No. 08-1386

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR,

Complainant,

v.

DELEK REFINING, LTD.,

Respondent.

BRIEF FOR THE SECRETARY OF LABOR

M. PATRICIA SMITH
Solicitor of Labor

JOSEPH M. WOODWARD
Associate Solicitor of Labor for
Occupational Safety and Health

CHARLES F. JAMES
Counsel for Appellate Litigation

SCOTT GLABMAN
Senior Appellate Attorney
U.S. Department of Labor
200 Constitution Ave., N.W.
Washington, D.C. 20210
(202) 693-5493

SEPTEMBER 28, 2011

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES: **Page**

Authorities on which we principally rely are marked with an asterisk.

STATUTES AND REGULATIONS:

Occupational Safety and Health Act Standards,

MISCELLANEOUS:

STATEMENT OF ISSUES

(1) Did Respondent Delek Refining, Ltd. violate the process hazard analysis ("PHA") and compliance audit provisions of the process safety management ("PSM") standard at 29 C.F.R. §§ 1910.119(e)(5) and 1910.119(o)(4) as Serious Citation 1, Items 4 and 12 respectively allege?

(2) Does the mechanical integrity provision of the PSM standard at 29 C.F.R. § 1910.119(j)(4)(i) apply to Delek's positive pressurization unit as Serious Citation 1, Item 8 alleges?

(3) Was Delek's use of a steam lance a covered change requiring updating of process safety information under the management of change provision of the PSM standard at 29 C.F.R. § 1910.119(l)(4) as Serious Citation 1, Item 9(b) alleges?

(4) Did the Secretary establish employee access to the unguarded rotating shafts in violation of the machine-guarding standard at 29 C.F.R. § 1910.219(c)(2)(i) as Serious Citation 1, Item 13 alleges?

(5) Did Delek violate the labeling provision of the hazard communication standard at 29 C.F.R. § 1910.1200(f)(5)(i) as Serious Citation 1, Item 15 alleges?

STATEMENT OF THE CASE

After a series of fires in Delek's Tyler, Texas oil refinery, OSHA inspected the facility and later issued a citation itemizing several serious violations of the PSM standard, 29 C.F.R. § 1910.119, and one violation each of the machine-guarding and hazard communication standards at 29 C.F.R. §§ 1910.219(c)(2)(i) and 1910.1200(f)(5)(i), respectively. The ALJ affirmed seven of these violations, and Delek petitioned for discretionary review of six of them with total penalties of $30,600. ALJ

Dec. 59-60.[1] The Commission directed all six remaining violations for review. Comm'n Briefing Notice at 1.[2]

REGULATORY BACKGROUND

The goal of the PSM standard is to prevent or mitigate accidental releases of highly hazardous chemicals that could lead to a catastrophe in the workplace and the surrounding community. 29 C.F.R. § 1910.119, para. 1, "Purpose," App. C, § 1, para. 2.; DOL, OSHA, 29 C.F.R. Part 1910, *Process Safety Management of Highly Hazardous Chemicals; Explosives and Blasting Agents* ("PSM Preamble"), 57 Fed. Reg. 6,356, 6,358-59, 6,372 (1992). The cited PHA provision, § 1910.119(e)(5), requires that the employer establish a system to resolve PHA findings, resolve these findings promptly, document their resolution and establish a written schedule for remaining corrective actions. The cited compliance audit provision, § 1910.119(o)(4), provides that the employer shall promptly respond appropriately to each audit finding, and document each response and its correction of the deficiencies. The cited mechanical integrity provision, § 1910.119(j)(4)(i), requires inspection and testing of covered process equipment. The management of change provision at § 1910.119(l)(1) & (l)(4) stipulates that the employer shall update its process safety information when it makes changes to, among other things, its process technology, equipment and procedures.

---

[1] Delek did not appeal the ALJ's affirmance of Citation 1, item 6, alleging a serious violation of 29 C.F.R. § 1910.119(f)(3) for failure to ensure that the FCC unit's operating procedures were current, accurate and certified annually. Complaint, Ex. A. The ALJ assessed a penalty of $2,250 for this violation.

[2] Two of these violations, the violations of process hazard analysis and compliance audit provisions of the PSM standard, Citation Items 4 and 12, were consolidated as a single issue, issue (1), in the Commission's Briefing Notice. Comm'n Briefing Notice at 1, # (1).

The machine-guarding standard, 29 C.F.R. § 1910 Subpart O, protects employees from endangering themselves on machines not only through operational necessity but also through their own carelessness, fatigue or inadvertent actions. *Fabricated Metal Prods., Inc.*, 18 BNA OSHC 1072, 1074 (No. 93-1853, 1997); *B.C. Crocker*, 4 BNA OSHC 1775, 1777 (No. 4387, 1976). The shafting provision, § 1910.219(c)(2)(i), requires all exposed parts of horizontal shafting seven feet or less from the floor or a working platform to be completely guarded.

The hazard communication ("HazCom") standard, 29 C.F.R. § 1910.1200, requires all employers to provide information to their employees about the hazardous chemicals to which they are exposed through a hazard communication program, labels and other forms of warning. § 1910.200(b)(1). The purpose of giving workers this information is to allow them to protect themselves quickly and effectively from specific identified hazards and chemicals. DOL, OSHA, 29 C.F.R. Parts 1910, 1915, 1917, 1918, 1926 & 1928, *Hazard Communication* ("1994 HazCom Preamble"), 59 Fed. Reg. 6126, 6126, 6156 (1994). The cited labeling provision, § 1910.1200(f)(5)(i), requires that each container of hazardous chemicals in the workplace have a label, tag or marking identifying the hazardous chemicals inside the container. This provision is designed to give exposed employees an immediate warning of the hazards confronting them and serve as a reminder of more detailed information at other locations in the workplace. OSHA, 29 C.F.R. Part 1910, *Hazard Communication* ("1983 HazCom Preamble"), 48 Fed. Reg. 53,280, 53,301 (1983).[3]

[3] The 1983 HazCom final rule applied only to employers in the manufacturing industries (as well as chemical importers), 1983 HazCom Preamble, 48 Fed. Reg. at 53,280. Nevertheless, the 1983 preamble is applicable here because the labeling provision of that

The HazCom standard allows an employer to use such written materials as signs, placards, process sheets, batch tickets or operating procedures in lieu of labels as long as these written materials identify the applicable containers and convey all the information that labels are required to include. 29 C.F.R. § 1910.1200(f)(5)-(f)(6). The alternative written materials must be readily accessible to employees in their work area throughout each work shift. § 1910.1200(f)(6).

STATEMENT OF FACTS

Delek bought the La Gloria oil refinery in Tyler, Texas from Crown Central on April 29, 2005. ALJ Dec. 2; Hearing Transcript ("Tr.") 1854-55, 2762. Delek's Tyler refinery processes crude oils, and produces flammable refined products such as gasoline, diesel and jet fuels, which Delek sells to wholesale customers. *Refining Segment/ delek* (visited Aug. 2, 2011) <http://www.delekus.com/node/21; Tr. 3040. The Tyler refinery contains at least 10,000 pounds of flammable liquid or gas. Complainant's Exhibit ("C-") 24 at 767. Approximately 90 to 95% of the liquids and gases in the refinery are hydrocarbons, which have the potential for catastrophic release or fire. Tr. 2571. About 270 employees work in the facility. C-2. In the first three years that Delek owned the Tyler refinery, eight to ten fires broke out, many resulting from the unexpected release of hydrocarbons. ALJ Dec. 13-14; Tr. 1608-09. As a result of one of these fires, an employee was hospitalized for radiation burns on his face and eyes when a malfunctioning flare caused a flash fire. ALJ Dec.58-59; Tr. 1250-55. The incident was caused, in part, by a failure to post hazard signs or warnings near the flare warning employees of the dangers of operating it. ALJ Dec. 58-59; Tr. 1254.

---

final rule, the former 29 C.F.R. § 1910.1200(f)(4)(i), 48 Fed. Reg. at 53,343, is virtually identical to the current labeling provision, § 1910.1200(f)(5)(i).

Following these fires, OSHA inspected the Tyler refinery for about four months, starting on February 19, 2008, under the agency's national emphasis program on PSM in refineries. ALJ Dec. 2. The inspection audited Delek's PSM program, reviewed the program's documentation, and inspected various units in the facility, especially the fluid catalytic cracking ("FCC") unit. ALJ Dec. 2-3. The FCC unit applies heat and pressure to break down gas oil into smaller hydrocarbon vapors, which are refined further into gasoline. Tr. 171. As a result of the inspection, OSHA alleged several violations of the PSM standard and one violation each of the machine-guarding and hazard communications standards, 29 C.F.R. §§ 1910.219 & 1910.1200(f)(5).

Six of these cited violations, assessing total penalties of $30,600, remain at issue. Citation 1, Items 4 and 12 allege serious violations of 29 C.F.R. §§ 1910.119(e)(5) and 1910.119(o)(4), respectively, for failure promptly to (1) resolve the refinery's PHA team's findings; and (2) document corrections to a required compliance audit's deficiency findings. Complaint, Ex. A. Item 8 alleges a serious violation of § 1910.119(j)(4)(i) for failure to inspect and test the positive pressurization unit in the Tyler refinery's FCC unit control room. Complaint, Ex. A. Item 9(b) alleges a serious violation of § 1910.119(l)(4) for failure to document and keep a change in PSM information on file when Delek applied a steam lance to cool hot spots on process equipment in the FCC unit. Complaint, Ex. A. Item 13 alleges a serious violation of § 1910.219(c)(2)(i) for failure to guard exposed rotating shafts in the boiler unit. Complaint, Ex. A. Item 15 alleges a serious violation of § 1910.1200(f)(5)(i) for failure to label containers of hazardous chemicals. Complaint, Ex. A.

THE ALJ'S DECISION

The ALJ affirmed all seven violations before him and assessed all of the proposed penalties. Only the six violations that Delek appealed will be discussed here.

The ALJ affirmed citation 1, items 4 and 12, alleging serious violations of 29 C.F.R. §§ 1910.119(e)(5) and 1910.119(o)(4), the PHA and compliance audit provisions of the PSM standard, respectively, and assessed a penalty of $6,300 for each. ALJ Dec. 4-14, 38-45. The ALJ found that Delek violated the PHA provision by not establishing a system for promptly resolving the PHA team's findings for 1994, 1999 and 2004, not resolving these findings in a timely manner, and not documenting their resolution. *Id*. at 4, 10, 59.

The ALJ also found that Delek did not establish the required system for resolution of PHA findings until March 2008, almost three years after buying the Tyler refinery in April 2005, and even then, 16 findings, including five high-priority safety items, were unresolved. *Id*. at 7-10 & n.14, 12 n.16. Three of these high-priority safety items were still unresolved at the time of the hearing, which was held over three weeks between September 1, 2009 and March 4, 2010. ALJ Dec. 1-2, 12 n.16. The ALJ further determined that, with the exercise of reasonable diligence, Delek could have known long before March 2008 that its predecessor Crown Central had not resolved all of the PHA items. *Id*. at 10-11. The ALJ also held that Delek's assertion that it had made much more important safety improvements to the Tyler facility than resolving the PHA findings did not excuse the refiner's violation. *Id*. at 11-12.

The ALJ also found that Delek violated the compliance audit provision by not promptly resolving each finding of the cited audit reports and documenting the

corrections thereto. ALJ Dec. at 43. The ALJ determined that, at the time the violation was discovered, there were ten unresolved findings of Crown Central's 2001 and 2004-05 PSM audit reports on the Tyler refinery. *Id*. at 38-39, 41. The ALJ concluded that since Delek had these reports for three years, the refiner did not exercise reasonable diligence in resolving the audit findings and documenting that deficiencies had been corrected. *Id*. at 42.

The ALJ affirmed citation 1, item 8, alleging a serious violation of 29 C.F.R. § 1910.119(j)(4)(i), the mechanical integrity provision of the PSM standard, and assessed a penalty of $6,300. ALJ Dec. at 19-30. The ALJ found that Delek violated this provision by not testing and inspecting the positive pressurization unit ("PPU") in the Tyler refinery's FCC unit's control room to ensure that the PPU was working properly. ALJ Dec. 22 & n.28. The ALJ also determined that the PPU had not been working properly for many years when OSHA inspected it, and was not repaired until a year after the inspection. *Id*. at 22, 30. The ALJ held that the cited provision applies to the PPU because that unit is process equipment within the meaning of the PSM standard since the unit has monitors, or sensors, and alarms. *Id*. at 25-26.

The ALJ affirmed citation 1, item 9(b), alleging a serious violation of 29 C.F.R. § 1910.119(l)(4), the management of change provision of the PSM standard, and assessed a penalty of $6,300. ALJ Dec. at 30-38. The ALJ found that Delek violated this provision by not documenting and keeping on file a management of change procedure when the refiner used a steam lance to cool hot spots on the regenerator in the FCC unit. *Id*. at 31-32, 36-37. The ALJ also found that the PMS standard applies to the regenerator because the regenerator is connected to the reactor, which is connected to components in the FCC

unit containing at least the standard's threshold quantity of 10,000 pounds of flammable liquid or gas. *Id*. at 32-33. The ALJ further found that Delek's use of the steam lance was a change requiring documentation and filing because the steam lance was used to control the temperature of the regenerator's exterior, a function that the regenerator was designed to do. *Id*. at 34-36. The ALJ also determined that using the steam lance required Delek to update its regenerator process safety information because the procedure reduced the maximum operating temperature for the regenerator's exterior wall from 802º F to a goal of about 600 to 650º F, and potentially affected employees' health and safety. *Id*. at 32, 35-36.

The ALJ affirmed citation 1, item 13, alleging a serious violation of 29 C.F.R. § 1910.219(c)(2)(i), the shafting provision of the machine-guarding standard, and assessed a penalty of $3,150. ALJ Dec. 45-48. The ALJ found that Delek violated this provision by not guarding the exposed rotating shafts of a ceiling air fan and a cooling water electric pump in the main aisle way of the boiler unit of the Tyler refinery. *Id*. at 45-46. The ALJ also found that the unguarded rotating shafts posed a hazard of catching and injuring employees' hands and fingers, including breaking bones. *Id*. at 48. The ALJ further determined that employees working in the boiler unit, including technicians who inspected the cited equipment daily and maintenance workers who had to fix other equipment, had access to this hazard because they walked or worked within a few feet of the unguarded shafts. *Id*. at 46-47.

The ALJ affirmed citation 1, item 15, alleging a serious violation of 29 C.F.R. § 1910.1200(f)(5)(i), the labeling provision of the Hazard communication standard, and assessed a penalty of $2,250. ALJ Dec. 48-59. The ALJ found that Delek violated this

provision by not labeling containers of hazardous chemicals in the FCC and alkylation units of the Tyler refinery. *Id*. at 48-51. The ALJ also found that Delek did not comply with the alternative method of identifying containers set out in § 1910.1200(f)(6) because Delek's alternative materials are not readily accessible and do not always contain the required information about the vessel contents and the hazardous chemicals. *Id*. at 51-56. The ALJ noted that Delek's alternative procedures, which require employees to retrieve information from different documents in different areas of the refinery, would be particularly noncompliant in an emergency where employees would be unable to access required information quickly and easily. *Id*. at 56.

ARGUMENT

I. *The ALJ Correctly Found That Delek Violated the PHA and Compliance Audit Provisions*.

The PHA violation: Section 1910.119(e) of the PSM standard requires that a process hazard analysis be conducted by a team with expertise in engineering and process operations. Subsection (e) (5) of this section states, in relevant part: "The employer shall establish a system to promptly address the team's findings and recommendations; assure that the recommendations are resolved in a timely manner[;] . . . and] complete actions as soon as possible . . . ." 29 C.F.R 1910.119(e)(5). The ALJ found that Delek violated section 1910.119(e)(5) by not establishing a system for promptly resolving the Crown PHA team's findings for 1994, 1999 and 2004, not resolving these PHA findings in a timely manner, and not documenting their resolution. ALJ Dec. 4, 10, 59. The record confirms the ALJ's finding. Delek did not develop a system for resolving PHA findings and documenting their resolution until March 11, 2008, nearly three years after buying the Tyler refinery in April 2005, when Dewana Tarpley, Delek's PSM coordinator,

submitted a PHA tracker to OSHA. Tr. 131-40, 1854; C-19. Even in March 2008, 16 PHA findings, including five high-priority safety items, remained unresolved, and three of these items were still open at the time of the hearing, one-and-a-half-to-two years later. C-19, items 3-5, 8, 13, 25, 37, 39, 42, 59, 67, 69, 78, 87, 90, 93; Tr. 145-55; ALJ Dec. 1-2, 7-10 & n.14, 12 n.16.

The compliance audit violation: Section 1910.119(o) of the standard requires that the employer certify that it has "evaluated compliance with the provisions of this section at least every three years to verify that the procedures and practices developed under the standard are adequate and are being followed." Subsection (o)(4) states: "The employer shall promptly determine and document an appropriate response to each of the findings of the compliance audit, and document that deficiencies have been corrected." 29 C.F.R. 1910.119(o)(4). The ALJ found that Delek violated the compliance audit provision by not promptly resolving each of the findings of two audit reports and documenting the corrections thereto. ALJ Dec. at 43. At the time the violation was discovered, Delek had not determined and documented an appropriate response to ten of the findings of Crown Central's 2001 and 2004-05 PSM reports on the Tyler refinery despite having had these reports in its possession in hard copy and in electronic format for almost three years. C-37 - C-39; Respondent's Exhibit R-R, items 4, 6, 7, 10, 36, 38, 43, 45-49; Tr. 1832, 2835-38, 2905-09; ALJ Dec. at 38-41.[4]

Delek does not dispute that it had no system in place to address the outstanding PHA findings until March 11, 2000, and that it did nothing to determine and document a

[4] The ALJ determined that items 4 and 7, and items 47 and 48, each constituted one finding and one correction, reducing the number of items listed above from 12 to 10. ALJ Dec. 41.

response to the relevant audit findings. Delek argues, instead, that it had no obligation to address these findings because the PHA and compliance audits were performed by a different employer, Crown. Delek Opening Brief ("Delek Op. Br.") 5-7. Delek claims that it was not so obligated because "the standard requires 'the employer' – i.e., the employer who conducted the PHAs and audits to establish a system to address the PHA team's recommendations and determine and document a response for each of the audit findings." Delek Op. Br. 7.

But, of course, the PSM standard does not say that "the employer" responsible for addressing PHA and audit findings must be the same employer who conducted the PHA and audit, and to accept that interpretation would lead to absurd results. An employer could hire a contractor to perform the PHA and audit and then claim no responsibility for responding to the findings made by this different employer. Delek was plainly the relevant "employer" under section 1910.119(e)(5) and section 1910.119(o)(4) at the time it took over ownership and operation of the facility, since Delek controlled the processes addressed by the PHAs and the "procedures and practices" addressed by the audits, and its employees were endangered by the process hazards documented in the PHA findings and the deficiencies identified in the audits.[5]

[5] The standard provides for intitial PHAs to be conducted by May 26, 1997 and for follow-up PHAs to be conducted at five-year intervals thereafter to ensure that the analysis is consistent with current processes. Thus, initial PHAs do not "belong uniquely to the employer who conducted the PHA," Delek Op. Br. 7, but remain relevant throughout successive changes in ownership of covered facilities so long as the processes and hazards do not change. Similarly, Crown's compliance audits were not "unique" to it as an employer; rather, they were relevant to the procedures and practices developed under the standard. Finally, Delek asserts that it might have rejected the Crown PHA team's findings, or made different findings, or conducted a new PHA. *Id*. at 7. But Delek did none of these things, and it is Delek's failure to address the PHA findings in any way for almost three years that is the gravamen of the violation here.

Contrary to Delek's claim, the ALJ did not effectively hold that an employer who purchases a facility must "immediately" discover and remedy the prior owner's shortcomings. Delek Op. Br. 6. The ALJ found Delek violated the PHA and audit provisions by failing to exercise reasonable diligence to resolve the outstanding findings promptly. ALJ Dec. 10, 42. Nor did the ALJ err, as Delek argues, by denying Delek discretion to prioritize safety hazards and determine the manner in which to achieve compliance. Delek Op. Br. 8. This argument suggests that Delek weighed the safety benefits of compliance and concluded that other safety measures should take precedence. In fact, Delek did not even look at the PHAs for nearly three years and therefore could not have made any judgment about the benefits of compliance. ALJ Dec. 11, Delek Op. Br. 11 (asserting that Delek had no reason to doubt Crown's representations that all PHA and audit findings had been addressed and therefore "had no reason to look into the matter"). In any event, Delek was required to act with reasonable promptness to address the outstanding PHA and audit findings and it may not excuse its failure to comply by arguing that other projects were more important. ALJ Dec. 12. The OSH Act does not give an employer discretion to substitute its own judgment for the requirements of a standard. *Fluor Daniel v. OSH Rev. Comm'n*, 295 F.3d 1232, 1240 (11th Cir. 2002); *Valdak Corp. v. OSHRC*, 73 F.3d 1466, 1469 (8th Cir. 1996).

Delek next claims that the ALJ did not make the necessary fact findings to support liability under the "successor liability" doctrine. Delek Op. Br. 6, 9-10. The successor liability doctrine, however, has no application here since liability is predicated entirely upon *Delek's* failure to establish a system to address PHA and audit findings concerning processes, procedures and practices which *Delek* controlled, and which

affected the safety of *Delek*'s employees. As explained above, Delek was subject to the standard's requirements when it assumed ownership and control over the facility and its processes. Whether Delek was, as a legal matter, Crown's successor is irrelevant, and the ALJ did not purport to rest his decision on that ground.[6]

Finally, Delek contends that it did not know, and could not reasonably have known, that any PHA or audit findings remained open because Crown orally assured it that all of these findings had been resolved. Delek Op. Br. 10-11. The record shows, however, that Delek did not exercise reasonable diligence in determining whether the cited PHA and audit findings had been resolved. Frank Simmons, Delek's refinery manager, testified that, after Delek bought the refinery but before it hired Ms. Tarpley, the refiner knew that there were outstanding PHA items but did nothing to verify whether these findings were addressed. Tr. 2272-73. Donald Whaley, Delek's environmental health and safety manager, testified that he never requested documentation from Crown that it had addressed its PHA findings. Tr. 1833-37.

Delek also did nothing to determine and document appropriate responses to the cited audit reports even though it had these reports in its possession in hard copy and in electronic format for almost three years, from the time it bought the facility until the date of the OSHA inspection. Tr. 1832, 2835-38. Indeed, Delek did not even have a PSM coordinator for the Tyler refinery until it hired Ms. Tarpley in December 2007, over two-and-a-half years after it bought the facility. Tr. 755.

---

[6] Cases such as *Sharon & Walter Constr., Inc.*, 23 BNA OSHC 1286, 1294-96 (No. 00-1402, 2010), in which the Commission applied the successor doctrine to determine whether the citation history of a corporate employer could be attributed to a related, but legally distinct corporation, are wholly inapposite here.

Thus, Delek did not exercise reasonable diligence in failing to inquire for almost three years whether the previous PHA and audit findings had been resolved, and therefore had constructive knowledge of the violations. *N & N Contractors, Inc. v. OSHRC*, 255 F.2d 122, 127 (4th Cir. 2001) (failure to use reasonable diligence to discern the presence of a violative condition constitutes constructive knowledge of it); *Getty Oil Co. v. OSHRC*, 530 F.2d 1143. 1146 (5th Cir. 1976) (reasonable diligence includes the simple expediency of making an inquiry).

II. *The ALJ Correctly Found That the Mechanical Integrity Provision Applies to the PPU.*

The ALJ found that Delek violated section 1910.119(j)(4) by failing to perform inspections and tests on the PPU. The mechanical integrity provision at 29 § 1910.119(j)(1) specifies that section 1910.119(j)(4) applies "to the following process equipment: (i) Pressure vessels and storage tanks; (ii) Piping systems (including piping components such as valves); (iii) Relief and vent systems and devices; (iv) Emergency shutdown systems; (v) *Controls* (including monitoring devices and sensors, alarms, and interlocks) and, (vi) Pumps." 29 C.F.R. § 1910.119(j)(1) (emphasis added). The PSM standard defines "process" as follows:

> *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.

29 C.F.R. § 1910.119(b) (emphasis added). As shown below, the ALJ's finding that that the PPU is covered process equipment under the PSM standard is correct because the

PPU is part of the fluid catalytic cracking process and constitutes a "control" within the meaning of section 1910.119(j)(4)(v).

1. *The PPU is part of a process*

Fluid catalytic cracking is a process subject to the PSM standard in which crude oil is converted into usable fuels, such as gasoline. Delek Op. Br. 13; Tr. 171. The process is run from a control room which contains electrical equipment manned continuously by Delek employees called operators. Tr. 169-70, 434-36, 442-43, 1347-50; ALJ Dec. 23, 28-29. The Positive Pressure Unit ("PPU") is designed to pressurize the atmosphere within the control room so that if a release of hydrocarbon vapors occurs, flammable vapors will not be able to contact unclassified electrical equipment that could spark an explosion. C-51 (Delek's Mechanical Integrity Manual) at 750; Tr. 404, 895-97, 1239-40, 1359; ALJ Dec. at 28-29. The PPU contains sensors, monitors and alarms which detect the presence of flamable gas and shut down the unit when the gas concentration reaches a specific limit. ALJ Dec. 19-20. The pressurized air inside the control room presses against the air outside and pushes it back. Tr. 404-05.

The PPU is *process* equipment because its action in forming a pressure barrier directly blocking the influx of flammable hydrocarbon vapors into the control room is an "activity involving a highly hazardous chemical, including *any use* . . . [or] *handling*" of the chemical. (emphasis added). The Secretary's construction fits comfortably within the natural and ordinary meaning of the phrase "any use or handling" and plainly serves the standard's express purpose of "minimizing the consequences of catastrophic releases of. . . flammable or explosive chemicals." 29 C.F.R. § 1910.119, para. 1, "Purpose," App. C, § 1, para. 2.; PSM Preamble, 57 Fed. Reg. at 6,358-59, 6,372.

Delek and its *amici* insist that the PPU cannot be part of a process because it does not "contain" a highly hazardous chemical. Delek Br. 14; Amicus Br. 5. The word "contain," however, does not appear in the definition of "process" in the standard. Nor would covered process equipment such as alarms, 29 C.F.R. § 1910.119(j)(v), necessarily contain a highly hazardous chemical. The interpretive issue under the definition is whether the operation of the PPU can reasonably be considered to involve the use or handling of a highly hazardous chemical. That the PPU "handles" flammable hydrocarbon vapors by keeping them away from unclassified electrical equipment is self evident.[7]

Delek also claims that the Secretary's construction here is contrary to OSHA's prior published interpretations. Delek Op. Br. 15-17. Delek first asserts that interpreting process equipment to include equipment that does not contain a highly hazardous chemical is contrary to a 2008 letter from Richard Fairfax to Howard Feldman. Delek Op. Br. 15-16. Delek makes this assertion despite the fact that the letter expressly states that OSHA considers equipment, such as utility systems, to be part of a process "whether they contain HHC or not" if they are "important for the prevention and mitigation of catastrophic releases of HHC due to their direct involvement in the overall functioning of the process." Letter from Richard Fairfax, Director, Directorate of Enforcement Programs, OSHA, to Howard Feldman, American Petroleum Institute (Jan. 31, 2008, C-

[7] Equipment such as vessels and pipes containing a highly hazardous chemical are process equipment under the standard. Amicus Br. 5. The definition of "process," however, includes more than the storage or on-site movement of such chemicals.

57 at 3.[8] The letter in no way supports the notion that process equipment is limited only to equipment that contains a hazardous chemical; it says exactly the opposite.

Delek also cites a 1994 interpretive letter that states that an employer is required to determine the extent of the process used to manufacture an explosive device and include equipment "*which may or may not contact the explosive or explosive device components during the manufacturing activity*." Delek Op. Br. 16. Letter from H. Berrien Zettler, Deputy Director, Directorate of Compliance Programs, OSHA to Sam Mannan, Jones and Neuse, Inc. (May 25, 1994), C-56, 1st Letter at 1 (emphasis added). This letter, like the one in 2008, shows that OSHA has consistently interpreted the definition of process to extend beyond mere containment of highly hazardous chemicals.[9]

---

[8] Delek points to other language in the letter that states "it is OSHA's position that if an employer determines that a utility system or any aspect or part of a process which does not contain an HHC but can affect or cause a release of HHC or interfere in the mitigation of the consequences of a release, then relevant elements of PSM could apply to these aspects." Delek Op. Br. 16. Delek asserts that this statement means that employers must affirmatively decide that equipment is part of a process before it is covered. *Id*. The Secretary does not agree that coverage is so limited, but in any event, the ALJ found that Delek did in fact conclude that the PPU was critical to effective handling of highly hazardous chemicals in the event of a catastrophic release, and the evidence overwhelmingly supports that conclusion. ALJ Dec. 23, 25-26; Tr. 1239-40, 1354-56, 2359-60, 3067-68.

[9] Delek claims that the Secretary's construction vastly expands the scope of the standard by making anything that blows against hazardous vapors in a threshold quantity, including the wind, part of a process. Delek Br. 15. The Secretary's interpretation of "process," however, does not apply to random activities or forces of nature, such as the wind, but to the employer's purposeful activities involving, using, or handling hazardous chemicals, or preventing their potential release. 29 C.F.R. § 1910.119(b) (definition of "process"). The Secretary's interpretation is neither "novel" nor "strained," but simply tracks the language of the definition.

2. *The PPU is a "control" requiring inspection and testing*

Section 1910.119(j)(4) requires inspection and testing of the types of process equipment listed in section 1910.119(j)(1) (i)–(vi). One type of covered process equipment is "[c]ontrols (including monitoring devices and sensors, alarms and interlocks)." 29 C.F.R.1910.119(j)(1)(v). The PPU is a "control" in the ordinary sense of the word; it regulates the atmosphere within the FCC control room by preventing the influx of flammable hydrocarbon vapors. ALJ Dec. 23. *See* Webster's Third New International Dictionary 496 (1961 ed.).[10] Moreover, the PPU contains equipment such as "monitoring devices [,] sensors [and] alarms," listed as examples of controls in the standard. 29 C.F.R. § 1910.119(j)(1)(v). The Secretary's interpretation that the PPU *is* a control because it functions as a control in preventing the influx of highly hazardous chemicals into the control room and incorporates various types of control devices is entitled to deference because it is reasonable and consistent with the language and purpose of the standard. *Martin v. Occupational Safety & Health Review Comm'n* ("*CF & I* "), 499 U.S. 144, 150-51 (1991).

Delek argues that the PPU is not a control because its expert, John Reynolds, expressly testified to this effect. Delek Op. Br. 17. The ALJ, however, addressed Reynolds testimony and found it contrary to the standard and "unpersuasive." ALJ Dec. 27.

Neither Delek nor its *amici* make any coherent argument that the PPU cannot be considered a control within the meaning of the standard. Rather Delek claims that

[10] The dictionary defines the word control in part to mean the exercise of power or authority over something. "To exercise restraining or directing influence over: REGULATE, CURB." *Id.*

acceptance of the Secretary's construction would mean that light switches, alarm clocks, coffee-makers and other similar control devices would automatically be considered "process equipment." Delek Op. Br. 18. But this claim obviously conflates what are two distinct interpretive questions: whether the PPU is *process* equipment and whether the PPU is a control. As discussed in Part 1 of this argument section, the PPU is process equipment because, unlike alarm clocks and coffee-makers, the PPU is directly involved in the use and handling of a highly hazardous chemical in the event of a catastrophic release. Whether the PPU is also a control, and therefore subject to the inspection and testing requirement in 1910.119(j)(4), is a separate question addressed in Part 2 above, which Delek and *amici* largely ignore.

III. *The ALJ Correctly Found That Delek's Use of a Steam Lance Was a Covered Change Requiring Updating of Process Safety Information Under The Management of Change Provision.*

The management of change provision at 29 § 1910.119(l)(1) & (l)(4) stipulates that the employer shall update its process safety information ("PSI") when it makes changes to, among other things, the technology, equipment and procedures of its process. The PSI provision at § 1910.119(d)(2)-(3), in turn, requires the employer to compile written PSI on, inter alia, process technology and equipment, including safe upper and lower temperature limits, the safety and health consequences of deviations from process technology, and relief system design. As shown below, the ALJ correctly found that Delek's use of the steam lance was a covered change under § 1910.119(l) because the steam lance was used to control the temperature of the regenerator's exterior, a function that the regenerator was designed to do. ALJ Dec. at 34-36. The ALJ further correctly determined that using the steam lance required Delek to update its regenerator PSI

because the procedure reduced the maximum operating temperature for the regenerator's exterior wall from 802º F to a goal of about 600 to 650º F, and potentially affected employees' health and safety. *Id*. at 32, 35-36.

The steam lance was a six-to-eight-foot pipe connected to a steam hose that Delek used to cool hot spots on the regenerator in the FCC unit. ALJ Dec. 31-32, 36-37. The hot spots raised the temperature of the exterior wall of the regenerator from 350º to 850º F. *Id*. at 34 n.34. The use of the steam lance resulted in changes to process technology, equipment and procedures within the meaning of the standard. First, since the regenerator was not designed to be operated with a hot spot, or with steam being continually applied to its exterior, more frequent inspections were necessary. Tr. 185-86, 330, 2151-52, 2329. Before the hot spot was discovered, the regenerator was inspected quarterly. Tr. 2151-52. After the discovery, the inspections were much more frequent. *Id*. Second, the method of controlling the temperature of the outside of the refractory was changed. Before the steam lance was used, Delek relied on the insulation on the inside of the refractory to maintain an acceptable temperature on the exterior wall. Tr. 187, 2750-51. When applying the steam lance, however, Delek used steam and the boilers to control the temperature. Tr. 187, 2750-51. Third, the hot spot caused the metal exterior wall to change color and could, over time, make the regenerator unsafe to run. ALJ Dec. 34; Tr. 423, 1439-41, 2756-57.

Delek's use of the steam lance was a change requiring the regenerator PSI to be updated. In the first place, because Delek's PSI for the regenerator does not specify that steam may be used to cool its exterior shell, Delek should have changed its design specifications to note this change in the cooling method, but did not do so. 29 C.F.R. §

1910.119(d)(3)(i)(D) (equipment PSI includes relief system design and design basis); Tr. 2748, 2756. Next, Delek's PSI for the technology of the process should have been updated to reflect the change in the maximum operating temperature of the regenerator from 802º F to a goal of about 600 to 650º F, but Delek did not change its PSI. § 1910.119(d)(2)(i)(D) (technology PSI includes safe upper and lower temperature limits); Tr. 2747. Finally, Delek was required to evaluate and document the safety and health consequences of these deviations from the temperature norms for the refractory, but instead just assumed that the temperature of the exterior would not exceed 900º F or pose a hazard. § 1910.119(d)(2)(i)(E) (technology PSI includes evaluation of the safety and health consequences of deviations); ALJ Dec. 35-36; Tr. 2331-32, 2736.

On appeal, Delek and its *amici* contend that the use of the steam lance was not a change in process but a routine maintenance activity that does not affect the technology, equipment or procedures of the refractory process. Delek Br. 22-25; *Amicus* Br. 5-6. Delek's *amici* complain that, under the ALJ's decision, "[e]ven routine safe maintenance actions such as applying steam, tightening a seal or bolt, repairing missing insulation, or painting a piece of equipment may require the generation of a MOC [management of change] . . . ." *Amicus* Br. 6. Delek and its *amici* both assert that the decision will vastly expand the definition of a covered change and require employers to spend an inordinate amount of time and resources performing MOCs on routine maintenance activities. Delek Br. 25; *Amicus* Br. 6. Delek further objects that the cited MOC provision, 29 § 1910.119(l)(4), is inapplicable because it presupposes a change in PSI before that information can be updated, and Delek never changed its PSI here. Delek Br. at 25-26. As demonstrated below, however, these objections have no merit.

Unlike the routine maintenance activities that the *amici* cite, Delek's use of the steam lance involved a change in the refractory's cooling method and operating temperature that potentially affected the safety and health of employees. The ALJ found that, with the hot spot, the refractory's exterior wall reached a much higher temperature than usual. ALJ Dec. at 34-36. He also noted the testimony of Delek's expert witness, John Arendt, that if a high enough temperature was maintained for a sufficient period, the refractory could degrade and fail and release flammable hydrocarbons and a 1000º F catalyst.[11] ALJ Dec. 35-36; Tr. 2756-58. Thus, the ALJ properly concluded that Delek's use of the steam lance was a covered change that required updating of Delek's refractory PSI. ALJ Dec. at 36.

Finally, Delek's argues that the MOC provision is inapplicable because even if the use of the steam lance was a covered change to process technology, equipment or procedures, Delek never changed its PSI so there was nothing to "update." Delek Op. Br. 25-26. The updating required by section 1910.119 (l)(4), however, is changing the existing PSI to add safety information pertaining to the covered change in process technology, equipment or procedures. The necessary change is effected by the update, not a precondition of the update. Thus, the MOC provision applies here.

[11] Both the PSI and MOC provisions were designed to assess process hazards. In its preamble discussion of the PSI provision, OSHA explained that "[t]he compilation of information concerning process chemicals, technology and equipment provides the foundation for identifying and understanding the hazards involved in a process . . . ." PSM Preamble, 57 Fed. Reg. 6,356, 6,374 (1992). Similarly, the agency noted that many of the industrial incidents that it reviewed resulted from changes in process and concluded that any contemplated changes to a process must be thoroughly evaluated to assess the potential impact on the safety and health of employees. *Id*.

IV. *The ALJ Correctly Found Employee Access to Unguarded Rotating Shafts in Violation of the Shafting Provision of the Machine-Guarding Standard.*

The machine-guarding standard at § 1910.219(c)(2)(i), requires all exposed parts of horizontal shafts seven feet or less from the floor or a working platform to be completely guarded. The ALJ found, and Delek does not dispute, that the refiner did not guard the exposed rotating shafts of a ceiling air fan and a cooling water electric pump in the main aisle way of the boiler unit of the Tyler facility. ALJ Dec. at 45-46. As shown below, the ALJ also correctly determined that employees working in the boiler unit, including technicians who inspected the cited equipment daily and maintenance workers who had to fix other equipment, had access to the unguarded shafts because the employees walked or worked within a few feet of them. *Id*. at 46-47.[12]

The record demonstrates that employees could and did come within close proximity to the unguarded shafts. Employee Gaddis testified that he could get close enough to touch the back of the motor of the water pump and the back of the fan. Tr. 191-98 (especially 195-98). OSHA's assistant area director ("AAD") also testified that, during the inspection, Delek operator Payne came close enough to touch the water pump and the fan. Tr. 364-67. The AAD further testified that Delek had operations technicians in the boiler unit, near the unguarded shafts, daily to inspect these units and correct deficiencies; at least two employees a shift and two shifts a day. Tr. 368-69, 2427-28. He also testified that someone passing by either machine could accidentally trip and fall

[12] Under well-established Commission case law, the Secretary may establish employee exposure to the violative condition without proof of actual exposure by showing employee access to the zone of danger based on "reasonable predictability." *Phoenix Roofing*, 17 BNA OSHC 1076, 1079 n.6 (No. 90-2148, 1995); *Gilles & Cotting, Inc.*, 3 BNA OSHC 2002, 2003 (No. 504, 1976). "Reasonable predictability" is discussed below, *see infra*, p. 24.

onto a rotating shaft. Tr. 368. The AAD further noted that, in addition to the technicians, other Delek employees in the boiler unit are supposed to walk by the pump when doing their rounds, carrying tools which could hamper their ability to stop a fall into the unguarded equipment. Tr. 2436, 2438. The AAD's inspection notes also say that the unguarded shafts were within a hand's reach of employees walking or working around them. C-40 at 1.

Delek claims that the ALJ ignored or misapplied Commission case law on what constitutes employee exposure to a violative condition. Delek 27-29. Specifically, Delek alleges that, according to Commission precedent, employee exposure cannot be established where employees are not "assigned to come into contact with unguarded machinery" and there is enough room to walk around it. Delek Br. at 28. Delek also claims that Delek employees are never assigned to work at or near the fan or pump and are never closer to them than about five feet. *Id*. at 29. Delek further asserts that it was not reasonably predictable that an employee would fall onto a shaft at that distance, and that Delek was not required to anticipate such an occurrence. *Id*.

Delek's contentions are not well founded. The Commission's long-established test for employee access is broader than Delek allows and asks whether it is reasonably predictable "that employees either while in the course of their assigned working duties, their personal comfort activities, or their normal means of ingress-egress to their assigned workplaces, will be, are, or have been in a zone of danger." *Fabricated Metal Prods., Inc.*, 18 BNA OSHC 1072, 1074 (No. 93-1853, 1997); *Phoenix Roofing*, 17 BNA OSHC 1076, 1079 n.6 (No. 90-2148, 1995); *Gilles & Cotting, Inc.*, 3 BNA OSHC 2002, 2003 (No. 504, 1976). So, contrary to Delek's contention, the ALJ did not misapply the law,

but correctly considered whether employees in the boiler room would be, were, or had ever been close to the unguarded shafts.

Furthermore, there was evidence that employees did not always stay at least five feet away from the unguarded shafts, but sometimes came close enough to touch them. Tr. 191-98 (especially 195-98), 364-67; C-40 at 1. The employees' proximity to the shafts and the photographs of the fan and the pump, C-41(a)-(e), also support the ALJ's finding that the shafts posed a hand and finger hazard, ALJ Dec. 46-47. Thus, Delek's objections to the ALJ's finding lack a sound basis in either fact or law.

V. *The ALJ Correctly Found That Delek Violated the Labeling Provision of the Hazard Communication Standard.*

The labeling provision of the hazard communication ("HazCom") standard, § 1910.1200(f)(5)(i), requires that each container of hazardous chemicals in the workplace have a label, tag or marking, identifying the hazardous chemicals inside the container. The purpose of the labels is to give exposed employees an immediate warning of the hazards confronting them and remind them of more detailed information at other locations in the workplace. OSHA, 29 C.F.R. Part 1910, *Hazard Communication* ("1983 HazCom Preamble"), 48 Fed. Reg. 53,280, 53,301 (1983). Specifically, the labels must allow employees to correlate the applicable hazardous chemical in the container with specific information about its hazards, either on the basis of the labels alone or in conjunction with other immediately available information. § 1910.1200(f)(5)(i)-(ii).

As an alternative to labels, the standard allows the use of such written materials as signs, placards, process sheets, batch tickets or operating procedures as long as these written materials identify the applicable containers and convey all the information required to be on a label, including the information necessary to correlate the chemical

with its hazards. 29 C.F.R. § 1910.1200(f)(6). The alternative written materials must be readily accessible to employees in their work area throughout each work shift. § 1910.1200(f)(6). The key to evaluating the effectiveness of any such alternative labeling method is to determine whether employees can correlate the visual warning on the in-plant container (or the alternative written materials) with the applicable chemical and its appropriate hazard warnings. OSHA Instruction, CPL 2-2.38D (Mar. 20, 1998), App. A, "Labels and Other Forms of Warning, Paragraph (f)," (f)(5), para. 4. An employer who uses alternative written materials has the burden of proving that employee awareness of required information equals or exceeds what would have been achieved by using labels. 1994 HazCom Preamble, 59 Fed. Reg. 6126, 6156 (1994).

The ALJ found, and Delek does not dispute, that Delek did not label containers of hazardous chemicals in the FCC and alkylation units of the Tyler refinery. *Id*. at 48-51. As shown below, the ALJ also correctly found that Delek did not comply with the alternative method of identifying containers set out in § 1910.1200(f)(6) because Delek's alternative materials are not readily accessible and do not always contain the information required to correlate the hazardous chemicals in a vessel with their hazards. *Id*. at 51-56. The ALJ noted that Delek's alternative procedures, which require employees to retrieve information from different documents in different areas of the refinery, would be particularly noncompliant in an emergency where employees would be unable to access required information quickly and easily. *Id*. at 56.

Delek attempts to communicate hazard information to its employees under the alternative method of 29 C.F.R. § 1910.1200(f)(6) by providing, among other things, diagrams, training, operating procedures and material safety data sheets. Delek Br. 30-

31; *Amicus* Br. 7. The ALJ correctly found, however, that these materials were too incomplete and too scattered to meet the requirements of paragraph (f)(6). ALJ Dec. 53-56. The record fully supports his finding.

First, Delek's diagrams do not always show the chemicals in a line or a vessel, and contain no information about their hazards. Tr. 2205, 2314, 2535; R-U, R-V, R-W. Furthermore, the drawings that Delek uses to train new employees in the FCC unit do not contain hazard information about the chemicals there. Tr. 2535. Moreover, Delek's operating procedures do not say where particular chemicals are located in a unit, do not always define the chemicals or state their hazards, and are too long to enable employees to readily ascertain what chemicals are in a particular vessel and what the hazards of the chemical are. Tr. 2318; Joint Exhibit ("JX-") X at 12,948-62, 12,963-78. In addition, two of the cited vessels are not even listed in the operating procedures' table of contents. ALJ Dec. 54 & n.56; JX-X. Similarly, Delek's material safety data sheets do not specify the unit or the vessel where the subject chemicals can be found, do not list some chemicals by their popular names, and are contained in notebooks that are four inches thick, making it difficult to locate critical information readily. Tr. 203-04, 2314-17, 2534. On the basis of these facts, the ALJ correctly found that Delek did not comply with the alternative method provision because the refiner's hazard information was too scattered and incomplete to enable an employee readily to identify the hazardous chemicals in a vessel or correlate these chemicals with their hazards. ALJ Dec. at 53-56.

On appeal, Delek and its *amici* argue that the ALJ's finding is contrary to the plain meaning and purpose of the alternative method provision, conflicts with another ALJ's decision, deprives Delek of fair notice, and will create confusion in the regulated

community. Delek Br. 31-34; *Amicus* Br. 7. As shown below, these arguments have no merit.

Delek and its *amici* claim that the ALJ's finding is contrary to the plain meaning of the alternative method provision because the ALJ found that all required hazard information must be immediately accessible to employees in a single document in a single location whereas the provision allows employers to use multiple documents and information sources and requires only ready accessibility. Delek Br. 31-33; *Amicus* Br. 7. Delek and its *amici*, however, mischaracterize both the ALJ's finding and the provision. Neither the ALJ's finding nor paragraph (f)(6) requires that employers must provide all required hazard information in one document in a single location. Instead, the ALJ correctly held that the standard requires that information identifying a vessel's hazardous chemicals and describing the specific hazards of those chemicals be readily accessible. ALJ Dec. 56. The standard, in turn, provides that an employer can provide general hazard information about a chemical on a label as long as specific hazard information about that chemical is immediately available elsewhere. 29 C.F.R. § 1910.1200(f)(5)(ii); *see also* 1983 HazCom Preamble, 48 Fed. Reg. at 53,301 (purpose of the labels is to give employees an immediate warning of the hazards confronting them and remind them of more detailed information at other locations).

Since the alternative method provision, paragraph (f)(6), stipulates that alternative written materials must identify applicable containers and provide all the information required by paragraph (f)(5) to be on a label, the alternative written materials can provide general hazard information about a chemical as long as more specific hazard information about that chemical is immediately available. 29 C.F.R. §§ 1910.1200(f)(5)(ii);

1910.1200(f)(6).[13] Thus, Delek could have identified a container's hazardous chemicals and provided general information about their hazards on a batch ticket, and provided more specific hazard information in material safety data sheets in a different location as long as all required materials were immediately available to employees in their work area throughout each work shift. §§ 1910.1200(f)(5)(ii); 1910.1200(f)(6). Since Delek failed to provide either all the required information or immediate access, the ALJ correctly found that the refiner did not comply with the alternative methods provision.

Delek also contends that the ALJ's finding negates the purpose of the alternative methods provision, which is to allow employers broad latitude in complying with the labeling provision. Delek Br. at 33-34. Delek further asserts that if its alternative method is noncompliant, it would be difficult to imagine a method that would comply. *Id*. at 33. Delek's claims, however, are unfounded. Although the standard does grant employers wide discretion in complying with the labeling provision, that discretion is not unlimited, and employers must comply with the provision's basic requirements, which are to identify the chemicals in a container and give employees an immediate warning of the corresponding hazards. Delek's alternative method does not achieve this goal because it does not provide adequate identification, hazard information or warnings, and does not give employees sufficiently quick access to critical information.

Delek's remaining objections are without merit. The conflict that Delek alleges between the ALJ's finding and another ALJ decision, *Fina Oil & Chemical Co.*, No. 86-

[13] Paragraph (f)(6) says that alternative written materials shall be "readily accessible." In light of the labeling provision's purpose of giving employees an immediate warning of the hazards of the applicable chemicals and paragraph (f)(5)(ii)'s requirement that specific hazard information be immediately available elsewhere if not on the label, it is reasonable to construe "readily accessible" in paragraph (f)(6) as meaning "immediately accessible."

0904 1987 WL 89097(OSHRC, Feb. 3, 1987), is legally insignificant because the earlier decision was unreviewed and does not bind the Commission. *Smoot Constr.*, 21 BNA OSHC 1555, 1556 n.1 (No. 05-0652, 2006).

Delek's fair notice objection is also unwarranted. Contrary to Delek's assertion, the ALJ's decision is consistent with OSHA's interpretations of the alternative methods provision since the standard was promulgated. The purpose of the standard is to give workers hazard information so that they can protect themselves quickly and effectively from specific identified hazards and chemicals. 1994 HazCom Preamble, 59 Fed. Reg. at 6126, 6156. The alternative method provision, paragraph (f)(6), requires the alternative written materials to convey all the information required by (f)(5) to be on a label, i.e., the identity of the hazardous chemicals and specific information about their hazards, and be readily accessible. 29 C.F.R. §§ 1910.1200(f)(5) & (6).

In accordance with the plain meaning of paragraph (f)(6), the preambles to the HazCom final rules as well as the 1998 HazCom directive, CPL 2-2.38D, also say that the alternative materials must identify the applicable hazardous chemicals, provide specific information about their corresponding hazards and be readily accessible. 1983 HazCom Preamble, 48 Fed. Reg. at 53,304; 1994 HazCom Preamble, 59 Fed. Reg. at 6,156; OSHA Instruction, CPL 2-2.38D (Mar. 20, 1998), App. A, "Labels and Other Forms of Warning, Paragraph (f)," (f)(5), paras. 3-4. Thus, the ALJ's finding does not deny Delek fair notice because it is consistent with OSHA's long-standing interpretation of the alternative method provision. Therefore, Delek's arguments notwithstanding, the finding should not cause any confusion in the regulated community about the application of the provision.

CONCLUSION

For the above reasons, the ALJ's decision should be affirmed.

M. PATRICIA SMITH
Solicitor of Labor

JOSEPH M. WOODWARD
Associate Solicitor of Labor for
Occupational Safety and Health

CHARLES F. JAMES
Counsel for Appellate Litigation

_____

SCOTT GLABMAN
Senior Appellate Attorney
U.S. Department of Labor
Frances Perkins Bldg., Room S-4004
200 Constitution Avenue, N.W.
Washington, D.C. 20210-0001
(202) 693-5493

September 28, 2011

CERTIFICATE OF SERVICE

I hereby certify that, on this _____ day of September, 2011, I served a copy of the preceding *Brief for the Secretary of Labor* by fax on

Mark S. Dreux, Esq.
(202) 857-6395

I also served a copy by regular mail on the same day on the following:

Donald D. Evans, Esq.
Deputy General Counsel
American Chemistry Council
700 Second St., NE
Washington, DC 20002

Harry M. Ng, Esq.
Vice President and General Counsel
American Petroleum Institute
1220 L Street, NW
Washington, DC 20005-4070

Gregory M. Scott, Esq.
Executive Vice President and General Counsel
National Petrochemical and Refiners Association
1667 K Street, NW, Suite 700
Washington, DC 20006

_____
SCOTT GLABMAN
Attorney for the Secretary of Labor