SECRETARY OF LABOR,	:	
Complainant,	:	
	:	OSHRC
v.	:	Docket No. 95-0341
	:	
MEER CORPORATION,	:	
Respondent.	:	
	:	

Appearances:

Nancee Adams-Taylor, Esq.
Office of the Solicitor
U.S. Department of Labor
For Complainant

David G. Uffelman, Esq.
Grotta, Glassman & Hoffman
Roseland, New Jersey
For Respondent

Before Administrative Law Judge Richard DeBenedetto

DECISION AND ORDER

Meer Corporation (Meer) was cited on January 9, 1995, for both serious and nonserious violations of numerous safety requirements for the management of hazards associated with processes using highly hazardous chemicals. The standard prescribing the multiple procedures is referred to as process safety management (PSM). The serious citation also includes an item alleging violation of the machine guarding standard at 29 C.F.R. § 1910.219(c)(3) dealing with vertical shafting.[1] The Secretary proposes that penalties totaling $29,500 be assessed for the serious citation and $1000 for the nonserious. Meer contested the matters.

Meer maintains a facility in North Bergen, New Jersey, where it uses flammable liquids in the manufacture and processing of natural botanical products as ingredients for food and pharmaceutical industries (Exh. C-9). The PSM standard applies to a process which involves a flammable liquid on site in one location in a quantity of 10,000 pounds or more. §1910.119(a)(1)(ii).

[1]The original citation item referred to the standard at § 1910.219(c)(2)(i), which covers horizontal shafting. By order entered on November 1, 1995, the Secretary was allowed to amend the citation to substitute the vertical for the horizontal.

While Meer acknowledges that it stores at its facility flammable liquids in the form of Methanol and Ethanol in a quantity that exceeds 10,000 pounds (Tr. 240-241, 322), it challenges the citations claiming that its usage of the flammable liquids is specifically excluded from coverage by § 1910.11 9(a)(1)(ii)(B), which identifies the exclusion as follows:

> Flammable liquids stored in atmospheric tanks or transferred which are kept below their normal boiling point without benefit of chilling or refrigeration.

It is not disputed that the liquids were stored in atmospheric tanks (as well as transferred) and kept below normal boiling point without chilling or refrigeration. The Secretary contends that the storage tanks were "interconnected" to blending vessels for batch processing, thereby rendering the exemption inoperative in accordance with § 1910.119(b), which defines "process" as follows:

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

The Secretary presented several OSHA documents in support of her case, including an Interpretation Letter (Exh. C-12), PSM Guidelines for Compliance (Exh. C-13), and a Fact Sheet "highlighting" the PSM standard (Exh. C-14). The Interpretation Letter, dated January 8, 1993, is addressed to an attorney representing the Flavor and Extract Manufacturers' Association, and the Fragrance Materials Association. The attorney had requested that the OSHA Director of Compliance Programs clarify the applicability of the PSM standard to his clients. The Director's response reads, in pertinent part, as follows:

> In your letter you requested that OSHA answer the following question. Does the rule (at 29 CFR 1910.119(a) (1) (ii) (b)) [sic] exempt all flammable liquids stored or transferred which are kept below their normal boiling point without benefit of chilling or refrigeration, including, but not limited to, flammable liquids in atmospheric tanks?
>
> The answer to your question is no, and the following is provided for clarification. The exemption is limited to flammable liquids stored in atmospheric tanks or transferred which are kept below their normal

> boiling point without the benefit of chilling or refrigeration. This exemption is applicable to flammable liquids in tanks, containers and pipes used only for storage and transfer (to storage) and not connected to a process or a process vessel. Similarly, stored flammable liquids in containers, including cans, barrels and drums, would be exempt from coverage by the PSM standard. We recommend you carefully consider the definition of "process" to determine further applicability of the PSM standard in situations where flammable liquids are stored in tanks or containers at a worksite.

Both the Guidelines and the Fact Sheet reflect essentially the same interpretation: that atmospheric tank storage and associated transfer of flammable liquids kept below their normal boiling point without chilling or refrigeration are not covered by the PSM standard unless the storage tank is connected to a process.

When the Secretary completed her case in chief, Meer moved to dismiss the PSM-related charges on the ground that the Secretary failed to establish facts necessary to show that the flammable liquids stored in the atmospheric tanks were connected to a process. The motion was granted (Tr. 507-08). During the course of the hearing, Meer also argued that the definition of "process" read in conjunction with the 119(a)(1)(ii)(B) exemption is unconstitutionally vague and unenforceable. The issue is also raised in Meer's posthearing brief at 2. Both the factual and constitutional issues will be addressed.

The Secretary's principal witnesses were OSHA compliance officers Arthur Dube and Valerie Cordelli.[2] Dube testified that he had received training in the PSM standard and had given training courses in the subject to OSHA personnel. He accompanied Cordelli during the inspection of Meer's facility as her "technical" advisor (Tr 13-26).[3] On the question of whether his observations during

[2] The Secretary's third witness was Christopher Schiller, enforcement supervisor of the New Jersey Department of Environmental Protection (DEP). His testimony was essentially limited to a 1994 report of hazardous substance information filed by Meer with DEP (Exh. C-9). Schiller's testimony and the hazardous substance data contained in the 1994 report are not relevant to the decisive issues in the case.

[3] On cross-examination, Dube stated that his role went beyond that of technical advisor: "I was there to help on the inspection. I was the technical advisor. I took the lead on the [PSM] items" (Tr. 154-55). In her prehearing disclosure statement and witness list, Secretary's counsel listed Dube as an expert witness and described him as "the in-house Regional 'expert' on process safety and the process safety standards."

the inspection led him to conclude Meer was obligated to comply with the PSM standard, Dube testified on direct examination as follows (Tr. 26-27):

> Q Did you make a determination, based on your on site observations, as to whether or not this employer was covered?
> A Yes.
> Q And what was that determination?
> A The determination was the threshold quantity of a flammable substance and how it was used.
> Q How was it used?
> A It was used in the process of a botanical extract. The process itself was a bo -- I believe was a botanical extract.
> Q And in your understanding, what was determinative as to whether or not that was covered by the standard?
> A Oh, Okay. The, the flammable substance that was utilized was *piped into the extraction process by a hard piping*, and it was going through a series of distilling operations and extraction operations. I think mixing and blending also. I'm not entirely positive about the, you know, all of the processing at this time.
> Q In fact, that would have been indicated if something had been given to you showing the process. Was anything given to you showing the process?
> A I believe we have a process flow or a floor plan or something like that showed us where the tanks were, where the kettles were, --
> Q Okay.
> A --and where the equipment was.

When asked to explain what he meant by the term "hard pipe," he stated: "Well hard pipe versus a flexible hose or something like that" (Tr. 28). When Secretary's counsel sought to clarify what the witness actually observed, his response was somewhat ambiguous (Tr. 29):

> Q Do you know, based on your observations, *did you observe these tanks and their hard piping on*--
> A Yes, I was on a plant tour; yes.
> Q Plant tour. Who accompanied you on that plant tour?
> A Valerie Cordelli and Dick Maier. I hope I'm saying the name right. Dick Maier.

On cross-examination, Dube stated that when he conducted his inspection of Meer's facility, he was accompanied during "the whole tour" by compliance officer Cordelli and Meer's vice president of operations Richard Maier. Bob Miller, the shop steward, also participated in the tour some of the time (Tr. 137-38, 244). When Dube was questioned as to whether he sought to obtain

information from Richard Maier about a storage tank that the inspection party came upon (which was labeled alcohol), the following exchange took place (Tr. 139-40):

> Q And did you ask Mr. Maier anything about that tank?
> A About the tank?
> Q About the tank?
> A Sure.
> Q What did--
> A What was in it. He said: 'Alcohol. That's our alcohol storage tank.'
>
> 'What happens to the alcohol when it comes out of that tank?' *We followed the pipe*.[4]
>
> Q Did you make any determination as to the volume of alcohol in that tank?
> A Mr. Maier already had made that determination inside; but if I'm not mistak -- I don't recall, but I think there might have been a marking on the tank that might have said 10,000 gallons, but I'm not positive.[5]

Meer's counsel continued to probe the witness concerning the quantity of flammable liquids at the facility and the extent of his knowledge about the manufacturing process (Tr. 149-50,153-54):

> Q Now, in making that determination, were you aware of and did you take into consideration the language of (a)(1)(ii) that talked about, that states "on site in one location in a quantity of 10,000 pounds or more"?
> A Yes.
> Q All right. And what aspects of Meer's operations did you conclude met that threshold quantity? What specific parts of Meer's operations did you have knowledge of at the time that you made that, made the determin--
> A The extraction process.
> Q All right. And where was the 10,000 pounds quantity?
> A It was more than 10,000 pounds in each of the two buildings, each of the two extraction processes.
> Q Each of the two tanks that you saw?
> A No, I didn't say that. In the processes. The process includes

[4]A conflicting account of the inspection was presented by compliance officer Cordelli on critical points which will be discussed presently; however, on this occasion it is noteworthy that Cordelli testified that she did not follow the pipes (Tr. 259).

[5]Ten thousand gallons is "roughly equivalent to three times the amount of pounds," the unit of weight used in the standard (Tr. 28).

the storage tank, the pipes, the stills, the extractions, the blendings, etcetera.

Q All right. Did you take any measurements of quantities involved in those processes?

A No.

Q Did you take an measurements of the equipment?

A No.

Q Did you calculate any volumes?

A Of the equipment?

Q Of the--

A For the equipment?

Q Of the pipes, of the equipment, of anything?

A No.

Q All right. So, if you took no measurements and you made no calculations, was your entire determination based upon what was written on document R-2?

A No. Also what was discussed with Mr. Maier.

Q Right. And what did Mr. Maier tell you? That--

A He said he had in excess of however many gallons he said at the time. It was, you know, 3,000 or 4,000 gallons, or 6,000 in one. It was something like that.

Q All right.

A I can't recall the exact number.

* * * *

Q So, it's your testimony that there are only two processes at Meer Corporation?

A There were two that, that we looked at. I don't know if there were more than two.

Q What were the two that you looked at?

A Like I said, they were an extraction process, botanical extraction process in two different buildings.

Q All right. And one of those processes involved methanol and the other involved SDA-3A, whatever that is?

A Whatever that is; yeah. I believe that's the way it was; yeah.

Q Oh, Okay. Well, I'll show you R-2 again. What is SDA-3A?

A At that time, I was told it was a flammable substance.

Q You were told that? Who told you that?

A I don't recall who told me that.

Q All right. So, you drew the conclusion that there were two processes at Meer Corporation. One involved methanol and involved 6,500 gallons; and the other involved SDA-3A, which you didn't know what that was, and that involved 3,600 gallons?

A Or the--

> Q Is that your testimony?
> A Or, I'm not entirely clear. Or that it could have been both of those different chemicals, different substances in one process.

Dube acknowledged that he spent most of his time at the facility on gathering information to determine whether Meer complied with the numerous citation items that delineate the requirements of the PSM standard (Tr. 154). Near the end of his cross-examination, Meer's counsel again sought to elicit Dube's knowledge about Meer's manufacturing process (Tr. 183):

> Q But at the point in time that you were making these determinations, what information did you have specifically about the nature of Meer's operations and their manufacturing systems?
> A Okay. It was a flammable, a flammable substance. We knew that. We knew that there were valves that were, we knew some of the equipment, you know, vessels and things like that. The mixing.

There is nothing in Dube's testimony to suggest that the "interconnection" between the stored alcohol and manufacturing process was accomplished by anything other than a "piping" system, and Secretary's counsel made no attempt to elicit testimony from Dube that went beyond "hard piping" as a conduit for conveying the flammable liquids to the extraction process.

Compliance officer Cordelli testified that she did not ask Maier to explain the manufacturing process at any time during the inspection (Tr. 245, 379). During much of her testimony, considerable emphasis was given to the piping system. She stated that she observed three tanks located just outside the coal tar area (Exh. C-4 at 244) that were "piped", and that the piping was shown in the plant diagram (Exh. C-4 at page 246). At one point during direct examination, however, when she was asked to describe the manufacturing process in the coal tar room, she added a new element (Tr. 249-50):

> Q Can you describe the process as to the best of your understanding as to how the material is transferred?
> A In the cold [sic] tar room?
> Q If you -- If you are aware of it.
> A From what I recall, basically, they -- Depending upon what batch they had to make, *they would connect the rubber hose*. Basically, this is how the whole process worked. But they would *connect a rubber hose to the pipe and dispense into either the kettle, the drum, the stills, whatever they were going to make the batch in.*
> Q What happened -- Go ahead.
> A I was just going to say that, every quantity of whatever

> flammable liquid they were going to put into these batches differed because of the batches that they had made there.
> Q So they would physically connect a hose to, say, the pipes that are shown on 246, and then open a valve --
> A Yes.
> Q -- and the material would be allowed to flow into a kettle or whatever they had?
> A Yes.
> Q What would happen with it after that? With the material after that?
> A Then they would blend, mix, make their batch.
> Q While in that kettle?
> A Yes.
> Q Do you know what happened with the kettles after the mix had been blended?
> A Then they would dispense it out of the kettles into the 55 gallon drums or a container, whatever they were going to put it into, to ship it to wherever their customer was.

After almost a full day of testimony by Dube, who spoke of "hard piping," Cordelli's is the earliest mention of a "rubber hose" connection. How did she come by the information? Not by personal observation. Although she testified that she saw Meer's process in actual operation (Tr. 244), she did not disclose any relevant or significant eyewitness account of the manufacturing process itself that sheds any light on the interconnection issue, despite repeated attempts by the undersigned to elicit such information (Tr. 266-88).

On cross-examination Cordelli stated that the source of her information was an employee (unidentified) whom she encountered in the coal tar area during her inspection in late July 1994 (Tr. 387-90). To underscore the difficulty in following her testimony, we quote the following dialogue, which occurred on redirect examination of Cordelli and which directly contradicts her statement regarding the employee interview of July 1994 (Tr. 396-97):

> Q I think you stated in your answer to Mr. Miller's question that you didn't ask anyone about the process on your second inspection [1994]. Is that your testimony? Do you recall that testimony?
> A I recall that, not asking, yeah.
> Q Were you present while anybody asked about the process during your second inspection [1994]?
> A I was present during -- when at the opening conference, when Mr. Dube and Mr. [Maier] were going over the elements of the

> standard. Mr. Dube was asking the general questions, whether there was one process, two processes or three processes.
> Q Did you -- You were present for the answers that were provided?
> A Regarding the talking about the process?
> Q Yes.
> A At that time, yes.
> Q And with respect to knowing the operations and what Meer does, is that because you weren't -- your limited knowledge as to what they do, is that strictly because you are only familiar with what was provided to you?
> A JUDGE DEBENEDETTO: Ms. Taylor, I'm going to object if Mr. Miller does not. I don't see where this is probative. The questions that were put to Ms. Cordelli clearly elicited testimony that she is not well versed in the manufacturing process of this employer.
> But Ms. Cordelli, in so many words says, so what. She knows a hazard when she sees it.
> MS. ADAMS-TAYLOR: Right.

Assuming that her information was derived from an employee informant during the 1994 inspection, Cordelli's version of the process differed from Dube's on a vital point, and that is the use of a rubber hose to make the connection between the pipe of the storage tank where the flammable liquid was stored and "the kettle, the drum, the stills, whatever they were going to make the batch in." The clear implication of Cordelli's testimony is that the hose connecting the stored alcohol and the manufacturing process vessels was not a fixed component of the equipment, but was attached on a temporary basis in order to effect the transfer of the alcohol from the storage tank to the processing vessel. There is not one shred of evidence to indicate that once the alcohol was transferred for processing, the hose remained attached to the piping of the storage tank and the processing vessel while the manufacturing process was performed. In other words, interconnection between the stored chemicals and the manufacturing process is not shown.

It is to be noted that when Secretary's counsel questioned both Dube and Cordelli regarding the piping that they considered to be a part of the processing equipment, references were repeatedly made to Meer's plant layout (Exh. C-4 at 246, 247) to illustrate the interconnecting "hard" piping system (Tr. 26-27, 245, 248-49, 251). In fact, the piping (designated by "direction of flow" and "valves") depicted in the diagrams serves to interconnect the flow of one storage tank to the flow of

another storage tank;[6] there is no indication in the plant layout that there was interlinkage between the storage tanks and any process or process equipment, and no evidence was offered to demonstrate in a clear and focused manner how a connection to the manufacturing process would be achieved within the context of the schematic arrangement of the processing equipment, whether it be by rubber hose or some other device.

Because it is a recurring subject of debate in OSHA hearings, a few words should be said concerning unidentified employee informants as a source of admissions against the employer. Cordelli testified that she was told how the process worked in the coal tar room by an unnamed employee she encountered working in that area. At the time Secretary's counsel elicited Cordelli's testimony concerning the information reportedly provided by an employee, no objection was raised by opposing counsel. It was not until after the close of the Secretary's case, when Meer moved to dismiss the PSM charges, that the parties disputed the probative value of Cordelli's testimony founded on information from an unnamed employee (Tr. 415).

In the posthearing brief, the Secretary argues that the testimony qualifies as an admission under Rule 801(d)(2)(D) of the Federal Rules of Evidence, which provides that a statement is not hearsay if it is offered against a party and is "a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship." Citing the case of *O'Neal v. Morgan*, 637 F.2d 846 (2d Cir., 1980), the Secretary further argues that the authentication or identification requirement of Fed. R. Ev. 901(a) has been fulfilled in accordance with the *O'Neal* case. (Secretary's brief at 17-18).

Rule 901(a) provides that "the requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." The Advisory Committee Note to the rule comments that "authentication and identification represent a special aspect of relevancy....Thus a telephone conversation may be irrelevant because on an unrelated topic or because the speaker is not identified. The latter aspect is the one here involved. Wigmore describes the need for authentication as 'an inherent legal necessity' [citations omitted]." The Advisory Committee Note comments further that

[6]The tanks shown on page 246 are identified as "bulk storage coal tar alcohol (denatured) and those on page 247 are identified as "bulk alcohol storage" and "bulk recovered alcohol."

"this requirement of showing authenticity or identity falls in the category of relevancy dependent upon fulfillment of a condition of fact and is governed by the procedure set forth in rule 104(b)."[7]

Notwithstanding Meer's counsel's failure to raise a timely objection to Cordelli's testimony regarding the admission allegedly made by one of Meer's employees, Rule 901(a) and the Advisory Committee Note strongly suggest that out-of-court statements of unidentified sources are intrinsically suspect. Thus, the adjudicating officer must concern himself with the probative worth of the evidence. The Secretary apparently has recognized this problem: in the posthearing brief she calls our attention to the *O'Neal* case, a civil rights suit brought by the plaintiff seeking damages against several defendants for false arrest and police brutality. A detective witness who testified about a purported admission by one of the defendants as to having "beat up" plaintiff's decedent, could not identify the speaker making the admission during a telephone conversation with the detective witness. The Court held that when plaintiff presents to the trial judge sufficient evidence from which the jury can reasonably find that an admission was made by one of a limited group of two or more defendants, the admission should be received in evidence and the jury should be instructed that it may consider the admission against each member of the group of defendants who fails to persuade the jury that he did not make the statement. *O'Neal,* 637 F.2d at 851.

In her posthearing brief, the Secretary refers to Cordelli's inspection notes or worksheets (Exh. C-8) which contain the names of "five or six employees...from whom the statement could have originated, similar to the pool of employees [sic] in *O'Neal."* Secretary's brief at 19. This case is decisively dissimilar from the *O'Neal* case. There the defendants were *parties* in a civil suit for monetary damages based upon *their* alleged wrongful conduct. The Court relied upon the approach taken by some courts when dealing with similar problems in the field of tort law:

> One situation arises when the plaintiff presents evidence to show that two persons acted negligently toward him, but is unable to determine which of the two caused the injury he sustained. Professor Prosser offers the example of two defendants negligently firing weapons in a public area, with the bullet from one striking the plaintiff. If from

[7]Rule 104(b) provides:

Relevancy conditioned on fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition of fact.

> ballistics or other evidence the plaintiff cannot determine which defendant caused his injury, Professor Prosser endorses the view that the burden of persuasion shifts to the defendants to prove that they did not cause the injury; if the jury is not persuaded by the evidence of either defendant, liability is imposed upon both defendants. See Prosser, *The Law Of Torts*, 243 and nn. 54-57 (4th ed. 1971) (collecting cases)....

Id. at 851. The Court left no doubt that under other circumstances, it would apply the traditional rule:

> A strict approach to the rules of evidence might suggest that an admission is not relevant and hence cannot come into evidence until the trial judge, acting under Rule 104(b), has determined that there is at least sufficient evidence (adduced or to be presented) for the jury reasonably to find that it was made by the particular defendant against whom it was offered....

Id.

The instant case presents rudimentary obstacles: the "five or six" employees mentioned in Cordelli's inspection notes may or may not include the alleged informant; we have no way of knowing from either Cordelli's testimony or her notes. Cordelli's notes disclose the names of five employees having various job descriptions, but none of whom is shown as having been assigned to the coal tar area in question. The Secretary's own comment that "the statement could have originated" from the "five or six employees," strikes a chord of uncertainty. Moreover, one would expect the Secretary's efforts to establish identification be applied *during the hearing* instead of in the posthearing brief. Beyond these obstacles lies a more serious question: should the principle in the *O'Neal* case be extended to the unidentified employee informant in OSHA cases? Neither logic nor anything in the *O'Neal* case justifies doing so.

Regardless of whether its reliability has been established, the probative force of the purported admission operates against the Secretary's case, in that it points up the patchwork of inconsistent and vague evidence which forms the basis of the Secretary's case. As previously discussed, the temporary use of the hose to accomplish the transfer of the alcohol does not establish that the storage tanks were connected to a process or a process vessel after the alcohol was transferred from the exempt atmospheric tanks.

Following the presentation of the testimony of the three witnesses, Dube, Cordelli and

Schiller, the Secretary rested at which point Meer moved to dismiss the PSM case.[8] Before ruling on the motion, the undersigned called, as an aid to the court, Thomas Seymour, Acting Director of the OSHA Office of Safety Standards Programs. Having played a substantial role in drafting the PSM standard, Seymour was engaged by the Secretary as an expert witness but was not presented during the case in chief (Tr. 441-43).

Seymour explained the purpose of the PSM standards and some of the factors that had to be considered in applying the standard. Seymour's comments on the storage of alcohol in atmospheric tanks and the definition of process were in accord with the information set out in the OSHA interpretation letter and guidelines discussed earlier.

Both parties were allowed to question Seymour. Meer's counsel elicited testimony regarding the consequences of events based upon a hypothetical situation (Tr. 486-88):

> Q Now, it's key to showing the applicability of the standard that you show the connection to a process; isn't that correct?
> A As we have defined the term "process," correct.
> * * * *
> Q ...So if it's not connected to a process, it's outside the standard; is that correct?
> A As we have defined process in the standard, correct.
> * * * *
> Q So the -- let's say at the end of this -- from time to time the employer goes to the spigot on these storage tanks, draws out a drum full of flammable liquid and carts it across into his plant and dumps it into an acknowledged process....
> * * * *
> Q Now you don't count all the liquid that's in the storage tanks as part of the process, under that scenario, where you're carting in with a barrel and dumping it in and putting it into an admitted process;

---

[8] Evidently the Secretary had some idea that her case showed signs of foundering and in need of shoring up. After presenting all her witnesses, and during the interval before the hearing resumed for a third day, the Secretary took the unusual step of filing a motion to compel responses to discovery, claiming, in part, Meer "failed to answer many of the Secretary's Interrogatories, and provided partial or incomplete responses to other Interrogatories." Secretary's motion at 2. The Secretary presented a number of arguments, including the following:

> Respondent has evaded answering the most central and critical questions -- those contained within Interrogatory No. 3. Interrogatory No. 3 seeks information regarding whether the tanks referenced in Interrogatory No. 2 are "connected, in any way, to pipes or other connectors," the purpose of the pipes or other connectors, and whether and how they are connected to any part of Respondent's process. *Id.*

The Secretary's motion was denied for being untimely.

is that correct?
A Because it's not interconnected.
Q Because it's not interconnected. That's the key term; is that correct?
A That's correct.

There is no logical difference between using a temporary hose attachment and the hypothetical portable drum as a means of transferring the alcohol to a process vessel.

The Secretary having failed to show that the storage tanks were connected to a process within the meaning of the PSM standard, as interpreted by the Secretary , citations number 1 and number 2 cannot be sustained (excepting only the machine guarding violation set forth in item 9 of citation number 1).

"PROCESS" UNDER THE PSM STANDARD

Meer also contends that the term "process" as defined by the standard is unconstitutionally vague and indefinite as it relates to the atmospheric tank exemption. It is an adjudicative axiom, which Meer duly notes, that given the Secretary's failure to establish a prima facie case, the constitutional issue need not be addressed. Nevertheless, in view of the potential for major hazard accidents and the need to protect employees from the consequences of chemical incidents, and because the problems that have been presented in this case were partly due to the language in the cited provisions of the PSM standard, there are compelling reasons to deal with the constitutional sufficiency of the regulation and to direct our attention to what the Fifth Circuit Court of Appeals said in *Diamond Roofing v. OSHRC*, 528 F.2d 645, 649 (5th Cir. 1976):

> An employer, however, is entitled to fair notice in dealing with his government. Like other statutes and regulations which allow monetary penalties against those who violate them, an occupational safety and health standard must give an employer fair warning of the conduct it prohibits or requires, and it must provide a reasonably clear standard of culpability to circumscribe the discretion of the enforcing authority and its agents....
> If a violation of a regulation subjects private parties to criminal or civil sanctions, a regulation cannot be construed to mean what an agency intended but did not adequately express.

Although previously quoted, both the exemption and the definition of "process" merit repeating here so that they may be more clearly observed as being grammatically interrelated:

> Flammable liquids stored in atmospheric tanks or transferred which are kept below their normal boiling point without benefit of chilling or refrigeration. § 1910.119(a)(1)(ii)(B).
>
> Process means any activity involving a highly hazardous chemical including any use, storage, manufacturing, handling, or the on-site movement of such chemicals, or combination of these activities. For purposes of this definition, any group of vessels which are interconnected and separate vessels which are located such that a highly hazardous chemical could be involved in a potential release shall be considered a single process. § 1910.119(b).

The exemption tells us that flammable liquids either stored in or transferred from atmospheric tanks are exempt from the PSM standard, regardless of the quantity involved. We are not informed of any transfer restriction.[9] The word "process" is defined as meaning any activity involving a highly hazardous chemical including "any use, *storage*, manufacturing, handling, or the *on-site movement* of such chemicals or combination of these activities." By definition, process means either storage alone, or on-site movement alone, or the combination of these activities. Also by definition, "any group of vessels which are interconnected...shall be considered a single process."

There is nothing in the language of the exemption and the process definition that warns Meer about the delimitation of the exemption as conceived by the Secretary. In her guidelines and interpretation letter, the Secretary altered the exemption by adding such qualifying phrases as: "and not connected to a process or a process vessel," or "unless the atmospheric tank is connected to a process." These restrictive words obfuscate the meaning of "process" as defined by § 1910.119(b), which, as we have noted, instructs us that storage is considered to be a process, as is "on-site movement" (i.e., transfer), or a combination of these activities.

Deference must be given to an agency's interpretation of its own regulations. *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 566, 100 S.Ct. 790, 797, 63 L.Ed. 2d 22 (1980). However, where the imposition of penal sanctions is at issue, the due process clause prevents that deference from validating the application of a regulation that fails to give fair warning of the conduct it prohibits or requires. *Diebold, Inc. v. Marshall*, 585 F.2d 1327, 1335-39 (6th Cir. 1978). It is recognized that defects in the constitutional sufficiency of a regulatory warning may be cured by authoritative judicial

[9]The Interpretation Letter (Exh. C-12), quoted above, explains that the word "transfer" appearing in the exemption means "transfer (to storage)."

or administrative interpretations which clarify obscurities or resolve ambiguities. *Rose v. Locke*, 423 U.S. 48, 52 96 S.Ct. 243, 46 L. Ed. 2d 185 (1975). On the other hand, an agency's interpretation of a regulation is valid only if that interpretation complies with the actual language of the regulation. An agency is bound by the regulations it promulgates and may not attempt to circumvent the amendment process through changes in interpretation unsupported by the language of the regulation. *Fluor Constructors v. OSHRC*, 861 F.2d 936, 939 (6th Cir. 1988).

The court in *Langer Roofing & Sheet Metal v. Secretary of Labor*, 524 F.2d 1337, 1339, n.3, (7th Cir. 1975), turned to Lewis Carroll to make the point that "unlike Humpty Dumpty, the Secretary may not give a word whatever meaning she chooses." In a marginal note, the court quotes Alice and Humpty Dumpty's debate on the relativity of language:

> "When I use a word," Humpty Dumpty said in rather scornful tone, "it means just what I choose it to mean–neither more or less."
>
> "The question is," said Alice, "whether you can make words mean so many different things."
>
> "The question is," said Humpty Dumpty, "which is to be master–that's all." Lewis Carroll, *Through the Looking-Glass*, Chapter 6.

As to the facts in this case, it is believed that the exemption language and the process definition as it applies to the exemption are so vague and uncertain as to be insufficient to warn Meer that it was required to comply with PSM standard.

THE MACHINE GUARDING VIOLATION: § 1910.219(c)(3)

Item 9 of citation number 1, as amended, alleges that the vertical shafts of two mixers attached to stills #6 and #7 in the New Extract Building were not guarded in accordance with § 1910.219(c)(3), which provides, in relevant part, that vertical and inclined shafting seven feet or less from the floor shall be enclosed with a stationary casing.

The Secretary's photographic exhibits (Exhs. 7(a) and 7(b)) show two shafts mounted in the center of stationary casings each of which is open on one side. The shafts are about 18 inches from the floor and within the recesses of the bases of the partially open casings. Compliance officer Cordelli testified that operators of the equipment were required to work on occasion in proximity to the shafts in a manner that exposed them to the hazard of having the legs of their pants caught in the rotating shafts (Tr. 303-04).

Meer does not dispute that the machine guarding violation existed as demonstrated by the evidence; however, Meer claims that the $3500 penalty proposed by the Secretary is excessive and not in accord with the penalty criteria set forth in section 17(j) of the OSH Act., 29 U.S.C. § 666(j), which provides that when penalties are assessed, due consideration must be given to the size of the employer, the gravity of the violation, the good faith of the employer, and the employer's history of previous violations. Gravity is generally accorded the most weight. *Baltz Bros. Packing Co.*, 1 BNA OSHC 1118, 1971-73 CCH OSHD ¶ 15,464 (No. 91, 1973).

The photographs clearly indicate that because of their recessed location, it would be difficult to reach or come into contact with the shafts (including by means of clothing), even if an employee were to stand or walk so close that his shoes touched the base of the casings. Consequently, it is concluded that the violation was of relatively low gravity warranting a penalty of $1,000.

Based upon the foregoing findings and conclusions, it is

ORDERED that citations number 1 and number 2 are vacated excepting item 9 of citation number 1 dealing with the machine guarding standard which is affirmed and for which a penalty of $1,000 is assessed.

RICHARD DeBENEDETTO
Judge, OSHRC

Dated: _____
Boston, MA