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Fire Retardant Clothing Is Not, Per Se, Required to Be Worn by Employees in the Oil and Gas Industry

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On June 6, 2012, a decision much anticipated by the oil and gas industry was rendered (the Decision). The Decision has clarified whether fire/flame retardant/resistant clothing (FRC) is always required to be worn by workers in the oil and gas drilling, production, and well-servicing industries. The answer is, "No, not always."

On October 15, 2010, the Occupational Safety and Health Administration (OSHA) conducted an inspection of a Petro-Hunt, L.L.C. (Petro) production worksite located near Keene, North Dakota and issued a Citation and Notification of Penalty (Citation) to Petro alleging that it violated 29 C.F.R. § 1910.132(a). The Citation was contested and a hearing was held in November 2011.

An Administrative Law Judge (ALJ) based his Decision, in part, on his conclusion that an enforcement memorandum issued by OSHA and relied upon by OSHA in this matter ("the Memo") constituted improper rulemaking on the part of OSHA. In reaching his Decision, the ALJ also considered and relied upon the specific circumstances and facts with regard to the worksite at issue.

First, the ALJ noted the performance-based nature of 29 CFR § 1910.132(a), which gives each employer discretion, within reason, to determine how to properly address a hazard. The ALJ also noted that the regulation is broadly worded to apply to numerous hazardous conditions or circumstances.

The ALJ held that not only does the Memo not have the force and effect of law, it is not even entitled to deference as an interpretation because its interpretation is not reasonable. Specifically with regard to his finding that the Memo does not constitute the law, the ALJ explained:

> … 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 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.

The ALJ determined that OSHA failed to establish that Petro had actual knowledge of, or that a reasonable person in Petro's circumstances would have recognized, a hazard requiring the use of FRC. The ALJ's Decision was based upon numerous factors, including: (1) OSHA's failure to establish that flash fire was a hazard at the facility; (2) Petro's exemplary accident record with regard to injuries caused by fire (none in the last two years at any of Petro's production facilities); (3) Petro's thorough hazard assessment in which it decided (consistent with industry custom and practice) to rely upon numerous engineering and administrative controls; and (4) the "clearly deficient" inspection of the facility by OSHA. Accordingly, the ALJ vacated the Citation.

Assuming the Decision is not overturned on appeal, this is a victory that has been a long time coming for employers in the oil and gas industry. Specifically, this Decision establishes that FRC is not, per se, required to be worn by employees, though employers will need to continue to evaluate the use of it on a case-by-case basis through proper hazard assessments in which they determine what personal protective equipment is necessitated by the particular conditions at issue. It may also prevent OSHA's future use of such enforcement Memos to mandate PPE in other industries and worksites.

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