

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1924 Building - Room 2R90, 100 Alabama Street, SW
Atlanta, Georgia 30303-3104

Secretary of Labor,
Complainant,
v.
Big Sky Well Service,
Respondent.

OSHRC Docket No. **07-1290**

Appearances:

Paul Spanos, Esq., U. S. Department of Labor, Office of the Solicitor,, Cleveland, Ohio
For Complainant

Gino Pulito, Pulito & Associates, Elyria, Ohio
For Respondent

Before: Administrative Law Judge Nancy J. Spies

DECISION AND ORDER

Big Sky Well Services, Inc., cleans, repairs, and replaces oil storage tanks as needed for oil well companies throughout Ohio. On April 25, 2007, Big Sky employees Jeffrey Homkes and Ronald O. Parobek were working at an oil well near Rock Creek, Ohio. They were preparing to remove a damaged crude oil storage tank and replace it with another one. As they were working, the tank exploded, seriously injuring Parobek. Occupational Safety and Health Administration (OSHA) compliance officer Mark Snitzer arrived at the site to conduct an inspection. Snitzer took photographs that day and, over the next few weeks, interviewed Big Sky employees and requested various documents from the company. Based upon Snitzer's inspection, the Secretary issued a citation to Big Sky on June 20, 2007, alleging serious violations of thirteen standards of the Occupational Safety and Health Act of 1970 (Act).

The Secretary alleges Big Sky violated these standards:

Item 1—§ 1910.23(c)(1), for failing to provide fall protection for an employee standing atop an oil storage tank. The Secretary proposes a penalty of \$750.00 for item 1.

Item 2—§ 1910.106(b)(6), for failing to eliminate or control sources of ignition where the presence of flammable vapors was possible.¹ The Secretary proposes a penalty of \$2,500.00 for item 2.

Item 3a—§ 1910.132(a), for failing to require that employees wear personal protective equipment (PPE).

Item 3b—§ 1910.132(d)(2), for failing to prepare a written certification of a workplace hazard assessment. The Secretary proposes a total penalty of \$2,500.00 for items 3a and 3b.

Item 4—§ 1910.157(g)(2), for failing to provide an educational program for employees to familiarize them with fire extinguishers and incipient stage fire fighting. The Secretary proposes a penalty of \$750.00 for item 4.

Item 5a—§ 1910.252(a)(2)(iv), for failing to inspect the area before permitting cutting or welding.

Item 5b—§ 1910.252(a)(2)(vi)(c), for allowing cutting or welding in the presence of explosive atmospheres or in explosive atmospheres that may develop.

Item 5c—§ 1910.252(a)(3)(i), for permitting welding, cutting, or other hot work on a tank before it had been thoroughly cleaned. The Secretary proposes a total penalty of \$2,500.00 for items 5a, 5b, and 5c.

Item 6—§ 1910.334(a)(4), for permitting employees to use portable electric equipment and flexible cords in a highly conductive work location. The Secretary proposes a penalty of \$2,500.00 for Item 6.

Item 7a—§ 1910.1200(e)(1), for failing to develop a written hazard communication program.

Item 7b—§ 1910.1200(g)(1), for failing to have a material safety data sheet (MSDS) for crude oil and natural gas.

Item 7c—§ 1910.1200(h)(2)(i), for failing to provide hazard communication training to employees working with hazardous chemicals.

¹ Prior to the hearing, the Secretary moved to amend items 2, 5b, and 5c of the citation, which were inaccurate, according to the Secretary, due to a “data entry error.” The undersigned granted the motion in an order issued on February 21, 2008 (Tr. 3). At the hearing, the Secretary moved to amend item 7c to allege a violation of § 1910.1200(h)(2)(i), which the undersigned also granted (Tr. 227-228). Items 2, 5b, 5c, and 7c in this decision reflect these amendments.

Item 7d—§ 1910.1200(h)(1), for failing to provide effective information and training to employees on hazardous substances in their work area at the time of their initial assignment. The Secretary proposes a total penalty of \$2,500.00 for items 7a, 7b, 7c, and 7d.

Big Sky contested the citation and the Secretary filed a complaint. In its answer, Big Sky admits jurisdiction but denies it was engaged in a business affecting interstate commerce.

The undersigned held a hearing in this matter on March 3 and 4, 2008, in Cleveland, Ohio. The parties have filed post-hearing briefs. In its brief, Big Sky concedes it violated item 4 and items 7a through 7d (Big Sky's brief, pp. 19, 23-24). Big Sky denies it violated the standards cited in the remaining items, and asserts the affirmative defense of employee misconduct for item 1.

For the reasons discussed more fully below, the undersigned affirms items 1, 2, 3b, 4, 5b, 6, 7a, 7b, 7c, and 7d. Items 3a, 5a, and 5c are vacated.

Facts

Big Sky services oil wells throughout Ohio. At times, a company will hire Big Sky to remove a damaged crude oil storage tank and replace it with a new one. That was Big Sky's assignment for employees Jeff Homkes and Ronald O. Parobek (known as Owen) on April 25, 2007. They were to remove a 210-barrel above-ground storage tank that was leaking. The tank contained a mixture of oil, brine (salt water) and natural gas (Tr. 350-351).

An oil storage tank typically sits in a "battery," a shallow pit covered with a layer of gravel, and, in some instances, railroad ties. Oil is pumped from the ground through a "separator" that separates the liquid from natural gas. The oil and brine mixture flow towards the tank and then up the side of the tank through the small pipeline, the "dump line." The dump line empties into the storage tank (Tr. 59). The separator does not remove all of the natural gas from the oil and brine mixture. Some of the natural gas vapors dissipate and drift away as the mixture sits in the tank, but on damp days the gas vapors tend to build up in the tank due to the humidity. It was raining on April 25, 2007 (Tr. 121).

Following their standard procedure, Homkes and Parobek turned off the flow of oil and brine at the well head (Tr. 20). They attached a hose from a vacuum truck to a 3-inch valve at the bottom of the tank. They then suctioned out the fluids as far as the valve would allow. Parobek's job was to disconnect the fittings and coupler apparatus at the "union" and the connections at the dump line itself ("the plumbing") from the top of the tank and to remove the dump line. The next steps would

have been to tilt the tank on its side and vacuum out the remaining liquid left below the 3-inch valve, haul the damaged tank away from the battery, and install the new tank (Tr. 26-30).

The steel tank was approximately 15 feet high and mounded at the top. Its top could be accessed by climbing a ladder to a platform affixed approximately 4 feet from the top of the tank. The platform was equipped with guardrails. The top of the tank was not. On April 25, Parobek had climbed the ladder to the platform, and then had climbed up onto the top of the tank. Using a wrench and a sledge hammer, Parobek began to disconnect the plumbing. Homkes had turned on a generator and plugged a DeWalt grinder into it. About 10 to 15 minutes after Parobek had climbed on top of the tank, he heard Homkes curse and then the sound of the grinder hitting the ground. Parobek yelled down to ask what happened and Homkes replied, "The grinder bit me," meaning the grinder had shocked him. Parobek had just resumed disconnecting the plumbing when the tank exploded. Parobek was thrown from the tank into the nearby woods. He suffered a shattered femur and a collapsed lung. Homkes was not injured. The ensuing blaze destroyed the tank, a pickup truck, the vacuum truck, and other equipment on the site (Exhs. C-2 and C-4; Tr. 30, 32, 34, 117).

A Business Affecting Commerce

The Act applies to employers. Section 3(5) of the Act defines "employer" as "a person engaged in a business affecting commerce who has employees," and "commerce" as "trade, traffic, commerce, transportation, or communication among the several states, or between a state and any place outside thereof."

In its answer, Big Sky denies a statement in the Secretary's complaint that alleges, "Respondent at all times hereinafter and mentioned was engaged in handling goods or materials which were manufactured to be and had been moved in interstate commerce."

It is the Secretary's burden to establish a cited company was engaged in interstate commerce, and it is easily met. An employer's use of goods manufactured out of state is sufficient to establish jurisdiction. *Avalotis Painting Co.*, 9 BNA OSHC 1226 (No. 76-4774, 1981). Big Sky operates from an office that is equipped with computers and telephones used for business purposes (Tr. 96). It owns a Dodge Ram pickup, backhoes, bulldozers, and various pieces of equipment, including welders and generators (Tr. 331, 361) Big Sky buys its safety equipment from Nasco in Oklahoma City, Oklahoma (Tr. 345). The Secretary established Big Sky was engaged in a business affecting commerce and was an employer within the meaning of the Act at the time of the inspection.

The Citation

The Secretary has the burden of proving the violations by a preponderance of the evidence.

In order to establish a violation of an occupational safety or health standard, the Secretary has the burden of proving: (a) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, (c) employee access to the violative conditions, and (d) the employer's actual or constructive knowledge of the violation (*i.e.*, the employer either knew or, with the exercise of reasonable diligence could have known, of the violative conditions).

Atlantic Battery Co., 19 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

Item 1: Alleged Serious Violation of § 1910.23(c)(1)

The Secretary alleges Big Sky committed a serious violation of § 1910.23(c)(1), which provides in pertinent part:

Every open-sided floor or platform 4 feet or more above adjacent floor or ground level shall be guarded by a standard railing (or the equivalent as specified in paragraph (e)(3) of this section) on all open sides except where there is entrance to a ramp, stairway, or fixed ladder.

The Secretary alleges Big Sky failed to provide guardrails on the top of the oil storage tank. A note to item 1 states, "In lieu of guardrails the employer may have employees work from scaffolds or ladders. Employees may also use fall protection devices." Big Sky argues § 1910.23(c)(1) does not apply to the top of the storage tank. If a violation is found, Big Sky contends it is the result of employee misconduct on the part of Parobek.

1. *Applicability*

Big Sky argues § 1910.23(c)(1) does not apply because the top of the tank is neither a floor nor a platform. Section 1910.23(c)(1) is found in "Subpart D--Walking--Working Surfaces" of the 1910 standards. Subpart D does not define "floor," but the common meaning of the word is found in *The American Heritage Dictionary* (Second Col. Ed., 1987): "1. The surface of a room on which one stands. 2. The lower or supporting surface of a structure." The top of the tank is the upper, not the lower, surface of the structure. It is not a floor.

Section 1910.21 provides definitions for terms used in § 1910.23. Section 1910.21(a)(4) defines "platform" as "A working space for persons elevated above the surrounding floor or ground, such as a balcony or platform for the operation of machinery and equipment." Whether a surface

is a platform is a question of fact. *Superior Electric Co.*, 16 BNA OSHC 1494, 1496 (No. 91-1597, 1993).

It is undisputed Parobek stood, squatted, and worked on the top of the tank to disconnect the plumbing. “An elevated surface does not automatically become a ‘working space’ and a ‘platform’ merely because employees occasionally set foot on it while working.” *Unarco Commercial Products*, 16 BNA OSHC 1499, 1502 (No. 86-1555, 1993).

Robert Barr is a shareholder in Big Sky and represented the company at the hearing. Although Barr no longer works in the field, he had been in the oil well servicing business for about 42 years at the time of the hearing, and had himself removed storage tanks “thousands of times” in his career (Tr. 354). Barr asserted neither he nor his assistants stood on top of tanks to disconnect the dump lines: “We’ve never got on top the tank in all the times I’ve ever been on it” (Tr. 358). Barr stated he always stood on the platform affixed to a portion of the side of the tank to disconnect the plumbing (Tr. 357):

I always stand on the walkway and get ahold of the pipe wrench, pull my body against the tank so I’ve got to hold me and pull on the pipe wrench, and if it doesn’t come, we hit it with a hammer and we try it again. But, I’ve never had any serious problems getting them, and they had an over-sized wrench. So, it’s still kind of hard to believe that he would get on the tank.

Barr acknowledged Homkes and Parobek did not follow his method for removing the plumbing (Tr. 358):

But it’s kind of like any other thing. If you do it for a long time, and you have never had a problem with it, you tend to do it your old way, and I think Jeff and Owen were accustomed to doing it an old way that they were trained, and even if you tell them to change, most likely they’re probably going to do it their old way. It’s hard to teach an old dog new tricks type of thing.

For his part, Homkes did not deny he stood on top of a tank on occasion, but claimed it was an atypical method for him to use (Tr. 170):

It would either be too tight where you can’t—you don’t want to be—it just depends on which way it’s coming up on the tank, you know, because one way you’re unloosening it coming in one way, and the other would be to tighten it. So, it just depends where it ties in to the tank at because if you push the valve, you know it’s real tight. I stand on the tank and I kick the pipe wrench down.

Homkes had previously worked for H & W Welding, where he had also removed storage tanks. H & W Welding also hired Parobek, who worked for the company for three months. It appears this was Parobek's first job after he graduated from high school, other than working on his mother's farm. Homkes trained Parobek, and together they replaced approximately 22 tanks while working with H & W Welding (Tr. 18, 37).

Later, when Homkes was working for Big Sky, he recommended the company hire Parobek. Parobek had been working for Big Sky for two months at the time of the explosion. In his two months with Big Sky, Parobek had assisted in replacing eight tanks. In every instance, Parobek was working under the supervision of Homkes (Tr. 23, 57).

Parobek always climbed on top of the tank to remove the plumbing. He used a pipe wrench and a sledge hammer to disconnect the joints (Tr. 71-72). Parobek stated, "You can probably reach the bottom part of the pipe, but you would have to get up and work on the top end in order to get to the union" (Tr. 99). Parobek routinely removed the plumbing by standing on the top of the tank (Tr. 100).

Homkes was the only person who trained Parobek in tank removal. Parobek believed the method he used was correct. He did not believe he could reach the union or generate enough leverage to disconnect the valves while standing down on the platform. Homkes saw Parobek standing on the tank the day of the explosion as well as at all the other times they removed tanks together, and he never told him not to do so (Tr. 32, 117). Under these circumstances, Big Sky used the top of the tank as the preferred and usual elevated working space to remove the union apparatus and the dump line connections. The top of the tank was a platform within the meaning of § 1910.23(c)(1).

2. Noncompliance

There were no guardrails protecting the top of the tank. The Secretary does not realistically expect Big Sky to install guardrails on the tops of tanks. She advocates the use of a ladder or scaffold if an employee cannot perform the work from the partial platform. (The citation also suggests using personal fall protection, such as a harness and lanyard tied off to some point, but this suggestion may be impractical given the other hazards present on the site. As Parobek stated, "I would hate to see what would have happened if I was [tied off]" (Tr. 31)). Alternatively, if

employees can be trained, as Barr states, to remove the plumbing while standing on a guarded portion of the platform, no further measures need be taken.

Big Sky also asserts it complied with § 1910.23(c)(1) because the platform attached to the side of the tank was 4 feet below the top of the tank (Tr. 71, 171). The company claims an employee standing on the tank “would have a platform below him/her which is no more than 4 feet” (Big Sky’s brief, p. 15). First, the platform does not extend all the way around the tank (Tr. 100). It runs only 3 feet along the tank and is 2½ feet wide (Tr. 182-183). Second, § 1910.23(c)(1) requires guardrails on platforms “4 feet or more above adjacent floor or ground level.” At the 4-foot distance, guardrails would still be required on the tank. The platform could not constitute a catch platform. Big Sky failed to comply with the terms of § 1910.23(c)(1) when it permitted Parobek to work from the top of the 15-foot high tank.

3. Employee exposure

Parobek was exposed to a fall of 15 feet from the top of the tank.

4. Employer knowledge

Homkes was a supervisor for Big Sky (Tr. 21, 113-114). Parobek received all of his training in tank removal from Homkes. Homkes saw Parobek working on top of the tank. “[W]here a supervisory employee has actual or constructive knowledge of the violative conditions, that knowledge is imputed to the employer, and the Secretary satisfies [her] burden of proof without having to demonstrate any inadequacy or defect in the employer's safety program." *Dover Elevator Co., Inc.*, 16 BNA OSHC 1281, 1286 (No. 91-862, 1993). *See also, Danis Shook Joint Venture XXV*, 319 F. 3d 805 (6th Cir. 1983). Further, for many of the reasons discussed in the section below, Big Sky’s failure to give the supervisor any appropriate safety guidance, makes the violation foreseeable. As supervisor, Homkes’s knowledge is imputed to Big Sky.

The Secretary established Big Sky committed a violation of § 1910.23(c)(1). Parobek was exposed to a fall of 15 feet while standing on the top of the tank in the rain. Had he fallen, he likely would sustain broken bones or other serious injury (Tr. 228). The violation is serious.

Unpreventable Employee Misconduct

Big Sky contends any violation of § 1910.23(c)(1) resulted from Parobek's misconduct in standing on top of the tank. In order to establish the affirmative defense of unpreventable employee misconduct, an employer is required to prove (1) that it has established work rules designed to prevent the violation, (2) that it has adequately communicated these rules to its employees, (3) that it has taken steps to discover violations, and (4) that it has effectively enforced the rules when violations are discovered. *Precast Services, Inc.*, 17 BNA OSHC 1454, 1455 (No. 93-2971, 1995), *aff'd without published opinion*, 106 F. 3d 401 (6th Cir. 1997). Big Sky failed to prove any of the elements of its defense.

Big Sky must demonstrate it had an established work rule designed to prevent the violation of § 1910.23(c)(1), a fall protection standard. Homkes was questioned about his knowledge of fall protection (Tr. 119):

Q. Are you aware of any Big Sky work rule relating to fall protection?

Homkes: I don't understand what you're saying.

Q. During your time with Big Sky, have you ever learned about a safety rule detailing proper use of fall protection?

Homkes: Do you mean like if you fall, how did you fall on the ground?

Q. How do you avoid falling in the first place?

Homkes: No, sir.

Q. Did Big Sky ever relate to you at what heights you are supposed to utilize fall protection?

Homkes: No, sir.

Q. Did you receive any fall protection training from Big Sky?

Homkes: No, sir.

Parobek cannot be blamed for employee misconduct when his own supervisor did not know the basics of fall protection safety. Big Sky had no safety manual, no safety program, and no material safety data sheets. It provided no safety training, held no toolbox meetings, and failed to discuss any aspect of safety with its employees (Tr. 17, 109). Homkes and Parobek both

demonstrated a lack of familiarity with basic safety rules at the hearing (Tr. 31, 32, 47-49, 109, 119, 135).

Barr referred to Homkes as his “safety person because he is the one that has the knowledge” (Tr. 360), but Homkes testified he had received no safety training at either Big Sky or H & W Welding (Tr. 109-111). Barr prided himself on his hands-off approach, stating, “It would be kind of condescending for me to tell Jeff how to do his safety” (Tr. 360) and, “I let my people do things freely, the American way, the way they want to do them unless I see an absolute danger to them or somebody else which I haven’t” (Tr. 371). There was little chance Barr would see “an absolute danger” because Big Sky had no program for discovering violations. During Parobek’s career with Big Sky, a supervisor came out “maybe once” to spot check the work (Tr. 115). Big Sky demonstrated a lax attitude regarding safety.

Big Sky has failed to establish its employee misconduct defense. Item 1 is affirmed.

Item 2: Alleged Serious Violation of § 1910.106(b)(6)

Section 1910.106(b)(6) provides:

In locations where flammable vapors may be present, precautions shall be taken to prevent ignition by eliminating or controlling sources of ignition. Sources of ignition may include open flames, lightning, smoking, cutting and welding, hot surfaces, frictional heat, sparks (static, electrical, and mechanical), spontaneous ignition, chemical and physical-chemical reactions, and radiant heat.

The Secretary contends Big Sky failed to control ignition sources in a location where it knew natural gas was likely to be present. Big Sky argues the Secretary failed to establish the cause of the explosion, and thus cannot establish a violation of § 1910.106(b)(6).

1. Applicability

The tank contained a liquid mixture of crude oil and brine. Three MSDS for crude oil were introduced at the hearing. All three state flammable vapors are present in crude oil and warn against bringing sources of ignition in proximity to the oil (Exhs. C-7, C-8, and R-1). Barr conceded, “There will be some natural gas that’s trapped in the oil” (Tr. 372). Homkes testified he was aware natural gas vapors were present in crude oil, and the vapors dissipate more slowly in humid

conditions (Tr. 121). Parobek knew gas vapors remained in the tank even after most of the liquid was suctioned out (Tr. 27).

The record establishes flammable vapors may be present in crude oil storage tanks. The cited standard applies to the conditions at the worksite.

2. Noncompliance

In order to comply with § 1910.106(b)(6), the employer must take precautions to prevent ignition of flammable vapors by eliminating or controlling source of ignition. Among sources of ignition, the standard lists “cutting and welding, . . . frictional heat, [and] sparks.” These sources of ignition were created when Homkes used the DeWalt grinder at the site.

That day Homkes used a DeWalt grinder which he connected to a generator by either a 50-foot or 100-foot long extension cord (Tr. 123). When Homkes plugged in the grinder, he was approximately 4 feet from the tank (Tr. 122).

Homkes’s use of the grinder was a much debated topic at the hearing. Cutting a hole in the tank would enable Homkes to insert a hose into the tank and drain the liquid that was below the 3-inch valve (Tr. 196-197). Big Sky takes the position that Homkes did not use the grinder to cut the tank before it was removed (and cleaned out so as to remove any flammable vapors). Homkes and Parobek knew using the grinder to cut a notch in the tank was detrimental to Big Sky’s case. Their attempts to protect the company resulted in contradictions, back-pedaling, and disavowals of their signed written statements taken by Snitzer.

At the hearing, when Parobek was asked about the grinder, he initially stated, “I remember the generator was running, and I remember there was a grinder, I believe” (Tr. 36). He elaborated (Tr. 37):

I was about to take another pipe out of the unit with a 28-inch pipe wrench, and I remember Jeff cussing, and I asked him, “What’s the matter Jeff?” He said, “The grinder bit me.” The grinder shocked him. I’m like, “Okay,” and I continued with the pipe. Then, boom. . . . The tank exploded.

At first, Parobek admitted that sometimes Homkes used the grinder to nick or cut a hole in a storage tank before the tank was removed from the battery (Tr. 37-38):

I figured that everything was sucked out, all the plumbing and all that, sometimes you will cut a hole into it and then move it or vice versa, you move it first and then cut a hole in it. . . . After you take the plumbing and all that out, you cut a hole into it and then you move it, or you move it and then cut the hole into it. It just depends on what the supervisor wants to do that day.

When asked specifically if anyone had ever cut a hole in a tank before removing it from the battery, Parobek replied, “Yes, they did it. But, we had, I mean, it was all sucked out and everything, and you would never expect nothing like that to happen if he did cut it” (Tr. 38). Parobek flatly contradicted this statement a little later, replying, “No,” when asked if there had “ever been a case where there is grinding or cutting into the tank while it sits in the battery” (Tr. 76).

Snitzer visited Parobek at his home on May 23, 2007, approximately one month after the explosion. Snitzer wrote down Parobek’s account of the April 25 accident, then gave it to Parobek to review. Parobek signed the statement, which reads (Exh. C-2; Tr. 318-320; emphasis added):

On 4/25/2007 at about 11:30. We arrived on the site to replace the tank. I went back to the well with Jeff and we shut down the valve at the separator. We removed the cover to insert the vacuum hose and sucked out the oil. And then I climbed up the ladder and we went onto the tank and began to loosen the hammer union. *I heard Jeff using the grinder when I was on the tank* then I heard the grinder stop, Jeff cursed and [I] heard him throw it down and walk away. Then I heard a whoosh sound, the lid blew open and I saw a big ball of white and I was thrown into the air.

At the hearing, Parobek stated he was on medication at the time Snitzer took his statement and he had no memory of the interview (Tr. 39). Parobek conjectured Snitzer may not have understood what he was saying, so Snitzer “put it in terms that he could understand” (Tr. 85). Nevertheless, Parobek demonstrated a clear and specific memory of the details surrounding the interview. It is not credible medication caused confusion only about his description of the accident.

At one point during his testimony, Parobek claimed he heard only the generator running and not the grinder (Tr. 39), then later said he heard either the grinder or the generator running before he heard Homkes curse (Tr. 86). Parobek said there was a difference between the sound a generator makes and the sound a grinder makes because “if the grinder is running, and it’s cutting into a piece of steel, it’s making that awkward noise it makes. It’s kind of annoying, actually” (Tr. 87). He goes

on to say, “I do not recall whether or not I heard” the grinder (Tr. 87). Parobek stated the only use for the grinder on the site was cutting a hole into the side of the tank. He could not explain why Homkes was running the grinder at that point if he was not using it to cut a hole in the tank (Tr. 72, 104). When asked if he believed Homkes was using the grinder, Parobek answered, “It might have been in my mind. I’m not too sure of it” (Tr. 104).

Homkes’s testimony was on similar shifting ground. Snitzer interviewed Homkes on May 2, 2007, one week after the explosion. Homkes signed the statement (Exh. C-3; Tr. 320-321; emphasis added):

We went to the well head, shut valves on well head to turn gas off. Went to separator and shut off dump valve (gas usually pushes oil to tank. Sucked off liquid up to 3" from bottom of tank (oil and brine). Pulled vac truck and pickup. *Made a notch in the sidewall.* Owen climbed up to top, undoing dump line union with 36" pipe wrench (aluminum). *Need to notch more.* Cord came out, plugged back in. Cord one hand and grinder in other—shocked me. Dropped cord and grinder. 30 sec to 1 minute later, exploded. I had planned to get backhoe and remove tank from dike and place new tank.

Like Parobek, Homkes claims he does not remember signing his statement. Initially he denied having made a notch in the tank (Tr. 127). Homkes gave a series of convoluted explanations for why he had plugged the grinder into the generator if he was not using it on the tank. At one point Homkes states, “I have never cut a tank in a tank battery. Well, I’m not going to say that; that’s a lie” (Tr. 161). Later, after repeatedly denying he had used the grinder to cut a notch in the tank, Homkes states, “Now, this much, I don’t remember notching the tank. I mean, if I did that, it was a stupid move, but I did not remember doing that” (Tr. 165).²

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Homkes was nervous and ill at ease during these portions of his testimony. He overexplained some answers, at times to the point of incoherence (Tr. 159-164), but then turned cryptic and avoided directly answering other questions, especially ones regarding the presence of his personal truck on the site. He appeared to be trying out different answers (“How is that? Is that a good answer?” (Tr. 152); “How is that for an answer? (Tr. 191)). One reason for his hesitancy emerged at the hearing – Homkes was involved with a co-worker(s), allegedly someone in management, in an arrangement whereby Homkes would drive his personal vacuum truck to the worksite and suction out the remaining oil, which would not normally be recovered. He would then sell the remains of the crude oil (Tr. 178). Homkes told Snitzer he planned to drain the rest of the liquid through the notch after he had suctioned out what he could through the valve (Tr. 196-197). Although the facts suggest others in the company may have known of the arrangement, Barr was not aware of this practice until after the explosion (Tr. 356-357).

The undersigned finds the signed statements given by Homkes and Parobek one week and one month, respectively, after the explosion to be more reliable than their testimony at the hearing. The written statements are consistent with the evidence and with each other. It would be difficult to set aside the signed written statement of one witness who gave contradictory, self-serving testimony at the hearing. To set aside two such signed statements in favor of confusing, obfuscating testimony would defeat reason. The accounts recorded in the written statements are more credible than any of the contradictory testimony at the hearing.

The record establishes on April 25, 2007, Homkes plugged a grinder into a generator while standing within 4 feet of a crude oil storage tank, and then used the grinder to cut a notch in the leaking storage tank. After cutting the notch, Homkes intended to make a deeper cut, but the grinder shocked him and he threw it down to the ground. Big Sky did not eliminate or control the sources of ignition created by the friction of the grinder against the tank, the heat resulting from the use of the grinder against the tank, or any sparks caused by Homkes throwing the grinder onto the ground. Big Sky failed to comply with the terms of the cited standard.

Big Sky argues the Secretary failed to prove the use of the grinder caused the explosion. Big Sky's focus is misplaced. The Secretary is not required to prove the cause of the explosion, only that sources of ignition were present. Had the tank not exploded, Big Sky still would have been in violation of § 1910.106(b)(6) because of Homkes's use of the grinder.

3. Employee exposure

Parobek and Homkes were exposed to the hazards of fire and explosion created by the use of the grinder on the tank.

4. Employer knowledge

Big Sky supervisor Homkes used the grinder on the tank. His actions were foreseeable. His knowledge is imputed to Big Sky.

The Secretary has established a serious violation of § 1910.106(b)(6). Item 2 is affirmed.

Item 3a: Alleged Serious Violation of § 1910.132(a)

Section 1910.132(a) provides:

Protective equipment, including personal protective equipment for eyes, face, head, and extremities, protective clothing, respiratory devices, and protective shields and barriers, shall be provided, used, and maintained in a sanitary and reliable condition wherever 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 in the function of any part of the body through absorption, inhalation or physical contact.

The citation charges, “One employee who was working at a gas and oil well site was not provided with fire retardant clothing suitable for flash fire protection.” Homkes was wearing fire retardant clothing the day of the explosion. Parobek was not (Tr. 46-47).

1. Applicability

The Secretary established that crude oil creates chemical hazards capable of causing injury or impairment in the function of body parts. The MSDSs for crude oil warn of eye and skin irritation, lung damage, and dermatitis (Exhs. C-7, C-8, and R-1). Section 1910.132(a) applies to Big Sky’s work site.

2. Noncompliance

One of the MSDSs for crude oil advocates PPE in the form of safety goggles, gloves, and “protective clothing to prevent skin exposure” (Exh. C-7). Another states, “Wear chemical resistant gloves and other protective clothing as required to minimize skin contact. No special eye protection is routinely necessary” (Exh. C-8). The third states: “Skin and body protection: Neoprene or nitrile gloves to prevent skin contact” (Exh. R-1). None of the MSDSs recommends the use of fire retardant clothing. The one case the Secretary cites in her brief in discussing this item, *Yellow Freight Systems, Inc.*, 17 BNA OSHC 1699 (No. 93-3292, 1996), addresses a violation of § 1910.132(a) for failing to provide employees with boots, gloves, and aprons.

The only form of PPE the Secretary specifies in item 3a of the citation is fire retardant clothing. She cannot establish a violation of § 1910.132(a) by showing Big Sky failed to provide other forms of PPE. The Secretary has adduced no evidence demonstrating employees working with crude oil are required to wear fire retardant clothing.

The Secretary has failed to establish Big Sky violated the terms of § 1910.132(a).

Item 3b: Alleged Serious Violation of § 1910.132(d)(2)

Section 1910.132(d)(2) provides:

The employer shall verify that the required workplace hazard assessment has been performed through a written certification that identifies the workplace evaluated; the person certifying that the evaluation has been performed; the date(s) of the hazard assessment; and, which identifies the document as a certification of hazard assessment.

Section 1910.132(d)(2) is part of “Subpart I–Personal Protective Equipment.” Section 1910.132(d)(1) requires the employer to “assess the workplace to determine if hazards are present, or are likely to be present, which necessitate the use of personal protective equipment.” If the employer finds such hazards, the employer is required to select the appropriate PPE, communicate this information to employees, and select PPE that fits each employee.

1. Applicability

Section 1910.132(d)(2) applies to Big Sky’s worksite. The employees were working with crude oil, a hazardous substance (Exhs. C-7, C-8, and R-1).

2. Noncompliance

Homkes was the supervisor on the site. He conceded he did not perform the required workplace hazard assessment or written certification (Tr. 130-131). Big Sky violated the terms of § 1910.132(d)(2).

3. Employee exposure

Homkes and Parobek were exposed to the potential hazards created by working in proximity to crude oil without a proper PPE assessment.

4. Employer knowledge

As supervisor, Homkes’s knowledge he did not perform a workplace hazard assessment was foreseeable and is imputed to Big Sky.

The Secretary has established Big Sky committed a serious violation of § 1910.132(d)(2).

Item 4: Alleged Serious Violation of § 1910.157(g)(2)

Section 1910.157(g)(2) provides:

The employer shall provide the education required in paragraph (g)(1) of this section upon initial employment and at least annually thereafter.

Section 1910.252(g)(1) 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.

Section 1910.157(g)(2) applies to Big Sky's worksite. There was a fire extinguisher in one of the trucks at the site (Tr. 323). Neither Homkes nor Parobek had been trained by Big Sky in the use of fire extinguishers or the hazards involved with incipient stage fire fighting (Tr. 47, 131). They were exposed to the fire hazards present at the site. As the employer, Big Sky necessarily knew it had not provided the required training.

In its brief, Big Sky "concedes that a formal educational program was not in place on April 25, 2007," for training in fire extinguisher use. The violation is established. Item 4 is affirmed.

Item 5a: Alleged Serious Violation of § 1910.252(a)(2)(iv)

Section 1910.252(a)(2)(iv) provides:

Before cutting or welding is permitted, the area shall be inspected by the individual responsible for authorizing cutting and welding operations. He shall designate precautions to be followed in granting authorization to proceed preferably in the form of a written permit.

The citation alleges, "No written permit or other means to describe precautions to be followed for the grinding and cutting of the tank during the removal project at the gas well."

1. Applicability

Section 1910.252(a)(2)(iv) applies to the worksite. Homkes used a grinder to cut the storage tank.

2. Noncompliance

Homkes testified he inspected the area before he used the grinder the morning of the explosion. He made a visual inspection “[b]ecause when you are going to work on any tank or cut on any tank, you want to see where the sparks are going to be falling in case there was oil in the way that would catch on fire” (Tr. 132). Homkes did not prepare a written permit or designate precautions to be followed (Tr. 132).

The Secretary contends Big Sky violated the cited standard because (Secretary’s brief, p. 13):

Prior to commencing work, Mr. Homkes did not discuss his use of the grinder with Mr. Parobek, did not have any discussions about safety with Mr. Parobek, did not discuss the hazards associated with flammable liquids and vapors with Mr. Parobek and did not discuss possible ignition sources with Mr. Parobek.

None of the omissions listed by the Secretary are relevant to the cited standard. Section 1910.252(a)(2)(iv) requires an inspection be made by the person responsible for authorizing cutting. Homkes was the person responsible for the authorization, and he made the required inspection. Homkes was also the person doing the cutting, so any precautions to be followed were to be followed by him. It was not necessary for him to designate precautions for Parobek; Parobek was not using the grinder.

The second sentence of the standard applies only when the person authorizing the cutting is different from the person cutting. It was unnecessary for Homkes to issue himself a written permit (and the standard does not require the authorization be in written form). All the standard requires when the authorizing person is the same as the person doing the cutting is that he or she inspect the area. Homkes stated he did so, and the Secretary has not rebutted that statement.

The Secretary has failed to establish Big Sky violated the terms of the standard. Item 5a is vacated.

Item 5b: Alleged Serious Violations of § 1910.252(a)(2)(vi)(c)

Section 1910.252(a)(2)(vi)(c) provides:

Cutting or welding should not be permitted in the following situations:

...

(c) In the presence of explosive atmospheres (mixtures of flammable gases, vapors, liquids, or dusts with air), or explosive atmospheres that may develop inside uncleaned or improperly prepared tanks or equipment which have previously contained such materials, or that may develop in areas with an accumulation of combustible dusts.

The citation states, “A grinder was used to cut the side of a tank which had just been pumped out. The tank contained crude oil, natural gas and brine.”

1. Applicability

Homkes used a grinder to cut into an uncleaned tank. Section 1910.252(a)(2)(vi)(c) applies to the cited condition.

2. Noncompliance

Homkes cut a notch in the tank, which still contained a mixture of crude oil, brine, and natural gas (Exh. C-3). The natural gas created an explosive atmosphere. The Secretary has established Big Sky failed to comply with the terms of the standard.

3. Employee exposure

Homkes and Parobek were exposed to the hazards associated with an explosive atmosphere.

4. Employer knowledge

As supervisor, Homkes’s knowledge as he cut into the tank is imputed to Big Sky.

The Secretary has established Big Sky committed a serious violation of § 1910.252(a)(2)(vi)(c).

Item 5c: Alleged Serious Violation of § 1910.252(a)(3)(i)

Section 1910.252(a)(3)(i) provides:

No welding, cutting, or other hot work shall be performed on used drums, barrels, tanks or other containers until they have been cleaned so thoroughly as to make absolutely certain that there are no flammable materials present or any substances such as greases, tars, acids, or other materials which when subjected to heat, might produce flammable or toxic vapors. Any pipe lines or connections to the drum or vessel shall be disconnected or blanked.

The citation states: “A grinder was used to cut the side of the tank which had just been pumped out and had not been cleaned; approximately 3 inches of crude oil and brine remained in the tank.” This description and the hazard created (igniting flammable vapors) are virtually identical to the previous violation cited in item 5b.

Both §§ 1910.252(a)(2)(iv) and (3)(i) prohibit welding and cutting on tanks that may contain flammable vapors. Violations may be found duplicative where the standards cited require the same abatement measures, or where abatement of one citation item will necessarily result in abatement of the other item as well. *Flint Eng. & Const. Co.*, 15 BNA OSHC 2052, 2056-2057 (No. 90-2873, 1997). Here, the abatement is the same for both standards: prohibit cutting the tank with a grinder while it contains crude oil.³ Item 5c is vacated as duplicative of item 5b.

Item 6: Alleged Violation of § 1910.334(a)(4)

Section 1910.334(a)(4) provides:

Portable electric equipment and flexible cords used in highly conductive work locations (such as those inundated with water or other conductive liquids), or in job locations where employees are likely to contact water or conductive liquids, shall be approved for those locations.

³ Item 2, affirming a violation of § 1910.106(b)(6), also concerned the hazard created in part by using the grinder to cut the tank containing crude oil. Item 5b is not duplicative of Item 2, however, because item 2 addressed sources of ignition in addition to those created by cutting the tank. Big Sky violated § 1910.106(b)(6) when Homkes plugged the grinder into the generator within 4 feet of the tank, and when he threw the grinder on the ground after it shocked him. Those actions are not addressed by the § 1910.252 subsections.

The citation states, “Employees working in the rain used a grinder which was not designed for work in wet locations.

1. Applicability

On April 25, 2007, Homkes used a DeWalt grinder connected to an extension cord plugged into a generator. It was raining. Section 1910.334(a)(4) applies to the cited conditions.

2. Noncompliance

DeWalt does not manufacture a grinder designed or approved for use in wet locations (Tr. 224). Homkes testified he knew the grinder was not approved for wet locations: “You’re not supposed to use them in wet areas or any electrical stuff” (Tr. 134-135). The Secretary has established Big Sky failed to comply with the terms of this standard.

3. Employee exposure

Homkes was exposed to the hazard of electrical shock or electrocution.

4. Employee knowledge

As supervisor, Homkes’s knowledge he was using the grinder in the rain is imputed to Big Sky. Without the guidance of safety instructions or safety oversight, his actions were foreseeable.

The Secretary has established Big Sky committed a serious violation of § 1910.334(a)(4). Item 6 is affirmed.

Items 7a, 7b, 7c, and 7d: Alleged Serious Violations of §§ 1910.1200(e)(1), (g)(1), (h)(2)(1), and (h)(1)

Section 1910.1200 is the hazard communication standard (HCS). The Secretary alleges Big Sky violated four subsections of this standard:

Item 7a: § 1910.1200(e)(1):

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, material safety data sheets, and employee information and training will be met[.]

Item 7b: § 1910.1200(g)(1):

Chemical manufacturers and importers shall obtain or develop a material safety data sheet for each hazardous chemical they produce or import. Employers shall have a material safety data sheet in the workplace for each hazardous chemical which they use.

Item 7c: § 1910.1200(h)(2)(i):

Employees shall be informed of: (i) The requirements of this section.

Item 7d: § 1910.1200(h)(1):

Employers shall provide employees with effective information and training on hazardous chemicals in their work area at the time of their initial assignment, and whenever a new physical or health hazard the employees have not previously been trained about is introduced into their work area. Information and training may be designed to cover categories of hazards (*e.g.*, flammability, carcinogenicity) or specific chemicals. Chemical-specific information must always be available through labels and material safety data sheets.

Big Sky did not have a written hazard communication standard; did not maintain MSDSs for any hazardous substances, including crude oil; did not inform employees of the requirements of the hazard communication standard; and did not provide employees with effective information and training on hazardous chemicals in their work area.

When asked whether Big Sky had a hazard communication program, Parobek replied, “What is a hazard communication program?” (Tr. 49). He had never heard of an MSDS (Tr. 50). When Homkes was asked if Big Sky had a hazard communication program, he asked, “What do you mean by that? I would say probably not, but I don’t know for sure” (Tr. 135). He testified that, prior to the explosion, he had never received information from Big Sky regarding hazardous chemical on the worksite, and he had never seen an MSDS (Tr. 135-136).

Homkes and Parobek were exposed to the hazardous effects of working in proximity to crude oil. Big Sky knew it was not implementing the required hazard communication program.

Big Sky concedes it violated the terms of these four cited subsections (Big Sky's brief, pp.23-24). The Secretary has established violations of the cited subsections of the HCS. Items 7a, 7b, 7c, and 7d are affirmed.

Penalty Determination

The Commission is the final arbiter of penalties in all contested cases. In determining an appropriate penalty, the Commission is required to consider the size of the employer's business, history of previous violations, the employer's good faith, and the gravity of the violation. Gravity is the principal factor to be considered.

At the time of the inspection, Big Sky employed 15 to 20 employees (Tr. 350). It had no history of previous violations. Big Sky is given no credit for good faith. Despite the hazardous nature of its work, it had no safety program and provided no safety training to its employees at the time of the explosion. Barr displayed an indifferent attitude toward safety at the hearing, placing the onus for safety on Homkes and blaming the government for interfering with his business (Tr, 360-361). The gravity of each violation is the remaining factor to be considered in determining the penalties.

Item 1—§ 1910.23(c)(1): The gravity of this violation is high. It was Parobek's practice to stand on top of the tank every time he disconnected the dump line. The nature of the task required Parobek to bend over and push or pull on the wrench as he worked to disconnect the plumbing. Sometimes Parobek hit the wrench with a sledgehammer. Parobek went through these motions within arm's reach of the edge of the circular tank. It was raining the day of the explosion. All of these circumstances increased the likelihood Parobek could lose his footing on the tank.

A penalty of \$750.00 is appropriate.

Item 2—§ 1910.106(b)(6): The gravity of this violation is high. Homkes used a grinder to notch a hole in the side of tank containing crude oil. Barr, Homkes, and Parobek all testified they were aware this is an unsafe practice. Creating sources of ignition in proximity to a tank containing crude oil exposed the employees to a deadly hazard.

A penalty of \$2,500.00 is appropriate.

Item 3b—§ 1910.132(d)(2): The gravity of this violation is moderate. The employees were exposed to eye and skin irritation from working around the crude oil. A penalty of \$500.00 is appropriate.

Item 4—§ 1910.157(g)(2): The gravity of this violation is moderate. Parobek had previously received training in the use of fire extinguishers in high school (Tr. 47). Homkes's previous employer, North Star Steel, had provided him with training in the use of fire extinguishers (Tr. 131). A penalty of \$500.00 is appropriate.

Item 5b—§ 1910.252(a)(2)(vi)(c): The gravity of this violation is high. Homkes used a grinder cut a notch in a tank containing crude oil. This exposed Homkes and Parobek to the dangers of an explosive atmosphere. Parobek was fortunate to have escaped with only a shattered femur and a collapsed lung. A penalty of \$900.00 is appropriate.

Item 6—§ 1910.1910.334(a)(4): The gravity of this violation is high. Homkes was using a grinder in the rain that was not approved for wet locations. Homkes risked death by electrocution or a serious electrical shock. A penalty of \$2,500.00 is appropriate.

Items 7a through 7d—§§ 1910.1200(e)(1), (g)(1), (h)(2)(i), and (h)(1): The gravity of this violation is high. Employees who are not trained in the hazards of working with hazardous substances are not able to take the necessary safety precautions to lessen their exposure. A penalty of \$2,500.00 is appropriate.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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.

ORDER

Based upon the foregoing decision, it is ORDERED that:

1. Item 1 of the citation, alleging a violation of § 1910.23(c)(1), is affirmed and a penalty of \$750.00 is assessed;
2. Item 2 of the citation, alleging a violation of § 1910.106(b)(6), is affirmed and a penalty of \$2,500.00 is assessed;
3. Item 3a of the citation, alleging a violation of § 1910.132(a), is vacated;

4. Item 3b of the citation, alleging a violation of § 1910.132(d)26), is affirmed and a penalty of \$500.00 is assessed;
5. Item 4 of the citation, alleging a violation of § 1910.157(g)(2), is affirmed and a penalty of \$500.00 is assessed;
6. Item 5a of the citation, alleging a violation of § 1910.252(a)(2)(iv), is vacated;
7. Item 5b of the citation, alleging a violation of § 1910.252(a)(2)(vi)(C), is affirmed and a penalty of \$900.00 is assessed;
8. Item 5c of the citation, alleging a violation of § 1910.252(a)(3)(i), is vacated;
9. Item 6 of the citation, alleging a violation of § 1910.334(a)(4), is affirmed and a penalty of \$2,500.00 is assessed; and
10. Items 7a through 7d of the citation, alleging violations of §§ 1910.1200(e)(1), (g)(1), (h)(2)(i), and (h)(1), are affirmed and a penalty of \$2,500.00 is assessed.

A total penalty of \$10,150.00 is assessed.

/s/ Nancy J. Spies

NANCY J. SPIES

Judge

Date: February 17, 2009