

SECRETARY OF LABOR,

Complainant,

v.

SEYFORTH ROOFING CO., INC.,

Respondent.

OSHRC DOCKET NO. 99-0075

APPEARANCES:

For the Complainant:

Margaret Terry Cranford, Esq. Office of the Solicitor, U.S. Department of Labor, Dallas, Texas

For the Respondent:

Robert E. Rader, Jr., Esq., Rader, Campbell, Fisher & Pyke, Dallas, Texas

Before: Administrative Law Judge: James H. Barkley

DECISION AND ORDER

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C. Section 651 *et seq.*; hereafter called the "Act").

Respondent, Seyforth Roofing Co., Inc. (Seyforth), at all times relevant to this action maintained a place of business at 4301 Vista, Pasadena, Texas, where it was engaged in roofing. Respondent admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

On December 2, 1998 the Occupational Safety and Health Administration (OSHA) conducted an inspection of Seyforth's Pasadena worksite. As a result of that inspection, Seyforth was issued citations alleging violations of the Act together with proposed penalties. By filing a timely notice of contest Seyforth brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

Prior to the hearing, the Secretary withdrew item 2 of "serious" citation 1. On July 28, 1999, a hearing was held in Houston, Texas on the remaining item, No. 1, which alleges a violation of §1926.153(o). The parties have submitted briefs on the issues and this matter is ready for disposition.

Alleged Violations

29 CFR 1926.153(o): Where LP gas systems are exposed to potential damage from vehicular traffic, precautions were not taken to prevent the possibility of damage to the cylinder:

(a) At 4301 Vista, Pasadena, Texas, near front entrance where a 250 gallon propane tank was not protected from vehicular equipment.

Facts

Kelly Knighton, the OSHA Compliance Officer (CO), testified that she arrived at Seyforth's Pasadena work site at approximately 9:45 a.m. on December 2, 1998 (Tr. 5-6). Knighton observed an employee using a Skytrack forklift to unload tar from a truck (Tr. 6-8). The employee was operating the forklift within the proximity of a 250 gallon LP [liquified petroleum] tank which was being used to heat the tar kettle for Seyforth's roofing operation (Tr. 8-9, 13-14; Exh. C-2). CO Knighton stated that as she watched, the operator used the forklift to unload metal doorframes for the inside of the building (Tr. 10, 29). Knighton stated that she saw the Skytrack make three or four passes before the driver could be flagged down (Tr. 19). Knighton estimated that as the Skytrack moved, the tines of the forklift passed within 3 to 5 feet of the tank (Tr. 10). Knighton testified that she observed four Seyforth employees working within the vicinity of the tank as the Skytrack passed by (Tr. 15, 19).

Knighton testified that she alerted the driver, a superintendent for the general contractor on site, Mr. Fontenot, to the hazard involved in operating the Skytrack in the vicinity of the LP tank (Tr. 8, 28). Fontenot asked if the hazard could be abated by putting up some flags (Tr. 12). Knighton testified that she told Fontenot that the flags would serve as a temporary measure, but that physical barricades which would prevent any contact with the LP tank are required by OSHA standards (Tr. 12, 22, 26, 54; Exh. C-1). Knighton testified that flags were strung around the LP tank within 30-45 minutes of her arrival on the site (Tr. 24).

Noe Sanchez, Seyforth's kettleman (Tr. 42), testified that it is part of his specifically assigned duties to watch over the kettle and LP tank and to ensure that the area is guarded (Tr. 43-46; Exh. R-1). Sanchez testified that on the morning of the OSHA inspection he had strung yellow caution tape around the kettle area (Tr. 48-49; Exh. C-4). Sanchez testified that the stucco subcontractor had removed the tape, between 7:00 and 8:00 a.m. the morning of the OSHA inspection, in order to erect scaffolding in the area (Tr. 50-51). Sanchez testified that he allowed the other workers to remove the caution tape, but warned them to be careful while working in the area (Tr. 52, 74). Sanchez further

stated that approximately 15 minutes prior to the OSHA inspection, he warned the forklift driver as he worked in the area, to assure that the Skytrack did not come too close to the tank (Tr. 54-55, 66).

Discussion

Section 1926.153(o) provides:

Where damage to a liquefied petroleum gas system from vehicular traffic is a possibility, precautions against such damage shall be taken.

Seyforth maintains that the cited standard is unconstitutionally vague, citing *e.g.*, *Midwest By-Products, Inc.*, 3 BNA OSHC 1408, 1974-75 CCH OSHD ¶19,827 (No. 2840, 1975), in which the Commission upheld the administrative law judge's (ALJ) dismissal of a citation issued under §1910.110(10), which is identical to the standard at issue in these proceedings, but is applicable to general industry, rather than construction. The ALJ in that case found that the standard was so vague as to be unenforceable. Seyforth goes on to cite 1992 and 1993 ALJ decisions holding that the Secretary's interpretation of §1910.110(10) to require physical barriers was, under the cited circumstances, unreasonable. *See, CDI Contractors, Inc.*, 15 BNA OSHC 2223 (No. 91-1987, 1992); *A.R.. Contractors, Inc.*, 16 BNA OSHC 1350 (No. 91-2277, 1993).

Complainant maintains that the Secretary has consistently interpreted the cited standard as requiring a physical barrier that would prevent any vehicular traffic from contacting a LP gas tank. Complainant argues that the yellow caution tape Seyforth claims to have strung around the LP tank would not conform to the standard's requirements. Moreover the Secretary points out, there were *no* physical precautions of any kind in use at the time of the OSHA inspection.

The cited standard is, as noted by Seyforth, broadly worded, and subject to differing interpretations. Nothing in the plain language of the standard provides employers with fair warning that physical barriers are required by the Secretary to avoid citation. A broadly worded standard, however, may be saved from constitutional vagueness where the application of objective external criteria gives the standard meaning. *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 1991-93 CCH OSHD ¶29,964 (No. 86-2059, 1993). The Secretary's interpretive rules, agency enforcement guidelines, and interpretations embodied in OSHA citations may provide notice to affected employers of their duties under a broadly worded standard. Prior Commission decisions have also been found to put employers on notice of proscribed conduct under a broadly worded standard. *Corbesco, Inc. V. Dole*, 926 F.2d 422 (5th Cir. 1991).

The Secretary did not introduce, and this judge is aware of no formal interpretation of the cited standard. The issue at bar, however, has been litigated extensively. In every case the Secretary argued

that the cited standard required physical barriers be erected. However, in none of the cases litigated did the Commission find that the Secretary's interpretation of the standard was reasonable. In none of the cases was the citation upheld. The Secretary could have, but has not, amended the problematic language to require barriers. This judge cannot find, therefore, that a reasonable employer, reviewing the available information, would have concluded that physical barriers were required to conform with the cited standard.

However, even accepting Seyforth's argument that physical barriers are not required by the cited standard, Seyforth was in violation of the cited standard. While Seyforth could not be expected to know that it was required to erect a barrier around the LP tank, it was aware that some kind of physical precaution, such as perimeter tape or warning lines were required; Seyforth's own safety rules require that the tank be secured with perimeter tape, barricade or warning lines (Exh. R-1). Perimeter tape around the LP tank had been removed between 7:00 and 8:00 a.m., with the consent of Respondent's kettleman, to allow a forklift to operate in the area. It is precisely when such vehicular traffic is near the propane tank that the required precautions need to be in place, to remind the vehicle operators to be cautious in the presence of explosive gas. As presented, the facts establish a violation of the cited standard.¹

Penalty

A penalty of \$2,625.00 was proposed by the Secretary.

The violation was correctly classified as "serious." CO Knighton testified that if a tine of the forklift had punctured the LP tank, the tank could become a projectile (Tr. 16). A spark could ignite the escaping petroleum resulting in an explosion (Tr. 15). Employees in the area could suffer fractures, contusions, severe burns, and/or death (Tr. 17). Four employees were exposed to the cited standard while the forklift was operated in the vicinity of the LP tank. The gravity of the violation was overstated, however, in that CO Knighton did not take into account that some precautions, *i.e.*, caution tape, had been in place earlier in the morning (Tr. 32-33).

Knighton testified that the proposed penalty reflects a 15% reduction for good faith, and a 10% reduction based on Seyforth's history (Tr. 19-20).

Taking into account the relevant factors, including the reduced gravity calculation, I find that a penalty of \$1,300.00 is appropriate.

¹ At the hearing, Seyforth withdrew the previously raised "unpreventable employee misconduct" affirmative defense (Tr. 35).

ORDER

1. Citation 1, item 1, alleging violation of §1926.153(o) is AFFIRMED, and a penalty of \$1,300.00 is ASSESSED.

James H. Barkley
Judge, OSHRC

Dated: