SECRETARY OF LABOR, Complainant, v. SAFEWAY, INC., Respondent.	OSHRC Docket No. 99-0316

DECISION

Before: RAILTON, Chairman, and ROGERS, Commissioner.[*]

BY THE COMMISSION:

This case is before the Occupational Safety and Health Review Commission under 29 U.S.C. §§ 661(j), section 12 (j) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-78 ("the Act"). The facts are largely undisputed. Safeway, Inc. ("Safeway")[1] hosted an outdoor cookout for some of its employees, those working in its bread baking facility, to demonstrate appreciation for their efforts over the Fourth of July holiday weekend in 1998. The cookout was scheduled during business hours and held outdoors next to the facility's loading dock. Safeway's plant superintendent was responsible for the event and issued a memo inviting employees to attend during paid breaks or unpaid lunch periods.

On the morning of the event, the plant superintendent asked the plant engineer to assist two other employees with setting up the grill. In so doing, Safeway used a 40-pound propane cylinder instead of the 20-pound cylinder that had been included with the grill when Safeway purchased it. To connect the grill's gas regulator to the incompatible valve inlet on the 40-pound cylinder, the plant engineer and a maintenance shop foreman left the site to purchase an adapter. When they returned, the plant manager reimbursed them from Safeway's "petty cash" account. The plant engineer then installed the adapter and connected the gas regulator to the cylinder. However, the cylinder was too large to be properly anchored to the platform beneath the grill, and the short length of the gas supply hose extending from the grill burners to the gas regulator prevented the plant engineer from stabilizing the cylinder upright on the ground next to the grill. Therefore, the plant engineer leaned the cylinder at a 45 to 60 degree angle against the side of the grill. When other

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[*]Commissioner Stephens has recused himself from participation in this case.

[1]We are amending the caption of this case to accurately reflect the employer's name, Safeway, Inc. The case was correctly docketed as Safeway, Inc. but later incorrectly captioned in some Commission documents as Safeway Bread Plant. The Complaint, Answer, motions from both the Secretary and Respondent, and orders by the judge consistently identified the employer as Safeway, Inc.

employees subsequently encountered ignition problems, the plant manager paged the plant engineer for further assistance. As the plant engineer and another employee attempted to determine the nature of the problem, liquid propane escaped from the cylinder and erupted into a fireball. Both suffered injuries.

The Secretary cited Safeway for a violation of section 5(a)(1) of the Act, 29 U.S.C. § 654(a)(1), which is commonly referred to as the general duty clause.[2] Specifically, the citation alleged that Safeway violated the general duty clause for exposing employees "to the release and ensuing fire of propane due to the improper use of a gas hose and regulator assembly in combination with a 40-pound propane cylinder . . . being used in a near horizon[t]al position while exerting stress on the regulator and gas hose assembly." Safeway contested the citation. As a threshold issue, Safeway argued that attendance at the barbeque was voluntary and that the location where the outdoor barbeque was held was not a workplace; thus, OSHA did not have jurisdiction under section 4(a) of the Act, 29 U.S.C. § 653(a).[3] In addition, Safeway contended that the Act contains specific standards that addressed the underlying hazard of fire and explosion due to the release and ignition of propane from a compressed gas cylinder. Thus, Safeway argued, the Secretary improperly cited the hazard under the general duty clause.

The Secretary thereafter moved to amend the Complaint to allege, in the alternative, that Safeway violated 29 C.F.R. § 1910.101(b).[4] Administrative Law Judge Sidney J.

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[2]Section 5(a)(1) of the Act provides:

> Each employer – (1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.

[3] Section 4(a) of the Act provides:

> This Act shall apply with respect to employment performed in a workplace in a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, Guam, the Trust Territory of the Pacific Islands, Wake Island, Outer Continental Shelf Lands defined in the Outer Continental Shelf Lands Act, Johnston Island, and the Canal Zone. The Secretary of the Interior shall, by regulation, provide for judicial enforcement of this Act by the courts established for areas in which there are no United States district courts having jurisdiction.

[4]29 C.F.R. § 1910.101(b) provides:

> **§ 1910.101 Compressed gases (general requirements).**
>
> . . . .
>
> (b) *Compressed gases.* The in-plant handling, storage, and utilization of all

Goldstein granted the motion to amend the Complaint. After a hearing was held and following review of post-hearing briefs, the judge found that section 1910.101(b) was inapplicable to the cited condition, but he affirmed a violation of section 5(a)(1) and assessed the Secretary's proposed penalty of $5,000. Safeway filed a petition for discretionary review of the judge's decision and that petition was granted. The issues on review are (1) whether the alleged violation occurred "with respect to employment performed in a workplace" within the meaning of Section 4(a) of the Act; (2) whether the judge erred in finding that 29 C.F.R. § 1910.101(b) is inapplicable to the cited condition involving the improper use of a propane gas grill; and (3) whether the judge erred in affirming a violation of section 5(a)(1) of the Act.

The two participating Commission members are divided on the appropriate disposition of the case on the merits. However, section 12(f) of the Act, 29 U.S.C. § 661(e), requires that official action be taken by the Commission with the affirmative vote of two members. Thus, to resolve this impasse, the Commission herein vacates the direction for review, thereby allowing the judge's decision and order to become the final appealable order of the Commission with the precedential value of an unreviewed judge's decision. *See, e.g., Texaco, Inc.*, 8 BNA OSHC 1758, 1760, 1980 CCH OSHD ¶ 24,634, p. 30,218 (Nos. 77-3040 & 77-3541, 1980); *Rust Engineering Co.*, 11 BNA OSHC 2203, 2205, 1984-85 CCH OSHD ¶ 27,024, p. 34,777 (No. 79-2090, 1984). *See also* sections 10(c), 11(a) and (b), and 12(j) of the Act, 29 U.S.C. §§ 659(c), 660(a) and (b), and 661(i). Accordingly, the direction

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compressed gases in cylinders, portable tanks, rail tankcars, or motor vehicle cargo tanks shall be in accordance with Compressed Gas Association Pamphlet P-1-1965, which is incorporated by reference as specified in § 1910.6.

for review is vacated.[5] However, the separate opinions of the two participating Commission members follow.

It is so ordered.

/s/
W. Scott Railton
Chairman

/s/
Thomasina V. Rogers
Commissioner

Dated: March 12, 2003

[5]Notwithstanding our action vacating the direction for review in this case, as the separate opinions of the Commissioners make clear, this was an appropriate case for review. The order vacating the direction for review is entered in order to allow the parties to bring finality to this case. The decisions of some United States courts of appeals have rejected alternative forms of disposition of our cases when only two members are available to decide cases. *See, e.g., Cox Brothers v. Secretary of Labor*, 574 F.2d 465 (9th Cir. 1978); *Shaw Construction, Inc. v. OSHRC*, 534 F.2d 1183 (5th Cir. 1976).

Separate Opinion of Commissioner Rogers

ROGERS, Commissioner.

Commissioner Rogers would conclude that the cited condition occurred in a workplace within the scope of section 4(a) of the Act. In addition, Commissioner Rogers would conclude that the judge erred in finding inapplicable and thus vacating the section 1910.101(b) item.

A. Did the cited Condition Occur in a "Workplace" Within the Scope of Section 4(a) of the Act?

The first question is whether the alleged violation occurred with respect to employment performed in a workplace as required by section 4(a) of the Act. 29 U.S.C. § 653(a). Although section 4(a) limits the application of the Act to "employment performed in a workplace," the Act does not define the phrase. A similar phrase, "place of employment," in section 5(a)(1) of the Act is also undefined, but both the Commission and the United States courts of appeals have consistently found that a "place of employment" includes any location where employees have been assigned work duties. *See Access Equipment Systems Inc.*, 18 BNA OSHC 1718, 1720-22, 1999 CCH OSHD ¶ 31,821, p. 46,776-77 (No. 95-1449, 1999); *Anthony Crane Rental v. Reich*, 70 F.3d 1298, 1303 (D.C. Cir. 1995); *Reich v. Simpson, Gumpertz & Heger Inc.*, 3 F.3d 1, 5 (1st Cir. 1993); *Clarkson Construction Company v. OSHRC*, 531 F.2d 451, 458 (10th Cir. 1976); *REA Express v. Brennan and OSAHRC*, 495 F.2d 822, 825 (2d Cir. 1974). In addition, the Commission has long recognized that in certain circumstances, the term "workplace" covers areas where work is not actually assigned or performed. *See, e.g., C.R. Burnett and Sons, Inc. and Harllee Farms*, 9 BNA OSHC 1009, 1018-19, 1980 CCH OSHD ¶ 24,964, p. 30,808 (No. 78-1105, 1980) (rent-free housing provided by employer to assure an available supply of labor to advance its own operations is a workplace and within the remedial jurisdiction of the Act); *RGM Construction Co.*, 17 BNA OSHC 1229, 1235, 1993-95 CCH OSHD ¶ 30,754, p. 42,729 (No. 91-2107, 1995) (the Act covers employees who have been, are, or will be in the

zone of danger during the course of their assigned duties, their personal comfort activities on the job, or their normal ingress-egress to and from their assigned workplaces).

Commissioner Rogers would find that the Act applies to the conditions cited in this case. The grill and cylinder were set up on Safeway's premises in an area that was located between the employee-visitor parking lot and the loading dock of the facility. This area where employees congregated was designated by Safeway as a smoking and picnic area. Safeway exercised control over the area by maintaining light bulbs, electrical outlets, drains, and roofing. The fact that the area was located outside the building where bread was produced does not exempt it from the Act's coverage.

The record establishes that two supervisors assigned the plant engineer to work on the grill and cylinder during his regularly scheduled work hours. The plant engineer obtained and installed the adapter (which was paid for by Safeway), and he was later required to help in resolving the grill ignition problem. There is no evidence that the plant engineer's work on the grill and cylinder was either voluntary or recreational. The plant engineer testified that he had never refused any assignments from either the plant manager or the plant superintendent, and that he interpreted the assignments to work on the grill and cylinder (both of which were company-owned equipment) to be part of his duties. Taken together, these facts establish that the cited condition occurred with respect to employment performed in a workplace. Accordingly, Commissioner Rogers would find that the Secretary acted within the scope of her authority under section 4(a) of the Act.

B. *Did the Judge Err in Finding 29 C.F.R. § 1910.101(b) Inapplicable?*

The next issue for consideration is the alleged violation of 29 C.F.R. § 1910.101(b). On this issue, Commissioner Rogers would find that the Secretary met her burden of proving a violation of section 1910.101(b). In her view, the standard's "in-plant" coverage is not, as Safeway claims, restricted to compressed gases used inside buildings as part of the production process, but by its terms is clearly applicable to the "handling, storage and utilization of *all* compressed gases in cylinders, portable tanks, rail tankcars, or motor vehicle

cargo tanks" (emphasis added). *Cf. Chicago and North Western Transportation Company*, 5 BNA OSHC 1121, 1122, 1977-78 CCH OSHD ¶ 21,608, p. 25,938 (No. 13071, 1977) (employer responsible for the safety of the equipment it owns and provides to its employees regardless of whether the equipment is used in production). Based on a consideration of the dictionary definition, the regulatory context, and common usage, Commissioner Rogers would find that the term "in-plant" plainly applies to an entire facility, both inside and outside of buildings. *See Webster's Third New International Dictionary* (1986) ("in-plant" defined as "carried on, occurring within or restricted to the confines of a manufacturing establishment or factory," and "plant" is defined as "the land, buildings, machinery, apparatus, and fixtures employed in carrying on a trade or a mechanical or other industrial business").

Commissioner Rogers notes that although the standard does not define "in-plant," the meaning is plain from the entire regulatory scheme and from common usage. Thus, where the Secretary intends to limit the applicability of a standard to the inside of buildings, she does so by using those precise words. For example, the corresponding construction industry standard, 29 C.F.R. § 1926.350(a)(12), broadly covers the "in-plant handling, storage and utilization of all compressed gases in cylinders, portable tanks, rail tankcars, or motor vehicle cargo tanks," while the preceding subsection, 1926.350(a)(11), narrowly addresses additional requirements for proper storage of compressed gas cylinders "inside of buildings." Numerous other standards also specify when applicability is limited to inside or outside of buildings. *See, e.g.*, 29 C.F.R. §§ 1910.106(g)(3)(ii), 1910.106(g)(3)(v)(b), 1910.110(c)(5)(i), and 1926.153(h)(1).[1] Commissioner Rogers would find that fair notice is provided by the standard's explicit, unambiguous requirements for employers to follow in specific circumstances. *See Ormet Corporation,* 14 BNA OSHC 2134, 2135-36, 1991-93

[1]Commissioner Rogers also notes that the plain meaning of "in-plant" is consistent with the Compressed Gas Association Pamphlet P-1-1965 ("CGA Pamphlet"), which is incorporated by reference into the standard and includes specific provisions on the safe storage, handling and utilization of compressed gas cylinders in areas not only inside but also outside of plant buildings.

CCH OSHD ¶ 29,254, p. 39,200 (No. 85-531, 1991); *Cleveland Consolidated, Inc.*, 13 BNA OSHC 1114, 1117, 1986-87 CCH OSHD ¶ 27,829, p. 36,428-29 (No. 84-696,1987); *Peterson Brothers Steel Erection Company, v. Reich*, 26 F.3d 573, 576 (5th Cir. 1994); *Faultless Div., Bliss & Laughlin Inds., Inc. v. Secretary of Labor*, 674 F.2d 1177, 1185-88 (7th Cir. 1982).[2]

As to the issue of noncompliance, Commissioner Rogers would find that the facts in this case establish that Safeway failed to comply with section 3.4.4 of the CGA Pamphlet, which requires that before use a cylinder must be "properly supported to prevent it from being knocked over." In addition, she would find that because two Safeway supervisors, the plant engineer and the plant manager, were aware of the cited condition, their actual knowledge is imputable to Safeway. She would further find that constructive knowledge was also shown by evidence that Safeway failed to implement a work rule prohibiting the use of the unsupported 40-pound cylinder with the grill. Commissioner Rogers would reject Safeway's argument that the violation was the result of unpreventable employee misconduct. The cited condition here was not the plant engineer's conduct, but Safeway's failure to provide proper support for the cylinder before use – a condition that was present and in plain view of the plant engineer's supervisors well before he allegedly loosened the supply hose connection during his efforts to address the grill ignition problem. For the reasons set forth above, Commissioner Rogers would conclude that the Secretary established a violation of section 1910.101(b).[3] Giving due consideration to the penalty factors in section 17(j) of the

[2]Safeway's reliance on *Consolidated Rail Corporation*, 1980 OSAHRC 80/126/B7 (No. 78-2163, 1980) ("*Consolidated Rail*"), an unreviewed judge's decision, is misplaced. In that case, the Secretary cited the employer for failure to store compressed gas cylinders in accordance with section 3.5.3 of the CGA Pamphlet, which specifically addresses the proper storage of cylinders "inside of buildings." The judge vacated the item because the cited tanks were located outside of a building.

[3]Notwithstanding the Chairman's suggestion, Commissioner Rogers believes that section 1910.110(c)(4)(ii) does not clearly apply to the use of a 40-pound propane cylinder attached to a portable barbecue grill. Its text and context strongly suggest that it is intended to apply to more elaborate "cylinder systems." Furthermore, while there may be some overlap in sections 1910.101(b) and 1910.110(c)(4)(ii), such overlap does not render the Secretary's

Act, 29 U.S.C. § 666(j), she would also affirm the Secretary's proposed penalty of $5,000.

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application of 1910.101(b) unreasonable. *See Martin v. OSHRC*, 941 F.2d 1051, 1057 (10th Cir. 1991), *on remand from Martin v. OSHRC*, 499 U.S. 144, 150-58 (1991).

Commissioner Rogers notes that the substantive requirement at issue under both standards is essentially the same. The relevant requirement under the CGA pamphlet incorporated by 1910.101(b) is that the cylinder be "properly supported to prevent it from being knocked over." The relevant requirement under 1910.110(c)(4)(ii) is that the container "shall be set upon firm foundation or otherwise firmly secured." And, the Chairman suggests yet a third possible standard, the National Fire Protection Association Standard for the Installation of Gas Appliances and Gas Piping, NFPA 54-1969, where the most relevant provision, 3.1.12, requires that gas "appliances shall be adequately supported and so connected to the piping as not to exert undue strain on the connections."

Aside from the fact that the Chairman seems to suggest that the Secretary's burden is to prove the inapplicability of every other standard that could possibly apply, he ignores the fact that all three standards require the same thing – that the cylinder be adequately supported. (Indeed, that is also part of the factual gravamen underlying the original allegation under section 5(a)(1).) To the extent either of the other two standards suggested by the Chairman applies, under our precedent, and consistent with the principle that in "an administrative proceeding, . . . pleadings are liberally construed and easily amended," the Commission should amend the citation pursuant to Rule 15(b) of the Federal Rules of Civil Procedure to conform the pleadings to the proof since the parties have clearly tried the question of whether the cylinder was adequately supported. *New York State Electric & Gas Corporation v. Secretary of Labor* ("*NYSEG*"), 88 F.3d 98, 104 (2d Cir. 1996). The amendment would "not alter the factual allegations set forth in the citation." *Safeway Store No. 914*, 16 BNA 1504, 1517, 1993 CCH OSHD ¶ 30,300, p. 41,750 (No. 91-373, 1993). Regardless of which of the three possible standards applied, "the material fact issues to be tried would have been exactly the same." *NYSEG*, 88 F.2d at 105. Accordingly, Safeway would not have been prejudiced by an amendment, and an amendment would have been proper.

Separate Opinion of Chairman Railton

RAILTON, Chairman.

Chairman Railton agrees with his colleague regarding her analysis and conclusion that the alleged violation occurred in a workplace as the term is used in the Act. There simply cannot be any question that the maintenance foreman was working within the scope of his employment and at the direction of Safeway's managers at the time of the accident.

Regrettably, however, the Chairman must disagree with her conclusion and analysis concerning the Secretary's plea in the alternative that Safeway violated section 5(a)(2) of the Act by not complying with the catch-all standard for compressed gases at 29 C.F.R. § 1910.101(b). In his view, the Secretary failed to prove that the standard contained in 29 C.F.R. § 1910.101(b) applied to the facts of this case. That failure occurred because the Secretary failed to prove that a more specific standard relating to propane did not apply to the facts.

OSHA promulgated a standard, 29 C.F.R. § 1910.110, which has specific application to propane gas. *See* 29 C.F.R. § 1910.110(a)(7) (covering "*propane*, propylene, butanes, . . . and butylenes") (emphasis added). The essence of the alleged violation in this case is that the forty-pound propane tank was leaning against the grill, and, was not "set upon [a] firm foundation or otherwise firmly secured." *See* 29 C.F.R. § 1910.110(c)(4)(ii).[1] Accordingly, there are at least two hazardous material standards that might have application to the facts of this case – 29 C.F.R. § 1910.101(b) and 29 C.F.R. § 1910.110(c)(4)(ii).

The citation Safeway received as well as the Secretary's Complaint in this case failed to charge a violation of either standard. Instead, the Secretary pursued a theory of

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[1]29 C.F.R. § 1910.110(c)(4)(ii) provides:

> **§ 1910.110 Storage and handling of liquefied petroleum gases.**
> . . . .
> (c) *Cylinder systems* . . . . (4) Containers and regulating equipment installed outside of buildings or structures . . . . (ii) Containers shall be set upon firm foundation or otherwise firmly secured; the possible effect on the outlet piping of settling shall be guarded against by a flexible connection or special fitting.

prosecution on the basis of the general duty clause. 29 U.S.C. § 654(a)(1). Safeway denied that charge by answering that "specific standards apply to hazards relating to the use of propane gas." The Secretary thereafter amended the Complaint to plead in the alternative a violation of the Act's special duty clause alleging a violation of the general compressed gas standard, i.e. the section 1910.101(b) standard. Nonetheless, the Secretary continued to press the general duty clause allegation at trial and in her briefs. The alternative charge under section 1910.101(b) appears to have been prosecuted as an after-thought.

It is hornbook OSHA law that the general duty clause is a "catch-all" provision designed to redress hazardous conditions not otherwise covered by OSHA standards. RABINOWITZ, OCCUPATIONAL SAFETY AND HEALTH LAW, at 90 (2d ed. 2002). Similarly, it is hornbook law that the Secretary has the burden of demonstrating that an OSHA standard applies to the facts when she alleges a violation of an OSHA standard. *Id*. at 34. In addition, 29 C.F.R. § 1910.5(c)(1) states that if a particular standard is applicable to a condition, it prevails over a different general standard.[2] In applying these principles to this case, it is clear that the Secretary should have, as an initial matter, demonstrated that the hazardous materials standards apply or do not apply to the facts. Second, 29 C.F.R. § 1910.101(b) cannot apply unless the Secretary proved the inapplicability of 29 C.F.R. § 1910.110(c)(4)(ii), which specifically applies to propane gases.[3] Finally, the general duty clause applies only if neither

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[2] 29 C.F.R. § 1910.5(c)(1) states in relevant part as follows:

> If a particular standard is specifically applicable to a condition, practice, means, method, operation, or process, it shall prevail over any different general standard which might otherwise be applicable to the same condition, practice, means, method, operation, or process . . . .

[3]The Chairman notes that section 1910.101 is headed, "Compressed gases (general requirements)," and thus, by its own terms, is a general standard that broadly applies to the storage and handling of "all compressed gases." *See* 29 C.F.R. § 1910.101(b). Section 1910.110 applies, by its own terms, to the storage and handling of liquefied petroleum gas – the type of gas at issue in this case. *See* 29 C.F.R. § 1910.110(a)(7). Thus, it is a more specifically applicable provision. Therefore, the particular applicable standard "shall prevail over any different general standard which might otherwise be applicable to the same condition . . . ." 29 C.F.R. § 1910.5(c). *See also Yazoo Manufacturing Company*, 12 BNA

standard has application to the facts. It is Chairman Railton's view that in this case the Secretary failed to demonstrate that 29 C.F.R. § 1910.101(b) applied because she failed to show that the propane gas standard contained in 29 C.F.R. § 1910.110 did not apply.

Counsel for Safeway addressed this issue at trial. He asked the Secretary's compliance officer for the basis for not citing the section 1910.110 standard. In response, the compliance officer effectively stated that he understood the scope provisions of the standard contained in 29 C.F.R. § 1910.110(i) to exempt low pressure piping systems from the requirements of the standard having application to propane hazards. This provision, however, indicates that low-pressure systems are covered by the National Fire Protection Association ("NFPA") Standard for the Installation of Gas Appliances and Gas Piping. NFPA 54-1969. The provision further states that the NFPA standard "shall apply" for such systems. *See* 29 C.F.R. § 1910.110(i)(2)(v). The problem here is that the Secretary did not demonstrate the inapplicability of the NFPA standard she had incorporated into section 1910.110 by virtue of the scope provision. The incorporated NFPA standard applies to low-pressure propane systems – the type of system the Secretary said that Safeway used for the barbeque.

The Secretary, therefore, failed to carry a basic element of her burden of proof. The judge in this case should have vacated the citation. What is to be lamented is the fact that the Secretary has given little, if any, guidance for employers to follow in order to comply with OSHA's hazardous materials standards. These standards are very technical and complex. The general compressed gas and the specific standard applicable to propane appear in the subpart for hazardous materials. OSHA's website offers little in the way of compliance guidance to these difficult and complex standards.

To compound matters, the Secretary prosecuted this case basically using a scattergun approach. Essentially, the Secretary has asked the Commission to pick and choose between two mutually exclusive theories of prosecution to affirm the citation one way or the other.

OSHC 1112, 1118; 1984-85 CCH OSHD ¶ 27,141, p. 35,018 (No. 81-2141, 1984) (finding specific standard prevailed over different general standard that might otherwise be applicable).

Chairman Railton believes that the specific standard which regulates the use of propane on its face applies to the facts of this case. The Secretary refused to prosecute under that theory, and she did not demonstrate that the standard was inapplicable.[4] Accordingly, the Chairman can neither conclude that Safeway violated its general duty, nor can he agree that the general compressed gas standard was violated. He would vacate the citation for failure of proof.[5]

[4]It is undoubtedly not the province of the Commission to elect the theory of prosecution. Sadly, the Commission has in the past interfered and stepped up to the plate only to have the Secretary challenge such actions on appellate court review. *Cuyahoga Valley Ry. v. United Transp. Union*, 474 U.S. 3, 6-7 (1985) ("It is the Secretary, not the Commission, who sets the substantive standards for the workplace, and only the Secretary has the authority to determine if a citation should be issued to an employer for unsafe conditions . . . . The Commission's function is to act as a neutral arbiter and determine whether the Secretary's citations should be enforced . . . ."). In this matter, the Secretary declined to prosecute under the standard that specifically applies to a liquified petroleum gas, i.e. propane. Unlike his colleague, the Chairman did not research the old NFPA standard to determine whether it too specified the requirements she indicates it states. That was a job for the prosecutor.

[5]The province of the Commission is to affirm or vacate citations and, when it affirms, assess appropriate penalties and order abatement. The Chairman doubts that any penalty is appropriate in this case. As for abatement, the Chairman believes no such order is necessary. Given the litigation efforts expended it is most unlikely that the events that gave rise to this case will reoccur.

SECRETARY OF LABOR, Complainant, v. SAFEWAY, INC., and its successors, Respondent.	OSHRC Docket No. 99-0316

APPEARANCES:

Mark W. Nelson, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado

James J. Gonzales, Esq., Holland & Hart, LLP, Denver, Colorado

Before: Administrative Law Judge Sidney J. Goldstein

DECISION AND ORDER

This is an action by the Secretary of Labor to affirm a citation issued to Safeway Bread Plant for the alleged violation of Section 5(a)(1) of the Occupational Safety and Health Act of 1970. The matter arose after a compliance officer for the Occupational Safety and Health Administration inspected a company worksite, concluded that the company violated that section of the Act, and recommended that the citation be issued. The Respondent disagreed with this determination and filed a notice of contest. After a complaint and answer were filed with this Commission, a hearing was held in Denver, Colorado.

The citation charged that:

Citation 1, item 1. Type of violation: **SERIOUS**

Section 5(a)(1) of the Occupational Safety and Health Act of 1970: The employer did not furnish employment and a place of employment which were free from recognized hazards that were causing or likely to cause death or serious physical harm to employees in that employees were exposed to the hazard of fire and explosion due to the release and ignition of propane:

a) Employees were exposed to the hazards of fire and explosion while using a "Sunbeam" brand, portable liquid propane gas barbecue grill (model 5662D). On or

> about July 17, 1998, employees were exposed to the release and ensuing fire of propane due to the improper use of a gas hose and regulator assembly in combination with a 40 pound propane cylinder. at the time of the incident, a 40 pound propane gas cylinder was being used in a near horizonal (sic) position while exerting stress on the regulator and gas hose assembly.

in violation of Section 5(a)(1) of the Act which reads in part:

> Each employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or likely to cause death or serious physical harm to his employees.

The salient facts may be briefly summarized. Safeway, Inc. operates a bread plant in Denver, Colorado. The company appreciates the production efforts of its employees, and from time- to- time sponsors a barbecue or cookout in its smoking and parking area. Workers are invited to attend and to participate in the food and soft drinks but are not required to do so. To this end Safeway purchased a Sunbeam gas grill equipped with a 20-pound gas tank which fit securely under the grill. It came with a caution that only a 20-pound gas tank was to be used in grilling.

The grill was used on a number of occasions, but sometimes where was insufficient fuel to service the cookout. To assure enough fuel for these events the company purchased four 40-pound propane gas tanks. These larger tanks also came with a warning that they were not to be utilized with a 20 pound gas grill. Nevertheless, on one occasion the 40-pound tank was adjusted so that it operated without mishap. On July 17, 1998, however, there was difficulty in adapting the 40-pound tank to the Sunbeam grill.

Officials of the company then called upon its head of maintenance, a person considered part of management, to make the necessary adjustments so that the 40-pound propane tank hooked into the gas grill. The maintenance chief had trouble with the connections and decided that an adapter was necessary. He purchased one and began maneuvering the 40-pound tank into the grill when some propane fuel escaped, touching the grill and creating a "ball of fire." the maintenance chief placed his hand over the escaping gas and suffered a hand burn. Another maintenance person was slightly singed.

On these facts the complainant asserts that the 5(a)(1) allegation better fits the circumstances. The respondent rejects this view of the case, contending that specific standards apply; that Safeway was in compliance with the standard; that it did not violate Section 5(a)(1) of the Act; that it was not aware of any hazards; that the accident was due to employee misconduct; and, finally, that any infraction did not warrant a "serious" designation.

The standard referred to by the Respondent is found at §29 CFR 1910.101(b) and is entitled *Compressed Gases*. It provides: "The in plant handling, storage, utilization of all compressed gases in cylinders, portable tanks, rail tank cars, or motor vehicle cargo tankers shall be in accordance with Compressed Gas Association Pamphlet P-1 1965 * * *." I do not believe that a barbeque grill for home use falls within this definition. The current matter not devolves upon the interpretation of Section 5(a)(1) of the Act.

Under the 5(a)(1) clause the Secretary must prove (1) that the employer failed to render its workplace free of a hazard which was (2) recognized and (3) causing or likely to cause death or serious physical harm.

The hazard here was the dangerous activity of selecting a 40-pound propane container when the outdoor cooking grill cautioned that only a 20-pound propane container should be used. The Secretary explains that the hazard in this case was a fire or explosion resulting from an unplanned release of propane due to the incompatibility of using a propane tank of the wrong size. Management recognized the incompatibility use of the 40-pound propane cylinder with the gas barbeque grill when its plant manager knew that the 40-pound tank was too big to fit under the grill in an upright position. The plant superintendent also recognized the hazard when he was informed by the engineer who hooked the tank to the grill for the Memorial Day cookout that an adapter was necessary.

Under Section 5(a)(1) of the Act a hazard is deemed recognized when the potential danger of a condition or activity is either actually known to the particular employer or generally known in the industry. *St. Jos Minerals v. OSHRC*, 647 F.2d 840, 845, 9 OSHC 1646. Thus, management people had actual knowledge of the hazard. Here also serious injury resulting from using the wrong or inappropriate propane cylinder.

In order to prove a violation of Section 5(a)(1), the Secretary must also show that feasible means exist to eliminate or materially reduce the hazards. In this case the hazard could be eliminated by using a 20-pound propane cylinder as directed by the manufacturer of the home style barbeque grill.

From the foregoing, I find that no standard adopted under the Act covers the situation at hand; that the Respondent violated Section 5(a)(1) of the Act; that the Respondent was aware of the hazard in the utilization of a 40-pound propane cylinder contrary to the manufacturer's instructions; that the Respondent has failed to establish that its maintenance supervisor was guilty of any misconduct connected with the work; and that the citation warranted a designation of "serious" in view of the injuries which were sustained by its maintenance chief.

In this decision I have not overlooked the evidence relating to the Respondent's drug policy and its dismissal of the employee who was injured as a result of the escaping propane. Such issues are not determinative of whether or not the Respondent violated Section 5(a)(1) of the Act.

I conclude that the Respondent violated Section 5(a)(1) of the Act as alleged in the citation. The citation and recommended penalty of $5,000.00 are therefore AFFIRMED.

/s/
Sidney J. Goldstein
Judge, OSHRC

Dated: June 30, 2000