

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.

National Steel Erection, Inc.,
Respondent.

OSHRC Docket No. 11-2467

Appearances: Joseph B. Lockett, Esq., U. S. Department of Labor, Office of the Solicitor
Nashville, Tennessee
For the Complainant

Josh Searcy, Esq., and John Bickel, Esq., Thacker, Bickel, Hodskins & Thacker, LLP
Owensboro, Kentucky
For the Respondent

Before: Administrative Law Judge Sharon D. Calhoun

DECISION AND ORDER

National Steel Erection, Inc. (National Steel), was engaged in fabricating holding tanks for the waste water system on the Tennessee Valley Authority-John Sevier Combined Cycle site in Rogersville, Tennessee. On August 3, 2011, National Steel was in the process of concluding its work activities at the site when Occupational Safety and Health Administration (OSHA) compliance officer Michelle Sotak conducted an inspection of the Tennessee Valley Authority-John Sevier Combined Cycle site. The OSHA inspection resulted in the Secretary issuing one serious citation to National Steel on August 29, 2011, alleging National Steel violated a construction standard of the Occupational Safety and Health Act of 1970 (Act).

The citation alleges a violation of § 1926.350(a)(10), for failing to separate oxygen and acetylene cylinders by a fire-wall with an appropriate fire rating. The Secretary proposed a penalty of \$2,380.00 for this alleged violation. National Steel timely contested the citation. The undersigned held a hearing in this matter on March 22, 2012, in Owensboro, Kentucky. The parties have filed post-hearing briefs.

For the reasons discussed below, Item 1 is affirmed and a penalty of \$1,500.00 is assessed.

Jurisdiction

The parties stipulated that jurisdiction of this action is conferred upon the Commission pursuant to § 10(c) of the Act, and that at all times relevant to this action, National Steel was an employer engaged in a business affecting interstate commerce within the meaning of § 3(5) of the Act, 29 U.S.C. § 652(5) (Tr. 6).

Background

National Steel was a subcontractor on the Tennessee Valley Authority-John Sevier Combined Cycle site in Rogersville, Tennessee, (jobsite) where electricity is produced (Tr. 11). Kiewit was the general contractor on the jobsite (Tr. 11). National Steel was responsible for fabricating holding tanks for the waste water system on the jobsite (Tr. 44). On August 3, 2011, OSHA Safety and Health Compliance Officer Michelle Sotak conducted an inspection of the jobsite pursuant to a local emphasis program for federal construction. On that day she inspected National Steel as a result of violative conditions she observed relating to its work on the site (Tr. 10-11). At the time of the OSHA inspection, National Steel was in the process of finishing its part of the project and only one of its employees, Don Morsaw, project superintendent, was onsite (Tr. 12, 45). National Steel was not performing any welding or cutting on the jobsite since they were concluding their work onsite (Tr. 44).

During a walk around inspection of the jobsite, Sotak observed an oxygen cylinder storage rack belonging to National Steel (Tr. 12; Exhs. C-1, C-2, C-4, C-5). The storage rack was made by National Steel and contained two acetylene cylinders, four propane cylinders and two oxygen cylinders (Tr. 16, 18, 19, 45). The valves on the oxygen and acetylene cylinders had been removed and protective caps were in place. The cylinders also were secured to the storage rack's vertical surface (Tr. 33). They had not been used for one week and were not to be used onsite (Tr. 14). The cylinders were separated on the rack by a noncombustible barrier which was 5 feet in height and ¼-inch thick (Tr. 17, 30, 31, 32). However, there was a 1-inch gap between the barrier and the frame on the right and left sides of the frame (Tr. 16, 17, 40, 50; Exhs. C-2, C-5). The oxygen cylinders were placed on the right side of the storage rack directly in front of the gap (Tr. 17; C-2). The acetylene cylinders were placed on the right side of the storage rack

opposite side of the barrier, directly behind the oxygen cylinders (Exhs. C-2, C-5). National Steel had not tested the barrier to determine its fire resistance rating (Tr. 20, 60).

The storage rack containing the cylinders was protected on one side by a barricade. Ladder cages were located on the back side of the storage rack (Tr. 21, 17, 40, 50-53, 63, 64; Exh. C-3). The closest work activity onsite was occurring approximately 30 feet from the storage rack (Tr. 15). The storage rack was located 5 feet from the road which was used by contractors to come in and out of the area (Tr. 18, 21; Exhs. C-1, C-2, C-3).

As a result of her inspection, Sotak recommended the issuance of a citation for a violation of § 1926.350(a)(10) for the conditions she observed relating to the storage of oxygen cylinders on the storage rack. The Secretary issued the instant citation to National Steel on August 29, 2011.

Discussion

The Secretary has the burden of establishing the employer violated the cited standards.

To prove a violation of an OSHA standard, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies; (2) the employer failed to comply with the terms of the cited standard; (3) employees had access to the violative condition; and (4) the cited employer either knew or could have known with the exercise of reasonable diligence of the violative condition.

JPC Group Inc., 22 BNA OSHC 1859, 1861 (No. 05-1907, 2009).

Citation

Item 1: Alleged Serious Violation of 29 C. F. R. § 1926.350(a)(10)

The Secretary cited National Steel for a serious violation of § 1926.350(a)(10), alleging:

On or about 8/03/22, employees were exposed to fire and explosion hazards when oxygen and acetylene cylinders were not separated by a fire-wall with a ½ hour rating.

Section 1926.350 (a)(10) 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 (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.

The facts of this case are not in controversy. National Steel was engaged in fabricating holding tanks for the waste water system on site (Tr. 13). This work is construction activity (Tr. 13). Applicability of the standard is established.¹ Project Superintendent Don Morsaw and four or five employees of another contractor had access to the conditions (Tr. 26). These employees were painting and sandblasting the tanks located to the right of the storage rack, approximately 30 feet away (Tr. 15, 45; Exh. C-1). In addition, a job trailer belonging to another contractor working onsite was directly behind the storage rack, approximately 50 feet away (Tr. 15; Exh. C-1). Access to the violative conditions is established. Actual knowledge is shown by evidence that Morsaw, project superintendent onsite for National Steel, was aware that the barrier had not been tested and that the cylinders were in storage. In addition, constructive knowledge is established by the location of the storage rack and cylinders in plain view (Exhs. C-1, C-2, C-3, C-5). Morsaw should have been aware of the violation.

The only issue in dispute is whether the barrier on the storage rack was sufficient and complied with the terms of the standard. For the reasons set forth below, the undersigned finds that the barrier was insufficient.

Compliance with the Terms of the Standard

When oxygen cylinders are in storage, § 1926.350(a)(10) provides employers with two methods for complying with the standard. Oxygen cylinders must be separated a minimum distance of 20 feet from fuel-gas cylinders or they must be separated by a noncombustible barrier at least 5 feet high with a fire-resistance rating of at least ½ hour. There is no dispute that National Steel's oxygen cylinders were in storage. Morsaw told Sotak the cylinders had not been used for one week and were not to be used onsite (Tr. 14). Further, the valves on the oxygen and acetylene cylinders had been removed and protective caps were in place (Tr. 33). Rather than separating the oxygen cylinders by a distance of 20 feet, National Steel used a barrier to separate the stored oxygen cylinders.

The barrier separating the oxygen cylinders was 5 feet in height and ¼-inch thick; however, there was a 1-inch gap between the barrier and the frame on each side of the frame (Tr. 6, 17, 30 ; Exhs. C- 2, C-5). The fire resistance rating of the barrier is not known. Neither the Secretary nor National Steel tested the barrier to determine its fire resistance rating (Tr. 20,

¹ In its brief, National Steel argues it was denied due process due to vagueness of the standard, and a lack of fair notice of the requirements of the standard as it applied to ¼-inch barriers. The undersigned has considered National Steel's arguments and finds they lack merit and are not supported by a preponderance of the evidence.

30-31, 60). National Steel should have tested the barrier or otherwise ascertained that it met the fire resistance rating required by the standard. In order to meet her burden, the Secretary must show the barrier failed to meet the fire resistance rating of the standard. National Steel argues the standard should be vacated because the Secretary did not test the barrier for a fire resistance rating (National Steel's Brief, p. 4). The Secretary contends she 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. Therefore, the ¼-inch barrier used by National Steel undoubtedly would not provide the appropriate fire resistance (Secretary's Brief, p. 10; Exh. C-7).

The interpretative guidance relied upon by the Secretary is a June 30, 2006, Memorandum on Interpretation for Fire Resistance Ratings for Metal (Exh. C-7). Although the interpretation guidance deals with a different standard, § 1910.253(b)(4)(iii), Sotak testified § 1910.253(b)(4)(iii) addresses the same hazard and the same conditions found in this case (Tr. 22). Sotak's testimony was uncontroverted. The June 30, 2006, Memorandum provides in relevant part:

In fact, a solid mild steel plate barrier, ½-inch thick, would fail to meet the fire-resistance rating for ½-hour (see attached memorandum, dated July 15, 1982). To obtain a ½-hour fire-resistance rating criteria, the most common materials used are plaster (cement, lime, and perlite) fillers, and mineral wool fillers. For example, a fire barrier (solid partition) would be comprised of metal lath on ¾-inch steel channels, combined with a 2-inch thick cement plaster (see attached notes titled, 1910.253- Welding, Cutting and Brazing). Solid mild steel plate barriers combined with plaster fillers such as concrete provide a higher protection factor that meet or exceed the ½-hour fire-resistance rating, because concrete has low thermal conductivity and capacity properties.

Based on the above information, solid mild steel plate barriers, ½-inch thick, used alone would not meet OSHA's ½-hour requirements. However, a combination of materials used in conjunction with solid mild steel plate barriers would achieve the ½-hour fire-resistance rating criteria. Therefore, any material used that meets or exceeds the ½-hour fire-resistance rating would be in compliance and acceptable for 29 CFR 1910.253(b)(4)(iii).

(Exh. C-7, Emphasis Added).

The evidence adduced at the hearing refers to the barrier used by National Steel only as a noncombustible metal barrier (Tr. 30). There was no evidence that the metal it was comprised of was solid steel. Also there was no evidence that it was comprised, as well, of other non-metal materials such as cement plaster and mineral wool fillers, which would obtain the required

½-hour fire resistance rating as set forth in the June 30, 2006, Memorandum. Not knowing whether the metal the partition was comprised of solid steel, the undersigned cannot conclude that the ¼-inch barrier used, based on thickness alone, renders the barrier insufficient, as the Secretary contends.² However, because the evidence adduced shows the ¼-inch partition was made only of metal and was not combined with something such as cement plaster, the undersigned finds the barrier does not meet the ½-hour fire resistance rating, based on the June 30, 2006, Memorandum.

Even if the metal partition were ½-inch solid steel and combined with concrete plaster, the undersigned finds the barrier would be insufficient nonetheless because of the 1-inch gap on either side of the barrier exposing the oxygen cylinders to the acetylene cylinders. The undersigned agrees with the Secretary's assertion that there was no barrier at all because of the 1-inch gap between the barrier and the frame. The Secretary relies on an April 20, 1992, Interpretation Letter which provides the partition between the oxygen and fuel-gas cylinders must be configured so as to prevent fire from circumventing the barrier (Exh. C-6). The barrier used by National Steel only provided partial separation between the oxygen and fuel-gas cylinders and because of the 1-inch gap Sotak testified fire could circumvent the barrier (Tr. 20). The undersigned agrees and finds the barrier was insufficient. National Steel's contention that the cylinders were physically separated as required by the standard fails. Photographs admitted into evidence show the oxygen and acetylene cylinders were adjacent to each other (Exhs. C-2, C-5). The proximity of the cylinders to each other can be seen via the 1-inch gap on the right side of the storage cylinder (Exh. C-2, C-5). The Secretary has met her burden of proving a violation of § 1926.350(a)(10).

The Secretary classified this item as serious. Under § 17(k) of the Act, a violation is serious "if there is a substantial probability that death or serious physical harm could result from" the violative condition. Sotak testified employees could sustain severe burns in the event of a fire explosion resulting in a serious injury (Tr. 27). Item 1 is properly cited as serious.

National Steel contends the citation should have been classified as *de minimis*. A violation is *de minimis* when a deviation from the standard has no "direct or immediate"

² National Steel also contends the barrier exceeded the industry standard of 3/16 inches. As this case involves a specific OSHA standard which must be complied with, National Steel's arguments as to industry standard are not relevant and are rejected.

relationship to employee safety. *Dover Elevator Co.*, 15 BNA OSHC 1378, 1382 (No. 88-2642, 1991). National Steel relies on OSHA's Letter of Interpretation to Kenneth Yotz, dated May 8, 2006, in support of its argument the violation should have a *de minimis* classification (National Steel's Brief, pp. 6 - 7). That letter of interpretation provides specific conditions must be met in order for a violation to be classified as *de minimis*. One of those conditions, as National Steel points out in its brief, is there must be only one acetylene cylinder and one oxygen cylinder (National Steel's Brief, p. 7). The evidence adduced shows there were two oxygen cylinders and two acetylene cylinders on the storage rack at the jobsite. National Steel's reliance on the May 8, 2007, Yotz Letter of Interpretation fails.³ Sotak testified a serious injury could result in the event of a fire explosion. The undersigned finds Sotak's testimony credible. This violation had a direct or immediate relationship to employee safety, and National Steel's reliance on the Yotz Interpretation Letter is misplaced.

Penalty Determination

The Commission is the final arbiter of penalties in all contested cases. *Secretary v. OSHRC and Interstate Glass Co.*, 487 F.2d 438 (8th Cir. 1973). The Commission must determine a reasonable and appropriate penalty in light of § 17(j) of the Act and may arrive at a different formulation than the Secretary in assessing the statutory factors. Section 17(j) of the Act requires the Commission to give "due consideration" to four criteria when assessing penalties: (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 Construction Co.*, 15 BNA OSHC 2201 (No. 87-2059, 1993).

The Secretary proposes a penalty of \$2,380.00 for this violation taking into account National Steel's size and good faith, applying a 30 percent reduction for size because the company had 50 employees; and applying a 15 percent reduction for good faith because National Steel had a safety and health program in place (Tr. 27-28). The severity of the hazard was rated at medium and the probability was rated at lesser because the cylinders were secured and only one employee of National Steel was exposed (Tr. 26-27). There is no evidence of a prior history

³ The Yotz Interpretation Letter was not offered into evidence at the hearing, therefore, is not a part of the record evidence in this case.

of violation of this standard, and because employees were not working in the immediate vicinity of the hazard, but were directly exposed to it only as they drove by, the undersigned finds a lower penalty is appropriate. Further, although there were eight cylinders stored in violation of the standard and the cited conditions existed for as long as one week, National Steel certainly attempted to comply with the standard by erecting a metal barrier between the oxygen and acetylene tanks and ensuring the cylinders were secured. Additionally, National Steel erected a barricade in front of the storage rack to reduce vehicular contact. These factors also weigh in favor of a smaller penalty. Accordingly, undersigned finds a penalty of \$1,500.00 is appropriate under § 17(j) of the Act.

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:

Citation 1, item 1, alleging a violation of § 1926.350(a)(10), is affirmed as serious and a penalty of \$1,500.00 is assessed.

/s/ Sharon D. Calhoun
SHARON D. CALHOUN
Judge

Date: May 4, 2012
Atlanta, Georgia