



UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR,

Complainant,

v.

NEWPORT NEWS SHIPBUILDING
 AND DRY DOCK COMPANY,

Respondent.

UNITED STEELWORKERS OF
 AMERICA,

Authorized Employee
 Representative.

OSHRC Docket No. 90-2658

DECISION

Before: FOULKE and MONTROYA, Commissioners.*

BY THE COMMISSION:

Newport News Shipbuilding and Dry Dock Co. (“NNS” or the “company”) is an employer engaged in shipbuilding, shipbreaking and ship repair in Newport News, Virginia. The Secretary issued a citation to NNS after a compliance officer of the Occupational Safety and Health Administration (“OSHA”) examined photographs taken by NNS during an OSHA investigation unrelated to this case. The citation alleged that NNS violated 29 C.F.R.

* Chairman Stuart E. Weisberg did not participate in the decision of this case.

§ 1910.253(b)(4)(iii)¹ by failing to separate oxygen cylinders “in storage” from fuel gas cylinders by the required minimum distance of 20 feet or by the statutory alternative of a noncombustible barrier. A \$1,200 penalty was proposed. An Administrative Law Judge affirmed the citation as repeated and assessed a \$1,000 penalty. For the reasons that follow, we affirm the judge’s decision.

Facts

Between April 1990 and the August 8, 1990 date of the inspection, NNS employees were engaged in welding and burning operations using cutting torches to break up roof sections made of sheet metal and steel in an NNS landfill area. Two to three employees were employed at the job, which involved up to six hours a day of burning time.

The parties stipulated that the citation item correctly states the number, type, and location of the compressed gas cylinders. Five racks of the cylinders were located in the area of the burning operations. Four separate racks containing thirty-two oxygen cylinders were located within six feet of two propane cylinders, which were hooked up to regulators. Sixteen of the oxygen cylinders were filled; two of them were being used by the employees conducting the burning operations. The other sixteen oxygen cylinders were empty and awaiting pickup.

NNS welding foreman Thomas Buchanan ordered gas cylinders after first determining each morning how many full oxygen bottles were left over following the previous day’s work. Buchanan testified that on average he would have twenty-five to thirty bottles of compressed

¹ Section 1910.253(b)(4)(iii) provides:

§ 1910.253 Oxygen-fuel gas welding and cutting.

.....
(b) *Cylinders and containers--*

.....
(4) *Oxygen storage.*

.....
(iii) 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.

gas delivered to the site each day. Buchanan also testified that although he had never seen them, the department from which he ordered the bottles kept records.

Gerald Lewis, a welder for NNS and the one employee who worked in the burning area during the entire April to August 8, 1990 period, testified that two employees would jointly use a total of between seven and twelve oxygen cylinders during a day's burning operations. Another welder, John C. Murray, testified that out of curiosity he measured the time that it took him to use up an oxygen cylinder; he determined that it took eighteen minutes of continuous burning.

Judge's Decision

The administrative law judge affirmed a repeat violation of section 1910.253(b)(4)(iii) and assessed a \$1,000 penalty. The judge found that there were at least forty-two cylinders at the site and that at least some of the cylinders were "in storage," explaining:

The record evidence indicates that the welder/burners worked continuously throughout their six hour shift. Even at the rate of usage estimated by Respondent (as high as 40 cylinders per shift) there were some oxygen cylinders located at the site which could not possibly be used during an entire shift. Placing gas cylinders in a location where it is known that they would not be used or needed for more than a shift or required to be used on an intermittent basis is placing them "in storage" within the meaning and intent of the standard. Under these circumstances, the cylinders cannot be considered to be in use or available for use within a reasonable amount of time.

The judge also discussed the meaning that should be given the phrase "in storage" in the cited standard. He noted that the Secretary argued that deference is due his interpretation of the phrase under the U.S. Supreme Court's decision in *Martin v. OSHRC (CF&I Steel)*, 499 U.S. 144, 150-58 (1991). However, the judge concluded that he was bound by Commission precedent until that precedent is changed by the Commission. See *Armour Food Co.*, 14 BNA OSHC 1817, 1990 CCH OSHD ¶ 29,088 (No. 86-247, 1990)(cylinders at a location where they were to be used within a 15-minute period were not "in storage"); *MCC of Florida, Inc.*, 9 BNA OSHC 1895, 1897, 1981 CCH OSHD ¶ 25,420, p. 31,681 (No. 15757, 1981).

The judge found the violation repeated based on a 1988 citation for a violation of the same standard (before the standard was renumbered) that had become a final order. The judge reduced the \$1,200 proposed penalty to \$1,000 because of "a company-wide concern for the safety of its employees" and the fact that the repeat violation was based on "only one prior violation."

Arguments of NNS

NNS argues that the forty-two cylinders that the judge found were present at the worksite have no basis in the record and that if the judge had applied his "per shift" test to the correct number of cylinders -- thirty-four -- the test would have required him to dismiss the citation. NNS argues that the judge's decision does not address the question of whether the cylinders were charged with gas and, if they were not, whether the standard applies. NNS also contends that the judge did not follow the Commission's *Armour Food* precedent which would have required him to conclude that the cylinders were not "in storage."

NNS contends that "storage" is not an ambiguous term, and that since a definition for the term is not supplied, common usage applies, that is, to put something away "for preservation or later use or disposal," *Webster's Ninth New Collegiate Dictionary*, p. 1162 (1985). NNS argues that the cylinders here were not in storage under either that definition or under *Armour Food* but were being used in an on-going cutting operation.

NNS claims the *Martin* deference issue should not be considered by the Commission because the Secretary did not seek, and the Commission did not grant, review on it. If the Commission does consider the issue, NNS claims that it should find the Secretary's interpretation unreasonable. It relies on the standard's adaptation from ANSI Z49.1 - 1967, which did not define "in storage," and on OSHA's failure to update the standard or inform the public about its interpretation. NNS also claims that the Secretary's interpretation of the standard is not reasonable because it has changed twice during this litigation. NNS further argues that it lacked prior notice that the Secretary would consider these cylinders to be "in storage," because the Secretary had failed to appeal Commission cases like *Armour Food* that did not accept his interpretation of "in storage."

Arguments of the Secretary

The Secretary argues that all thirty-two of the oxygen cylinders standing in the staging area near the burning operation, except for the two that were connected to the propane cylinders, were "in storage." He contends that it is undisputed that two NNS employees were using the cylinders to fuel their torches on the day of inspection and that there were no non-combustible barriers between the oxygen cylinder racks and the propane cylinders. The Secretary argues that NNS knew of the oxygen cylinders' placement within twenty feet of the propane tanks because of foreman Buchanan's active supervisory role in the operation and because the oxygen tanks and propane cylinders were in plain view.

The Secretary relies on the interpretations of "in storage" given by ANSI and NFPA and on the testimony of Frederick Kitson, who testified as the Secretary's expert in the handling and use of compressed gases. Kitson had worked in the compressed gas industry for about thirty-four years. He had been a member of the National Fire Prevention Association's ("NFPA") "No. 51 Committee" since 1967 and its Chairman between 1980 and 1989. That committee published NFPA No. 51 - 1974, entitled "Standard for the Installation and Operation of Oxygen-Fuel Gas Systems for Welding and Cutting." Kitson had also worked with the "ANSI Z49 Committee," which published ANSI Z49.1, entitled "Safety in Welding and Cutting."

Kitson testified, the Secretary states, that the term "cylinder storage" is defined in NFPA No. 51 - 1974 to mean "Cylinders of compressed gas standing by on the site (not those in use or attached ready for use)." Kitson also testified that the definition for cylinder storage was included in the 1973 edition of ANSI Z49.1² and the 1974 edition to NFPA--51 (and in all subsequent editions of both standards), as an attempt to clarify the original intent of these source standards. Kitson testified that ANSI and NFPA definition of "cylinder storage" is reflective of the definition that is in current use in the compressed gas industry and is generally known by those handling and using compressed gas cylinders. It was

² The standard cited here, 29 C.F.R. § 1910.253(b)(4)(iii), is derived in part from the 1969 version of NFPA--51, Welding and Cutting Oxygen Fuel Gas System and from the 1967 version of ANSI Z49.1, Safety in Welding and Cutting. See 29 C.F.R. § 1910.256.

Kitson's opinion, the Secretary points out, that under the circumstances of August 8, 1990, the thirty cylinders which were not attached to regulators were in storage.

The Secretary notes that the Commission has referred to other standards or codes to clarify OSHA standards, citing *Armour Food*, 14 BNA OSHC at 1825, 1990 CCH OSHD at p. 38,887 (Commission looked to revised version of original ANSI source standard to give meaning to "enclosed" in 29 C.F.R. § 1910.219(f)(3)); accord *Vanco Constr.*, 11 BNA OSHC 1058, 1061, 1983-84 CCH OSHD ¶ 26,372, p. 33,454 (No. 79-4945, 1982), *aff'd*, 723 F.2d 410 (5th Cir. 1984).

The Secretary argues, contrary to NNS, that his interpretation of "in storage" would not permit an unlimited number of compressed oxygen cylinders to be within twenty feet of fuel gas tanks if the oxygen cylinders were attached to common manifolds or separately equipped with pressure regulators. The Secretary claims that he interprets section 1910.253 to limit close placement of cylinders to those that could be placed in service at one time.

The Secretary contends that the Commission's construction of "in storage" in *Armour Food* and other decisions which pre-date *Martin* should be overruled in light of the *Martin* ruling that the Secretary's reasonable interpretations of his ambiguous regulations are entitled to deference. The Secretary disputes NNS's claim that the issue is not before the Commission because it was not directed for review, pointing out that the meaning of "in storage" was the primary issue litigated at the trial, was fully briefed on review, and is inextricably linked to the directed issue. The Secretary maintains that the Commission has not consistently interpreted the term "storage," and has defined "store" and "storage" in the manner he urges here, citing *R. Zoppo Co.*, 9 BNA OSHC 1392, 1395, 1981 CCH OSHD ¶ 25,230, p. 31,183 (No. 14884, 1981) and similar cases. At a minimum, the Secretary argues, these cases show that "storage" is capable of more than a single meaning. The Secretary argues that he has consistently interpreted "storage" to include any compressed gas cylinders that are standing by and not in actual use, or attached and ready for use. The Secretary states that while NNS argues it lacked notice of his interpretation prior to the August 1990 inspection, none of its witnesses testified that the company implemented its cylinder usage policy on the basis of Commission case law.

The Secretary argues that NNS incorrectly contends that he failed to prove that any of the thirty cylinders actually contained gas. He points out that welder/burner Lewis testified without rebuttal that the sixteen cylinders referenced in citation portions (a) and (c) were filled with oxygen. The Secretary claims that even if there is no evidence that the oxygen cylinders contained gas, Commission precedent establishes that compressed gas cylinders contain enough residual gas to present a hazard, citing *Trinity Indus.*, 9 BNA OSHC 1515, 1520, 1981 CCH OSHD ¶ 25,297, p. 31,323 (No. 77-3909, 1981); *accord Williams Enterp. of Georgia, Inc.*, 7 BNA OSHC 1900, 1903, 1979 CCH OSHD ¶ 24,003, p. 29,137-38 (No. 13875, 1979).

Finally, the Secretary argues that the judge properly found the violation repeated on the basis of an uncontested April 1988 citation for failing to properly separate oxygen cylinders from acetylene and propane tanks. The Secretary points out that the prior citation was for violation of 29 C.F.R. § 1910.252(a)(2)(iv)(c) which, upon OSHA's reorganization of the standard, was renumbered section 1910.253(b)(4)(iii).

Discussion

The judge affirmed a violation of the cited standard for those cylinders that would not have been used up in a single shift. He found that there were at least forty-two cylinders at the site and that, at the most, the company used forty cylinders per shift -- leaving two cylinders at the site on an overnight basis. It was those two cylinders that the judge found to be "in storage." Contrary to the judge's finding of forty-two cylinders, the parties agree -- as does the Commission -- that there were only thirty-four cylinders at the worksite (thirty-two oxygen cylinders, two of which were in use, and two propane cylinders). The number used per shift, however, is in dispute.

Welder Lewis testified that two employees would jointly use seven to twelve oxygen cylinders per day. Employee Pinkard, who delivered cylinders to the site on orders from company foreman Buchanan, testified that he delivered "[a]s many as 24 bottles [cylinders] a day." Foreman Buchanan testified that NNS used twenty-five to thirty cylinders per day. Buchanan also admitted, however, that maybe once a week the company would not "go through" all the racks of bottles delivered to the site. Thus, the weight of the evidence

suggests daily cylinder use totals lower than the twenty-five to thirty put forth by the company foreman. However, even if the foreman's high end estimate of twenty-five to thirty cylinders were used each day, somewhere between two and seven of the thirty-two oxygen cylinders at the site would not have been used up during the single shift each day that the cylinders were used. We therefore conclude that from two to seven cylinders present at NNS's landfill were in storage and should have been separated from the propane cylinders by a minimum distance of twenty feet or by a noncombustible barrier at least 5 feet high.³ See *Hackney/Brighton Corp.*, 15 BNA OSHC 1884, 1888, 1992 CCH OSHD ¶ 29,815, p. 40,619 (No. 88-610, 1992)(where acetylene cylinder kept together with oxygen cylinders in oxygen cylinder storage area between about 3:00 p.m. one day and 9:30 a.m. next day, cylinders were in storage under 29 C.F.R § 1910.252(a)(2)(iv)(c), the standard involved here prior to its being renumbered).

Because we decide this case on the basis of established Commission precedent and affirm the Secretary's citation, it is not necessary for us to address the Secretary's argument that the Commission must defer to his interpretation of "in storage." It is also unnecessary for us to address the company's argument that it lacked notice of the Secretary's interpretation of "in storage."


The citation alleges that the violation was repeated. Under Commission precedent, a violation is repeated if "at the time of the alleged repeated violation, there was a Commission final order against the same employer for a substantially similar violation." *Potlatch Corp.*, 7 BNA OSHC 1061, 1063, 1979 CCH OSHD ¶ 23,294, p. 28,171 (No. 16183, 1979). Under *Potlatch*, a prima facie case of similarity is established by a showing that the prior and present violations were for failure to comply with the same standard. In 1988, the Secretary issued NNS a citation alleging a violation of the standard involved here prior to its being renumbered. The citation was for failing to properly separate oxygen cylinders from propane tanks. Because NNS did not contest the citation, it became a final order of

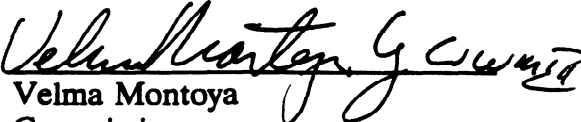
³ NNS has argued that the Secretary failed to prove that any of the oxygen cylinders, except the two attached to the propane cylinders, actually contained compressed gas at the time. The contention is without merit. Welder Lewis testified that the cylinders specified in portions (a) and (c) of the citation were filled with oxygen.

the Commission by operation of law. NNS does not argue that if the Commission finds the cited standard was violated, it should not be found repeated. Therefore, we find that the violation here was repeated under *Potlatch*.

The Secretary proposed a \$1,200 penalty. The judge, crediting NNS's good faith, reduced that amount and assessed a \$1,000 penalty. After a consideration of the penalty factors found at 29 U.S.C. § 666(j), we assess a \$1,000 penalty.

Accordingly, we agree with the judge that NNS violated cited section 1910.253(b)(4)(iii) and that the violation was repeated.⁴ We assess a \$1,000 penalty.


Edwin G. Foulke, Jr.
Commissioner


Velma Montoya
Commissioner

Dated: March 24, 1994

⁴ On review, the Secretary has unilaterally withdrawn Item 1 of Serious Citation 1 issued to NNS alleging a violation of 29 C.F.R. § 1915.55(a)(1). See *Hamilton Fixture*, 16 BNA OSHC 1073, 1076, 1993 CCH OSHD ¶ 30,034, p. 41,172 (No. 88-1720, 1993). The item had been affirmed by the judge, and the Commission had granted review on the company's petition. We set aside the judge's decision affirming the item and vacate the withdrawn item.



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SECRETARY OF LABOR,
Complainant,

v.

NEWPORT NEWS
SHIPBUILDING AND DRY DOCK
COMPANY,
Respondent.

UNITED STEELWORKERS OF
AMERICA,
Authorized Employee
Representative.

Docket No. 90-2658

NOTICE OF COMMISSION DECISION

The attached decision by the Occupational Safety and Health Review Commission was issued on March 24, 1994. **ANY PERSON ADVERSELY AFFECTED OR AGGRIEVED WHO WISHES TO OBTAIN REVIEW OF THIS DECISION MUST FILE A NOTICE OF APPEAL WITH THE APPROPRIATE FEDERAL COURT OF APPEALS WITHIN 60 DAYS OF THE DATE OF THIS DECISION.** See Section 11 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 660.

FOR THE COMMISSION

Ray H. Darling, Jr.

Ray H. Darling, Jr.
Executive Secretary

March 24, 1994
Date

Docket No. 90-2658

NOTICE IS GIVEN TO THE FOLLOWING:

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Secretary of Labor,
 Complainant,

v.

Docket No. 90-2658

Newport News Shipbuilding and
 Drydock Co.,
 Respondent.

NOTICE OF DOCKETING

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on October 11, 1991. The decision of the Judge will become a final order of the Commission on November 12, 1991 unless a Commission member directs review of the decision on or before that date. **ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW.** Any such petition should be received by the Executive Secretary on or before **October 31, 1991** in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. § 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary
 Occupational Safety and Health
 Review Commission
 1825 K St., N.W., Room 401
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Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
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If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 634-7950.

FOR THE COMMISSION

Ray H. Darling, Jr.
 Executive Secretary

October 11, 1991
 Date

BH

Docket No. 90-2658

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UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, :

Complainant, :

v. :

NEWPORT NEWS SHIPBUILDING AND :
DRY DOCK CORP., :

Docket No. 90-2658

Respondent. :

UNITED STEELWORKERS OF AMERICA, :

Authorized Employee :
Representative. :

APPEARANCES:

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On behalf of Complainant

ROBERT E. MANN, Esq.
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Chicago, IL
On behalf of Respondent

BEFORE: MICHAEL H. SCHOENFELD
JUDGE, OSHRC

DECISION AND ORDER

Background and Procedural History

This is a proceeding before the Occupational Safety and Health Review Commission pursuant to § 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (1970) ("the Act"), to review a citation issued by the Secretary of Labor pursuant to § 9(a) of the Act and the related proposed assessment of penalty.

On August 8, 1990, Mr. Barry Burbage, a Compliance Officer ("CO") of the Occupational Safety and Health Administration of the Department of Labor ("OSHA") conducted an inspection of a work site located at 4101 Washington Avenue, Newport News, Virginia in response to OSHA's receipt of a notification that an accident had resulted in a fatality. The fatality did not result in a citation and is of no consequence to this decision. Respondents' employees were engaged in shipbuilding and ship repair.

As a result of the inspection, two citations were issued to Respondent alleging that it had committed one serious and one repeat violation of the Act with proposed penalties of \$500 and \$1,200, respectively. Respondent filed a timely notice of contest.

Pleadings were filed joining the issues and there was some discovery. The United Steelworkers of America, District 35 - Local 8888 requested party status consistent with Commission Rules 20 and 22.¹ The motion was granted. Respondent's Motion for Summary Judgement was denied and the case came on to be heard on the merits in Norfolk, Virginia on May 16, 1991. Complainant and Respondent have both filed post-hearing briefs.

Jurisdiction

The complaint alleges, and Respondent concedes, that it is a corporation which has about 26,000 employees and is engaged in the business of ship building and ship repair and that in the course of its business it uses equipment and goods which have traveled in interstate commerce. (Pleadings).

¹ Rules of Procedure of the Occupational Safety and Health Review Commission, 29 C.F.R. §§ 2200.1 - .212, as amended, 55 Fed. Reg. 22780 - 4 (June 4, 1990).

Accordingly, I conclude that Respondent is an employer within the meaning of § 3(5) of the Act.²

Discussion

Before dealing with the individual cited items, there is a threshold issue in this case which must be addressed. It involves the definition of the term "storage."

Respondent contends that the citations are invalid because the cylinders were not "in storage." The Secretary on the other hand, contends that the cylinders were "in storage." Additionally, the Secretary argues that deference should be given to her construction of the term. See C F & I Steel Corporation, ___ U.S. ___, 111 S. Ct. 1171 (1991) ("C F & I"). The Secretary would have me decide the case under C F & I and reject the view of the Commission as stated in Armour Food, 14 BNA OSHC 1817, 1827 (No. 86-247, 1990). I decline to do so. Even if the interpretation of the term "in storage" espoused by the Secretary is not unreasonable and would otherwise be entitled to Commission deference under C F & I, administrative law judges of the Commission are bound by applicable Commission precedent until such time as the precedent is withdrawn or modified by the Commission itself.

Although Respondent's operation is essentially ship repair, shipbreaking or shipbuilding, at the time of the inspection some of its employees were engaged in burning operations to cut up scrap metal in its North Yard, Landfill area. The employees were using compressed gas fueled torches to accomplish their tasks (TR 9-12, 49, 129).³ Cylinders of fuel gas and oxygen were used because the

² Title 29 U.S.C. § 652(5).

³ References to the record to this case are as follows: TR, Transcript of Proceedings; GX, Government Exhibit; RX, Respondent Exhibit.

location of temporary scrap site was beyond the permanent fuel gas piping system which was installed at Newport's shipyard. (TR 142-44, RX-A). Thus, forklift operator, Kermit Pinkard, delivered daily shipments of compressed gas cylinders from a centralized compressed gas storage area to the workers. (TR 113-14; RX-A). The burning operations were conducted in one shift per day with at most three employees. (TR 50, 130). Significantly, their burning operations utilized separate individual hose lines for the oxygen and the propane. (TR 59, 79). Thus, the fuel gas and oxygen cylinders used in the operation could have been separated while they were in use.

On the day of the inspection there were five racks of compressed gas cylinders at the site. The racks were arranged as follows; thirty-two oxygen cylinders were on four cylinder racks which were within twenty feet of a fifth cylinder rack containing two propane cylinders. The two propane cylinders were attached to the torch hoses for use. Two of the thirty-two oxygen cylinders were attached to regulators ready for use. (TR 10-11; CS-1 & 2). Two of the oxygen cylinders cited in Instance A of Citation Number 1 which had no protective valve caps formed the basis of Citation Number Two. (TR 12-14; CX-1).

Central to Respondent's argument that the oxygen cylinders were not "in storage" is the rate of usage of the compressed gases in the cutting operation. Respondent takes the position that oxygen cylinders placed in the location in which they would be actually used and whose use was imminent were not "in storage." Respondent asserts that only that quantity of oxygen cylinders which would be used on a daily basis would be delivered to the site. Thus, according to Respondent, there can be no violation of the cited standard if it is shown by the evidence and reasonable inferences drawn from such evidence that the cutting operation was consuming oxygen at such a rate that the only oxygen cylinders in the area were those used during the shift.

According to Mr. Thomas Buchanan, the Welding Foreman in charge of this scrap-cutting operation, the rate of oxygen usage averaged twenty-five to thirty cylinders per day. (TR 131, 133). In support thereof, Respondent's burners⁴, conducted an informal experiment which demonstrated that each man consumed oxygen at the rate of one cylinder each eighteen minutes of cutting. At that rate forty cylinders of oxygen would be used per day. (TR 106-08). Under more controlled conditions, Respondent's Welding Engineering Department performed an experiment which demonstrated a 33.4 cylinder rate per day usage. (TR 124-5; RX-B). A Forklift operator testified that he delivered at least twenty-four cylinders to the site each day. (TR 114).

The Secretary on the other hand relies on the testimony of a welder/burner, Mr. Lewis, who recollected at the hearing that he used approximately seven to twelve cylinders per shift between the two burners. (TR 50-1). Reliance on this estimation would greatly reduce the rate of usage and result in the conclusion that a significant number of the oxygen cylinders present at the site at the time of the inspection would not be used immediately.

Accepting arguendo, Respondent's highest possible calculation that forty cylinders of oxygen were used per day, the evidence demonstrates that there were at least forty two cylinders present at the site. There were thus additional cylinders present which could not be used during the shift. At least those cylinders were "in storage." In reaching this conclusion, I rely on the Commission decisions which have addressed the issue of whether cylinders are in storage. Most recently, where cylinders were at the location where they were soon to be put to use (within a fifteen minute period) the cylinders were considered to not be "in storage." Armour, supra, 14 BNA OSHC at 1827. The Commission in

⁴ Employees who operate cutting/welding torches are referred to as "burners."

Armour likened the case to another case where cylinders were not in storage when available for use. Grossman Steel & Aluminum Corp., 6 BNA OSHC 2020 (No. 76-2834, 1978). Similarly, in another case where the cylinders were available and located in the area for immediate use, they were held to be not in storage. MCC of Florida, Inc., 9 BNA OSHC 1895, 1897, (No. 15757, 1981).

In the present case, the facts are distinguishable from the line of cases as noted in Armour. Although the cylinders in this case were located in the area where they were going to be used eventually, oxygen and fuel gas was in use continuously, not intermittently. Respondent's method of operation here falls outside of the intermittent use type of operation at issue in MCC of Florida. The record evidence indicates that the welder/burners worked continuously throughout their six hour shift. Even at the rate of usage estimated by Respondent (as high as 40 cylinders per shift) there were some oxygen cylinders located at the site which could not possibly be used during an entire shift. Placing gas cylinders in a location where it is known that they would not be used or needed for more than a shift or required to be used on an intermittent basis is placing them "in storage" within the meaning and intent of the standard. Under these circumstances, the cylinders cannot be considered to be in use or available for use within a reasonable amount of time. The cylinders were in storage.

Citation 1, Item 1

Alleged serious violation of 29 C.F.R. § 1915.55(a)(1)

The cited standard reads as follows:

Section 1915.55 Gas welding and cutting.

....
 (a) Transporting, moving and storing compressed gas cylinders. (1) Valve protection caps shall be in place and secure....

The complaint alleges concerning Citation 1, Item 1, that

Respondent failed to have valve protection caps on two oxygen cylinders in storage.

The CO did not personally observe any uncapped cylinders. (TR 44-45). The photograph which shows two uncapped cylinders (CX-1) was taken on the day of the inspection, but long before the CO had arrived at the site.

One of Respondent's employees, Mr. Lewis, conceded that he violated published safety rules when he mistakenly forgot to replace the caps when he changed cylinders. (TR 53, 55-56; CX-1). Mr. Lewis recognized that it was a violation of company rules and that he could have been disciplined.

In general, to prove a violation of a standard, the Secretary must demonstrate by a preponderance of the evidence (1) that the cited standard applies, (2) non-compliance with the terms of the standard, (3) employee exposure or access to the hazard created by the non-compliance, and (4) the employer knew or, with the exercise of reasonable diligence, could have known of the condition. Astra Pharmaceutical Products, Inc., 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981); Dun-Par Engineered Form Co., 12 BNA OSHC 1949 (No. 79-2553), rev'd & remanded on other grounds, 843 F.2d 1135 (8th Cir. 1988), decision on remand, OSHRC Docket No. 79-2553 (Apr. 12, 1989).

It is unchallenged that the cited standard applies to cutting operations of the type in which Mr. Lewis was engaged at the time of the inspection.

Mr. Lewis' testimony coupled with the photographic evidence clearly establish that the cited oxygen cylinders did not have valve protection caps in place. Respondent is imputed with knowledge of the condition as evidenced by Mr. Lewis' testimony that he was aware of the Company's published safety rules on this matter and recognized that he could have been disciplined for non-

compliance. Moreover, Mr. Charles P. Kline testified that each operator is given a safety manual called Torch Sense covering the valve protection cap rule. (TR 162; RX-E). The Secretary has established a violation of the standard.

On the issue of the seriousness of the hazard, the CO testified that if the cylinders or unprotected caps were struck, they could rupture and release the oxygen or the cylinders could become a missile flying about randomly with such force that "they could go through a concrete structure such as buildings." (TR 13). The CO opined that in the event of an accident the employees could sustain serious injuries or possibly even death. The seriousness of the injuries is also confirmed by the safety pamphlet which is given to each operator. (RX-E, p.17).

Under § 17(k) of the Act, 29 U.S.C. § 666(j), a violation is serious where there is a substantial probability that death or serious physical harm could result from the violative condition. It is the likelihood of serious physical harm or death arising from an accident rather than the likelihood of the accident occurring which is considered in determining whether a violation is serious. The Secretary has established that the violation was serious within the meaning of § 17(k) of the Act.

In its Answer, Respondent asserted two affirmative defenses to the alleged violation of 29 C.F.R. § 1915.55(a)(1) (untimely issuance of the citation and vagueness of the cited standard) which it did not pursue at trial nor in its post hearing brief. Respondent has thus abandoned those defenses. Moreover, in its post hearing brief, Respondent did raise for the first time the affirmative defense of unpreventable employee misconduct. (Respondent's Brief p. 17). Respondent's failure to affirmatively plead unpreventable employee misconduct constitutes a waiver of this defense. Commission Rule 36(b), 29 C.F.R. § 2200.36(b); Hoffman Construction Co., 6 BNA OSHC 1274, 1276, (No. 4182, 1978).

Considering the size of the employer, approximately 26,000 employees; its good faith, particularly as evidenced by its extensive safety program; history and the gravity of the violation under § 17(j) of the Act, 29 U.S.C. § 666(i), I find that a penalty of \$500 is appropriate for this violation which created a hazard to which two employees were exposed.

Citation 2, Item 1

Alleged repeat violation of 29 C.F.R. § 1910.253(b)(4)(iii)

The pertinent standard reads:

Section 1910.253 Oxygen-fuel gas welding and cutting.

....

(b) Cylinders and containers --

....

(4) Oxygen storage.

....

(iii) 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.

As previously noted, the cylinders referenced in the four instances of Citation Number Two were "in storage" within the meaning of 29 C.F.R. § 1910.253. Respondent's method of delivery and storage at the work site consisted of the use of steel racks holding groups of cylinders. The Welding Foreman, Mr. Thomas Buchanan, testified that there were three or four racks kept at the site routinely. (TR 133). Moreover, Mr. Pinkard, testified that the photograph depicting the oxygen cylinders in close proximity to the propane cylinders was typical of how close he kept the oxygen and propane cylinders. (TR 172-73). The oxygen cylinders were located within twenty feet of propane cylinders. In the event of a fire severe burns could result. (TR 21).

Mr. Frederick Kitson, an expert in the handling, storage, and use of compressed gases recommended several modes of abatement. (TR 79). Compliance with the standard is simple; separate the cylinders by at least twenty feet. The burning operations in this case made it even more achievable because the used had separate fuel gas and oxygen hose lines.

The violation was appropriately characterized as "repeated". A violation is repeated even if there is only one single prior infraction of the same standard. George Hyman Construction Co. v. OSHRC, 582 F.2d 834, 839 (4th Cir. 1978). Further, if there is only one prior infraction, then it may properly be factored in assessing a penalty. See § 17(j) of the Act, 29 U.S.C. § 666(i). Hyman, at 838 n.8. The record evidence establishes that Respondent was previously cited for the same violation² on one previous occasion on May 18, 1988. (TR 22; CX-8).

The determination of an appropriate penalty is within the discretion of the Commission. In this case Respondent is considered large and although the Secretary did not credit Respondent with good faith, the record evidence indicates a company-wide concern for the safety of its employees. It is a repeat violation but there is only one prior violation. Under these circumstances the penalty proposed is reduced to \$1000.

² The previous citation was also for storing oxygen cylinders within twenty feet of a gas cylinder, but the standard was numbered differently at that time.

FINDINGS OF FACT

Findings of fact relevant and necessary to a determination of all issues have been made in the above text. Fed. R. Civ. P. 52(a). All proposed findings of fact and conclusions of law inconsistent with this decision are hereby denied.

CONCLUSIONS OF LAW

1. Newport News Shipbuilding & Dry Dock Corporation, Respondent herein, was at all times pertinent hereto, an employer within the meaning of § 3(5) of the Occupational Safety and Health Act of 1970.

2. The Occupational Safety and Health Review Commission has jurisdiction over the parties and the subject matter.

3. Respondent was at all times pertinent hereto, required to comply with the requirements of the Act and the regulations issued pursuant the Act.

4. The Secretary established that Respondent was in serious violation of 29 CFR § 1915.55(a)(1).

5. A civil penalty of \$500 is appropriate for the serious violation.

6. The Secretary established Respondent committed a repeat violation of 29 C.F.R. § 1910.253(b)(4)(iii).

7. A civil penalty of \$1,000 is appropriate for the repeat violation.

ORDER

1. Citation No. 1, Item 1, alleging a serious violation of 29 C.F.R. § 1915.55(a)(1) with a penalty of \$500 is AFFIRMED.

2. Citation No. 2, Item 1, alleging a repeat violation of 29 C.F.R. § 1910.253(b)(4)(iii) with a penalty of \$1,000 is AFFIRMED.



MICHAEL H. SCHOENFELD
Judge, OSHRC

Dated: OCT 9 1991
Washington, D.C.