

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF)
)
MEDUSA CEMENT COMPANY) DOCKET NO. EPCRA-023-93
)
Respondent)

MEMORANDUM OPINION AND ORDER

Under consideration is the motion to dismiss and/or for accelerated decision in favor of respondent, Medusa Cement Company, filed October 4, 1993.

Respondent moves to dismiss the Region 5 complaint against its Charlevoix, Michigan facility on the grounds that that facility is not subject to the reporting requirements of the Emergency Planning and Community Right-to-Know Act (EPCRA) §§ 311 and 312, as alleged in the complaint. Those EPCRA sections require that "[t]he owner or operator of any facility which is required to prepare or have available a material safety data sheet for a hazardous chemical under the Occupational Safety and Health Act of 1970 ... submit a material safety data sheet for each chemical, or a list of such chemicals ... [to] [t]he appropriate local emergency planning committee ... [t]he State emergency response commission ... [and] [t]he fire department with jurisdiction over the facility." 42 U.S.C. §§ 11021, 11022. Respondent maintains it does not have to prepare or have available a material safety data sheet for hazardous chemicals under the Occupational Safety and Health Act of 1970 (OSHA) because that area of regulation has been preempted by Mine Safety and Health Act (MSHA) regulation of its facility. Respondent represents that the MSHA regulations do not require a material safety data sheet. The complaint

identifies Number 2 and 6 fuel oil and diethylene glycol as hazardous chemicals that existed or exist in sufficient quantity at respondent's facility and, therefore, requires that respondent maintain a material safety data sheet.

Respondent relies primarily on the Interagency Agreement between the Mine Safety and Health Administration and the Occupational Safety and Health Administration, 44 Fed. Reg. 22827 (April 17, 1979), which states the principle "that as to unsafe and unhealthful working conditions on mine sites and in milling operations" MSHA provisions and standards will be applied by the Secretary of Labor. Both OSHA and MSHA have as their concern the working conditions of employees particularly if it affects their occupational health and safety. The Interagency Agreement was established to guide the two agencies in exercising their jurisdiction and to guide employers and employees in determining the jurisdiction of the two statutes involved. The principle division, however, is not always to be followed:

where the provisions of the Mine Act either do not cover or do not otherwise apply to occupational safety and health hazards on mine or mill sites ... or where there is statutory coverage under the Mine Act but there exist no MSHA standards applicable to particular working conditions on such sites, then the OSH Act will be applied to those working conditions....

Id. at 22828.

In its reply respondent points again to the general principle that MSHA will regulate workplace safety and occupational health at its mining facility. Additionally, respondent now relies on the general statement in § 4 (b) (1) of OSHA, 29 U.S.C. § 653 (b) (1), which seeks to eliminate wasteful duplication of the efforts of federal agencies in the workplace by displacing

OSHA regulations where another agency is already regulating the working condition. 1/ In Columbia Gas of Pennsylvania, Inc. v. Marshall, 636 F. 2d 913, 915 (1980), the court explained that § 4 (b) (1) applies only where the coordinate agency has exercised authority by promulgating regulations in the area and the concurrent regulations cover the specific working conditions within OSHA's jurisdiction. There appears to be no difference between the Interagency Agreement and the court's summary of how courts have interpreted the application of OSHA in areas where other agencies also have jurisdiction over workplace safety and health hazards.

OSHA requires in, 29 C.F.R. § 1910.1200 (g), that chemical manufacturers and importers prepare material safety data sheets for hazardous chemicals they produce or import. Employers are to transmit this information to employees through training programs and a material safety data sheet in the workplace for each hazardous chemical which they use. The safety data sheets are to identify, inter alia, the common and scientific name of substance, if a mixture, the chemical and common name of the ingredients which contribute to the hazard, the date the sheet was prepared, the name address and telephone number of the chemical manufacturer, descriptions of applicable precautions, control measures, first aid procedures and additional information about the nature of the chemical. The purpose of material safety data sheets is to insure that the hazards of chemicals used in the workplace are transmitted to employers and employees.

1/ Section 4 (b) (1) provides:
Nothing in this [Act] shall apply to working conditions of employees with respect to which other Federal agencies ... exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health.

Respondent cites a number of MSHA regulations which, it urges, demonstrate that MSHA regulates the specific working conditions that OSHA also regulates with regard to hazardous chemicals. It is apparent that, while some MSHA regulations address the risks that hazardous chemicals may present in the workplace, the MSHA regulations are not comprehensive, while those of OSHA are. Nor are the regulations of MSHA directed to the same workplace health and safety problem. 2/ MSHA's goal in this respect is the prevention of accidents with regard to hazardous chemicals in the workplace. This focus is reflected in MSHA's implementing regulations providing that hazardous materials should be stored in a manner that minimizes hazardous materials being accidentally liberated from their containers and directing that hazardous materials be labeled appropriately. 30 C.F.R. §§ 56.16003, 56.16004.

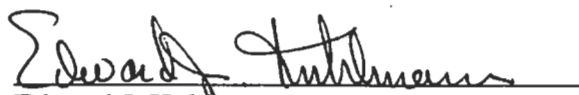
The OSHA regulations, on the other hand, seek from manufacturers, importers and employers detailed information about the hazard presented by chemicals to workers. The material safety data sheets not only assist the workers in the workplace in understanding the specific nature and risk of particular hazardous chemicals in the workplace but also inform doctors and emergency and other health and safety personnel about the make-up of the hazardous chemical in case of employee injury or a threat to the community at large. Respondent does not cite any MSHA regulation which serves a similar function in regulating risks to employee safety and health. OSHA's material safety data sheet does not repeat any requirements of MSHA on the employer and it is complementary with the MSHA rules. It helps both employers and

2/ Some sections of MSHA cited by respondent, while related to safety and the health of workers, are not necessarily directed to a threat to the health and safety of hazardous chemicals but seek, instead, to inform workers about the hazards of fire.

employees to know when to label hazardous chemicals and when to take care in their storage.

Section 4 (b) (1) was not intended to create industry-wide exemptions based on isolated or narrow exercises of statutory authority. Donovan v. Red Star Marine Services, 739 F. 2d 774, 777 (2d Cir. 1984). The word "exercise" as used in § 4 (b) (1) "requires more than isolated regulations peripherally affecting the working condition of employees." *Id.* Finally, the result which the respondent advocates -- that the ubiquitous OSHA regulations in question here should be displaced by the limited MSHA regulations -- is inconsistent with Congress' announced intention that OSHA jurisdiction over safe and healthful working conditions is "expansive." Southern Pacific Transp. Co. v. Utery, 539 F.2d 386, 391 (5th Cir. 1976). Respondent's motion will be denied.

ACCORDINGLY, IT IS ORDERED that the motion to dismiss and/or for accelerated decision in favor of respondent, received October 4, 1993 IS DENIED.


Edward J. Kuhlmann
Administrative Law Judge

September 10, 1996
Washington, D.C.

IN THE MATTER OF MEDUSA CEMENT CO. Respondent
EPCRA-023-93

CERTIFICATE OF SERVICE


I certify that the foregoing Memorandum Opinion and Order, dated Sept 10, 1996, was sent in the following manner to the addressees listed below:

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Dated: Sept. 10, 1996
Washington, DC