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United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. JAKE'S FIREWORKS, INC., Respondent.	OSHRC Docket No. 15-0260

Appearances:

Justin H. Whitten, Esq. & Megan J. McGinnis, Esq., Department of Labor, Office of Solicitor, Kansas City, Missouri
For Complainant

Michael E. Baker, Esq. & Eric Clawson, Esq., Jake's Fireworks, Inc., Pittsburg, Kansas
For Respondent

Before: Administrative Law Judge Peggy S. Ball

DECISION AND ORDER

I. Procedural History

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 659(c) ("the Act"). On August 12, 2014, two of Respondent's employees were unloading old fireworks from storage containers located at 689 South 69 Highway, Pittsburg, Kansas, which was Respondent's former base of operations. The site was being cleaned up in order to prepare for a new tenant. (Tr. 166–67). While the employees were unloading the last storage container, a fire broke out inside the container. (Tr. 124). Both employees were badly burned, and, unfortunately, one of them passed away as a result of his injuries.

Complainant received notice of the incident and dispatched Compliance Safety and Health Officer ("CSHO") Ryan Hodge the next day to conduct an inspection of Respondent. (Tr. 196–97). When he arrived at Respondent's current base of operations, CSHO Hodge learned that the Bureau of Alcohol, Tobacco, and Firearms and the Kansas State Fire Marshall's office had already been to the site of the accident and were concluding a meeting with Respondent's management. (Tr. 200–201). After that meeting, CSHO Hodge opened an inspection of Respondent, which included traveling to the location of the fire and conducting interviews. (Tr. 201–204). Based on CSHO Hodge's findings, Complainant issued a *Citation and Notification of Penalty* ("Citation") to Respondent, alleging nine serious violations and one other-than-serious violation of the Act, with a total proposed penalty of $55,000.00. Respondent timely contested the Citation.

On February 9, 2016, Complainant filed a *Motion to Amend Complaint*, which sought to amend Citation 1, Items 1 through 5 to a single violation of 29 C.F.R. § 1910.109(b)(1). The following changes were also sought: (1) the renumbering of Citation 1, Items 6, 8, and 9; (2) the withdrawal of Citation 1, Item 7; (3) amendment of the violation description in Citation 1, Item 8 (to be renamed as Citation 1, Item 3); and (4) adjustment of the total proposed penalty to $24,000.00. Respondent did not object to the filing, nor did it file a response to the *Motion to Amend*. Accordingly, the Court granted the *Motion*. Subsequently, Respondent filed an *Answer to the Second Amended Complaint* on March 5, 2016.

The trial took place on May 3–4, 2016, in Kansas City, Kansas. The following witnesses testified: (1) Kansas State Fire Marshall Michael Tippie; (2) CSHO Ryan Hodge; (3) [redacted], an employee of Respondent; and (4) Scott Moutz, Respondent's Production Manager. Both parties timely submitted post-trial briefs.

II. Jurisdiction

The parties submitted a Joint Stipulation Statement, which was read into the record. (Tr. 17–20). The stipulations state that Respondent is an employer engaged in a business affecting commerce within the meaning of section 3(5) of the Act and that the Occupational Safety and Health Review Commission has jurisdiction of this proceeding pursuant to Section 10(c) of the Act. (Tr. 17–19; Ex. J-1).

III. Factual Background

Respondent imports bulk consumer fireworks from China to its storage facility located at 1500 East 27th Terrace, Pittsburg, Kansas, which Respondent also refers to as the Superior Building. (Tr. 155–56). According to its production supervisor, Jason Moutz, after receiving the bulk fireworks, Respondent stores them in its warehouse facility. (Tr. 156). The fireworks packages are ultimately broken down and re-packaged into kits by Respondent's production unit. (Tr. 156). For example, Moutz discussed how a specified number of artillery shells (a type of firework) are combined with launch tubes in individual packages, which are further packaged into cardboard shippers and sent to Respondent's customers. (Tr. 154–55).

Before Respondent moved to its current location at the Superior Building, Respondent owned and operated out of a facility located at 689 South 69 Highway, also in Pittsburg, Kansas. (Tr. 158). The old facility is located approximately two miles from the Superior Building, and it takes about 10 minutes to travel in between each location. (Tr. 158). The Highway 69 facility is comprised of two warehouse buildings and several hundred storage containers. (Tr. 159–60; Ex. C-20 at 3). When the Highway 69 facility was in operation, the warehouse was stocked with fireworks brought in from the storage containers, and customer orders for fireworks would be pulled from the warehouse. (Tr. 159–60). However, since Fall 2012, the Highway 69 facility had

been vacant, except for the storage containers, which were used for storing old cardboard boxes and fireworks that were no longer sold. (Tr. 156–57). According to Moutz, "It basically was kind of an out-of-sight, out-of-mind thing. We was cleaning it, you know, but we hadn't been there in 15 months. Stuff had got left there." (Tr. 163).

Approximately 12 to 15 months after Respondent moved to the Superior Building, a new tenant was slated to take over at the Highway 69 facility, which required a clean-up. (Tr. 166–67). Respondent selected Scott Moutz to supervise the clean-up, who, in turn, selected [redacted] and [redacted] to empty the storage containers, which contained cardboard, debris, and damaged and/or old fireworks. (Tr. 122–23, 166). Moutz referred to [redacted] as his right-hand man and further relayed that [redacted] and [redacted] did not require significant supervision. (Tr. 154). Moutz said he looked inside the bunker at issue before [redacted] and [redacted] began work, and claims only to have seen a partial pallet of fireworks and some cardboard; though he admits that he would not characterize what he did as an "inspection". (Tr. 167–68).

[redacted] and [redacted] clocked in at the Superior Building around 8:00 a.m. on August 12, 2014. (Tr. 119). [redacted] testified that he and [redacted] were directed by Moutz to unload "bunkers"[1] at the Highway 69 facility, just as they had done during the previous two or three days. (Tr. 121–22). [redacted] drove to the Highway 69 facility in a forklift accompanied by [redacted] in a company vehicle. (Tr. 123–24). [redacted] was wearing a tank top, shorts, and tennis shoes, while [redacted] was wearing a t-shirt, jeans, and steel-toed boots.[2] (Tr. 127). After they arrived around 9:00 a.m., [redacted] and [redacted] began to unload bunkers using the

1. The term "bunker" refers to the storage containers located at the Highway 69 facility.
2. Their supervisor, Moutz, also testified that he has been wearing T-shirts and shorts to unload fireworks for years. (Tr. 186).

forklift. (Tr. 126). According to [redacted], he and [redacted] would take turns operating the forklift, lifting pallets of cardboard, shippers, and fireworks, while the other would steady the load from the side. (Tr. 127–28, 132). This process continued until their lunchbreak, and resumed until approximately 2:35 p.m., when a fire broke out as they were emptying the last bunker. (Tr. 125, 167).

According to [redacted], he was steadying a load of Excalibur 6-inch artillery shells while [redacted] was attempting to pick up the load with the forklift. (Tr. 128). [redacted] recalled the inside of this particular bunker contained five pallets of Excalibur shells, with each pallet containing 24–32 packages of 10-shell packages, and an additional pallet of either Treasures (another firework) or shippers, though he could not remember which. (Tr. 128–129). [redacted] testified that the bunker had exposed metal plates and nails. (Tr. 131; Ex. C-3). The fireworks inside were also in poor condition—[redacted] said many of the Excalibur shells were "rotting out and gun-powdered away, mildew" and that he observed "quite a bit" of gunpowder spilled on the floor. (Tr. 139, 149).

As [redacted] and [redacted] were in the process of picking up a pallet, [redacted] noticed a spark underneath the forklift; after that he could not recall any details. (Tr. 132). Moutz, who was stationed at the back dock, testified that he heard the report of a Saturn missile, which is an aerial, exploding firework. (Tr. 178). At that point, he took off running towards the bunker, which was roughly 100 yards away. (Tr. 178). When he arrived, [redacted] came running out of the bunker on fire, followed shortly thereafter by [redacted]. (Tr. 179). Two other employees who were on site ran to get help. (*Id.*). [redacted] suffered severe burns as a result of the fire, and [redacted] died as a result of his injuries.

Fire Investigator Michael Tippie of the Kansas State Fire Marshall's office was called to the scene by the Crawford County Sherriff's Office on the day of the fire. (Tr. 44). When he arrived, Crawford County law enforcement and the fire department were on scene. (Tr. 45). As he walked the scene of the incident, Fire Investigator Tippie saw the forklift at the south end of the bunker. (Tr. 45). Just outside the bunker, Fire Investigator Tippie saw cardboard scattered around the area, some of which was burned, some of which was not, and some of which indicated that the contents were, in fact, 1.4G Consumer Fireworks.[3] (Tr. 46; Ex. 19 at 10–11). He also observed fireworks on the ground in various states of damage: some were undamaged and some were consumed but for the launch tube and binder clay. (Tr. 46; Ex. 19 at14–15; Ex. 21). A lot of fireworks had become impacted in the space between the fork and the mast of the forklift and more were found underneath the forklift when it was removed from the bunker, which had melted down almost completely to the steel ribs. (Tr. 46, 50; Ex. 19 at 15). Prior to the forklift being removed, Fire Investigator Tippie observed that the left fork of the truck was positioned directly over the previously mentioned steel plate and exposed nail. (Tr. 70).

In addition to reviewing the location of the actual fire, Fire Investigator Tippie also reviewed the state of other bunkers on the property, as well as the loading dock area. (Tr. 61). Many of the bunkers were unswept and littered with debris, some had fireworks randomly on the ground, and one bunker in particular had a large pile of undamaged fireworks pushed up into the corner. (Tr. 61–62; Ex. C-19 at 17, 18). The loading dock also had fireworks "here and there" on the ground, some of which were heavily damaged from being driven over by a vehicle. (Tr. 61). Although Fire Investigator Tippie did not do a chemical analysis of the powder that he found on the floor of the exemplar containers and on the ground, he concluded the material was

3. He later testified that at least some of the material had been pulled from the container by the fire department. (Tr. 50).

pyrotechnic based on the MSDS sheet generated by Respondent, which did not provide specific chemical composition. (Tr. 94, 100, Ex. C-10). In response to cross-examination about the contents of the subject container prior to the accident, Fire Investigator Tippie pointed to the 1.4G product that he found underneath the right front tire of the forklift, which was exposed when the forklift was removed from the container after the fire occurred. (Tr. 95).

The Bureau of Alcohol, Tobacco, and Firearms also came to the worksite. (Tr. 200). As noted above, the ATF agents performed a close-out meeting with Respondent and even issued a report. (Ex. C-23). After providing CSHO Hodge with their business cards, however, ATF did not again participate in any inspection or subsequent regulatory action. (Tr. 201).

The day after the fire, CSHO Hodge performed an inspection and conducted interviews. As a result of his inspection, CSHO Hodge recommended that citations be issued to Respondent for multiple violations of the Act. On January 20, 2015, OSHA issued a *Citation and Notification of Penalty*, which was subsequently amended as described above. The Court shall address each violation and the parties' respective positions below.

IV. Discussion

A. Applicable Law

To establish a violation of an OSHA standard pursuant to Section 5(a)(2) of the Act, Complainant must prove: (1) the standard applies to the facts; (2) the employer failed to comply with the terms of the standard; (3) employees were exposed to the hazard covered by the standard, and (4) the employer had actual or constructive knowledge of the violation (i.e., the employer knew or, with the exercise of reasonable diligence, could have known of the violative condition). *Atlantic Battery Co.*, 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

Complainant has the burden of establishing each element by a preponderance of the evidence. *See Hartford Roofing Co.*, 17 BNA OSHC 1361 (No. 92-3855, 1995). "Preponderance of the evidence" has been defined as:

> The greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact *but by evidence that has the most convincing force*; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.

Black's Law Dictionary, "Preponderance of the Evidence" (10th ed. 2014) (emphasis added).

B. Citation 1, Item 1

Complainant alleged a serious violation of the Act in Citation 1, Item 1 as follows:

> 29 CFR 1910.109(b)(1): Explosives or blasting agents were stored, handled, and/or transported when such storage, handling, or transporting of such explosives or blasting agents constituted an undue hazard to life:
>
> On or about 8/12/2014, at the workplace located at 689 S. Highway 69, Pittsburg, KS: Employees engaged in material handling activities in and near container 155 were exposed to fire and struck-by hazards in that the storage and handling of these explosives constituted an undue hazard to life.

See Second Amended Complaint at 3.

The cited standard provides:

> No person shall store, handle, or transport explosives or blasting agents when such storage, handling, and transportation of explosives or blasting agents constitutes an undue hazard to life.

29 C.F.R. § 1910.109(b)(1).

1. The Standard Applies

The scope and application paragraph of section 1910.109 states:

> This section applies to the manufacture, keeping, having, storage, sale, transportation, and use of explosives, blasting agents, and pyrotechnics. The section does not apply to the sale and use (public display) of pyrotechnics, commonly known as fireworks, nor the use of explosives in the form prescribed by the official U.S. Pharmacopeia.

29 C.F.R. § 1910.109(k). An "explosive" is defined as "any chemical compound, mixture, or device, the primary or common purpose of which is to function by explosion, i.e., with substantially instantaneous release of gas and heat . . . . The term "explosives" shall include all material which is classified as Class A, Class B, and Class C explosives by the U.S. Department of Transportation." *Id.* § 1910.109(a)(3). The U.S. Department of Transportation no longer uses the A, B, and C classification systems; instead it uses a system of classification codes and compatibility groups. *See* 49 C.F.R. §§ 173.50(b), 173.52 (defining Class 1 explosives and further categorizing the classification codes and compatibility groups). The regulations found at 49 C.F.R. Chapter I are incorporated by reference into the Act's definition of "explosive". *See* 29 C.F.R. § 1910.109(a)(3) (citing 49 CFR chapter I). As such, revisions to the DOT standard are applicable to such definitions under the Act.

Under the DOT's previous classification system, Respondent's fireworks would be characterized as Class C explosives. (Tr. 20). The current DOT regulations now classify the same consumer fireworks as 1.4G explosives and are further identified by the subcategory UN0336. *See* 49 C.F.R. § 173.53; (R-7 at 4). Respondent admits that it imports, stores, and distributes 1.4G, UN0336 consumer fireworks, but that it does not manufacture the fireworks themselves or mix the chemicals contained therein. *See Respondent's Proposed Findings of Fact and Conclusions of Law* (citing Tr. 20, 171).

As stipulated by the parties, and as shown through the evidence introduced at trial, Respondent keeps and stores explosives as stated in the scope and application paragraph of 29 C.F.R. § 1910.109. (Tr. 20). This applies with equal force to both the Superior and Highway 69 locations. Although the Highway 69 location was no longer Respondent's active headquarters, Respondent nonetheless owned the site and directed its employees to perform clean-up of old

fireworks stored there.[4] (Tr. 120). Thus, Complainant made out a prima facie case that the standard applies.

Respondent, however, argues the standard does not apply because it is unconstitutionally vague. Respondent premises its argument on three bases. First, Respondent cites to an unreviewed ALJ decision in *Culberson Well Service, Inc.*, 12 BNA OSHC 1535 (Docket No. 85-0139, 1985), for the proposition that the term "when" as used in 1910.109(b)(1) is unconstitutionally vague. Second, Respondent claims the standard, as a whole, is vague because it is not clear what facts Complainant must prove to establish a violation of the standard. Third, Respondent argues, insofar as the cited standard is a performance standard, Complainant failed to cite to or reference any particular industry safety standard, such as NFPA 1124, and is therefore vague as applied. The Court rejects Respondent's arguments for the following reasons.

"A statute which is so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates due process." *Brennan v. Occupational Safety and Health Review Comm'n*, 505 F.2d 869, 872 (10th Cir., 1974) (citing *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926)). There is a difference, however, between the due process concerns in the context of a criminal statute and those in a case such as this, which involves "a regulation promulgated pursuant to remedial civil legislation." *Id.* Accordingly, the determination as to whether a particular standard is unconstitutionally vague must be done in light of the conduct to which it is applied. *See U.S. v. National Dairy Products Corp.*, 372 U.S. 29 (1962). "The test for determining the vagueness of a standard is 'the external and objective test' of whether 'a reasonable person responsible for the safety of employees, after considering

4. Irrespective of whether the Highway 69 site was part of Respondent's day-to-day operations, the determining factor for application of the cited standard is whether Respondent kept, had, or stored fireworks at the location. That factor is clearly satisfied.

the standard . . . and the factual situation, would be able to apply the language of the standard to the situation in order to identify the hazard and eliminate it.'" *Brown & Root, Inc.*, 9 BNA OSHC 1833 (No. 76-190, 1981) (citing *Pratt & Whitney Aircraft*, 2 BNA OSHC 1713, 1715 (No. 510, 1975)).

There are three problems with Respondent's reliance on *Culberson*. First, *Culberson* is an unreviewed ALJ decision, which means that it only carries the precedential value of persuasion. *See Leone Constr. Co.*, 3 BNA OSHC 1979, 1981 (No. 4090, 1976). Thus, whether that decision has stood for 30-plus years is of no consequence. Second, the ALJ in *Culberson* did not defer to the Secretary's reasonable interpretation of the standard. The ALJ's basis for doing so was two-fold: (1) the interpretation of the standard was a matter of first impression, and (2) the standard was not drafted by OSHA, but by the National Fire Protection Association (NFPA).[5] Irrespective of whether OSHA drafted the standard or whether its interpretation was a matter of first impression, the ALJ did not properly assess whether the Secretary's interpretation was reasonable in the first instance, instead concluding that the standard was susceptible to competing interpretations and therefore unconstitutionally vague. The Supreme Court held that an agency's interpretation of its own standards is entitled to deference so long as it is reasonable. *Martin v. OSHRC (CF&I Steel)*, 499 U.S. 144 (1991). In the face of competing, reasonable interpretations, that which is proposed by the Secretary takes precedence. *Id.* at 158 ("[A] reviewing court may not prefer the reasonable interpretations of the Commission to the reasonable interpretations of the Secretary . . . ."). The ALJ in *Culberson* basically stopped the analysis once he found an ambiguity but failed to ascertain whether the Secretary's interpretation of that ambiguity warranted deference.

5. The ALJ noted that the standard was "derived from" the NFPA standard and questions whether deference is due the Secretary or the NFPA, but never resolves the question. *Culberson Well Service, Inc.*, 12 BNA OSHC 1535.

More importantly, this Court is not convinced that the term "when", as used in the standard, is ambiguous. *See* 29 C.F.R. § 1910.109(b)(1) ("No person shall store, handle, or transport explosives or blasting agents *when* such storage, handling, and transportation of explosives or blasting agents constitutes an undue hazard to life.") (emphasis added). In *Culberson*, the Secretary proposed that the term "when" meant "in such a manner that", which, coincidentally, is the same interpretation proposed herein. *See Arcadian Corp.*, 17 BNA OSHC 1345, 1350 (No. 93-3270, 1995) (holding that consistency of interpretation is one factor bearing on reasonableness of Secretary's interpretation). The ALJ, however, perceived the ambiguity to be insurmountable, which, as discussed above, was likely attributable to the fact that it was an issue of first impression. While such may have had an impact on the adequacy of notice to the employer, this Court does not perceive the same interpretive issue. *See CF&I Steel*, 499 U.S. 158. The standard, as written, uses the term "when" to indicate the conditions under which certain activities shall not take place; namely, if the listed activities present an undue hazard to life. Thus, the context of the standard indicates the term "when" is being used in a conditional, not temporal, sense. In other words, the standard could just as easily be written in the following terms: "No person shall store, handle, or transport explosives or blasting agents [if] such storage, handling, and transportation of explosives or blasting agents constitutes an undue hazard to life." Read in this way, the Court finds that the term "when" is not ambiguous. Further, such a plain reading implies the interpretation that the Secretary proffered in *Culberson* and continues to advocate for in the case at bar: if, based on conditions or on method, storage, handling, or transportation is unduly hazardous to human life, then it shall not be done. Based on the foregoing, the Court rejects the rationale of the *Culberson* court.

In addition to its reliance on *Culberson*, Respondent claims the standard, as a whole, is vague because it is not clear what facts Complainant must prove to establish a violation of the standard. The Court disagrees.

"It is a basic proposition that 'statutes and regulations which purport to govern conduct must give an adequate warning of what they command or forbid.'" *J.A. Jones Construction Co.*, 15 BNA OSHC 2201 (No. 87-2059, 1993) (quoting *Diebold, Inc. v. Marshall*, 585 F.2d 1327, 1335 (6th Cir. 1978)). Absolute precision of language, however, is not required; "[r]ather, such a standard will be upheld if it is 'drafted with as much exactitude as possible in light of the myriad conceivable situations which could arise and which could be capable of causing injury.'" *Id.* (quoting *Ryder Truck Lines, Inc. v. Brennan*, 497 F.2d 230, 233 (5th Cir. 1974)). Thus, as noted above, a broad, performance-based standard "must be interpreted in light of the conduct to which it is being applied, and external, objective criteria, including the knowledge and perceptions of a reasonable person, may be used to give meaning to such a regulation in a particular situation." *Id.* Accordingly, "the level of understanding in the affected industry bears on whether a broadly-worded standard gives fair notice of its requirements." *Id.*; *see R & R Builders, Inc.*, 15 BNA OSHC 1383, 1387 (No. 88-282, 1991) ("[G]eneralized standards . . . are not vague and unenforceable if 'a reasonable person,' examining the generalized standard in light of a particular set of circumstances, can determine what is required, or if the particular employer was actually aware of the existence of a hazard and of a means by which to abate it. An employer can reasonably be expected to conform a safety program to any known duties.").

A prime example of a similar, broadly worded standard is the personal protective equipment (PPE) standard found at 29 C.F.R. § 1910.132(a), which provides: "Protective equipment, including personal protective equipment . . . shall be provided, used, and maintained

. . . *whenever* it is necessary by reason of hazards of processes or environment, chemical hazards, radiological hazards, or mechanical irritants encountered in a manner capable of causing injury or impairment . . . .” 29 C.F.R. § 1910.132(a). (emphasis added). Much like the cited standard, the PPE standard is phrased as a conditional requirement: if certain hazards are present, adequate protective equipment shall be worn. There is no indication of what conditions should prompt the wearing of PPE, nor is there an indication of what PPE is proper in a given situation; rather, compliance with the standard is premised on context and standard practice within the industry. *See Cape & Vineyard Div. of New Bedford Gas and Edison Light Co. v. OSHRC*, 512 F.2d 1148, 1152 (1st Cir. 1975). In fact, the scope of the PPE standard is much broader in that it is applicable across all industries and applies to the prevention of any injury or impairment to “any part of the body”. 29 C.F.R. § 1910.132(a). The cited standard, on the other hand, is limited to the storage, handling, and transport of explosives insofar as such activity is *unduly* hazardous to human life, thus curtailing the potential scope of its application.

Respondent contends the cited standard does not state what Complainant must prove in order to show that the standard was violated and further argues that the specific allegations levied at trial and discussed throughout discovery are not sufficient to overcome the prejudice Respondent claims to have suffered by virtue of an insufficiently pleaded violation. The Court rejects these arguments for the reasons discussed below.

As regards the pleading requirements, it should be noted that “administrative pleadings, especially citations, should be construed liberally and amended easily.” *Gold Kist, Inc.*, 7 BNA OSHC 1855 (No. 76-2049, 1979) (citing *Nat’l Realty & Constr. Co., Inc. v. OSHRC*, 489 F.2d 1257 (D.C. Cir. 1973)). In that respect, the determination of whether fair notice has been given to the cited employer can be discerned by considering “the pleading, hearing, and decisional

stages of the case since the purpose of the particularity requirement may then be fulfilled." *Id.* (citations omitted). In *Gold Kist*, the Commission overruled the ALJ's decision to vacate a citation on fair notice grounds. *Id.* In particular, the Commission found the ALJ failed to consider factors *external* to the citation. *See id.* (citing *Gannett Corp.*, 4 BNA OSHC 1383 (No. 6352, 1976)). Those factors included an examination of the pleadings, motions, and discovery inquiries. *Id.* That examination revealed a key admission by the respondent, as well as an indication from the Secretary that its citation was premised on an industry safety code. *Id.* Ultimately, the Commission determined that the respondent was not prejudiced in its ability to choose whether to contest or in its efforts to defend itself.

Throughout this litigation, Complainant has identified NFPA 1124 as the reference point for Respondent's duties under 29 C.F.R. § 109(b)(1).[6] During his deposition, CSHO Hodge stated that he referred to the NFPA 1124 standards in assessing the violation. (Ex. R-4 at 12–14). During that same deposition, the parties also discussed OSHA Directive 02-01-053, entitled "Compliance Policy for Manufacture, Storage, Sale, Handling, Use, and Display of Pyrotechnics". (Ex. C-12). That directive, amongst other things, indicates that NFPA 1124 is one amongst many sources that a CSHO may consult when determining industry practice and addressing potential hazards. (*Id.*). Furthermore, in his response to Respondent's requests for production, Complainant also noted that NFPA 1124 can serve as a source for "documenting the industry practice and addressing the hazards associated with storage of consumer fireworks." (Ex. R-5 at 4).

6. At trial and during CSHO Hodge's deposition, there appeared to be some confusion regarding the import of NFPA 1124 and its applicability to 29 C.F.R. § 1910.109(b)(1). Respondent contends that Complainant repeatedly denied that NFPA 1124 was the governing standard under the Act; however, Complainant merely reiterated that the governing standard is 29 C.F.R. § 1910.109(b)(1) and that NFPA 1124 merely serves as one source for industry practice and hazard identification. (Ex. R-5 at 4, 10). This dispute appears to be, in significant part, semantic.

Although the Citation is not a model of clarity, it nonetheless apprised Respondent that its employees were exposed to hazards related to explosions (fire and struck-by hazards) and that this was related to the manner in which they stored, handled, and transported consumer fireworks. Further, during discovery, and CSHO Hodge's deposition in particular, the nature of those hazards was discussed extensively. Specifically, he noted:

> [T]he container was not under the control and authority of a person who was competent to have knowledge of what the contents of the container was and the condition of the contents. Also, that there was no housekeeping, regular housekeeping in the container to insure [sic] that such things such as rodents and raccoons did not get into the container and damage the contents of the container. There was no labeling on the container to identify that it contained fireworks or to keep fire away. That there was debris within 25 feet of the container and when I say debris, I mean like old tires and un-manicured grass, dried grass, things like that, that if a fire occurred the fire could then spread.

(Ex. R-4 at 15). CSHO Hodge also discussed the state of the fireworks found in various containers, including crushed fireworks with the inner contents exposed, firework debris and other combustible materials swept into a corner, and the use of a forklift capable of producing sparks. (Ex. R-4 at 21–22). Each of the identified hazards has its referent in NFPA 1124.[7] (Ex. C-11).

As noted above, a standard will not be held to be vague and unenforceable if a reasonable person, familiar with the industry, can determine what is required or if the employer was actually aware of both the existence of a hazard and of a means by which to abate it. *See R & R Builders, Inc.*, 15 BNA OSHC at 1387. At its core, the cited standard requires the proper storage, handling, and transportation of explosive materials. 29 C.F.R. § 1910.109(b)(1). According to Fire Investigator Tippie and CSHO Hodge, NFPA 1124 provides industry standards and

7. For example, the most directly applicable provision in NFPA 1124 is section 6.12, which addresses housekeeping. (Ex. C-11 at 29). This provision prohibits the presence of loose black powder and exposed pyrotechnic composition; requires that storage containers be kept clean, dry, and free of rubbish; prohibits the use of tools with spark-producing metal parts; and requires that brush, dried vegetation, and other combustibles be kept at least 25 feet away from the perimeter. (*Id.*).

practices for identifying and abating hazardous conditions. (Tr. 87, 290; Ex. C-11). In its answers to Complainant's requests for production, Respondent admitted that it relies on, amongst other things, NFPA 1124. (Ex. C-17 at 004). In fact, Respondent's self-generated MSDS for 1.4G fireworks discusses precautions and hazards that are directly related to, and likely stem from, the NFPA 1124 housekeeping standards, including: keeping shipping cartons cool and dry, carefully picking up and placing spilled items in cardboard cartons, and sweeping up exposed chemical composition with a natural fiber (read: non-sparking) brush. (Ex. C-10). Further, Moutz also testified about Respondent's extensive housekeeping program at the Superior facility, which had apparently fallen by the wayside at the Highway 69 facility. (Tr. 165). Accordingly, the Court finds not only that a reasonably prudent employer in Respondent's position would understand that the condition of the storage containers and their contents, in addition to the manner in which cleaning operations were carried out, were hazardous, but that Respondent itself was actually aware of what was required in order to prevent hazards from coming to fruition. *See J.A. Jones*, 15 BNA OSHC 2201 (finding employer had actual notice of standard's requirements to the extent it already had a program for correcting hazards of the same type as that alleged by Secretary); *see also Trinity Indus., Inc.*, 15 BNA OSHC 1481, 1485 n.8 (No. 88-2691, 1992) (holding an employer's voluntary safety efforts may be considered in conjunction with other evidence to demonstrate that the employer had notice of its obligations under a broadly worded standard). Thus, the Court finds the standard applies.

2. The Terms of the Standard Were Violated

At bottom, this is a housekeeping violation. Respondent's "out of sight, out of mind" attitude towards the Highway 69 facility goes a long way towards explaining the conditions that existed there. (Tr. 163). Amongst other things, Respondent stored damaged, 1.4G consumer

fireworks; the contents of those fireworks were exposed and spilled on the floor of multiple containers;[8] fireworks were found wet and mildewed; grass and brush had grown in close proximity to the storage containers; combustible trash was found both inside and outside of the containers; and the containers themselves had cracks and holes, which permitted animals and moisture to enter. (Tr. 106, 139, 254–55; Ex. C-19, C-20, C-21). [redacted], who was intimately familiar with the conditions at the Highway 69 site, testified that he saw "quite a bit" of loose firework powder on the floor. (Tr. 148–49). Fire Investigator Tippie observed poor housekeeping conditions throughout the complex, including fireworks that appeared to have been driven over and crushed fireworks underneath and compacted within the fork and mast of the forklift. (Tr. 56). According to CSHO Hodge and Fire Investigator Tippie, all of these conditions contributed to a fire and explosion hazard which presented an undue hazard to life.[9] (Tr. 79–80, 105–07). The Court agrees. Accordingly, the Court finds that Respondent violated the standard.

3. Respondent's Employees Were Exposed to the Hazard

[redacted] and [redacted] worked in and around the aforementioned storage containers on the day of the accident and for several days before. The photographs of Fire Investigator Tippie

8. Respondent attempted to discredit Fire Investigator Tippie's conclusions regarding the presence of spilled black powder and/or pyrotechnic material on the floor of the storage containers by asking whether he or any of the other witnesses actually performed testing of the powder to determine its chemical content. Although no testing was performed, the Court finds Fire Investigator Tippie's conclusion to be supported by the evidence: (1) [redacted], who is familiar with fireworks, testified that he observed powder on the floor of the subject trailer prior to entering; (2) there were fireworks that were broken open near the powder; and (3) according to Respondent's self-generated MSDS, the 1.4G Consumer Fireworks "Contains pyrotechnic composition—a solid mixture of oxidizer and fuel that will burn if ignited." (Ex. C-10). *See Okland Constr. Co.*, 3 BNA OSHC 2023 (No. 3395, 1976) (holding judge properly upheld violation based on inferences drawn from circumstantial evidence).

9. The fact that an accident actually occurred lends further credence to this conclusion. Though Respondent correctly argues that the fact of the accident is not sufficient proof of a violation, it nonetheless is a factor to consider. *Ralston Purina Co.*, 7 BNA OSHC 1302 (No. 76-2551, 1979) ("Although evidence concerning the occurrence of and circumstances surrounding an accident is not necessary for the Secretary to establish a prima facie case, and certainly such evidence is not necessarily conclusive in finding a violation, the occurrence of and circumstances surrounding an accident may be probative evidence of a violation.").

illustrate hazardous conditions, such as those described above, existed throughout the Highway 69 worksite. (Ex. C-19, C-20, C-21). Irrespective of the specific cause of the accident in this case, the Court finds violative conditions existed throughout the Highway 69 worksite due to Respondent's hands-off, "out-of-sight, out-of-mind" approach to it. *See American Wrecking Corp.*, 19 BNA OSHC 1703, 1707 n.4 (No. 96-1330, 2001) (consolidated) ("Determining whether the standard was violated is not dependent on the cause of the accident."), *aff'd in part, rev'd in part*, 351 F.3d 1254 (D.C. Cir. 2003) (reversing willful characterization). As a result, [redacted], [redacted], and Moutz were exposed to fire and explosion hazards posed by the poor housekeeping conditions at the Highway 69 worksite.

4. Respondent Had Knowledge of the Conditions

"To establish knowledge, the Secretary must prove that the employer knew or, with the exercise of reasonable diligence, should have known of the conditions constituting the violation." *Central Florida Equip. Rentals, Inc.*, 25 BNA OSHC 2147 (No. 08-1656, 2016). To satisfy this burden, Complainant must show "knowledge of the *conditions* that form the basis of the alleged violation; not whether the employer had knowledge that the conditions constituted a hazard." *Id.* "When a corporate employer entrusts to a supervisory employee its duty to assure employee compliance with safety standards, it is reasonable to charge the employer with the supervisor's knowledge[,] actual or constructive[,] of noncomplying conduct of a subordinate." *Mountain States Tel. & Tel. Co. v. Occupational Safety & Health Review Comm'n*, 623 F.2d 155, 158 (10th Cir. 1980).

Respondent's production supervisor, Moutz, was present at the Highway 69 worksite on the day of the accident. (Tr. 163–64). He testified that they had not been to the Highway 69 facility in at least 15 months since they moved to the Superior facility. (Tr. 163). He also

testified that he specifically observed the conditions described above—including the condition of the bunker at issue—and as represented in the photographs found in Exhibit C-19. (Tr. 163; Ex. C-19 at 6). Moutz noted that the Highway 69 facility "was never like that" when they were operating at that location. (Tr. 163). Thus, not only were violative conditions present at the facility, but Respondent's production supervisor was aware that the conditions existed. Accordingly, the Court finds that Respondent had actual knowledge of the conditions through the knowledge of Moutz.

Further, the Court also finds that Respondent had constructive knowledge of the conditions at the Highway 69 worksite. Notwithstanding the move to the Superior facility, Respondent nonetheless continued to store old fireworks at the Highway 69 worksite. As compared to the extensive program of clean-up at the Superior facility, Moutz noted that such a program no longer existed at the Highway 69 facility because "there was no one there", at least not on a regular basis. (Tr. 165). In light of Respondent's knowledge of the contents of the containers, their location, and the length of time it had been since any housekeeping had occurred at the Highway 69 worksite, the Court finds that a reasonable employer, in Respondent's position, should have been aware of these conditions and taken steps to abate them.

5. The Violation Was Serious

A violation is "serious" if there was a substantial probability that death or serious physical harm could have resulted from the violative condition. 29 U.S.C. § 666(k). Complainant need not show that there was a substantial probability that an accident would actually occur; he need only show that if an accident occurred, serious physical harm could result. *Phelps Dodge Corp. v. OSHRC*, 725 F.2d 1237, 1240 (9th Cir. 1984). If the possible

injury addressed by a regulation is death or serious physical harm, a violation of the regulation is serious. *Mosser Construction*, 23 BNA OSHC 1044 (No. 08-0631, 2010); *Dec-Tam Corp*., 15 BNA OSHC 2072 (No. 88-0523, 1993).

The Court has already found that Respondent's employees were exposed to fire and explosion hazards at the Highway 69 worksite. *See* Section IV.B.3, *supra*. Likely injuries resulting from exposure to fire and/or explosion include burns of various degrees, struck-by injuries, and the possibility of death. (Tr. 249, 256–57). In addition, the standard itself is couched in terms of conditions that are "unduly hazardous to human life". 29 C.F.R. § 1910.109(b)(1). Accordingly, the Court finds that the violation was serious. Thus, Citation 1, Item 1 is AFFIRMED as alleged by Complainant.

C. Citation 1, Item 2

Complainant alleged a serious violation of the Act in Citation 1, Item 2 as follows:

> 29 CFR 1910.132(d)(1): The employer did not assess the workplace to determine if hazards are present or are likely to be present, which necessitate the use of personal protective equipment (PPE):
>
> On or about 8/12/2014, at the workplace at 689 S. Highway 69, Pittsburg KS: Employees engaged in material handling activities in container 155 were exposed to fire and struck-by hazards in that a job hazard analysis had not been performed in order to determine what PPE was needed while loading and unloading fireworks.

See Citation and Notification of Penalty at 11; *see also Second Amended Complaint* at 3.

The cited standard provides:

> The employer shall assess the workplace to determine if hazards are present, or are likely to be present, which necessitate the use of personal protective equipment (PPE).

29 C.F.R. § 1910.132(d)(1).

1. The Standard Applies

The terms of the standard indicate that "the employer *shall* assess the workplace" to make determinations regarding the appropriate use of PPE. 29 C.F.R. § 1910.132(d)(1). It is not conditional; it applies generally to all employers whose employees are potentially exposed to hazards. Thus, the standard applies.

2. The Terms of the Standard Were Violated

The Court also finds the terms of the standard were violated. The standard requires five things: (1) the performance of an assessment; (2) selection of appropriate PPE; (3) requiring its use; (4) communication of selection decision; (5) ensuring proper fit of PPE. *Id.* Respondent contends that it performed the foregoing assessment and that Complainant "offered no proof that a hazard that presented and [sic] undue risk to life was not properly assessed." *Resp't Br.* at 16. The Court disagrees.

First, Complainant is not required to prove that a hazard presented an "undue risk to life" in making a PPE assessment; rather, it is only required to determine if hazards are present that necessitate PPE. In that respect, Complainant identified a number of hazards to which Respondent's employees were exposed, including fire and explosion hazards and struck-by hazards resulting from material handling. (Tr. 208). Second, there is absolutely no evidence to corroborate Respondent's claim that it performed a hazard assessment. Complainant's own supervisor, Moutz, testified he "didn't even think of" performing a worksite assessment to determine whether PPE was required. (Tr. 186). Similarly, CSHO Hodge testified that he spoke to Respondent's Human Resource Director, Jim Ramsey, who told him that Respondent had not

performed a hazard assessment. (Tr. 237–38). In addition, Respondent did not have any documentation indicating that an assessment had been performed.[10]

Based on the foregoing, the Court finds that the terms of the cited standard were violated.

3. Respondent's Employees Were Exposed to the Hazard

For the same reasons expressed above in Section IV.B.3, *supra*, the Court finds that Respondent's employees were exposed to a hazard necessitating the use of PPE.

4. Respondent Had Knowledge of the Conditions

The obligation to perform a hazard assessment belongs to Respondent's management team. *See* 29 C.F.R. § 1910.132(d)(1) ("[T]he employer shall . . . ."). According to two different members of Respondent's management team, Moutz and Ramsey, Respondent had not performed a PPE assessment. Thus, the Court finds that Respondent had knowledge of the violation.

5. The Violation Was Serious

CSHO Hodge identified multiple hazards at the Highway 69 worksite, including fire, explosion, and struck-by hazards, none of which were identified or assessed through a workplace hazard assessment, nor were they addressed through the selection and use of PPE. CSHO Hodge testified that exposure to any of these hazards could result in serious injuries, including crushing injuries, burns, and even death. (Tr. 206–208). Accordingly, the Court finds that the violation was serious. Thus, Citation 1, Item 2 is AFFIRMED as alleged by Complainant.

D. Citation 1, Item 3

Complainant alleged a serious violation of the Act in Citation 1, Item 3 as follows:

10. Contrary to the arguments of Respondent, though 1910.132(d)(1) does not require documentation of the assessment, 1910.132(d)(2) does. *See* 29 C.F.R. § 1910.132(d)(2) (requiring verification of hazard assessment through written certification). The lack of such certification is not sufficient evidence in and of itself to prove a violation; however, it is strong evidence that such an evaluation did not occur.

> 29 CFR 1910.157(g)(1): An educational program was not provided for all employees to familiarize them with the general principles of fire extinguisher use and the hazards involved with incipient stage fire fighting:
>
> On or about 8/12/2014, at the workplace at 689 S. Highway 69, Pittsburg KS: Employees engaged in fire extinguishing activities were exposed to fire hazards in that an educational program to familiarize employees with the general principles of the use of fire extinguishers had not been developed and implemented.

See Citation and Notification of Penalty at 13; *see also Second Amended Complaint* at 3.

> The cited standard provides:
>
> Where the employer has provided portable fire extinguishers for employee use in the workplace, the employer shall also provide an educational program to familiarize employees with the general principles of fire extinguisher use and the hazards involved with incipient stage fire fighting.

29 C.F.R. § 1910.157(g)(1).

1. The Standard Applies

> According to the *Scope and application* paragraph of 29 C.F.R. § 1910.157:
>
> The requirements of this section apply to the placement, use, maintenance, and testing of portable fire extinguishers provided for the use of employees. . . . Where extinguishers are provided but are not intended for employee use *and* the employer has an emergency action plan and a fire prevention plan that meet the requirements of 29 CFR 1910.38 and 29 CFR 1910.39 respectively, then only the requirements of paragraphs (e) and (f) of this section apply.

29 C.F.R. § 1910.157(a) (emphasis added). There is no dispute Respondent provided portable fire extinguishers at the Highway 69 worksite. (Tr. 181, 184–85). Respondent claims, however, that its employees were instructed not to fight fires and to evacuate the premises in the event of one. That, however, only covers one part of the exception described above. In addition to the fire extinguishers not being intended for employee use, Respondent must also have an emergency action plan and a fire protection plan that comply with §§ 1910.38 and 1910.39. Respondent failed to establish those elements. S*ee C.J. Hughes Constr. Inc.*, 17 BNA OSHC 1753, 1756 (No. 93-3177, 1996) ("A party seeking the benefit of an exception to a legal

requirement has the burden of proof to show that it qualifies for the exception."). Therefore the Court finds the standard applies.

2. The Terms of the Standard Were Violated

The Court also finds the terms of the standard were violated. In its brief and at trial, Respondent admitted that it does not have a formal fire extinguisher program in place. This was illustrated by Moutz's testimony. He testified first that Respondent did not have a program that he knew of, but that "we all use them, but there's no official training, but you pull the pin and pul [sic] the trigger. I mean, that's about all there is to a fire extinguisher." (Tr. 186). Ramsey also admitted to CSHO Hodge that Respondent did not provide the required educational training. (Tr. 242–43). The Court finds that the terms of the standard were violated.

3. Respondent's Employees Were Exposed to the Hazard

According to Moutz, employees have used fire extinguishers in the past at fireworks shoots. (Tr. 186). In addition, Ramsey told CSHO Hodge that he believed one of the fire extinguishers at the Highway 69 site was used on the day of the incident because it was not fully charged. (Tr. 241). As noted above, Respondent's employees were exposed to fire and explosion hazards due to the conditions at the Highway 69 worksite. The Court accepts CSHO Hodge's testimony that attempting to put out a fire with an employer-provided extinguisher without having proper training exposes employees to potential fire hazards. In that respect, the Court finds Respondent's employees were exposed to the hazard.

4. Respondent Had Knowledge of the Conditions

Both Moutz and Ramsey, members of Respondent's management team, were aware of the lack of any fire extinguisher education training. As members of management, Moutz's and

Ramsey's knowledge is imputable to Respondent. *See* Section IV.B.4, *supra*. Accordingly, Respondent had actual knowledge of the violation. Respondent does not dispute this fact.

5. The Violation Was Serious

CSHO Hodge testified that, counter to the assertions of Moutz, operation of a fire extinguisher is not just a pull-and-shoot operation. (Tr. 241–42). He stated the primary hazard stemming from this type of violation is the possibility of an untrained employee failing to extinguish an incipient fire, only to be overcome by the flames and/or smoke inhalation. (Tr. 242). As previously noted, exposure to either of these hazards could cause serious injury, up to and including death. Accordingly, the Court finds the violation is serious. Thus, Citation 1, Item 3 is AFFIRMED as alleged by Complainant.

E. Citation 1, Item 4

Complainant alleged a serious violation of the Act in Citation 1, Item 4 as follows:

> 29 CFR 1910.178(c)(2)(vii): Power-operated industrial trucks designated as DY, EE, or EX were not used in atmospheres in which combustible dust is not normally in suspension in the air by normal operation of equipment or apparatus but where deposits or accumulations of such dust could be ignited by arcs or sparks originating in the truck.
>
> On or about 8/12/2014, at the workplace at 689 S. Highway 69, Pittsburg KS: Employees engaged in material handling activities using a LP forklift inside container 155 were exposed to fire hazards in that the forklift was not designated as safe for operations when combustible dust may be present.

See Citation and Notification of Penalty at 14; *see also Second Amended Complaint* at 3.

The cited standard provides:

> Only approved power-operated industrial trucks designated as DY, EE, or EX shall be used in atmospheres in which combustible dust will not normally be in suspension in the air or will not be likely to be thrown into suspension by the normal operation of equipment or apparatus in quantities sufficient to produce explosive or ignitable mixtures but where deposits or accumulations of such dust may be ignited by arcs or sparks originating in the truck.

29 C.F.R. § 1910.178(c)(2)(vii).

1. The Standard Applies

According to 1910.178(a)(1), "This section contains safety requirements relating to fire protection, design, maintenance, and use of fork trucks . . . and other specialized industrial trucks powered by electric motors or internal combustion engines." 29 C.F.R. § 1910.178(a)(1). Thus, at the most general level, the standards found under section 1910.178 apply. With respect to the cited subsection, 1910.178(c)(2)(vii), its requirements are only applicable if certain conditions are met: (1) deposits or accumulations of combustible dust; and (2) such accumulations or deposits may be ignited by arcs or sparks originating in the truck. *See id.*

Respondent's primary contention is that neither CSHO Hodge nor Fire Investigator Tippie collected a sample of the purported combustible dust to determine the contents through laboratory testing. In particular, Respondent claims CSHO Hodge did not follow any of the requirements of the directive governing combustible dust inspection procedures. (Ex. C-13). The Court finds such testing was unnecessary.

Complainant correctly notes that the Act does not define "combustible dust" and, therefore, relies on the definition provided in OSHA's Compliance Directive, CPL 03-00-008, *Combustible Dust National Emphasis Program*: "A combustible particulate solid that presents a fire or deflagration hazard when suspended in air or some other oxidizing medium over a range of concentrations, regardless of particle size or shape." (Ex. C-13 at 10).[11] A "combustible particulate solid" is further defined as "any combustible solid material composed of distinct particles or pieces, regardless of size, shape, or chemical composition." The directive also indicates testing requirements for combustible dust.[12] (Ex. C-13).

11. These definitions track the NFPA standard for combustible dust as well. (Ex. R-2, NFPA 654).
12. It should be noted that an addendum to CPL 03-00-008 indicates that "this directive is not intended for inspections of explosives and pyrotechnics manufacturing facilities covered by the Process Safety management

Complainant does not dispute that it did not take samples of the spilled firework material from inside of the trailers; however, he claims such testing was not necessary because fireworks are a commonly known combustible substance. *Compl't Br.* at 23. While the Court does not entirely agree with that argument, there is nonetheless sufficient evidence to establish the combustibility of the spilled contents of the fireworks in the container at issue, as well as other storage containers at the Highway 69 worksite. As noted above, Respondent's own MSDS sheet, which is generally applicable to all 1.4G fireworks at its facility, indicates the contents of the 1.4G consumer fireworks are "a solid mixture of oxidizer and fuel that will burn if ignited." (Ex. C-10). In other words, this is not a question or whether the spilled contents of the broken fireworks will combust under the proper conditions as in the case of the other dusts identified in CPL 03-00-008; rather, the fuel contained within the fireworks is already combined with an oxidizing medium to cause an explosion upon ignition. (Ex. C-10; *see* Ex. C-19 at 18–19 (showing fireworks packages indicating "WARNING – SHOOTS FLAMING BALLS – CAREFULLY READ OTHER WARNING ON BACK PANEL"). The distinction is important—the sources for the types of dust in the Combustible Dust CPL are not, in and of themselves, volatile. (Ex. C-13 at 1). However, the source of the dust identified in the storage containers is unquestionably so—the fireworks identified by [redacted] and Moutz were intended to ignite, achieve flight, flash, and explode, all through the process of combustion. (Ex. C-19 at 9–11).

In addition to the foregoing, [redacted], who had observed the condition of the bunker at issue prior to the fire and had years of experience working around fireworks, testified he saw

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(PSM) standard . . . . (Ex. C-13 at 4). Although Respondent does not engage in pyrotechnic manufacturing, such an exception clarifies that pyrotechnic and/or explosive materials are not characterized in the same way as other combustible dusts, e.g., cotton, wood, metal, or carbonaceous materials.

broken-open fireworks with their contents spilled onto the floor of the bunker. (Tr. 143–44). Fire Investigator Tippie, who has years of experience working with explosives and has specific experience related to pyrotechnics, also testified that he observed broken-open fireworks with their contents spilled onto the floor. (Tr. 62). Given the contents of the fireworks, combined with the observations of [redacted] and Fire Investigator Tippie, the Court finds that it is reasonable to infer that combustible dust was present at Respondent's worksite.[13] Thus, the standard applies.

2. The Terms of the Standard Were Violated

The Court also finds the terms of the standard were violated. First, as discussed above, the storage container at issue, as well as other storage containers at the Highway 69 worksite, contained deposits or accumulations of combustible dust. *See* Section IV.B.2, *supra*. Second, though Respondent argues that the testimony regarding the actual ignition source of the fire in this case was not explicitly identified as "originating in the truck"; the specific cause of this accident is irrelevant to the question of whether the standard was violated. The cited standard states, "Only approved power-operated trucks designated as DY, EE, or EX shall be used . . . where deposits or accumulations of [combustible] dust may be ignited by arcs or sparks originating in the truck." 29 C.F.R. § 1910.178(c)(2)(vii). In other words, if there are deposits or accumulations of combustible dust that *may* be ignited by arcs or sparks originating in the truck, *only* DY, EE, or EX trucks can be used. The presumption regarding trucks not certified as DY, EE, or EX is already built into the standard—they produce sparks that could ignite combustible dust. *See id.* § 1910.178(b) (DY units "do not have any electrical equipment"; in EE units "the electric motors and all other electrical equipment are completely enclosed"; and EX units have "electrical fittings and equipment . . . designed, constructed and assembled [to be]

13. NFPA 1124 also defines "consumer fireworks" as "small fireworks devices containing restricted amounts of pyrotechnic composition designed primarily to produce visible or audible effects *by combustion*." (Ex. C-11 at 12).

used in certain atmospheres containing flammable vapors or dusts"). Respondent's employees were using a liquid propane (LP) designated forklift. (Tr. 174, 246). According to CSHO Hodge, an LP forklift is not intrinsically safe or rated for the conditions found at the Highway 69 worksite because it can "produce a spark or excessive heat, which would then be the source of ignition . . . ." (Tr 249). This comports with 1910.178, which characterizes an LP unit as "similar to the G unit except that liquefied petroleum gas is used for fuel instead of gasoline." 29 C.F.R. § 1910.178(b)(10). G units are "gasoline powered units *having minimum acceptable safeguards against inherent fire hazards*." *Id.* § 1910.178(b)(8) (emphasis added). Because the forklift Respondent was using was not appropriate for the conditions, the Court finds the terms of the standard were violated.[14]

3. Respondent's Employees Were Exposed to the Hazard

[redacted] and [redacted] were utilizing a liquid propane forklift in storage containers that contained accumulations of combustible, pyrotechnic material. As noted previously in this opinion, this exposed them to fire, explosion, and struck-by hazards. *See* Section IV.B.3, *supra*. Thus, the Court finds that Respondent's employees were exposed to the hazard.

4. Respondent Had Knowledge of the Conditions

[redacted] testified and Moutz confirmed that Respondent's employees used LP forklifts. (Tr. 133, 174, 249–250). Moutz told CSHO Hodge that Respondent had not considered using a different type of forklift, and the evidence shows that no serious hazard evaluation was performed. (Tr. 250). Moutz also testified he observed [redacted] and [redacted] using the LP forklift to unload fireworks and material from the storage containers on the day of the accident. (Tr. 167–68). Further, as discussed repeatedly above, the Court has already found Respondent

14. This may not be the case under normal operations at the Superior facility, but the state of the fireworks and the containers at the Highway 69 facility were such that additional precautions were warranted.

was at least constructively aware of the conditions at the Highway 69 worksite. *See* Section IV.B.4, *supra*.

5. The Violation Was Serious

For the same reasons expressed above with respect to Citation 1, Item 1, the Court finds the violation was serious. *See* Section IV.B.5. The Court hereby incorporates those findings herein. Accordingly, Citation 1, Item 4 is AFFIRMED as a serious violation of the Act.

F. Citation 2, Item 1

Complainant alleged an other-than-serious violation of the Act in Citation 2, Item 1 as follows:

> 29 CFR 1910.1200(e)(1): The employer did not develop, implement, and/or maintain at the workplace a written hazard communication program which describes how the criteria specified in 29 CFR 1910.1200(f), (g), and (h) will be met:
>
> The employer has not developed a written hazard communication program.

See Citation and Notification of Penalty at 15; *see also Second Amended Complaint* at 3.

The cited standard provides:

> Employers shall develop, implement, and maintain at each workplace, a written hazard communication program which at least describes how the criteria specified in paragraphs (f), (g), and (h) of this section for labels and other forms of warning, safety data sheets, and employee information and training will be met . . . .

29 C.F.R. § 1910.1200(e)(1).

1. The Standard Applies

This section "requires chemical manufacturers or importers to classify the hazards of chemicals which they produce or import . . . ." 29 C.F.R. § 1910.1200(b)(1). As such, "This section applies to any chemical which is known to be present in the workplace in such a manner that employees may be exposed under normal conditions of use or in a foreseeable emergency."

Id. § 1910.1200(b)(2). A "foreseeable emergency" is defined as "any potential occurrence such as, but not limited to, equipment failure, rupture of containers, or failure of control equipment which could result in an uncontrolled release of a hazardous chemical into the workplace." *Id.* § 1910.1200(c).

Respondent contends the fireworks it imports and distributes are "articles", which are excepted from the requirements of 29 C.F.R. § 1910.1200. *See id.* §§ 1910.1200(b)(6)(v). Articles are defined as:

> [A] manufactured item other than a fluid or particle: (i) which is formed to a specific shape or design during manufacture; (ii) which has end use function(s) dependent in whole or in part upon its shape or design during end use; and (iii) which under normal conditions of use does not release more than very small quantities, *e.g.*, minute or trace amounts of a hazardous chemical (as determined under paragraph (d) of this section), and does not pose a physical hazard or health risk to employees.

Id. § 1910.1200(c). The Court finds Respondent cannot establish that it is entitled to the benefit of this exception.

The first two elements of the definition of an article are easily established—fireworks are formed to a particular shape during manufacture, which facilitates the end use. The third element contains two parts: (1) under normal conditions of use, the article does not release more than very small quantities of hazardous chemicals; and (2) the article does not pose a physical hazard or health risk. According to this section, a "physical hazard" is defined as "a chemical that is classified as posing one of the following hazardous effects: explosive; flammable (gases, aerosols, liquids, or solids); oxidizer (liquid, solid, or gas); self-reactive; pyrophoric (liquid or solid); self-heating; organic peroxide; corrosive to metal; gas under pressure; or in contact with water emits flammable gas." *Id.* The same definition directs readers to review Appendix B to the standard, which is entitled "Physical Hazard Criteria". *Id.*; *see also* Appendix B to § 1910.1200 (defining and classifying explosives).

Respondent's principal problem in attempting to prove the exception is that the purported articles pose a physical hazard. First, the parties agree the fireworks at the Highway 69 worksite are considered 1.4G explosives by the DOT. (Tr. 20). Second, § 1910.1200(c) defines an explosive chemical as a physical hazard. According to mandatory Appendix B, an explosive chemical is "a solid or liquid chemical which is in itself capable by chemical reaction of producing gas at such a temperature and pressure at such a speed as to cause damage to the surroundings. Pyrotechnic chemicals are included even when they do not evolve gases." *Id.* at Appendix B, Sec. B.1.1.1. (also describing items which contain explosive chemicals). In view of that definition, the appendix indicates that the class of explosives comprises:

> (a) explosive chemicals; (b) explosive items, except devices containing explosive chemicals in such quantity or of such a character that their inadvertent or accidental ignition or initiation shall not cause any effect external to the device either by projection, fire, smoke, heat, or loud noise; and (c) chemicals and items not included under (a) and (b) above which are manufactured with the view to producing a practical explosive or pyrotechnic effect.

Id. at Appendix B, Sec. B.1.1.2. The only exceptions to this class are items that, although they contain explosive chemicals, will not cause any effect external to the item when ignited. *Id.* This is consistent with the definition of an article provided at 29 C.F.R. § 1910.1200(c), which includes manufactured items that do not release more than very small quantities of hazardous chemical under normal conditions of use. *Id.* § 1910.1200(c). The fireworks in the bunkers identified as "artillery shells" or were otherwise characterized as capable of flight, flashes, or explosions, do not fall within that limited exception. Accordingly, the Court finds the fireworks identified in Respondent's bunkers as capable of such effects are not "articles" under the terms of the Hazard Communication Standard.

Without the benefit of the exception, the Court finds that the standard applies to Respondent's workplace. According to the scope and application paragraph, this section applies

to "any chemical which is known to be present in the workplace in such a manner that employees may be exposed under normal conditions of use or in a foreseeable emergency." *Id.* § 1910.1200(b)(2). At the very least, the facts of this case illustrate that Respondent's employees were exposed to a "foreseeable emergency" in that there was potential for "equipment failure, rupture of containers, or failure of control equipment which could result in an uncontrolled release of a hazardous chemical into the workplace." *Id.* § 1910.1200(c). Further, Respondent's MSDS described procedures for the clean-up of spilled items or exposed chemical composition, which illustrates exposure under normal conditions of use. (Ex. C-10). The state of the containers described by [redacted] and Fire Investigator Tippie do not suggest "minute or trace amounts" of a hazardous chemical such that the effects of its inadvertent or accidental ignition would be confined to the item/device/article. *See* 29 C.F.R. § 1910.1200(c), Appendix B, Sec. B.1.1.2.

2. The Terms of the Standard Were Violated

CSHO Hodge asked Respondent's HR Manager, Ramsey, if Respondent had a hazard communication program and whether he could have a copy. (Tr. 260). Ramsey said that they did not have a hazard communication program. (Tr. 260). Subsequent requests for any sort of documentation were also unavailing. (Tr. 262). Because Respondent did not have a hazard communication program, the terms of the standard were violated.

3. Respondent's Employees Were Exposed to the Hazard

For the same reasons expressed in Section IV.B.3, *supra*, the Court finds Respondent's employees were exposed to the hazard.

4. Respondent Had Knowledge of the Conditions

As previously noted, Respondent's HR Manager told CSHO Hodge that they did not have a hazard communication program, and subsequent requests for documents illustrating such

a program went unfulfilled. Indeed, Respondent's entire defense to this citation is that it relied on the standard's definition of "article" as the reason for not implementing such a plan. *See* Ex. R-8 at 2 (indicating Respondent's belief that its consumer fireworks are articles). Thus, Respondent had knowledge of the conditions requiring the implementation of a hazard communication plan. It is the employer's responsibility in the first instance to have compliant plans and procedures in place. The failure to have a plan at all—as opposed to having the opportunity to observe non-compliant behavior—can only be known by the employer. Accordingly, the Court finds Respondent had knowledge of the conditions requiring a hazard communication plan and that it did not possess a plan to address those conditions.

V. Penalty

Under the Act, an employer who commits a "serious" violation may be assessed a civil penalty of up to $7,000 for each such violation. *See* 29 U.S.C. § 666(b). In determining the appropriate penalty for affirmed violations, section 17(j) of the Act requires the Commission to give due consideration to four criteria: (1) the size of the employer's business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the employer's prior history of violations. 29 U.S.C. § 666(j). Gravity is the primary consideration and is determined by the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood of an actual injury. *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2214 (No. 87-2059, 1993). It is well established that the Commission and its judges conduct *de novo* penalty determinations and have full discretion to assess penalties based on the facts of each case and the applicable statutory criteria. *E.g.*, *Allied Structural Steel Co.*, 2 BNA OSHC 1457, 1458 (No. 1681, 1975); *Valdak Corp.*, 17 BNA OSHC 1135, 1138 (No. 93-0239, 1995), *aff'd*, 73 F.3d 1466 (8th Cir. 1995).

OSHA recommended a total penalty amount of $24,000. Complainant did not recommend a penalty adjustment for size of employer because Respondent employed more than 250 employees. (Tr. 266). The Secretary did not consider Respondent's levels of attempted good faith compliance or precautions to prevent injury sufficient to warrant significant penalty reduction.

The Court gives deference to the Secretary's penalty assessments. In so doing the Court notes the presence of a significant amount of highly explosive material at the worksite, which was designated by Respondent for the storage of such materials. Explosion or conflagration were all too likely to result from any misstep, and the probable injuries resulting from such an event carried a high likelihood of severity or death. Therefore the gravity assessment is high. The Court reduces the penalties assessed slightly, as noted below, based upon a somewhat larger assessment of Respondent's good faith efforts to prevent injury than was assigned by OSHA.

ORDER

The foregoing Decision constitutes the Findings of Fact and Conclusions of Law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure. Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Citation 1, Item 1 is AFFIRMED as serious, and a penalty of $7,000.00 is ASSESSED.
2. Citation 1, Item 2 is AFFIRMED as serious, and a penalty of $6,000.00 is ASSESSED.
3. Citation 1, Item 3 is AFFIRMED as serious, and a penalty of $3,000.00 is ASSESSED.
4. Citation 1, Item 4 is AFFIRMED as serious, and a penalty of $4,000.00 is ASSESSED.
5. Citation 2, Item 1 is AFFIRMED as other-than-serious, and no penalty is ASSESSED.

SO ORDERED

/s/
Judge Peggy S. Ball

Occupational Safety and Health Review Commission

Date: April 24, 2017
Denver, Colorado