



United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
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Phone: (202) 606-5400
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SECRETARY OF LABOR
Complainant,

v.

MONTANA SULPHUR & CHEMICAL COMPANY,
Respondent.

OSHRC DOCKET
NO. 94-3365

**NOTICE OF DOCKETING
OF ADMINISTRATIVE LAW JUDGE'S DECISION**

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on October 17, 1995. The decision of the Judge will become a final order of the Commission on November 16, 1995 unless a Commission member directs review of the decision on or before that date. **ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW.** Any such petition should be received by the Executive Secretary on or before November 6, 1995 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

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

Executive Secretary
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Review Commission
1120 20th St. N.W., Suite 980
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Petitioning parties shall also mail a copy to:

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

If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 606-5400.

FOR THE COMMISSION

A handwritten signature in black ink, appearing to read "Ray H. Darling, Jr.", written over a horizontal line.

Ray H. Darling, Jr.
Executive Secretary

Date: October 17, 1995

DOCKET NO. 94-3365

NOTICE IS GIVEN TO THE FOLLOWING:

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SECRETARY OF LABOR,

Complainant,

v.

MONTANA SULPHUR &
CHEMICAL COMPANY,

Respondent.

OSHRC Docket No. 94-3365

APPEARANCES:

For the Complainant:

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

For the Respondent:

Richard J. Dolan, Esq., Goetz, Madden & Dunn, Bozeman, Montana

Before: Administrative Law Judge Benjamin R. Loye

DECISION AND ORDER

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

Respondent, Montana Sulphur and Chemical Company (Montana), at all times relevant to this action maintained a place of business at 627 Exxon Road, Billings, Montana, where it was engaged in manufacturing hydrogen sulfide and sulphur. Respondent admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

On August 22 through September 22, 1994, the Occupational Safety and Health Administration (OSHA) conducted an inspection of Montana's Billings worksite. As a result of that inspection, Montana was issued citations alleging a "repeat" violation of 29 CFR§1926.58(1)(2) of

the Act, together with proposed penalties. By filing a timely notice of contest Montana brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

On June 22, 1995, a hearing was held in Billings, Montana. The parties have submitted briefs on the issues and this matter is ready for disposition.

Alleged Violations

Citation 1, Item 1 alleges:

29 CFR 1926.58(1)(2): Asbestos waste, scrap, debris, bags, containers, equipment, or contaminated clothing consigned for disposal were not collected and disposed of in sealed, labeled, impermeable bags or other closed, labeled, impermeable containers:

- (a) Montana Sulphur and Chemical: Asbestos containing material from the Railroad Boiler, containing approximately 31% asbestos, was left lying on the ground around the Boiler.

Facts

Ervin R. Ehret was employed by Montana at the time of the OSHA inspection as a supervisor for contractors certified for asbestos removal (Tr. 134-35). Between August 16 and 31, 1994 Montana was engaged in an asbestos removal project during its midnight to 8:00 a.m. shift (Tr. 12-13, 180; Exh. R-1 through R-4). Asbestos containing mastic insulation was removed from Montana's "railroad" boiler and piled on the ground prior to bagging and disposal at the city landfill (Tr. 8-15, 137). Ehret stated that he originally scheduled the project to include removal of only as much of the asbestos contaminated material as could be collected and bagged in one shift (Tr. 138, 140, 142, 145). The mastic, however, was wet, and was reinforced with chicken wire, which needed to be cut with tin snips and which poked holes in the bags (Tr. 137-38, 180). Ehret testified that he was unable to clean up all the insulation knocked down each night, and that some asbestos containing mastic remained on the ground at the end of each night during the asbestos removal project (Tr. 183). The mastic and wire debris was pushed close to the boiler, wetted down, and a barricade tape set up to prevent employee access to the area (Tr. 107, 182).

On the night of August 22, 1994, Ehret received a call from Montana's owner, Dr. Zink (Tr. 142-43, 156-57). The boiler, an essential part of Montana's plant operation (Tr. 177, 195, 204-05), had sprung a leak and Zink wanted the remaining insulation knocked down at once (Tr. 143, 192). Ehret stated that it took him two or three days to collect and bag the insulation knocked down on that occasion (Tr. 159).

On August 22, during the day shift, Cory Hofferber, a Montana maintenance worker (Tr. 125), entered the railroad boiler area to install a valve and a flange on the bottom belly of the boiler (Tr. 128, 200). Hofferber testified that he wore a Tyvex suit, gloves, boots, and used a fresh air respirator (Tr. 128-29, 201). It is undisputed that workers daily walked by the taped off area where the mastic was stored during the removal project (Tr. 126, 182).

Compliance Officer (CO) David Vaughn testified that the mastic material was a heavy, blackened plasterlike material, somewhat “cementous” in nature (Tr. 52). Bulk samples of the mastic contained 31% asbestos (Tr. 54). Vaughn testified that inhalation or ingestion of asbestos can result in respiratory lung disease, primarily asbestosis, which may be fatal (Tr. 63, 78, 109). Vaughn stated that wind could carry dried asbestos fibers into the air around the railroad boiler where employees were passing 25 to 50 feet away, exposing them to the cited hazard (Tr. 79-84). Vaughn stated that 90% of asbestos fibers can be contained by properly wetting the fibers (Tr. 92). Vaughn admitted there was no evidence that any employees were ever exposed to asbestos in excess of OSHA permissible exposure limits (PELs) (Tr. 84-87).

Vaughn also testified that failure to remove knocked down asbestos materials could result in a slip and fall hazard,¹ noting that the cited standard is part of the “housekeeping” provision (Tr. 77). Ehret admitted that the material left on the ground created a potential fall hazard (Tr. 160-61).

Discussion

The cited standard requires:

(1) *Housekeeping*. . . (2) *Waste disposal*. Asbestos waste, scrap, debris, bags, containers, equipment, and contaminated clothing consigned for disposal shall be collected and disposed of in sealed, labeled, impermeable bags or other closed, labeled, impermeable containers.

Complainant maintains that the cited standard requires the “immediate” collection of all asbestos containing material. Montana argues that nothing in the cited standard establishes a time frame within which bagging of asbestos containing material must be collected and bagged. This judge agrees.

¹ CO Vaughn admitted, however, that the citation was issued to address not perceived fall hazards (Tr. 89), but “serious consequences resulting from exposure to asbestos” (Tr. 68).

The cited standard addresses proper procedures for the collection and disposal of asbestos waste only. No mention of timeliness is made. Prompt bagging is, however, discussed at §1926.58(g), which requires:

Methods of compliance -- (1) Engineering controls and work practices. (i) The employer shall use one or any combination of the following control methods to achieve compliance with the TWA and/or excursion limit prescribed by paragraph (c) of this section: . . . (F) Prompt disposal of wastes contaminated with asbestos. . . in leak-tight containers.

Prompt bagging and disposal is also addressed at Appendix F of the standard “Work Practices and Engineering Controls for Major Asbestos Removal, Renovation and Demolition Operations -- *Non-Mandatory*” (emphasis added). That section states, *inter alia*:

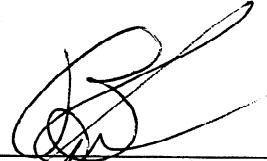
Bagging asbestos waste material promptly after its removal is another work practice control that is effective in reducing the airborne concentration of asbestos within the enclosure. Whenever possible, the asbestos should be removed and placed directly into bags for disposal rather than dropping the material to the floor and picking up all of the material when the removal is complete. If a significant amount of time elapses between the time that the material is removed and the time it is bagged, the asbestos material is likely to dry out and generate asbestos dust when it is disturbed by people working within the enclosure.

It is clear that the asbestos standard when read as a whole requires only that employers reduce asbestos exposures to below OSHA established exposure levels. Failure to promptly bag asbestos waste is only a violation of the Act, of §1926.58(g)(1)(i)(F), when it results in employee overexposures to asbestos. Here, Complainant exceeds both the scope of the standard and of its authority, citing Montana in an attempt to enforce procedures set out in the non-mandatory guidelines at Appendix F as binding regulations under the housekeeping regulations at §1926.58(l)(2), in order to circumvent the necessity of showing that employees were exposed to asbestos fibers in excess of the OSHA limits as required by (g)(1)(i)(F). It is well settled that the Secretary may not extend the reach of a standard beyond the plain meaning of a regulation's language, thus depriving the employer of fair warning of proscribed conduct. *See e.g., Bethlehem Steel v. OSHRC*, 573 F.2d 157 (3rd Cir. 1978); *Dravo Corporation v. OSHRC*, 613 F.2d 1227, (3rd Cir. 1980).

I find, therefore, that the Secretary's interpretation of the cited standard to include non-mandatory guidelines is unreasonable in that it expands the intended coverage of the standard, as set forth in subsection (g) *et seq.*, and deprives employers of notice as to the requirements of the Act. The cited violation will be vacated.

ORDER

1. Citation 1, item 1, alleging violation of §1926.58(l)(2), is VACATED.



Benjamin R. Loye
Judge, OSHRC

Dated: October 6, 1995