United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR, Complainant, v. THE THOMAS J. DYER COMPANY, Respondent.	OSHRC Docket No. **17-0950**

Attorneys and Law Firms:

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DECISION AND ORDER

John B. Gatto, United State Administrative Law Judge.

I. INTRODUCTION

This case arises from an inspection conducted by the Department of Labor's Occupational Safety and Health Administration ("OSHA"), which resulted in the issuance of one serious citation with a proposed penalty of $6,234.00 to The Thomas J. Dyer Company ("Dyer") for allegedly violating the Occupational Safety and Health Act of 1970 (the "Act"), 29 U.S.C. §§ 651–678. The citation charged a violation of 29 C.F.R. § 1926.350(a)(10), an OSHA construction industry standard related to gas welding and cutting. After Dyer timely contested the citation, the Secretary of Labor (the "Secretary")[1] initiated this enforcement proceeding before the Occupational Safety

[1] The Secretary's responsibilities under the Act have been delegated to an Assistant Secretary who directs OSHA. Secretary of Labor's Order 1-2012, 77 Fed. Reg. 3912 (Jan. 25, 2012). The terms "Secretary" and "OSHA" are used

and Health Review Commission (the "Commission" or the "Court") by filing a formal complaint charging Dyer with violating the Act and seeking an order affirming the citation and proposed penalty.[2] Dyer filed an answer denying it violated the Act and a bench trial was held in Lexington, Kentucky.

There is no dispute, and the Court finds, that it has jurisdiction pursuant to section 10(c) of the Act, 29 U.S.C. § 659(c), that Dyer is an employer engaged in a business affecting commerce within the meaning of section 3(5) of the Act, 29 U.S.C. § 652(5), and that Dyer's principal place of business is in Cincinnati, Ohio (Pretrial Order ¶2). Pursuant to Commission Rule 90(a), after hearing and carefully considering all the evidence and the arguments of counsel, the Court issues this Decision and Order, which constitutes its final disposition of the proceedings.[3] For the reasons indicated *infra*, the Court concludes the citation must be vacated.

II. BACKGROUND

On March 20, 2017, OSHA Compliance Safety and Health Officer Michelle Sotak conducted an inspection at the VA Medical Center in Lexington, Kentucky. (Tr. 10). During this inspection, nine of Dyer's employees were present at the center and engaged in "retro-fitting the Chiller Plant," which involved "welding, cutting, and construction." (Pretrial Order ¶ 2c; Tr. 11-12.) During her inspection, Sotak discovered a cage built by Dyer with at least ten liquid petroleum cylinders in the left compartment and two oxygen cylinders in the right compartment. (Tr. 14, 15-16, 26.) The two compartments were separated by two 1/8-inch steel barriers separated from each other by 2 inches of air. (Ex. C- 10; Tr. 22-3.) Both barriers were taller than 5 feet. (Ex. C- 10; Tr. 40.) A corrugated metal ceiling enclosed the roof of the cage, creating a gap between the ceiling and the barriers. (Ex. C- 10; Tr. 29-30, 35.) Additionally, a small gap was present at the bottom of the right compartment. (Ex. C- 10; Tr. 75.) The purpose of these gaps was to mimic the

interchangeably herein.

[2] Attached to the complaint and adopted by reference were the two citations at issue. Commission Rule 30(d) provides that "[s]tatements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes." 29 C.F.R § 2200.30(d).

[3] If any finding is in truth a conclusion of law, or if any stated conclusion is in truth a finding of fact, it shall be deemed so.

"chimney effect" utilized by the "Anthony cart," a small 2-compartment cart that fits 2 cylinders divided by a metal barrier, which enables hot air to be pulled from the bottom of the cage and expelled from the top of the barriers in the event of a fire. (Tr. 75-7.)

After interviewing Dyer's employees, Sotak determined the cage had been present for approximately six months and when the employees "need a cylinder, they'll go to the cage and get the cylinder and bring it to where it's needed." (Tr. 20). Sotak also testified Dyer's employees passed through this area daily to reach the Chiller Plant where they were working. (Tr. 24.) Although Sotak testified the case "is accessed as needed throughout the day or throughout the week, depending on how much welding or torching is occurring on site," she also testified they were "performing torching and welding activities on a daily basis." (Tr. 20).

As a result of her inspection, Sotak recommended the issuance of a citation for a violation of section 1926.350(a)(10) for the conditions she observed relating to the storage of the oxygen cylinders. (Tr. 21.) The Secretary subsequently issued the instant citation to Dyer on May 2, 2017.

III. ANALYSIS

The fundamental objective of the Act is to prevent occupational deaths and serious injuries. *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 11 (1980). "The Act requires that employers 'comply with occupational safety and health standards promulgated under this chapter.' 29 U.S.C. § 654(a)(2)." *Mountain States Contractors, LLC v. Perez*, 825 F.3d 274, 277 (6th Cir. 2016).[4] The Commission serves as a "neutral arbiter" between the Secretary and cited employers. *Cuyahoga Valley Ry. Co. v. United Transp. Union*, 474 U.S. 3, 7 (1985). Thus, Congress vested the Commission with the "adjudicatory powers typically exercised by a *court* in the agency-review

[4] Under the Act, an employer may seek review in the court of appeals in the circuit in which the violation occurred, the circuit in which the employer's principal office is located, or the District of Columbia Circuit. 29 U.S.C. § 660(a). The Secretary may seek review in the circuit in which the violation occurred or in which the employer has its principal office. 29 U.S.C. § 660(b). This case arose in Kentucky, and the company's corporate office is in Ohio, which are both in the Sixth Circuit. "[I]n general, '[w]here it is highly probable that a Commission decision would be appealed to a particular circuit, the Commission has ... applied the precedent of that circuit in deciding the case—even though it may differ from the Commission's precedent.'" *Dana Container, Inc.*, 25 BNA OSHC 1776, 1792 n.10 (No. 09-1184, 2015), *aff'd*, 847 F.3d 495 (7th Cir. 2017) (citation omitted). Therefore, the Court applies the precedent of the Sixth Circuit in deciding the case, where it is highly probable that a Commission decision would be appealed to.

context." *Martin v. Occupational Safety and Health Review Comm'n (CF&I Steel Corp.*), 499 U.S. 144, 151, 154 (1991) (emphasis in original).

The Secretary has the burden of establishing Dyer violated the cited standard. "To establish a prima facie violation of the Act, the Secretary of Labor must show by a preponderance of the evidence that '(1) the cited standard applies to the facts, (2) the requirements of the standard were not met, (3) employees had access to the hazardous condition, and (4) the employer knew or could have known of the hazardous condition with the exercise of reasonable diligence.'" *Id.*, 825 at 279 (*quoting Carlisle Equip. Co. v. Sec'y of Labor & Occupational Safety*, 24 F.3d 790, 792–93 (6th Cir. 1994) (internal citation omitted)).

Most of the facts of this case are not in controversy. Dyer was engaged in welding, cutting, and construction at the worksite where it had both oxygen cylinders and liquid petroleum cylinders. Dyer's employees retrieved the cylinders and passed through this area daily to reach the Chiller Plant where they were working. Access to the alleged violative conditions is established. Actual knowledge is also shown since Dyer knew the barrier had not been tested and that oxygen and liquid petroleum cylinders were in storage. In addition, constructive knowledge is established by the location of the storage rack and cylinders in plain view. Therefore, Dyer knew or could have known of the alleged hazardous condition with the exercise of reasonable diligence. Thus, the only issues in dispute are the applicability of the cited standard and whether the barrier on the storage rack complied with the terms of the standard.

The cited construction standard mandates "[o]xygen cylinders in storage shall be separated from fuel-gas cylinders or combustible materials (especially oil or grease), a minimum distance of 20 feet (6.1 m) or by a noncombustible barrier at least 5 feet (1.5 m) high having a fire-resistance rating of at least one-half hour." 29 C.F.R. § 1926.350(a)(10). The citation asserts Dyer violated the standard since employees were allegedly exposed to fire and explosion hazards when oxygen and liquid petroleum cylinders were not separated by a non-combustible barrier. (Compl. Ex. A.)

A condition precedent to the applicability of the cited standard is that the oxygen cylinders were "in storage." In a December 31, 1998, Standard Interpretations Letter, OSHA interpreted this "in storage" requirement as it relates to the cited construction standard, and indicated OSHA "consider[s] a cylinder to be in storage when it is reasonably anticipated that gas will not be drawn

from the cylinder within 24 hours (overnight hours included). At that point the storage requirements must be met." (Standard Interpretations Letter, dated December 31, 1998.)[5]

"In contrast, if it is reasonably anticipated that gas will be drawn from the cylinder during the next 24 hours, the cylinder is not considered to be in storage and the §1926.350(a)(10) storage requirements do not apply." (*Id.*) "Whether it is 'reasonably anticipated' that gas will be drawn within 24 hours is based on whether specific welding or cutting work is planned for that period and the number of gas cylinders expected to be required to do that work." (*Id.*) As indicated *supra*, the record shows Dyer was performing torching and welding activities on a daily basis and the cage was accessed as needed throughout the day. Therefore, it was reasonably anticipated that gas would be drawn from the cylinder during the next 24 hours, and therefore, the cylinders were not considered to be in storage. Thus, the section 1926.350(a)(10) storage requirements did not apply.

Further, although an agency's interpretation of its own regulation is entitled to substantial deference so long as it is reasonable, *Martin*, 499 U.S. 144, in this case the Secretary has not produced any evidence regarding Dyer's intended use of the cylinders within the relevant twenty-four hour period. The Commission has held that based on "the evidence as a whole," cylinders were not "in storage" under section 1926.350(j)[6] where "it is unclear when the cited cylinders were last used or when they were to be used next." *Andrew Catapano Enterprises, Inc.*, 17 BNA OSHC 1776, 1781 (Nos. 90-0050, 90-0189, 90-191, 90-0192, 90-0193, 90-0071, 90-0772, 91-0026, 1996) (*quoting American Bridge/Lashcon, J.V.*, 16 BNA OSHC 1867, 1869 (No. 91-633, 1994), *aff'd*, 70 F.3d 131 (D.C.Cir.1995)). The Court's holding, *supra*, is consistent with the Commission's holding in *Andrew Catapano Enterprises, Inc.*, *id.*, since, based on the evidence as

[5] *See* https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=22674 (last accessed October 5, 2017).

[6] Section 1926.350(j) was the predecessor to section 1926.350(a)(10), with the same requirements for stored cylinders. Section 1926.350(j) provides: "For additional details not covered in this subpart, applicable technical portions of American National Standards Institute, Z49.1–1967, Safety in Welding and Cutting, shall apply." Section 3.2.4.3 of ANSI Z49.1–1967 provides "Oxygen cylinders in storage shall be separated from fuel-gas cylinders or combustible materials (especially oil or grease), a minimum distance of 20 feet or by a noncombustible barrier at least 5 feet high having a fire-resistance rating of at least ½ hour." *See* https://archive.org/stream/gov.law.ansi.z49.1.1967/ansi.z49.1.1967_djvu.txt (last accessed October 5, 2017).

a whole, it is unclear when the cited cylinders were last used or when they were to be used next. Therefore, the Secretary has not established the cited standard applied to the facts.

Even assuming the Secretary established the cylinders were "in storage," he failed to prove the barrier on the cage did not comply with the terms of the standard. As indicated *supra*, Dyer had two options to comply with the cited standard and Dyer chose the latter option: to separate the oxygen and liquid petroleum cylinders by a noncombustible barrier at least 5 feet high with a fire-resistance rating of at least ½ hour. The parties do not dispute the barrier between the oxygen and liquid petroleum cylinders was made of noncombustible steel, and that it exceeded the 5-foot tall requirement. (Tr. 20, 22, 24-5, 40, 46.)

Patton testified their cylinder cart was premised on the engineered steel fire barriers patented by Anthony Welded Products ("Anthony cart"). In a January 23, 2004, Standard Interpretations Letter, the Secretary noted that while OSHA did not have the background technical information regarding the design and testing of the Anthony cart, "as long as the barrier is at least 5 feet high, meets the ½-hour fire resistance rating and is designed to prevent the spread of the fire from one cylinder to another, employers using the product would meet the requirements of §1926.350(a)(10)."[7] The Secretary argues "the record contains no indication that the steel barriers fabricated by [Dyer] are so specifically engineered." (Sec'y's Br. 9.)

The Secretary's assertion is true, since the Secretary failed to test the barrier to determine its fire resistance rating, and, as he is well aware, he had the burden to prove Dyer's barriers did *not* comply with the terms of the cited standard. Nonetheless, the Secretary contends he did not need to test the barrier because OSHA's "interpretative guidance" provides that a ½-inch thick solid steel barrier would not provide at least ½-hour fire resistance. Thus, the Secretary argues the ¼-inch barrier used by Dyer did not provide the appropriate fire resistance. (Sec'y's Br. 9) (*citing* Ex. C-11; Ex. R-4 at 0022-24). The Court finds no merit in this argument.

The Secretary relies on an unpublished, June 30, 2006, internal memorandum from OSHA's Director of Enforcement Programs to an OSHA regional administrator, addressing a

[7] *See* https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=24741 (last accessed October 5, 2017).

general industry standard, section 1910.253(b)(4)(iii). The internal memorandum indicates "a solid mild steel plate barrier, ½-inch thick, would fail to meet the fire-resistance rating for ½-hour[.]" (Ex. C-11). This unpublished internal memorandum in turn references a July 5, 1982 unpublished internal memorandum addressing yet another general industry standard, section 1910.252(a)(2)(iv)(c), which opines "a ½ inch mild steel plate barrier does not meet the intent of standards 29 CFR 1910.252(a)(2) (iv) (e)[.]" (Ex. R-4 at 0024).[8]

Assuming the Secretary gave adequate notice to regulated parties, including Dyer, of the unpublished internal memorandum,[9] the Court nonetheless concludes they are not reliable for at least two reasons. First, the Secretary failed to establish the opinions were based on sufficient facts or data, were the product of reliable principles and method, or that the principles and methods were reliably applied to the facts of this case.[10] Second, in addressing the cited construction standard, 1926.350(a)(10), the Secretary acknowledged in a March 4, 2004, Standard

[8] The Secretary asserts that even though OSHA did not publish the memoranda, the Court relied on them in *National Steel Erection, Inc.*, 24 BNA OSHC 1240, 1244 (No. 11-2467, 2012) (ALJ Calhoun). (Sec'y's Br. 9.) However, an unreviewed administrative law judge decision, such as in *National Steel*, does not constitute binding precedent for the Commission. *KS Energy Serv. Inc.*, 23 BNA OSHC 1483 (No. 09-1272, 2011); *Leone Constr. Co.*, 3 BNA OSHC 1979, 1981 (No. 4090, 1976). For the reasons indicated *infra*, to the extent *National Steel* relied on the cited memoranda, the Court does not find it persuasive and declines to follow it.

[9] When deciding whether to defer to the Secretary's interpretation of his own regulations, the Commission, like the reviewing courts, takes into account such factors as the adequacy of notice to regulated parties. *Martin*, 499 U.S. at 158-159. Here, the internal memoranda were not published on OSHA's web site where it maintains its standard interpretations. *See Wal-Mart Distribution Ctr. # 6016*, 25 BNA OSHC 1396, 1408 (No. 08-1292, 2015) (view of Commissioner MacDougall) (*citing Martin*, 499 U.S. at 158-159) (reviewing courts must defer to the Secretary's interpretation of his own regulations where that interpretation is reasonable, taking into account such factors as the consistency with which the interpretation has been applied, "the adequacy of notice to regulated parties," and "the quality of the Secretary's elaboration of pertinent policy considerations"). *See also Superior Masonry Builders, Inc.*, 20 BNA OSHC 1182, 1184 n.2 (No. 96-1043, 2003); *Union Tank Car Co.*, 18 BNA OSHC 1067, 1069 (No. 96-0563, 1997).

[10] This action was assigned to the Commission's Simplified Proceedings, where the Federal Rules of Evidence do not apply. 29 29 C.F.R. § 2200.209(c). Under such proceedings, the Court is required to "receive oral, physical, or documentary evidence that is not irrelevant, unduly repetitious or unreliable." *Id.* Even when the Federal Rules of Evidence do not apply, "they can provide guidance as to the types of evidence that may be less reliable and, therefore, properly excluded without violating due process." *Lacinaj v. Ashcroft*, 133 F. App'x 276, 287 (6th Cir. 2005). The Secretary sought in part to prove the cited violation vis-à-vis scientific or technical opinions contained in the unpublished internal memoranda. Under Rule 702, expert opinion testimony is permitted when the testimony is based on sufficient facts or data, is the product of reliable principles and methods, and the witness has reliably applied the principles and methods to the facts of the case. FRE 702.

Interpretations Letter that the "term 'fire-resistance rating' has traditionally been used in the industry to refer to a time period of fire-resistance determined in accordance with a viable testing protocol." (Ex. R-9 at 0042.) As the Secretary acknowledged in that interpretive letter, "We are not aware of any industry consensus standards designed to assess fire-resistance of barriers in vehicles." (*Id.*)

"A fire-resistance testing protocol for a barrier in a vehicle designed by a registered professional engineer familiar with fire-resistance testing would be acceptable. Similarly, a testing protocol developed by a Nationally Recognized Testing Laboratory would also be acceptable." (*Id.*) The internal memoranda do not indicate the opinions were based upon testing protocol designed by a registered professional engineer familiar with fire-resistance testing or a testing protocol developed by a Nationally Recognized Testing Laboratory. Therefore, the Court does not find them reliable. Thus, the Court concludes the Secretary also failed to prove the barrier in this case violated the fire-resistance rating requirements of the cited construction standard.[11]

Thus, for the foregoing reasons, the Court concludes the Secretary failed to prove a violation of the cited construction standard. Accordingly,

IV. ORDER

IT IS HEREBY ORDERED THAT the citation is **VACATED** and no civil penalty is imposed. **SO ORDERED**.

/s/ John B. Gatto
John B. Gatto
Administrative Law Judge

Dated: October 5, 2017
Atlanta, GA

[11] The Secretary also appears to argue a violation occurred because the Secretary stated in an April 20, 1992, Standard Interpretations Letter interpreting section 1910.253(b)(4)(iii) the "partition must be configured to prevent the fire from circumventing it." (Sec'y's Br. 5) (*citing* Ex. C-12). However, that general industry standard is not relevant since it does not relate to cylinder storage, but rather, relates to welding or cutting being performed in confined spaces. Therefore, any reliance on it by the Secretary is misplaced.