation of § 1910.132(a), it nevertheless specifically concludes that the use of FRC is required in light of the specifically identified hazard of hydrocarbon flash fires at certain oil and gas operations, including oil production facilities like Jonsrud. (C-17). This conclusion is not the enforcement of an obligation that has long been in place nor is it a purely administrative effort designed to uncover violations; rather, the FRC memo takes a performance standard and imbues it with a specific obligation that FRC must be worn during the enumerated oil and gas operations regardless of the particular circumstances that may be present at any individual facility. By doing this, Complainant has changed the requirement of the underlying standard; thus, engaging in improper rulemaking under the aegis of an enforcement standard.

The cases cited by Complainant do not support her contention that she did not engage in improper rulemaking. In *Nat'l Roofing Contractors Ass'n v. Dep't of Labor*, 639 F.3d 339 (7th Cir. 2011), the Seventh Circuit addressed an enforcement directive issued by OSHA with respect to 29 C.F.R. § 1926.501(b)(13), which addresses fall protection in residential construction activities. The standard at issue was promulgated in 1994. In 1999, OSHA issued an enforcement directive stating that if an employer utilized alternative fall protection systems other than those listed in the standard, it would not commence enforcement proceedings. *Nat'l Roofing*, 639 F.3d at 341. According to the court, the 1999 Directive was an exercise of prosecutorial discretion. *Id.* The 1999 Directive was supplanted by the 2010 Directive, which essentially required employers to show on a case-by-case basis why they used an alternative fall protection system. *Id.* (noting that the 1999 Directive essentially allowed alternatives as a way to avoid liability, not to comply with the regulation). The employer characterized the 2010 Directive as a standard and asserted that it constituted improper rulemaking. The court held that

the 2010 Directive did not modify the standard; instead, it merely revoked the safe harbor that was previously provided for in the 1999 Directive. *Id.* at 341–42. The duty contained in the underlying standard did not change; in fact, the standard itself provided an exception for alternative fall protection systems, but it placed the burden of proving the appropriateness of those systems on the employer. *Id.* at 340. In other words, the 2010 Directive merely reinstituted the authority that the Secretary already had.[9]

This case is not about an exercise of prosecutorial discretion. As opposed to the directives in *Steel Erectors* and *National Roofing*, the FRC memo imposes substantive legal obligations upon the oil and gas industry over and above what is already required. It clearly states that, in all instances, FRC is required at the enumerated oil and gas operations. The problem, however, is that the PPE standard is a broad, performance-based standard that gives an employer discretion, within reason, to determine how to properly address a hazard. *See, e.g.*, *Thomas Indus. Coatings, Inc.*, 21 BNA OSHC 2283, 2287 (No. 97-1073, 2007) ("[Performance] standards require an employer to identify the hazards peculiar to its own workplace and determine the steps necessary to abate them."). Contrary to the long-established precedent of determining whether PPE is required based upon a discrete set of facts and circumstances, Complainant has attempted to short-circuit its burden of proof by concluding that the failure to provide FRC is a *per se* violation of the general industry PPE standard.

Accordingly, the Court finds that the FRC memo constitutes improper rulemaking by Complainant. By using the terms "concludes" and "requires", Complainant has gone beyond mere interpretation and stepped into the realm of rulemaking by converting a performance-based standard into a specific standard. Complainant cannot "require" anything more than what is

9. The other case cited by Complainant in this regard, *Steel Erectors Ass'n of America, Inc.*, 636 F.3d 107 (4th Cir. 2011), addresses an issue almost identical to the one presented here, and the Fourth Circuit reached a similar conclusion.

authorized by the regulations. If Complainant wishes to specifically require that FRC be worn in all instances at oil and gas operations, then she must resort to the required notice and comment rulemaking process. Otherwise, Complainant must independently prove in each case that Respondent had actual notice, or that a reasonable person in Respondent's position would have recognized a hazard requiring the use of FRC. In light of the foregoing, the Court finds that the FRC memo does not have the force and effect of law,[10] and all that remains is the standard itself. However, prior to addressing the standard on its own terms, the Court will also address Complainant's argument that the FRC memo is entitled to deference as an interpretation of the PPE standard.

The FRC Memo as Interpretation

Assuming, *arguendo*, that the FRC memo is not an exercise in improper rulemaking, Complainant urges that it is a proper exercise of her power to interpret her regulations and is, therefore, entitled to deference under *CF&I Steel*. However, merely because Complainant has proffered an interpretation does not mean that the Court must automatically defer to it. Rather, as the Commission noted:

> It is well settled that the test for the applicability of any statutory or regulatory provisions looks first to the text and structure of the statute or regulations whose applicability is questioned. If no determination can be reached, courts may then refer to contemporaneous legislative histories of that text. If this inquiry into the meaning of the text does not settle the question, the courts then defer to a reasonable interpretation developed by the agency charged with administering the challenged statute or regulation.

Unarco Comm. Prods., 16 BNA OSHC 1499 (No. 89-1555, 1993).

Although the PPE standard is a broad, performance-based standard, the Court does not find that it is ambiguous. *See Superior Masonry Builders, Inc.*, 20 BNA OSHC 1182 (No. 96-1043, 2003) (citing *Unarco Comm Prods.*, 15 BNA OSHC 1499). The first part of the standard

10. *See Brennan v. Ace Hardware*, 495 F.2d 368, 376 (8th Cir. 1974) (enforcement memoranda do not have the force and effect of law).

indicates what qualifies as protective equipment, which includes, as is pertinent to the present dispute, protective clothing. *See* 29 C.F.R. § 1910.132(a). There is no real dispute that FRC constitutes protective clothing. The second part of the standard discusses the types of hazards that would render the aforementioned PPE necessary. *Id.* Again, there is no question that flash fires are such a hazard. In the context of this case, therefore, the Court does not discern any ambiguity warranting further inquiry.[11] Thus, the Court is left with the question of whether, within the framework of the specific facts and circumstances of this case, FRC was *necessary* at the Jonsrud facility.

For argument's sake, however, let us assume that the terms within § 1910.132(a) present the sort of ambiguity that warrants additional inquiry. Section 1910.132(a) was enacted under section 6(a) of the Act and was adopted verbatim from the Walsh-Healey Public Contracts Act. *See* Occupational Safety and Health Standards; National Consensus Standards and Established Federal Standards, 36 Fed. Reg. 10,465, 10,593 (May 29, 1971). This standard has remained virtually unchanged since it was originally promulgated as a part of the Walsh-Healey Act, and there is nothing in the legislative history that specifically addresses the situation presented here. Thus, the Court must look to see whether Complainant's proffered interpretation is reasonable.

In assessing the reasonableness of the Complainant's interpretation, the Court must consider whether the interpretation "sensibly conforms to the purpose and wording of the regulations." *CF&I Steel*, 499 U.S. at 151 (internal citations omitted). This evaluation takes into account whether Complainant has consistently applied the interpretation and whether the

11. In two separate cases, the Commission has held that the term 'protective equipment', as it is used in sections 1910.132(a) (general industry standard) and 1926.95(a) (construction standard), was ambiguous. *See USPS*, 2006 WL 6463045 (No. 04-0316, Nov. 20, 2006) (general industry standard); *The Ruhlin Co.*, No. 04-2049 (Nov. 20, 2006) (construction standard). However, the interpretive problem in those cases can be limited to the specific facts involved. In both *Ruhlin* and *USPS*, the Commission grappled with the question of whether warning garments constituted 'protective equipment'. *Id.* In both cases, the Commission had to resort to legislative history and an evaluation of the Secretary's interpretation of the standard because the standard was not clear as to whether warning garments could reasonably be included under the rubric of protective clothing. No such issue is presented here where FRC and flash fires fit comfortably within the plain language of the standard.

regulated parties have been provided with adequate notice. *Union Tank Car Co.*, 18 BNA OSHC 1067, 1069 (citing *CF&I Steel*, 499 U.S. at 150, 157–58). "The weight of such [an interpretation] in a particular case will depend on the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking the power to control." *Simpson, Gumpertz & Heger, Inc.*, 15 BNA OSHC 1851 (No. 89-1300, 1992) (citing *General Elec. Co. v. Gilbert*, 429 U.S. 125, 142 (1976) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944))). In light of the foregoing factors, the Court finds that Complainant's interpretation is not reasonable and, therefore, not entitled to deference under *CF&I Steel*.

There are two primary problems with the Complainant's interpretation as it is embodied in the FRC memo. First of all, the FRC memo's conclusion that FRC is required at the enumerated oil and gas operations is inconsistent with LOI One, which attempts to clarify the import of the FRC memo. The FRC memo specifically states that FRC is required because OSHA has concluded that administrative and engineering controls are insufficient to address the hazard of hydrocarbon flash fires. LOI One, however, undercuts that conclusion/interpretation by first declaring that the FRC memo is an enforcement policy document that is intended to be used by CSHOs in order to evaluate the need for FRC. (R-5-J at pp. 55–57). If this is truly an interpretive document, as stressed by Complainant, why is it that LOI One and the individuals governed by it regard it as an enforcement tool? (Tr. 124, 282). LOI One is also problematic for Complainant because it discusses the importance of evaluating an employer's hazard assessment, including the adequacy and implementation of engineering and administrative controls. If those controls are as inadequate as Complainant has concluded in the FRC memo, then it would make no sense for an inspector to evaluate their efficacy or implementation. This inconsistency is buttressed by the fact that LOI Two (issued subsequent to LOI One) reiterates

OSHA's conclusion that FRC is necessary and goes further by stating that "[e]mployers are expected to be in full compliance with the requirements set forth in the attached document. . . . OSHA has not granted a waiver from compliance due to short supply of FRC." (C-18). Clearly, the FRC memo and LOI Two purport to make the use of FRC mandatory at oil and gas operations, whereas LOI One, which is more in line with well-established precedent, would require Complainant to prove conclusively that a particular employer's failure to provide FRC was a violation given the particular circumstances at the Jonsrud site.

The inconsistency illustrated above points to another interpretive problem: the FRC memo's inconsistency with the existing regulatory regime. Paragraph (d) of § 1910.132 states, "The employer shall assess the workplace to determine if hazards are present, or are likely to be present, which necessitate the use of personal protective equipment (PPE)." 29 C.F.R. § 1910.132(d). The remaining subsections of 132(d) state what an employer shall do if a hazard warranting the need for PPE is present. *Id.* Paragraph (d) became effective as a final rule on July 5, 1994 and was adopted because "the Agency believes that the employer will be capable of determining and evaluating the hazards of a particular workplace." Personal Protective Equipment for General Industry, 59 Fed. Reg. 16,334, 16336 (April 6, 1994) (codified at 29 C.F.R. § 1910.132(d)). The caveat to OSHA's determination that employers should be able to make their own determinations regarding the assessment of hazards in the workplace is that "the employer is accountable for both the quality of the assessment and the adequacy of the PPE selected." *Id.* In other words, if it can be shown that the hazard assessment was insufficient and the subsequent selection of PPE was inadequate, then OSHA would have grounds for the issuance of a citation.[12] The FRC memo, taken alone, disregards the evaluative component of

12. The Commission has noted that "[c]onsent [will] be found only when the parties . . . 'squarely recognized' that they were trying an unpleaded issue." *NORDAM Group*, 19 BNA OSHC 1413, 1414–15 (No. 99-0954, 2001) (citing *Armour Food Co.*, 14 BNA OSHC 1817, 1824 (No. 86-247, 1990), *aff'd*, 37 F. App'x 959 (10th Cir. 2002) (unpublished). The Court notes that although Complainant has attempted to assert a violation of § 1910.132(d), she

this regulation and, instead, concludes that FRC is required in all circumstances. By doing so, the FRC memo constitutes an indirect repeal of section 132(d), which again requires notice and comment rulemaking. This is so even though Complainant has also published guidance entitled "Addressing the Need for Personal Protective Equipment: A Guide for Small Business Employers", which addresses the "hierarchy of controls." (Tr. 301, Court Ex. 1). This document, consistent with the requirements of § 1910.132(d), directs employers to conduct a hazard assessment to determine whether a particular hazard can be addressed with engineering and administrative controls. (*Id.*). Through a series of "if-then" scenarios, OSHA directs employers to use PPE only if the hazard cannot be addressed through the use of "feasible engineering and administrative controls." (*Id.*). Clearly this evaluative process is inconsistent with a blanket determination that FRC, or any PPE for that matter, is required in all instances. Because Complainant's interpretation is unreasonable and inconsistent, the Court need not follow it.

Back to the Standard

Because the Court has concluded that the FRC memo does not have the force and effect of law, all that is left is the standard itself. Thus, it was incumbent upon Complainant to establish that Respondent either had actual notice of a need for protective equipment or that a reasonable person familiar with the circumstances, including facts unique to the industry, would have recognized that such a hazard existed. *See Weirton Steel Corp.*, 20 BNA OSHC 1255. In this regard, Complainant failed to prove a violation.

One of Complainant's primary failures was her inability to establish the existence of the specific hazard of a flash fire. In support of her argument that a reasonable person would have

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has failed to properly plead such a violation. Further, the Court does not find that such a violation was tried by consent, as Respondent clearly contends that it did not do so. *See* Resp. Brief at 14.

recognized the hazard, Complainant relied upon the FRC memo, the API 500, and the NFPC 2112 and 2113 documents. As was shown above, the FRC memo is little more than an enforcement tool, which guides CSHOs on how to implement § 1910.132(a) in the context of oil and gas operations but does not carry the force and effect of law. The Court does not find that the FRC memo is sufficient to place an employer on notice that a hazard existed requiring the use of FRC; rather, the Court finds that, at best, the FRC memo notifies regulated parties of the manner in which Complainant will enforce the standard. That alone is not sufficient to apprise Respondent of the existence of a hazard at the Jonsrud site.

Furthermore, the API and NFPC documents equally fail to provide notice of the existence of flash fire hazards at Respondent's oil production facility. The API 500 indicates that the potential for fire or explosion may exist at certain classified locations, such as the treater-separator unit at the Jonsrud facility; however, it also indicates that, in locations such as the treater-separator unit, such an event is only likely to occur during accidental rupture or breakdown or during abnormal operation of equipment. (C-16 at p. 20). Complainant failed to prove any deficiency in the system or its operation to suggest the potential for such an event. Although she points to the October 14, 2010 fire as the strongest evidence that the hazard of flash fires existed at Jonsrud, there was no evidence presented to indicate that the October 14, 2010 event was, in fact, a flash fire.[13] The API document stresses that it is concerned with the potential for fires and explosions at certain classified facilities insofar as the employer is considering the placement of an electrical installation in close proximity to a classified location. (C-16). The evidence establishes that no electrical installation was present at the Jonsrud facility, and thus, insofar as the API 500 is concerned, a critical component for a flash fire was

13. Complainant attempted to establish that an explosion occurred by introducing photographs of the fire tube located a long distance from the burned down treater-separator unit; however, Wade Signalness, who was at the Jonsrud site shortly after the fire testified that the fire tube was attached to the treater-separator unit upon his arrival. (Tr. 189). The Court has no reason to disbelieve his testimony as it is uncontroverted.

missing; namely, an identifiable ignition source. (Tr. 85). Furthermore, Complainant could only offer speculation as to the actual cause of the fire at the Jonsrud facility; however, no specific evidence was introduced to suggest the cause or the type of fire.

In terms of notice, the NFPA documents are even more problematic. The NFPA documents are general industry documents; their primary purpose is to establish baseline requirements for clothing to be classified as FRC and to establish the criteria for selecting FRC based upon the hazards presented. The nexus is missing between the API's description of hazards at oil and gas facilities and the NFPA's standards for FRC. There is nothing linking these documents to suggest that, because a potential fire hazard exists at oil and gas facilities, FRC is required. In fact, the NFPA documents stress that a hazard assessment should be performed to determine whether FRC should be used. (C-24 at p. 9).

Respondent's accident history is particularly illuminating with respect to the issue of notice. According to Doug Hanson, the Area Safety Director for Respondent, there have been no injuries as a result of fire at Respondent's facilities in the two years prior to the inspection. (Tr. 215, 236). In addition, David Clark, Respondent's Corporate Safety Director, testified that, as a part of its PPE assessment, Respondent also looks at historical data regarding fires on production sites. (Tr. 439). According to Clark, Respondent had no record of flash fires at production sites and, in his 42 years working for Respondent, he was not aware of a flash fire ever having occurred at a Petro Hunt production site. (Tr. 439–40, 451). While the goal of the Act is to prevent the first accident, the Commission and circuit courts have repeatedly found that a low rate of injury indicates that a hazard requiring the use of PPE was not present. *See Owens-Corning Fiberglass Corp.*, 659 F.3d 1285, 1290 (5th Cir. 1981) ("[A] very low injury rate has a definite bearing on whether an employer has notice that personal protective equipment is necessary under a general regulation such as [§] 1910.132(a)"); *Gen. Motors Corp.*, 11 BNA

OSHC 2062 (No. 78-1443, 1984) (also finding that a low incidence of injury was not such to have led a reasonable man to differ with respondent's conclusion that safety shoes were necessary); *The Great Atlantic & Pacific Tea Co., Inc.*, 4 BNA OSHC 1025 (No. 6499, 1976) ("[F]our accidents over the extended period of time shown herein does not demonstrate the existence of an obvious hazard such that a reasonably prudent person familiar with the circumstances would take steps to abate the hazard.").

Complainant also argues that, because members of Respondent's safety team, such as Clark and Hanson, have had conversations regarding the use of PPE, they were aware of a hazard requiring its use. The Court finds that although such conversations may indicate awareness of a hazard, such conversations do not indicate that the hazard discussed required the use of FRC. *See, e.g.*, *Gen. Motors Corp.*, 11 BNA OSHC 2062 ("If employers are not to be dissuaded from taking precautions beyond the minimum regulatory requirements, they must be able to do so free from concern that their efforts will be relied on to establish their knowledge of an alleged hazard."). If anything, these conversations indicate that Respondent took its obligation to prevent hazards seriously but found that its existing regime of administrative and engineering controls was sufficient to prevent the hazard from coming to fruition.

In addition, Respondent's decision to utilize only engineering and administrative controls appears to comport with industry custom and practice. (Tr. 440–41). Clark testified that the industry does not recognize a fire or explosion hazard at production facilities like Jonsrud. (*Id.*). The Court does not agree that there was no fire hazard—clearly the implementation of administrative and engineering controls suggests otherwise—however, the Court does find that the industry has determined that administrative and engineering controls are sufficient to address that hazard, which is consistent with a proper hazard assessment pursuant to § 1910.132(d) and OSHA's guidance regarding the hierarchy of controls. (*See* Court's Ex. 1). Although

Complainant's Area Director, Tom Deutscher, stated that there "seems to be more of acceptance and the realization that [FRC] . . . is an effective instrument out there beyond administrative and engineering controls," such a finding does not rise to the level of an industry custom or practice. (Tr. 277). In fact, the FRC memo states that the use of FRC in the industry is "inconsistent". (C-17).

There is no argument that Respondent is obliged to ensure the quality of its assessment and the adequacy of the PPE selected. In order to establish a violation, however, Complainant, must be capable of eliciting evidence that would establish that Respondent failed to select PPE that Complainant asserts is necessary to address the hazard. Consistent with its obligations, Respondent conducted a hazard assessment and determined that certain administrative and engineering controls (illustrated exhaustively *supra*) were sufficient to address the hazards—flash fires or otherwise—present at the Jonsrud plant. Rather than establishing that the existing controls were insufficient to protect employees from the hazard of flash fires, Complainant relied almost exclusively on the FRC memo and national consensus standards such as the API 500, NFPC 2112, and NFPC 2113. Such evidence falls short of establishing the existence of a hazard requiring the use of FRC at the Jonsrud facility. The proper test for the application of § 1910.132(a) requires looking at the discrete circumstances at a particular facility, including the measures the employer has already taken to address the hazard. The CSHO's inspection was clearly deficient in that he was only aware that "some controls" were in place at the Jonsrud facility (which indicated that a hazard assessment took place), but he nevertheless failed to dig deeper to discover the extent of those controls or whether they were adequately maintained or implemented. (Tr. 128–35). Complainant's decision to rely on its own conclusions regarding the oil and gas industry as a whole led to her failure to properly consider all of the relevant circumstances at the Jonsrud facility.

Ultimately, the Court finds that Complainant failed to establish that Respondent had actual knowledge of, or that a reasonable person familiar with the circumstances would have recognized, a hazard requiring the use of FRC. Respondent clearly illustrated the numerous controls that it had instituted in order to address the potential for such a hazard. Further, by addressing recognized hazards with the implementation of these controls, which Respondent deemed sufficient to address the hazards, Respondent also showed that it was without actual knowledge of a hazard or that a reasonable person familiar with the circumstances at Jonsrud would have recognized a hazard. Conversely, Complainant failed to demonstrate, by a preponderance of the evidence, that those controls were insufficient so as to render the use of FRC necessary. Although Complainant attempted to prove that such controls were insufficient due to other fires that had occurred in the industry, there was no evidence introduced to suggest that the circumstances present at those fires were similar to those present at Jonsrud. The fact that Respondent had no documented history of flash fires is a strong indication that the circumstances were, in fact, different. Furthermore, even though Complainant introduced evidence that Respondent had experienced engineering control failures in the past, there was little to no evidence to suggest that the result of such failures was a flash fire warranting the use of FRC. (Tr. 162).

Based on the foregoing, the Court finds that Complainant failed to establish a violation of 29 C.F.R. § 1910.132(a). Accordingly, Citation 1, Item 1 shall be VACATED.

Affirmative Defenses

In light of the fact that the Court has found that there was no violation of the standard, it need not address the affirmative defenses raised by Respondent.

ORDER

The foregoing Decision constitutes the Findings of Fact and Conclusions of Law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure. Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Citation 1, Item 1 is VACATED.

/s/

Patrick B. Augustine
Judge, OSHRC

Dated: June 20, 2012
Denver, Colorado