

Tesoro West Coast Co.

SAFETY AND HEALTH

Process Safety Management

The employer established that its system of training is effective in practice because it developed a comprehensive training program for employees involved in operating a process and performing maintenance. Based on such a showing, the employer is not required to develop or implement an operation manual for training purposes and has not violated regulations pertaining to process safety management. ...*In re Tesoro West Coast Co.*, BIIA Dec., 01 W0964 (2004)

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

1 **IN RE: TESORO WEST COAST CO.) DOCKET NO. 01 W0964**
2)
3 **CITATION & NOTICE NO. 304113939) DECISION AND ORDER**
4 _____)

5 APPEARANCES:

6
7 Employer, Tesoro West Coast Co., by
8 Ehlke Law Offices, per
9 Douglas B. M. Ehlke

10
11 Employees of Tesoro West Coast Co., by
12 Chemical and Energy Workers
13 International Union Local 8-591, per
14 John Spurling, Unit Chair

15
16 Department of Labor and Industries, by
17 The Office of the Attorney General, per
18 Brian L. Dew, Assistant
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20 The employer, Tesoro West Coast Co., filed an appeal with the Board of Industrial Insurance
21 Appeals on October 3, 2001, from Citation and Notice No. 304113939 of the Department of Labor
22 and Industries dated August 15, 2001. In Citation and Notice No. 304113939, the Department
23 alleged that the employer committed serious violations of the following Washington Administrative
24 Code regulations:
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|----|---------------|----------------------|---------------------------|
| 27 | Item No. 1-1a | WAC 296-67-021(1)(a) | proposed penalty of \$500 |
| 28 | Item No. 1-1b | WAC 296-67-025(1)(a) | no additional penalty |
| 29 | Item No. 1-2 | WAC 296-67-017(5) | proposed penalty of \$500 |
| 30 | Item No. 1-3 | WAC 296-67-057(1) | proposed penalty of \$500 |
| 31 | Item No. 1-4 | WAC 296-67-037(2) | proposed penalty of \$500 |
| 32 | Item No. 1-5a | WAC 296-67-045(3) | proposed penalty of \$500 |
| 33 | Item No. 1-5b | WAC 296-67-037(3) | no additional penalty |
| 34 | Item No. 1-6 | WAC 296-67-029(2)(d) | proposed penalty of \$500 |
| 35 | Item No. 1-7 | WAC 296-67-053 | proposed penalty of \$500 |
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41 and committed general violations of the following:

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| 42 | Item No. 2-1 | WAC 296-67-013 | no proposed penalty |
| 43 | Item No. 2-2 | WAC 296-62-07111 | no proposed penalty |
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46 for a total penalty assessed of \$3,500. Citation and Notice No. 304113939 is **VACATED**.
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1 **DECISION**

2 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review
3 and decision on a timely Petition for Review filed by the Department to a Proposed Decision and
4 Order issued on September 15, 2003, in which the industrial appeals judge vacated Citation and
5 Notice No. 304113939 of the Department dated August 15, 2001.
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8 The Board has reviewed the evidentiary rulings in the record of proceedings and finds that
9 no prejudicial error was committed. The rulings are affirmed.
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11 We have granted review to address issues raised by the Department's Petition for Review
12 that were not discussed or dealt with in the Proposed Decision and Order. We also have granted
13 review in order to enter complete findings of fact and conclusions of law on each contested matter.
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16 The Department of Labor and Industries conducted an inspection at Tesoro West Coast Co.
17 beginning in February of 2001. Tesoro operates an oil refinery in Anacortes, Washington. Prior to
18 Tesoro operating the refinery, the refinery was owned and operated by Shell Oil Company.
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20 The Department's Citation and Notice cited violations of WAC Chapter 296-67. This code
21 provision is entitled *Safety Standards for Process Safety Management of Highly Hazardous*
22 *Chemicals*. The record reveals that this was the first inspection and the first attempt by the
23 Department to cite under these standards. Likewise, this is the first opportunity that we have had to
24 review a Citation and Notice alleging violations of Chapter 296-67.
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28 Chapter 296-67 operates substantially different from other sections of the Washington
29 Industrial Safety and Health Act. Other sections of the Washington Industrial Safety and Health Act
30 generally have a safety standard promulgated by the Department that either requires or forbids
31 specific activity by the employer and worker to ensure safe work activity. Ordinarily, a violation
32 cited by the Department generally alleges that a specific action had or had not been taken and that
33 therefore there was a violation of the safety standard. However, in matters involving
34 Chapter 296-67, there is no specific standard set forth in the Washington Administrative Code.
35 Instead, Chapter 296-67 sets forth a process safety management concept. This is a procedure that
36 is utilized by the employer with input from workers to address operational and maintenance safety
37 concerns. The Washington Administrative Code section (Chapter 296-67) mandates steps to be
38 taken and procedures to be followed to develop a safety management system.
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44 The Proposed Decision and Order failed to weigh much of the evidence presented. Instead,
45 our industrial appeals judge discounted the Department witnesses based on their credibility. Our
46 industrial appeals judge found that the Department witnesses were not credible or persuasive for a
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1 number of different reasons. He chose to rely on the expert testimony presented by Tesoro. In so
2 relying, our industrial appeals judge found that there was no basis for any of the violations alleged
3 in the Citation and Notice and vacated the entire Citation and Notice.
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5 While we concur with our industrial appeals judge that expert testimony is appropriate in a
6 case of this nature, we believe a better approach is to examine the facts presented with respect to
7 each violation alleged by the Department. We will do so and we will weigh the evidence to
8 determine what persuasive evidence supports the Citation and Notice or supports the vacation of
9 the Citation and Notice. With regard to the expert testimony, we believe such expert testimony
10 should be critically reviewed along with the factual evidence presented in order to reach our
11 decision. An expert opinion contrary to the facts will not be persuasive. We turn now to the
12 violations cited in the Citation and Notice.
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14 Citation Item No. 1-1a alleges a violation of WAC 296-67-021 regarding operating
15 procedures. The Department specifically alleges that Tesoro did not develop a set of operating
16 procedures, specific to the operation of the crude unit control board, that provide clear instruction
17 for each operating phase. Citation No. 1-1b alleges that the current system of training operators in
18 the crude process area is not effective in practice. The basis for finding that the training is not
19 effective in practice focuses on the fact that Tesoro did not develop a board operation manual.
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21 The controversy surrounding these alleged violations focuses on the sufficiency of written
22 operating procedures and training associated with the operation of the crude unit control board.
23 The Department believes that Tesoro should have developed a crude unit control board manual
24 separate from Tesoro's existing written procedures manuals for the crude unit.
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26 The Department relies on the testimony of Tesoro employees John Spurling, Glen Dowrey,
27 and Curtis Arseneau; and the opinion of the Department of Labor and Industries' inspector,
28 Christian Bannick, in support of its finding that the crude unit written procedures are deficient. John
29 Spurling, Glen Dowrey, and Curtis Arseneau all operate the crude unit control board at Tesoro's
30 plant. While each testified that, in their opinion, there were operations that did not have specific
31 written procedures, all believed that they were well-trained and were capable of operating the
32 control board. All were aware of and had been trained in the operation of the control board, as set
33 out in WAC 296-67-021(1). Additionally, Mr. Arseneau detailed a situation where he was required
34 to perform an emergency shutdown and he was able to safely do so without resorting to any
35 specific operating manual.
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1 The Department presented the testimony of Daniel Weir, Tesoro's process safety
2 management coordinator. Mr. Weir testified that there were written procedures addressing each of
3 the seven phases of operation set forth in WAC 296-67-021(1). He identified Exhibit Nos. 30
4 through 35 as the crude unit operating manual at the time of the Department's inspection.
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7 The Department argues that the manuals, Exhibit Nos. 30-35, are insufficient to comply with
8 WAC 296-67-021(1). However, the Department presented no evidence other than the statements
9 of Tesoro employees that they believe an additional board operating manual would be helpful.
10 These same employees testified that they were capable and competent to safely operate the crude
11 unit control board.
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14 Additionally, Mr. Weir testified that a draft manual for the crude unit control board operator
15 was considered and went through initial development stages. After initially attempting to create
16 such a manual, a review of the manual indicated it presented more problems with implementation
17 than expected and there was little benefit in its use. Tesoro also presented the testimony of Myron
18 Casada and Lawrence Csengery to rebut the Department's evidence.
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21 Mr. Casada is the director of risk services for ABS Consulting. He is ABS Consulting's
22 principal instructor in its process safety management course. He testified that a manual for the
23 crude board operator, as urged by the Department, is not required by WAC 296-67-021(1).
24 Mr. Casada testified that it is not industry practice to use such a manual.
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27 Mr. Csengery has 14 years of experience working in refinery industry safety programs.
28 Mr. Csengery agreed with Mr. Casada that the additional manual is not required and that Exhibit
29 Nos. 30-35 are the best operating procedures he has seen in a refinery crude unit. The
30 Department did not offer any persuasive evidence to refute the opinions expressed by these two
31 highly qualified experts. Our review of Exhibit Nos. 30 through 35, in conjunction with the testimony
32 presented on this issue, persuades us that these manuals meet the requirements of
33 WAC 296-67-021(1). Item No. 1-1a is vacated.
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36 Citation Item No. 1-1b alleges that Tesoro's system of training was not effective in practice
37 because Tesoro did not develop a board operation training manual. Item No. 1-1b is related to Item
38 No. 1-1a. Since we find that Tesoro did not violate WAC 296-67-021(1) by failing to have a board
39 operating manual, as set out in Item No. 1-1a, we also find that training on such a manual is
40 unnecessary. We also note that the testimony of John Spurling, Glen Dowrey, and Curtis Arseneau
41 persuades us that Tesoro's comprehensive system of training its crude board operators was
42 effective in practice.
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1 Item No. 1-2 in the Citation and Notice alleges a violation of WAC 296-67-017(5) regarding
2 tracking and documenting resolution of recommendations made by the process hazard analysis
3 team. The Department specifically alleges that Tesoro failed to adequately document 39
4 recommendations made by the team following the 1999 study.
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7 The process hazard analysis is at the heart of WAC Chapter 296-67. This analysis is
8 designed to identify, evaluate, and control the hazards involved in the process.
9 WAC 296-67-017(1). A process is defined as "any activity involving a highly hazardous chemical."
10 WAC 296-67-005.
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13 WAC 296-67-017 establishes the procedure for performing a process hazard analysis.
14 Section 4 of this WAC establishes the members of the team performing the process hazard
15 analysis. Section 5 requires that Tesoro, as the employer, must establish a system to address the
16 team's recommendations. The system must: (1) ensure the recommendations are resolved in a
17 timely manner and that the resolution is documented; (2) document what actions are to be taken;
18 (3) complete actions as soon as possible; (4) develop a written schedule of when the actions are to
19 be completed; and (5) communicate the actions to affected employees.
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23 The controversy regarding this violation focuses on Tesoro's system of documenting and
24 tracking safety items. The Department believes the system established by Tesoro is inadequate.
25 Tesoro contends its system is effective, provides adequate documentation and tracking, and meets
26 or exceeds industry practice as a process safety analysis.
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29 At the heart of the controversy is the use of the process hazard risk matrix. This matrix is set
30 out in section 3.1 at page 19 of Exhibit No. 4, entitled "Final Report Process Hazard Analysis
31 Revalidation-Crude Unit-Vacuum Flasher-Deasphalter," dated August 1999. The risk matrix is a
32 color-coded matrix consisting of four vertical levels relating to the likelihood of an occurrence of an
33 event and four horizontal classifications relating to severity of consequences. Green items are
34 either highly unlikely to occur or have a low consequence level. Red items have a high likelihood of
35 occurring and a high consequence level and the items in blue and yellow fall in between.
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39 In addition to Exhibit No. 4, the Department offered the opinion of Mr. Neil Mulvey.
40 Mr. Mulvey is the owner of NPN Environmental Safety, Inc. Mr. Mulvey provides consulting
41 associated with process safety management and risk management. The Department also
42 presented the testimony of Glen Dowrey, a Tesoro employee and member of the process hazard
43 analysis team, as well as the testimony of Christian Bannick, who is the lead inspector for the
44 Department of Labor and Industries.
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1 Mr. Bannick reviewed information supplied by Tesoro and determined there were 39 items
2 listed in Citation Item 1-2 that were safety items that had been identified as part of the process
3 hazard analysis, but not properly tracked or documented by Tesoro. Mr. Dowrey testified there was
4 no checklist created to track completion of the team's recommendations.
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7 Tesoro believes its use of a risk matrix system, which classifies items as high, medium high,
8 low to medium, and low, is an effective way of performing a process hazard analysis. Tesoro
9 believes that its risk matrix system, which classifies, tracks, and resolves safety issues, meets or
10 exceeds the requirement of WAC 296-67-017(5).
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13 The risk matrix identifies the risk by color. Items in the low to medium range or low blue and
14 green items, which are low items, are left to the discretion of management. These items have been
15 determined to present little or no safety risk. Effectively, these items are not a part of the process
16 hazard analysis because they present no significant safety risk.
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19 Mr. Mulvey reviewed Tesoro's risk matrix system. It was his opinion that regardless of where
20 the item appeared in the risk matrix, that WAC 296-67-017(5) required the item be tracked and its
21 resolution documented.
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24 Myron Casada explained the use of the risk matrix system. It is one of several systems used
25 to assess risks in the process hazard assessment process. While some companies use the risk
26 matrix system, it is not used by all. The low blue and green items from such a risk matrix system
27 would not necessarily be included in the process hazard assessment since these items, by
28 definition, do not present a significant safety risk. Mr. Casada testified that companies that use a
29 different process hazard assessment other than the risk matrix system probably would not even
30 identify the low risk items.
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33 Edward Hsu is the manager of regulatory affairs for Tesoro and oversees the health and
34 safety environmental issues at the plant. He testified that he reviewed the items specified in
35 Citation Item No. 1-2 to determine their status. He identified five high blue items and nine yellow
36 items on the list. All of these were being tracked in Tesoro's database. The remaining 25 items
37 listed in the citation were either all low blue or green items. Of these, 11 were tracked. The only
38 untracked items were the green items.
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41 Mr. Casada's explanation of the use of a risk matrix to classify and address safety issues
42 appears reasonable. If an item is identified in a process hazard assessment as not being a
43 significant safety risk, it would logically follow that no action need be taken. The Department's
44 insistence that the low risk items must be tracked is an attempt by the Department to substitute its
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1 judgment regarding the level of the risk and to therefore require the employer to take action that
2 would be unnecessary. We also accept Mr. Hsu's testimony regarding Tesoro's tracking of items
3 identified in its process hazard assessment. The Department has not rebutted this testimony. The
4 fact that the Department does not agree with the employer's hazard assessment does not establish
5 that the assessment was inadequate. See *Secretary of Labor v. BF Goodrich Hilton Davis, Inc.*,
6 19 OSHC, 1795 (November 26, 2001). Item No. 1-2 is vacated.
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10 Citation Item No. 1-3 alleges a violation of WAC 296-67-057(1) regarding certification of
11 Tesoro's 1998 process safety compliance audit. While the WAC provision only addresses the
12 certification of the audit process, the specific allegations in Item No. 1-3 are directed to other
13 sections of WAC 296-67-057. These other sections address the effectiveness of the compliance
14 audit.
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17 Our industrial appeals judge found that Item No. 1-3, as cited, only alleges a failure to certify
18 the compliance audit. We agree. WAC 296-67-057(1) only addresses the requirement that the
19 employer certify that it has evaluated compliance with the process hazard assessment. Exhibit
20 No. 7 is Tesoro's compliance audit certification dated March 30, 1998. Clearly, Tesoro meets the
21 requirement set out in WAC 296-67-057(1).
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24 The Department appears to argue that Item No. 1-3 cites Tesoro with a violation of all of
25 WAC 296-67-057. The Department, in its Petition for Review, lists subsections 3 and 4 of
26 WAC 296-67-057 as a part of Citation Item No. 1-3. It is clear to us that the Department wishes to
27 include other sections of WAC 296-67-057 as within the scope of Citation Item No. 1-3. The
28 Department could have moved to amend the citation. *ABB Power Generation, Inc.*, BIIA Dec.,
29 93 W469 (1994) and *Jeld-Wen of Everett*, BIIA Dec., 88 W144 (1990). We find nothing in the
30 record to indicate that the Department made such a motion to amend. The Department chose the
31 specific WAC section to cite the employer in Citation Item No. 1-3. The Department chose not to
32 move to amend the citation to expand the scope of the allegations. We are not inclined to do so at
33 this stage of the proceeding. Citation Item No. 1-3 is vacated.
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36 Item No. 1-4 and Item No. 1-5b in the Citation and Notice alleged violations of
37 WAC 296-67-037(2), (3). Both alleged violations addressed Tesoro's program of maintaining
38 mechanical integrity of process equipment. Item No. 1-4 cites a violation of WAC 296-67-037(2)
39 regarding written procedures for maintaining mechanical integrity of the process. Item No. 1-5b
40 cites a violation of WAC 296-67-037(3) regarding training for process maintenance activity.
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1 In Citation Item No. 1-4, the Department specifically alleges that Tesoro has not developed
2 and implemented written procedures for all equipment in the process. The Department alleges that
3 Tesoro's Anacortes Corrosion Awareness and Management Program (ACAMP) had not been fully
4 developed and implemented for the crude process area. Additionally, the Department alleges that
5 written inspection and testing procedures have not been developed for all protection instrument
6 systems. The Department specifically lists fifteen coded systems that fail to meet the requirements
7 of WAC 296-67-037(2).
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11 In support of its allegations in Item No. 1-4, the Department points to Exhibit Nos. 9, 10, and
12 11. Exhibit No. 9 is a ten-page Tesoro document entitled "Anacortes Corrosion Awareness and
13 Management Program" (ACAMP). Exhibit No. 10 is a one-page Tesoro document entitled
14 "Corrosion Review and CCD Status." Exhibit No. 11 is a 39-page Tesoro document entitled
15 "Corrosion Control Document." The Department contends that merely reading these documents is
16 ample proof of the violations alleged in Citation Item No. 1-4.
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20 John Pope is employed by Tesoro as the manager of engineering and maintenance
21 resources. He is in charge of the maintenance activities at the refinery. Mr. Pope explained
22 Tesoro's use of the ACAMP document. ACAMP is not part of any mechanical integrity procedure.
23 Rather, it is a high-level survey, or overview, of the corrosion prevention system at the plant.
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26 Mr. Csengery reviewed the ACAMP document. He described it as a management system to
27 prevent corrosion in Tesoro's process. It was his opinion that the ACAMP document was not
28 required by WAC 296-67-037 because it operates as a management tool while the specific
29 technical aspects of process maintenance are contained in other documents.
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32 The evidence in this record persuades us that the ACAMP document is not a part of the
33 mechanical integrity process required by WAC 296-67-037. The only evidence presented shows
34 that Exhibit No. 9 operates as a management overview to assist in safety, but, as such, is not
35 directed to specific maintenance of process equipment.
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38 The Department also contends that Tesoro did not develop written testing procedures for all
39 protective instrument systems, and lists 15 specific systems that lack such procedures. The citation
40 lists the systems alphabetically "a" through "o." The Department called Steve Barnett, Tesoro's
41 maintenance supervisor, to testify regarding the written procedures for the specific systems.
42 Mr. Barnett testified that all of the items, "a" through "o," have written procedures, as required by
43 WAC 296-67-037(2). Mr. Barnett wrote the procedures for these items. Although Mr. Barnett
44 testified that some protective instrument systems lack written procedures, the Department offered
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1 no evidence as to what such protective instrument systems lacked written procedures. The mere
2 allegation by Mr. Barnett that "some" protective instrument systems lack written procedures, is
3 vague, overly broad, and fails, in any specificity, regarding a violation of WAC 296-67-037(2).
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5 Mr. Csengery reviewed the procedures written by Mr. Barnett for items "a" through "o." It
6 was Mr. Csengery's opinion that the written procedures offered by Tesoro met the requirements of
7 WAC 296-67-037(2).
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10 Mr. Mulvey, testifying on behalf of the Department, offered his opinion that Tesoro's
11 mechanical integrity program did not meet the requirements of WAC 296-67-037(3). However,
12 Mr. Mulvey readily admitted that he had reviewed very little of the documentation regarding the
13 program and was not completely familiar with the systems listed "a-o" in Citation Item No. 1-4. We
14 are not persuaded by Mr. Mulvey's opinion. It is not based on the facts in this record. The
15 Department has failed to offer any persuasive evidence that Tesoro violated the provisions as
16 alleged in Item No. 1-4. Item No. 1-4 is vacated.
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20 Citation Item No. 1-5b alleges a violation of WAC 296-67-037(3) regarding training for
21 process maintenance activities. The Department specifically alleges that Tesoro's maintenance job
22 qualification book, used for training maintenance employees, does not include all equipment and
23 systems maintained by maintenance employees. In support of the violation, the Department points
24 to the testimony of Tesoro employee, Craig Emery.
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28 Mr. Emery has been a mechanic for Tesoro for seventeen years. Mr. Emery maintains
29 approximately forty analyzers. Mr. Emery testified that two analyzers were installed without
30 adequate training or notification in his work area. Mr. Emery referred to two pieces of equipment,
31 one he described as an O₂ analyzer, which relates to the efficiency of the furnace operation. The
32 other piece of equipment he described as the conductivity analyzer for the jet treater. He testified
33 that he did not understand the application of the jet treater analyzer. Additionally, he did not know if
34 either piece of equipment was related to the process hazard analysis.
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38 Arthur Spanski is a skilled group supervisor for Tesoro. As such, he supervises Craig Emery
39 and other employees in the analyzer group. Mr. Spanski detailed the training program for those he
40 supervises. This includes initial training and sending newer workers out with more skilled workers.
41 It is his opinion that Mr. Emery, and others in his group, were always properly trained on the
42 equipment they serviced.
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46 There is very little substantive evidence in this record regarding the specific allegations in
47 Item No. 1-5b. Mr. Emery is uncertain whether the two pieces of equipment he referred to are even

1 covered under the process hazard analysis. Mr. Spanski testified that every technician, including
2 Mr. Emery, is properly trained. The Department, in its Petition for Review, points to the testimony of
3 Mr. Casada, an expert called by Tesoro, regarding Item No. 1-5b. The Department asserts, in the
4 Petition for Review, that, "Tellingly, Mr. Casada had no criticism of citation Item 1-5b." 10/4/02 Tr.
5 at page 114, line 24, through page 115, line 2. We disagree with the Department's interpretation of
6 Mr. Casada's statement. Mr. Casada, when asked if he had an opinion regarding Item No. 5b of
7 Citation 1, responded, "There was not enough information, and there's not been anything that's
8 been presented that gives me the right or the wherewithal to make a comment." Mr. Casada simply
9 stated what is clear from our reading of this record. There is little evidence regarding Item
10 No. 1-5b. Clearly, Mr. Emery's testimony is insufficient to find that Tesoro violated
11 WAC 296-67-037(3). He does not understand the function of the analyzers for the jet treater, and
12 he lacks knowledge regarding whether either piece of equipment is even covered under the
13 process hazard analysis. Item No. 1-5b is vacated.

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Citation Item No. 1-5a alleges a violation of 296-67-045(3), relating to management of
change. The Department specifically alleges that Tesoro failed to effectively train maintenance
employees regarding changes made in process equipment. Item No. 1-5a is based on substantially
the same evidence as Item No. 1-5b. Our analysis of the evidence leads us to the same conclusion
we reached regarding Item No. 1-5b. That is, there is no substantial evidence to support the
allegation in Item No. 1-5a. Mr. Spanski's detailed testimony regarding the maintenance
employees' training is not rebutted by the Department's case. Again, Mr. Emery's testimony is
unconvincing, as is the testimony of Raymond Ohlsen, a Tesoro technician called by the
Department in support of alleged violation 1-5a. Item 1-5a is vacated.

Citation Item No. 1-6 alleges a violation of WAC 296-67-029(2)(d), regarding contractors
performing work in a covered process area. The Department specifically alleges that Tesoro's
system of controlling the entrance, presence, and exit of contract workers does not accurately
account for the workers' entry and exit into covered process areas.

The Department allegation focuses on two areas of non-compliance. First, the Department
makes a distinction between "facility" and "process." The Department contends that Tesoro's
system may control access to the facility, but not the covered processes. Secondly, the
Department argues that the system Tesoro uses to control contractor access fails to account for all
contract workers in covered process areas.

1 The Department offered the testimony of Mr. Mulvey that Tesoro's system of accounting for
2 contractors on the premises failed to meet the requirements set out in WAC 296-67-029(2)(d) by
3 not making a distinction between access to the "facility" and access to a covered "process" within
4 the facility. The Department points to the distinction in WAC 296-67-005, between the definition of
5 "facility" and the definition of "process" in support of its belief that Tesoro is not properly maintaining
6 control of contractor access.
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10 We do not read the definition of "facility" and "process" the same as the Department.
11 Clearly, a "facility," as defined in WAC 296-67-005, refers to a place. A place is either a building,
12 container, or equipment that contains a "process." A "process," as defined by WAC 296-67-005, is
13 an activity. Since the process or activity is within the facility, it is reasonable to assume that
14 controlled access to the facility is controlled access to the activity or process contained within the
15 facility. In the record before us, we find it sufficient to meet the requirements of
16 WAC 296-67-029(2)(d) if Tesoro controls access to the "facility." There is nothing in the record to
17 indicate that this level of control is insufficient to control access to the "process" within the facilities.
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21 The Department primarily relies on the statements of three Tesoro employees—Roel
22 Pedroza, Curtis Arseneau, and Bill Moore—in support of this violation. Each testified that at times
23 contract employees would not check in and the presence of the contract employees was difficult to
24 track. They also stated that the number of contract workers on site often would not be known.
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28 Tesoro presented the testimony of Dennis Rehkop in support of its position that it had
29 adequate contractor access control. Mr. Rehkop explained the system, which involves a computer
30 swipe card that keeps track of individuals entering and leaving the facilities. Additionally,
31 Mr. Rehkop explained that a safe work permit is required for certain areas. It is Tesoro's position
32 that the swipe card and the safe work permits are sufficient to meet the requirements of contractor
33 entrance, presence, and exit control.
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37 We are not persuaded by the testimony of the three Tesoro employees regarding this issue.
38 The fact that these three employees did not have the knowledge associated with the contractor
39 access and accountability is not persuasive evidence that Tesoro's program of controlling
40 contractor access was insufficient. Their testimony lacks any specificity about the date or time of
41 the occurrences. In summary, we find that the system in place to control contractor access at
42 Tesoro's Anacortes refinery meets the requirements of WAC 296-67-029(2)(d). Citation Item
43 No. 1-6 is vacated.
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1 Citation Item No. 1-7 alleges a violation of WAC 296-67-053, regarding emergency planning
2 and response. The Department specifically alleges that Tesoro's emergency response plan does
3 not accurately describe the roles and responsibilities of plant personnel who are expected to
4 respond to uncontrolled chemical releases.
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7 WAC 296-67-053, in effect at the time of the inspection and issuance of the Citation and
8 Notice, requires an emergency response plan to be developed under WAC 296-24-567.
9 WAC 296-24-567 sets out the requirements of an emergency response plan. Additionally,
10 WAC 296-67-053 indicates that employers **may** be subject to the emergency response provisions
11 in WAC 296-62, Part P. Part P of WAC 296-62 is entitled "Hazardous Waste Operations and
12 Treatment, Storage, and Disposal Facilities."
13

14
15 The Department's focus in Item No. 1-7 is on Tesoro's failure to comply with
16 WAC 296-62-1013(2) and WAC 296-62-41021. These WAC sections are found in Part R of
17 WAC 296-62-410. Part R is entitled "Emergency Response to Hazardous Substance Release."
18 WAC 296-62-41013 sets forth the elements of an emergency response plan. WAC 296-62-41021
19 sets forth the training required before participation in the emergency response. It is unclear to us
20 why the Department refers to WAC sections contained in Part R of WAC 296-62 as constituting a
21 violation of WAC 296-67-053, as alleged in the Citation and Notice. We can find no connection.
22 The Department has alleged a violation of WAC 296-67-053, in effect at the time of the inspection
23 and issuance of the Citation and Notice. This only requires Tesoro to establish and implement an
24 emergency action plan in accordance with the provisions of WAC 296-24-567.
25

26
27 In its Petition for Review, the Department quotes the provisions of WAC 296-67-053,
28 effective September 1, 2001. This version of WAC 296-67-053 does not apply to the Citation and
29 Notice issued on August 15, 2001. The difference between the version of WAC 296-67-053 in
30 effect at the time of the Citation and Notice and the version referred to by the Department in its
31 Petition for Review is contained in the last sentence of each version. As previously indicated, the
32 version in effect at the time of the issuance of the Citation and Notice indicates that the employer
33 **may** be subject to WAC 296-62, Part P. As we previously indicated, there is nothing in this record
34 to establish that Tesoro is subject to Part P of WAC 296-62 and the Department did not cite Tesoro
35 for a violation of any provision relating to Part P.
36

37
38 The Department urges the application of the version of WAC 296-67-053, effective
39 September 1, 2001. The last sentence of this version of the WAC provides that the employer **may**
40 be subject to the provisions of WAC 296-800-170. This section is entitled, "Employer Chemical
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1 Hazard Communication--Introduction." The Department has not alleged a specific violation of
2 WAC 296-800-170.
3

4 It appears that the Department is attempting to establish a violation of WAC 296-67-053 by
5 offering evidence of violation of other WAC provisions. Evidence that Tesoro may have violated
6 provisions of WAC 296-62-41013(2) and WAC 296-62-41021 will not establish a violation of
7 WAC 296-67-053. The Department has offered no evidence in support of Item No. 1-7. Item
8 No. 1-7 is vacated.
9

10
11 Citation Item No. 2-1 alleges a violation of WAC 296-67-013 relating to process safety
12 information. The Department specifically alleges that Tesoro's documents pertaining to process
13 safety information, Safety Regulation 61, must be modified to accurately reflect current tracking
14 systems and process safety documents. The Department further alleges that current documents
15 make reference to process safety information that is inaccurate or no longer applicable.
16
17

18
19 The Department relies on Exhibit No. 6, Tesoro's Safety Regulation 61, and the opinion of
20 Neil Mulvey to establish the violation alleged in Item No. 2-1. Mr. Mulvey was asked to assume that
21 some of the information in Exhibit No. 6 was inaccurate. Based on that assumption, Mr. Mulvey
22 stated that to the extent this document (Exhibit No. 6) was a part of Tesoro's overall process safety
23 management program, that not maintaining the document in an up-to-date fashion would mean that
24 Tesoro was not complying with the process safety information requirements of WAC 296-67-013.
25 In its Petition for Review, the Department asserts that it is undisputed that Exhibit No. 6 is Tesoro's
26 core process safety information reference document, which serves as an index for refinery policies
27 and procedures.
28
29

30
31
32 Tesoro presented the opinion of Mr. Csengery regarding Exhibit No. 6. Mr. Csengery
33 reviewed Exhibit No. 6 and stated that it did not contain process safety information. He described
34 Exhibit No. 6 as a template designed to help locate the process safety information required by
35 WAC 296-67-013.
36
37

38
39 We have reviewed Exhibit No. 6 in detail. We agree with Mr. Csengery that Exhibit No. 6
40 can best be described as an index to process safety information at the Tesoro plant.
41 WAC 296-67-013 notes that material safety data sheets may be used to comply with the
42 requirements contained within that WAC section. Exhibit No. 6 contains several references to
43 material safety data sheets (MSDS), which address specific processes and notes their location
44 within the Tesoro plant. It is these MSDS documents and other information that is required by
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1 WAC 296-67-013. Exhibit No. 6 is not the compilation of process safety information contemplated
2 by WAC 296-67-013.
3

4 The Department has offered no evidence that Tesoro failed to compile the process safety
5 information required by WAC 296-67-013. Mr. Mulvey's opinion regarding the completeness of
6 Exhibit No. 6 is of no value in determining whether Tesoro meets the requirements of
7 WAC 296-67-013. Mr. Mulvey's opinion is based on an assumption that is unsupported by the facts
8 in this record. Additionally, Mr. Mulvey readily admitted that he had not reviewed the entire
9 Department inspection file. Citation Item No. 2-1 is vacated.
10
11

12 Citation Item No. 2-2 alleges a violation of WAC 296-62-07111 relating to the written
13 respiratory protection program. The Department specifically alleges that Tesoro's written
14 respiratory protection program must include identification of the primary licensed healthcare
15 provider, describe the confidentiality requirements, and identify the policy regarding the frequency
16 of the follow-up evaluation. The program must describe the fit test procedures used, the frequency
17 of the fit test, and how Tesoro will certify grade 'D' air is provided to all supplied air respirator
18 devices.
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23 The Department contends that Exhibit No. 24 is Tesoro's written respiratory program. The
24 information that the Department has alleged is missing from the written respiratory program is not
25 contained in Exhibit No. 24. However, Tesoro offered Exhibit Nos. 75 through 78, which were
26 admitted into evidence. Exhibit Nos. 75 through 78 contain the specific information that the
27 Department alleges is missing from the Tesoro written respiratory program. Exhibit No. 75 is
28 Tesoro's respiratory medical evaluation questionnaire. Exhibit No. 76 is Tesoro's annual respiratory
29 medical questionnaire. On this document is the notice that any respiratory questionnaire that is
30 completed by an employee must be filled out and sent in a confidential envelope to the medical
31 department, where it will be reviewed. Exhibit No. 77 is a notice regarding the respiratory
32 questionnaire. This notice provides that the questionnaire needs to be completed and returned in a
33 confidential envelope to Diane Wilson in the medical department. The notice also indicates that
34 Diane Wilson is the healthcare professional who will be reviewing the questionnaire. Exhibit No. 78
35 is the certificate of analysis of breathing air Type I – Grade 'D'. Our review of these exhibits
36 persuades us that Tesoro has met the requirements as set forth in WAC 296-62-07111.
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44 In the Petition for Review, counsel for the Department urges us not to consider Exhibit
45 Nos. 75 through 78. We, of course, must evaluate all of the evidence that is received into this
46 record to determine whether the Department has established a violation of the WAC provisions that
47

1 it has cited, not just the evidence favorable to the Department. We cannot ignore evidence
2 presented in this record. Item No. 2-2 is vacated.
3

4 **FINDINGS OF FACT**

- 5 1. Between February and May of 2001, the Department of Labor and Industries
6 inspectors conducted an inspection of the premises of Tesoro West Coast
7 Company, in Anacortes, Washington.
8

9 On February 12, 2001, the Department of Labor and Industries issued an
10 inspection report concerning the Tesoro Refinery Inspection. A closing
11 conference was held on May 24, 2001.

12 On August 15, 2001, the Department of Labor and Industries issued a
13 Citation and Notice No. 304113939, in which it alleged that the employer
14 committed serious violations of the following Washington Administrative
15 Code regulations:

16 Item No. 1-1a WAC 296-67-021(1)(a), with a proposed penalty of \$500.

17 Item No. 1-1b WAC 296-67-025(1)(a), with no additional penalty.

18 Item No. 1-2 WAC 296-67-017(5), with a proposed penalty of \$500.

19 Item No. 1-3 WAC 296-67-057(1), with a proposed penalty of \$500.

20 Item No. 1-4 WAC 296-67-037(2), with a proposed penalty of \$500.

21 Item No. 1-5a WAC 296-67-045(3), with a proposed penalty of \$500.

22 Item No. 1-5b WAC 296-67-037(3), with no additional penalty.

23 Item No. 1-6 WAC 296-67-029(2)(d), with a proposed penalty of \$500.

24 Item No. 1-7 WAC 296-67-053, with a proposed penalty of \$500.
25

26 And committed general violations of the following regulations:
27

28 Item No. 2-1 WAC 296-67-013, with no proposed penalty.

29 Item No. 2-2 WAC 296-62-07111, with no proposed penalty.
30

31 The total penalty assessed was \$3,500.
32

33 On September 7, 2001, the employer filed a Notice of Appeal with the
34 Department of Labor and Industries from the Citation and Notice
35 No. 304113939, issued on August 15, 2001.
36

37 On September 25, 2001, the Department issued a Notice declining to
38 reassume jurisdiction of this matter.
39

40 On October 3, 2001, the Department of Labor and Industries forwarded the
41 appeal to the Board of Industrial Insurance Appeals as a direct appeal.
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1 On October 3, 2001, counsel for the employer filed a Notice of Appeal with
2 the Board of Industrial Insurance Appeals from the August 15, 2001 Citation
3 and Notice No. 304113939.

4 On October 4, 2001, the Board of Industrial Insurance Appeals issued a
5 Notice that an appeal was filed in this matter, and assigned Docket
6 No. 01 W0964.
7

- 8 2. Tesoro West Coast Company operates a refinery in Anacortes, Washington.
9 Its basic function is to refine crude petroleum into various useable forms of
10 oil-based products, including diesel fuel, gasoline, and propane.
11
- 12 3. In 1994 and 1998, Shell Oil Co., Tesoro's predecessor, conducted process
13 hazard analyses (PHAs) as mandated by WAC 296-67.
14
- 15 4. In 1998, when Tesoro Oil purchased the refinery from Shell Oil Co., it also
16 inherited process safety management responsibilities referred to in the PHAs
17 of Shell Oil Co. in 1994 and 1998.
18
- 19 5. Item No. 1-1a: Tesoro has written operating procedures addressing all of
20 the elements required by WAC 296-67-021. The written operating
21 procedures provide clear instructions for safely conducting activities in each
22 covered process consistent with the process safety information. Neither
23 WAC 296-67-021 nor the process safety information requires the
24 development or implementation of a crude unit control board manual.
25
- 26 6. Item No. 1-1b: Tesoro's system of training operators in the crude process
27 area complies with the requirements of WAC 296-67-025(1) in that the
28 operators are trained in an overview of the process and in the operating
29 procedures specified in WAC 296-67-021. Neither WAC 296-67-025 nor
30 Tesoro's process safety information require the development or
31 implementation of a board operation manual for training purposes. Tesoro's
32 system of training operators in the crude processing area is effective in
33 practice.
34
- 35 7. Item No. 1-2: Tesoro has established a system to properly address the
36 process hazard analysis findings and recommendations. This system
37 utilizes a risk matrix system to classify safety items as high, medium high,
38 low to medium, and low. The low to medium and low items do not present
39 significant safety risks and are not required to be addressed or tracked as a
40 part of the process safety hazard analysis.
41
- 42 8. The 39 items listed by the Department in Citation Item 1-2 included 14 green
43 items that were not required to be tracked as part of the process hazard
44 analysis. All other items identified by the Department in Citation Item 1-2
45 were tracked and their resolution was documented.
46
- 47 9. Item No. 1-3: Tesoro certified that it had evaluated compliance with the
provisions of WAC 296-67-057. The certification was done at least every

1 three years. The certification verified that the procedures and practices
2 developed under the process safety management standard are adequate
3 and being followed (Exhibit No. 7).
4

- 5 10. Item No. 1-4: Tesoro's Anacortes Corrosion Awareness and Management
6 Program (ACAMP) is a program used by management at Tesoro's refinery to
7 allow an overview of the corrosion prevention system at the refinery.
8

9 Tesoro's ACAMP document is not a written procedure to maintain the
10 ongoing integrity of process equipment as required by WAC 296-67-037(2).
11

12 Tesoro developed written inspection and testing procedures for all of the
13 protective systems tested in Citation Item 1-4. There is no evidence that any
14 specific protective instrument system at Tesoro's refinery lacks written
15 procedures.
16

- 17 11. Item Nos. 1-5a and 1-5b: Tesoro has developed a comprehensive training
18 program for employees involved in operating a process and performing
19 maintenance. Maintenance employees have been trained regarding
20 changes to process equipment as required by WAC 296-67-045(3) and
21 WAC 296-67-037(3).
22

- 23 12. Item No. 1-6: Tesoro has implemented a computer tracking system to
24 accurately account for the entrance, presence, and exit of contract workers
25 in a covered process area. Tesoro's system uses a computer swipe card as
26 well as a safety permit system. Tesoro's system controls access to the
27 facility containing the covered process. By controlling access to the facility,
28 Tesoro controls access to covered process areas. Tesoro's system to
29 control contract employees meets the requirements of
30 WAC 296-67-029(2)(d).
31

- 32 13. Item No. 1-7: The Department has failed to offer evidence that Tesoro's
33 emergency action plan, required by WAC 296-24-567, is inadequate.
34

- 35 14. Item No. 2-1: Tesoro's Safety Regulation 61 can best be described as an
36 index to process safety information at Tesoro's plant. Safety Regulation 61
37 does not contain process safety information. The Department has failed to
38 establish that Tesoro failed to compile process safety information as
39 required by WAC 296-67-013.
40

- 41 15. Item No. 2-2: Tesoro's written respiratory protection program includes all of
42 the requirements set out in WAC 296-62-07111 (Exhibit Nos. 24, 75, 76, 77,
43 and 78). Tesoro's written respiratory protection program identifies the
44 primary licensed healthcare provider, describes the confidentiality
45 requirements, and identifies the policy regarding frequency of follow-up
46 evaluations. The program describes the fit testing procedures and their
47 frequency. The program describes the certification of grade 'D' air to all
supplied air respiratory devices.

1
2
3 **CONCLUSIONS OF LAW**
4

- 5 1. The Board of Industrial Insurance Appeals has jurisdiction over the parties to
6 and the subject matter of this appeal.
7
8 2. The employer filed a timely appeal to the Board of Industrial Insurance
9 Appeals from the Citation and Notice No. 304113939, issued by the
10 Department of Labor and Industries on August 15, 2001.
11
12 3. Item No. 1-1a: No violation of WAC 296-67-021(1)(a) has been established.
13
14 4. Item No. 1-1b: No violation of WAC 296-67-025(1)(a) has been established.
15
16 5. Item No. 1-2: No violation of WAC 296-67-017(5) has been established.
17
18 6. Item No. 1-3: No violation of WAC 296-67-057(1) has been established.
19
20 7. Item No. 1-4: No violation of WAC 296-67-037(2) has been established.
21
22 8. Item No. 1-5a: No violation of WAC 296-67-045(3) has been established.
23
24 9. Item No. 1-5b: No violation of WAC 296-67-037(3) has been established.
25
26 10. Item No. 1-6: No violation of WAC 296-67-029(2)(d) has been established.
27
28 11. Item No. 1-7: No violation of WAC 296-67-053 has been established.
29
30 12. Item No. 2-1: No violation of WAC 296-67-013 has been established.
31
32 13. Item No. 2-2: No violation of WAC 296-62-07111 has been established.
33
34 14. Citation and Notice No. 304119939, issued by the Department of Labor and
35 Industries on August 15, 2001, is vacated in its entirety.

36 It is so **ORDERED**.

37 Dated this 27th day of April, 2004.

38 BOARD OF INDUSTRIAL INSURANCE APPEALS

39
40 /s/ _____
41 THOMAS E. EGAN Chairperson

42 /s/ _____
43 FRANK E. FENNERTY, JR. Member

44 /s/ _____
45 CALHOUN DICKINSON Member