APRIL 1, 2019 | PROCESS SAFETY MANAGEMENT (PSM)

OSHRC Dramatically Expands Interpretation of "Interconnected" for PSM-Coverage

By Eric J. Conn and Micah Smith

On March 28, 2019, the OSH Review Commission released its decision in *Sec'y of Labor v. Wynnewood Refining*, OSHRC, Nos. 13-0644 & 13-0791. In a fairly brief opinion, the Commission affirmed the decision of the ALJ on two significant issues:



United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR,
Complainant,
v.
WYNNEWOOD REFINING CO., LLC,
and its successors,
Respondent.

OSHRC Docket Nos. 13-0644 & 13-0791

ON BRIEFS:

Ronald J. Gottlieb, Attorney; Charles F. James, Counsel for Appellate Litigation; Ann Rosenthal, Associate Solicitor of Labor for Occupational Safety and Health; M. Patricia Smith, Solicitor of Labor; U.S. Department of Labor, Washington, DC
For the Complainant

Nicole A. Smith, Esq.; Benjamin E. Stockman, Esq.; Venable LLP, Washington, DC; and New York, NY
For the Respondent

Richard Moskowitz, General Counsel, American Fuel & Petrochemical Manufacturers; Peter Tolsdorf, Senior Counsel, American Petroleum Institute; Eric J. Conn, Esq.; Conn Maciel Carey PLLC, Washington, DC
For Amici Curiae American Fuel & Petrochemical Manufacturers and American Petroleum Institute

DECISION

Before: MacDOUGALL, Chairman; ATTWOOD and SULLIVAN, Commissioners.

BY THE COMMISSION:

The Occupational Safety and Health Administration cited Wynnewood Refining Company, LLC, for—as relevant here—twelve violations of various provisions of OSHA's Process Safety Management standard, 29 C.F.R. § 1910.119. Eleven of these violations involve the "Wid

1. the PSM standard applied to a utilities boiler; and
2. OSHA inappropriately relied upon the citation history of a prior owner in characterizing citations as Repeat.

Expanding PSM Coverage

With regard to PSM applicability, the decision is framed as a response to the arguments raised in the refinery's

brief, but it does not directly address the arguments raised by the amicus brief filed by AFPM and API. The Commission began its discussion of PSM applicability by evaluating the meaning of the definition of "process," in particular how to interpret this phrase:

"For purposes of this definition, any group of vessels which are interconnected and separate vessels which are located such that a highly hazardous chemical (HHC) could be involved in a potential release shall be considered a single process."

The Commission held that, in order to prove a group of vessels qualify as a process, OSHA may prove either that a) the group of vessels are interconnected or b) separate vessels are located such that an HHC could be involved in a potential release. With surprisingly little analysis, the Commission held that this was the plain meaning of the terms of the standard, and the Commission did not evaluate at all whether OSHA's interpretation deserved deference. (Note: Chairwoman MacDougall disagreed that this was the plain meaning of the terms, but she agreed that OSHA's interpretation of the definition deserved deference.)

This decision gave no credence to the arguments made by the refinery and the *amici*, which both urged the Commission to find that interconnected vessels be considered a single process only if there is a reasonable probability that an event such as an explosion would affect the interconnected vessels. Here is a link to our amicus brief prepared on behalf of the American Fuel and Petrochemical Manufacturers and the American Petroleum Institute.



DOCKET NOS. 13-0644 and 13-0791

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OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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UNITED STATES DEPARTMENT OF LABOR,
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WYNNEWOOD REFINING COMPANY, LLC
and Its Successors,
Respondent,

INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 351,
Authorized Employee Representative.

AMICUS BRIEF FOR
AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS,
and
AMERICAN PETROLEUM INSTITUTE
IN SUPPORT OF RESPONDENT

Richard Moskowitz
General Counsel
American Fuel & Petrochemical Manufacturers
1667 K Street, NW, Suite 700
Washington, DC 20006
(202) 457-0480 (phone)

Peter Tolsdorf
Senior Counsel
American Petroleum Institute
1220 L Street NW
Washington, DC 20005
(202) 682-8074 (phone)

Eric J. Conn
Counsel for Amici Curiae
Conn Maciel Carey PLLC
5335 Wisconsin Avenue, NW • Suite 660
Washington, DC 20015
(202) 909-2737 (phone)

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In the face of that compelling legal authority to the contrary, the Commission surprisingly held thatthe boiler was "interconnected" with PSM-covered processes because the boiler was a "vessel" that was interconnected to

other vessels. Specifically, the Commission found that the boiler was a PSM-covered vessel merely because it held water, explaining that the refinery's arguments concerning the absence of HHCs in the boiler's firebox were misplaced. In a statement that seems to clearly contradict OSHA's preamble to the PSM standard, the Commission went on to say that the PSM standard "does not even require that each vessel in an interconnected group contain HHCs at all." Building on this fantastic initial conclusion, the Commission, in only one sentence, concluded that the "interconnection" of the boiler with the FCC and Alkylation units (via a refinery fuel gas line and a steam header) was sufficient to establish PSM applicability to the boiler.

The Commission went on to evaluate the arguments presented on the question of whether the boiler was "co-located" with PSM-covered processes such that PSM coverage extended to the boiler. The refinery argued that, based on OSHA's preamble to the PSM standard, OSHA must prove that there is a reasonable probability that an event such as an explosion would affect nearby vessels that contain HHCs. But the Commission ignored the guidance set forth in the preamble, stating instead that OSHA must prove merely that "a highly hazardous chemical *could be involved* in a potential release." Having effectively lowered OSHA's burden of proof on this point, the Commission then focused not on the circumstances of the incident that occurred but rather on speculative testimony from OSHA's expert that the consequences of the incident could have been much worse. Relying on this speculation, the Commission affirmed the ALJ's finding that OSHA had effectively demonstrated the boiler was PSM-covered on the basis of its location.

We are continuing to analyze this decision and its potential impact on the regulated community, but it seems clear at this point that this decision marks a significant departure from the status quo. Since the PSM standard was promulgated, Industry has reasonably relied on OSHA's guidance in the Preamble to the Final PSM Standard, but the Commission's decision in this case ignores that guidance in favor of the positions that OSHA took in this litigation, dramatically expanding the coverage of the PSM standard. Using the Commission's logic, it is difficult to see what parts of a refinery or complex chemical manufacturing facility would not be deemed covered by the PSM standard given the incredibly broad interpretation of interconnectivity and proximity (with such speculative possibility to affect a nearby covered process).

Narrowing Successorship for Purposes of Repeat Violations

The Commission also concluded that a Repeat characterization was unwarranted for the five items on review, finding the record did not support OSHA's contention that there was sufficient continuity in the safety personnel at the cited entity such that "there was a Commission final order against the same employer for a substantially similar violation." The Commission, in applying the continuity of operations test for Repeat violations, acknowledged that several of the day-to-day managers were in the same positions under both the predecessor owner and the new refinery ower, including the refinery's vice president of refining, safety manager, PSM manager, operations manager, and two supervisors in the area where the Wickes boiler was located. Despite this evidence of operational continuity, the Commission found the following facts tipped the scales against a finding of "substantial continuity":

1. high-level executives of the new owner's current parent company—such as the executive vice president for operations and the vice president of environmental health and safety—took an increased role in day-to-day operations at the refinery and were present frequently to oversee the transition from one company to the other;

2. new management focused on improving safety, health, and the proper implementation of PSM at the refinery;
3. the number of refinery safety personnel was nearly doubled, including four new assistant operations supervisors responsible for occupational safety compliance;
4. $130 million of equipment upgrades were made;
5. more formalized training programs were developed and implemented; and
6. there was a renewed emphasis on management of change procedures, resulting in a safety culture shift at the refinery.

In short, there was not "a Commission final order against the *same employer* for a substantially similar violation."

For more information on this update, please contact Eric J. Conn at econn@connmaciel.com.



For up-to-date knowledge on all things Process Safety and Risk Management related, plan to attend the **2nd Annual Process Safety Summit in Washington, DC** on October 15-16, 2019. Look out for more information about the Summit soon.