United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, D.C. 20036-3419

SECRETARY OF LABOR,

Complainant,

v. OSHRC DOCKET NO. 99-2002

AIA ENVIRONMENTAL CORP.,

Respondent.

Appearances:

David L. Baskin, Esquire
Office of the Solicitor
U.S. Department of Labor
Boston, Massachusetts
For the Complainant.

Susan G. Rosmarin, Esquire
Stryker, Tams & Dill, LLP
Newark, New Jersey
For the Respondent

Before: Administrative Law Judge Covette Rooney

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* ("the Act"). Respondent, AIA Environmental Corporation ("AIA")[1], at all times

[1] At the hearing, the Secretary moved to amend the caption from AIA Demolition to AIA Environmental Corporation, the company's actual name; the motion was granted. (Tr. 6-7).

relevant to this action maintained a job site at 10 Glover Avenue, Norwalk, Connecticut, where it was engaged in interior demolition of an office building. (Tr. 9). AIA admits it is an employer engaged in a business affecting commerce within the meaning of section 3(5) of the Act and that it is subject to the requirements of the Act. On September 21, 1999, OSHA compliance officer ("CO") Douglas Avona inspected AIA's job site pursuant to a complaint about the site. As a result of the inspection, on October 7, 1999, AIA was issued two citations alleging serious and other-than-serious violations with a proposed total penalty in the amount of $4,000.00. AIA filed a timely notice of contest, this matter was designated for E-Z Trial pursuant to Commission Rule 203(a), and a hearing was held on February 29, 2000, in Hartford, Connecticut. On February 29, 2000, the parties filed a Partial Settlement Agreement, wherein Item 1 of Citation 2 was vacated.[2] Before me are Items 1a and 1b of Citation 1 and Item 2 of Citation 2. This matter is ready for disposition.

The Inspection

On September 21, 1999, CO Avona and a student intern arrived at the site at about 10:00 a.m. Upon entering the site, they met AIA's foreman, Frank Grimmer, who told them he would contact Emil Braun, AIA's chairman, and have him come to the site. He took them to the site office, where he said they could wait. On the way, the CO saw some green oxygen cylinders in the doorway of a garage. He then saw an AIA employee picking up another such cylinder just outside the garage. The intern said he had seen an employee operating a bobcat or forklift knock over the cylinder, and the CO had the intern photograph the scene. The CO asked Grimmer if the cylinders should be secured, but Grimmer did not respond. The CO and the intern proceeded to the office to wait for Braun, who arrived about an hour later. During that hour, the CO went outside to observe the work taking place. He went in the building that was being demolished and saw employees shoveling debris. He then went into the garage where he had seen the oxygen cylinders, which at this time were in the middle of the floor, and he also saw two black acetylene cylinders along a wall. Employees were moving around in the vicinity of the cylinders, which the intern photographed. (Tr. 9; 18-25; C-1-2).

When Braun arrived at the site, the CO conducted an opening conference with him and then

---

[2] On March 17, 2000, I signed a Consent Order approving this settlement agreement.

asked him for AIA's OSHA 200 logs for 1997, 1998 and 1999. Braun said the records were in his regular office and that he would be happy to comply with the request but that he needed it in writing. The CO next asked Braun whether, if he asked for AIA's hazard communication program and asbestos project plans, he would have to request those in writing also, and Braun replied in the affirmative. The CO and Braun then walked through the site, and the CO pointed out the cylinders in the garage and told him that they needed to be secured and properly separated. Braun responded that the cylinders had just arrived. (Tr. 26-33).

The Secretary's Burden of Proof

The Secretary has the burden of proving her case by a preponderance of the evidence. In order to establish a violation of an OSHA standard, the Secretary must show (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.*, 16 BNA OSHA 2131, 2138 (No. 90-1747, 1994).

Citation 1, Item 1a

29 C.F.R. 1926.350(a)(9), the cited standard, provides as follows:

> Compressed gas cylinders shall be secured in an upright position at all times except, if necessary, for short periods of time while cylinders are actually being hoisted or carried.

The citation alleges as follows:

> Building 10: Compressed gas cylinders of acetylene and oxygen were not secured to prevent them from bing knocked over.

The record establishes that shortly after CO Avona's entry onto the site he observed oxygen cylinders in a garage doorway that were not secured. He also he observed an employee picking up a fallen cylinder. Later in the inspection, the CO saw three oxygen cylinders and two acetylene cylinders standing unsecured in the garage. The uncontradicted evidence shows that the cylinders in the garage were not secured by any means to prevent them from falling over. (Tr. 19-36; C-1-2).

The cited standard clearly requires that unless they are being hoisted or carried, compressed

gas cylinders must be secured "at all times." The record contains no evidence that the cylinders were being carried or hoisted when the CO saw them inside the garage. I find that the standard applied to the condition of the unsecured cylinders and that AIA violated the standard. The CO testified that oxygen and acetylene cylinders are under pressure and that unsecured cylinders are subject to falling and having their valves ruptured or broken, which could cause a valve to become a projectile. (Tr. 32-33). The record shows that employees were working in the vicinity of the unsecured cylinders and were thus exposed to such a hazard. The cylinders were in plain view, and, therefore, management should have been aware of the violation. I also find that the violation was serious because serious physical harm could be expected if a cylinder were to fall and its valve were to break or rupture and strike an employee.[3] This item is affirmed as a serious violation.

Citation 1, Item 1b

29 C.F.R. 1926.350(a)(10), the cited standard, provides as follows:

> 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 citation alleges as follows:

> Building 10: Compressed gas cylinders of oxygen and acetylene were stored in close proximity (less than 20 feet) without an appropriate barrier.

The records establishes that there was neither a noncombustible barrier nor a minimum distance of 20 feet between the oxygen cylinders and the acetylene cylinders the CO observed. (Tr. 27-32; C-2). However, AIA argues that the cited standard did not apply to the cylinders because they were not in storage. In support of its argument, AIA relies upon OSHA'S interpretation of the term "in storage" within the meaning of the standard. OSHA considers a cylinder to be in storage when

---

3

Section 17(k) of the Act, 29 U.S.C. § 666(k), provides that a violation is "serious" if there is "a substantial probability that death or serious physical harm could result." To establish that a violation was serious, the Secretary need not show that an accident was likely to occur but that an accident was possible and that it was probable death or serious physical harm could have occurred. *Flintco Inc.*, 16 BNA OSHA 1404, 1405 (No 92-1396, 1993).

it is reasonably anticipated that gas will not be drawn from the cylinder within the next 24 hours. Whether it is reasonably anticipated that gas will be drawn within that time frame depends 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. *See* OSHA Standards Interpretation and Compliance Letter dated December 31, 1998, relating to the subject standard, entitled "Definition of 'in storage' and clarification of the requirements for intermittent use of gas cylinders." Although the term "in storage" is not defined within the relevant standards, it is well settled that an agency's interpretation of its own regulation is entitled to substantial deference so long as it is reasonable. *Martin v. Secretary of Labor,* 499 U.S. 144 [14 OSHC BNA 2097] (1991). I find that the Secretary's interpretation in this case is a reasonable one.

Emil Braun, AIA's chairman, testified that although he did not actually see the cylinders being delivered that day, he saw one of his delivery trucks on site as he accompanied the CO on the inspection.[4] He said he knew the truck was at the site to pick up empty cylinders and deliver full ones pursuant to AIA's normal operating procedure. He also said he observed burning activities that day and that they had not worked the previous day, a Monday, because of a religious holiday. Thus, no work had taken place since the Friday before the inspection, which was on Tuesday, September 21, 1999. (Tr. 10; 13-14; 52-55). Bruce Carley, AIA's general manager, testified he arrived at the site around 11:15 a.m., after being called about the inspection, and that he assumed a supervisory role because Grimmer was involved in the inspection. Carley further testified that two acetylene cylinders and four oxygen cylinders had been delivered to the site that day. He said that this was a day's supply of cylinders and that there was cutting going on in one of the buildings that day. (Tr. 44-51).

CO Avona testified that he saw no deliveries of cylinders and observed no torch cutting or welding at the site. However, noted that Braun had told him that the cylinders in the garage had just arrived. In addition, he acknowledged that Braun had explained to him that the cylinders were to be used for cutting pipes and duct work as they demolished the building. He further acknowledged that

---

4

Braun initially indicated he had seen the cylinders delivered; however, he later said he had not seen them delivered but knew they had been and had the receipts. (Tr. 13; 52-54).

he did not recall asking about the usage of the cylinders and thus did not know if they would be used in the next 24 hours. (Tr. 24-25; 28; 31; 37-43).

Based on the record, I find that the Secretary has not established by a preponderance of the evidence that the cited tanks were "in storage" within the meaning of the standard. Accordingly, the standard is inapplicable and this citation item is vacated.

Penalty Determination

The Secretary has grouped Items 1a and 1b of Citation 1 for penalty purposes and has proposed a total penalty of $1,000.00 for these two items. The Commission, as the final arbiter of penalties, must give due consideration to the gravity of the violation and the employer's size, history and good faith. *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2213-14 (No. 87-2059, 1993). I find the severity of the violation in this case to be moderate because of the high probability of an unsecured cylinder falling and the injuries that could have resulted. I also find that adjustments for size, history and good faith are warranted in view of the record before me. I conclude that the total proposed penalty of $1,000.00 is appropriate for Item 1a, and this penalty is accordingly assessed.

Citation 2, Item 2

29 C.F.R. 1910.1200(e)(4), the cited standard, provides as follows:

> The employer shall make the written hazard communication program available, upon request, to employees, their designated representatives, *the Assistant Secretary and the Director, in accordance with the requirements of 29 C.F.R. 1910.1020(e)*.[5] (Emphasis added).

The citation alleges as follows:

> Entire Facility: The employer's written hazard communication program was not made available, upon request, to a designated representative of employees.

As a preliminary matter, AIA points out that the citation as issued completely omitted the language set out above in italics. AIA also points out that the Secretary's evidence did not address

---

5 The Assistant Secretary includes the Assistant Secretary of Labor for Occupational Safety and Health, U.S. Department of Labor, or designee. *See* 29 C.F.R. 1910.1200(c).

the alleged violation, *i.e.*, whether the hazard communication ("HAZCOM") program was made available to a designated representative of employees, and contends that this item should be vacated. The Secretary, on the other hand, contends that the citation should be amended to conform to the evidence. The record clearly shows that both parties presented evidence regarding the CO's alleged request for AIA's written HAZCOM program. I find that the issue of whether the program was made available upon request to a designee of the Assistant Secretary was tried by the express consent of the parties. Accordingly, the citation is amended to conform to the evidence. Fed. R. Civ. P. 15(b).

It is undisputed the cited standard is applicable. However, I find that the Secretary has not demonstrated a violation of the standard because the record does not show that AIA refused to provide its HAZCOM program. As set out *supra*, the record establishes that the CO asked Braun for AIA's OSHA 200 logs for 1997, 1998 and 1999. Braun said the records were in his office and that he would be happy to comply but that he needed the request in writing. The CO then asked Braun whether, if he asked for AIA's HAZCOM program and asbestos project plans, he would need to request those in writing also, and Braun responded in the affirmative. (Tr. 26-27). In my opinion, this response was not a refusal because the CO's "request" was ambiguous at best and could have been interpreted differently by different persons. This conclusion is supported by the fact that while the CO believed he had requested the HAZCOM program, Braun did not believe the CO had made such a request. (Tr. 12-14; 26-27). I observed the respective demeanors of Braun and the CO and found their testimony on this point to be equally sincere. In addition, I note that the record discloses no further action on the part of the CO to obtain the HAZCOM program. On the basis of the record before me, I conclude that AIA did not violate the cited standard. This item is therefore vacated.[6]

Findings of Fact and Conclusions of Law

The foregoing decision constitutes my findings of fact and conclusions of law in accordance with Federal Rule of Civil Procedure 52(a).

6

In vacating this item, I note that the legislative history regarding this section indicates that the standard does not abrogate an employer's Fourth Amendment right to require OSHA to obtain a subpoena when seeking such documents. *See* 53 Fed. Reg. 38,140 (September 29, 1988).

ORDER

Based upon the foregoing, it is hereby ORDERED that:

1. Citation 1, Item 1a, alleging a serious violation of 29 C.F.R. 1926.350(a)(9), is affirmed, and a penalty of $1,000.00 is assessed.

2. Citation 1, Item 1b, alleging a serious violation of 29 C.F.R. 1926.350(a)(10), is vacated.

2. Citation 2, Item 1b, alleging an other-than-serious violation of 29 C.F.R. 1910.1200(e)(4), is vacated.

Covette Rooney
Judge, OSHRC

Dated: 3/27/00
Washington, D.C.