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

SECRETARY OF LABOR, Complainant, v. PROPELLEX CORPORATION, Respondent.	OSHRC Docket No. 96-0265

DECISION

Before: WEISBERG, Chairman; and ROGERS, Commissioner.

BY THE COMMISSION:

Propellex Corporation ("Propellex") manufactures munitions at its Elm Point production facility in Donaldson, Illinois. Following a large explosion that injured five employees, Occupational Safety and Health Administration ("OSHA") Compliance Officer Leland H. Darrow inspected the work site and issued one citation alleging three willful violations (Citation 1) and one citation alleging one other-than-serious violation (Citation 2) of various standards under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("OSH Act"); he proposed a combined penalty of $42,000.00. Propellex contested Citation 1, which alleges that it allowed its employees to: (a) maintain open flames in a burn barrel within nine feet of explosives, (b) use a cigarette lighter to ignite the fire in the burn barrel, and (c) smoke in a recognized "no smoking" area in willful violation of 29 C.F.R. §

1910.109(e)(1).[1] Following a hearing, Administrative Law Judge Sidney J. Goldstein issued a decision in which he affirmed the smoking item as serious, vacated the items pertaining to the maintenance of open flames in the burn barrel and the use of the lighter, and assessed a penalty of $5000.00. For the reasons that follow, we affirm the judge's decision in part and reverse in part.[2]

I. Background

Propellex was under a contract with the United States Department of Defense ("DOD") to produce a certain quantity of MK 45 MOD 1 ("Mark 45") primers, components of weapons used on Naval vessels, which contain black powder, a Class A, maximum hazard explosive.[3] Propellex destroyed those primers that did not meet government specifications by detonating them under controlled conditions ("demilitarizing" or "demilling") at an outdoor site, several hundred yards away from the plant buildings.[4] The work was performed by a crew consisting of four employees and leadperson Mary McKinnerney. The procedure was a simple one. The demilling crew would unload the crates of primers from a transport van and prepare the primers for detonation. To ensure that the primers would detonate properly, the crew punctured them with a sharpened screwdriver or awl, which caused some of the black powder to spill on the work table and ground below. The crew then placed them in a steel "test fixture," where they were detonated by an electrical charge set off by leadperson McKinnerney. An explosion occurred on November 27, 1995, when demilling

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[1]The standard provides, in relevant part:

> (e) *Use of explosives and blasting agents*-(1) *General provisions.* (i) While explosives are being handled or used, smoking shall not be permitted and no one near the explosives shall possess matches, open light or other fire or flame.

[2]Respondent made a motion for oral argument; however, upon review of the record, judge's decision, and briefs, we conclude that oral argument is unwarranted.

[3]*See* 29 C.F.R. § 1910.109(a)(3)(i) (classifying explosives).

[4]DOD inspector Vernon Buscher maintained an office at Propellex and visited the demilling site three times between May and November 1995 to "review what was going on," and to verify whether the demilling on particular contracts had been completed.

crew member Delbert Thomas collected a handful of the spilled black powder, wrapped it tightly in a "Chem Wipe," and tossed it into a fire in a barrel near the demilling work area that the crew used to keep warm.[5] This explosion ignited the primers at the worksite as well as the parked transport van, and left most of the demilling employees with severe burns and shrapnel puncture wounds, and left one with impaired use of her hand.

II. Discussion

A. Citation 1, Item 1a: The Burn Barrel

In Citation 1, Item 1a, the Secretary alleged that Propellex violated 29 C.F.R. § 1910.109(e)(1) because "employee(s) were allowed to handle explosives in such a way as to constitute an undue hazard to life in that, during the Demilling Operation of Mark 45 Explosive Devices, open flames were located approximately nine feet away." The judge found that the standard does not apply to the cited conditions and vacated the item. We find that the standard does apply and that a violation was proven.

To establish a violation, the Secretary must prove by a preponderance of the evidence that: (a) the cited standard applies; (b) the terms of the standard were not met; (c) employees had access to the violative condition; and (d) that the employer either knew, or with the exercise of reasonable diligence could have known, of the violative conditions. *Hamilton Fixture*, 16 BNA OSHC 1073, 1082, 1993-95 CCH OSHD ¶ 30,034, p. 41,178 (No. 88-1720, 1993), *aff'd without opinion*, 28 F.3d 1213 (6th Cir. 1994).

In finding that the standard does not apply, the judge mistakenly focused on language in the citation describing the cause of the accident: "[s]parks and/or burning debris from a burn barrel made contact with black powder residue and the explosive devices which caused an explosion, injuring five employees." However, at issue is not the cause of the accident, but whether the standard has been violated. Thus, the violation charged in Item 1a is that

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[5]The employees used a second barrel approximately 50 yards away from the work area to burn trash. Because the Secretary asserts that the violation was established by the use of the barrel nine feet away from the work area, we do not address whether the use of this "trash burn barrel" also violated the standard.

"employees were allowed to handle explosives" "approximately nine feet away" from "open flames," conditions that are clearly subject to the requirements of the standard. The judge also erred in finding that the standard's failure to refer to a specific distance between fire or flames and explosives renders it inapplicable to this case. The standard states that "[w]hile explosives are being handled or used, . . . no one *near* the explosives shall possess matches, open light or other fire or flame." 29 C.F.R. § 1910.109(e)(1)(i) (emphasis added). The meaning of "near" in a broadly-worded standard such as this one can be discerned from the purpose of the standard and the physical conditions to which it applies. *See, e.g., Ormet Corp.*, 14 BNA OSHC 2134, 2135-36, 1991-93 CCH OSHD ¶ 29,254, p. 39,200 (No. 85-531, 1991) ("near" in 29 C.F.R. § 1910.179(n)(3)(xi) means close enough to a crane's path of travel that it is reasonably foreseeable that employees could be hit by the crane's load if it should fall). Given the ignition prevention purposes of the standard, and the mere nine-foot distance between the open flames and where the employees were handling explosives, we find that it was reasonably foreseeable that the open flames posed a risk of igniting the explosives. Thus, we conclude that the standard applies to the cited conditions, a determination which Propellex does not dispute.

The evidence also establishes that the terms of the standard were not met and that the five demilling employees had access to the area of potential danger created by the open flames and the explosives. Indeed, Propellex concedes that "an open flame in a barrel only nine feet away from a work table containing Mark 45 primers or loose black powder" violates the standard, and the facts show that those conditions were present here. The record indicates that McKinnerney and the demilling employees warmed their hands over a fire in the burn barrel on cold days during the month before the accident, typically ten to fifteen feet from the demilling table. There was some evidence that the burn barrel started out in one location and was moved closer to the table as the weather grew colder. The employees testified, however, that for at least three to four weeks before the accident, the barrel had been located where it was on the day of the accident, which Compliance Officer Darrow calculated as nine feet away from the table. The employees testified that they punctured and detonated primers while the fire was burning in the barrel. They also testified that the black

powder that spilled from the punctured primers remained on the table and the ground during the workday, while the fire was burning in the barrel.

The fourth element of a violation is employer knowledge. *Hamilton Fixture*, 16 BNA OSHC at 1082, 1993-95 CCH OSHD at p. 41,178. "[T]he test of an employer's knowledge . . . is whether the employer knew, or with the exercise of reasonable diligence could have known, of the violative conditions." *Tampa Shipyards*, 15 BNA OSHC 1533, 1537, 1991-93 CCH OSHD ¶ 29,617, p. 40,100 (No. 86-360, 1992) (consolidated) (citing *A.P. O'Horo Co.*, 14 BNA OSHC 2004, 2007, 1991-93 CCH OSHD ¶ 29,223, p. 39, 128 (No. 85-369, 1991)). A supervisory employee's actual and constructive knowledge can be imputed to the employer. *Id.* at 1537, 1991-93 CCH OSHD at p. 40,100.

We find that Propellex had actual knowledge of the use of the burn barrel through leadperson McKinnerney, who testified that she lit the fire and warmed her hands by it on numerous occasions. Contrary to Propellex's argument, the record shows that McKinnerney was a supervisor whose knowledge is imputable to Propellex.[6] Under Commission precedent, "[a]n employee who has been delegated authority over other employees, even if only temporarily, is considered to be a supervisor for the purpose of imputing knowledge to an employer." *Id.* Although Propellex's leadpersons have been considered bargaining unit employees under the National Labor Relations Act,[7] and McKinnerney did not consider herself a management supervisor, the demilling crew reported to her and she reported to

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[6]Propellex argues, on the basis of "ethical prohibitions," that the Secretary should be estopped from claiming that McKinnerney is a supervisor whose knowledge should be imputed to it because the compliance officer interviewed McKinnerney without consulting counsel for Propellex. Propellex does not point to any authority for its assertion. Because we rely on McKinnerney's sworn hearing testimony rather than any off-the-record communications between McKinnerney and Compliance Officer Darrow, we do not find it necessary to consider this argument.

[7]*See Propellex Corp.*, 254 NLRB 839, 841-42 (1981), *aff'd without opinion*, 665 F.2d 1050 (7th Cir. 1981) (finding that although employer's leadpersons did not exercise "sufficient independent judgment and discretion" to constitute statutory supervisors, they were nonetheless cloaked with apparent authority as employer agents in the circumstances of the case, and their actions were imputed to the employer).

production manager Bradley Niemann. McKinnerney controlled activities at the demilling site and told the crew members what to do. She allowed them to take breaks "if they did a good job," and they considered her their "boss." Additionally, McKinnerney had the authority to "write up" members of the demilling crew, and although she could not discipline them directly, she documented any safety violations or other incidents and reported them to Niemann, who had "final say" on all such matters. She did not have the ability to hire or fire employees directly, but did have the opportunity to select at least one of the employees to join the demilling crew, and could indirectly have an employee fired with three warnings. She made approximately $1.00 per hour more than the rest of the crew. Accordingly, we conclude that McKinnerney's knowledge can be imputed to Propellex. *See Dover Elevator Co.*, 16 BNA OSHC 1281, 1286, 1993-95 CCH OSHD ¶ 30,148, p. 41,480 (No. 91-862, 1993) (the substance of the delegation of authority, not the title of the employee, is controlling in determining whether an employee is a supervisor)*; Tampa Shipyards*, 15 BNA OSHC at 1538 & n.10, 1991-93 CCH OSHD at 40,100-01 & n.10 (finding leadermen's knowledge imputable to employer despite their status as bargaining unit employees).[8]

For the reasons stated above, we determine that the judge erred in vacating Citation 1, Item 1a and conclude that the Secretary has established by a preponderance of the evidence that Propellex violated 29 C.F.R. § 1910.109(e)(1) by permitting its employees to maintain open flames in a burn barrel near explosives.

B. Citation 1, Item 1b:

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[8]Although we need not determine whether production manager Niemann also knew of the burn barrel hazard, we note that he was aware that the unauthorized possession of fire or flame at any location within the plant area was prohibited by Propellex's own safety rules, he was responsible for ensuring that safety regulations were followed and for disciplining employees, and he admittedly witnessed the employees warming their hands by a fire in a barrel. Although he testified that the burn barrel he saw was 50 yards from the work area and demilling operations were not in progress, the testimony of several of the employees indicates that they observed Niemann at the demilling site while operations were in progress and a fire was burning in the barrel approximately 10 to 15 feet away. Testimony from DOD employee Leonardo Jackson tends to corroborate the employees' testimony. Niemann, however, denied making any such statements to Jackson, and the judge, who found that the standard did not apply, did not resolve these conflicts in the testimony.

The Cigarette Lighter

The Secretary alleged that Propellex violated 29 C.F.R. § 1910.109(e)(1) because "employees were allowed to possess a cigarette lighter which was used to ignite a fire in a burn barrel located approximately nine feet away from the Mark 45 Demilling Operation." The judge found that 29 C.F.R. § 1910.109(e)(1) does not apply to the possession of cigarette lighters, and that the standard was not violated because the lighter was kept in a purse, some distance away from the primers and black powder. We find that the standard does apply to the cited conditions and that a violation was proven.

Contrary to the judge's findings, the citation is not based on mere possession of an unlit lighter. Rather, it is based on evidence that, on at least one occasion, the employees lit the lighter nine feet away from primers and the spilled black powder. Thus, the employees used a lighter on the morning of the accident to ignite a fire in the burn barrel nine feet away from the work table, after primers had been brought to the site and employees had started demilling. Two employees, Laurent and Thomas, specifically recalled and testified that on the morning of the accident, the burn barrel was not lit until after the primers arrived on the site and demilling had begun. Thomas explained that "[i]t wasn't cold enough to need a fire that morning, but it was turning colder; as the day progresses [sic]" and so the warm barrel was lit just before noon.[9] Moreover, Sipes and McKinnerney both testified that the fire was lit on that particular day with a "Chem Wipe and a lighter." We, therefore, find that the Secretary has shown by a preponderance of the evidence that a lighter was used near explosives, that the standard applied, and that a violation of the standard occurred.[10]

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[9]Employee Sipes testified, in response to a question regarding the first thing that happened on the morning of the accident, that the employees lit the burn barrel. However, he was not asked about the timing of lighting the barrel in relation to when the primers were brought out that morning. We conclude that Sipes' testimony is outweighed by the more direct and specific testimony of Laurent and Thomas.

[10]Our finding of a violation is limited to the day of the accident. The evidence establishes that the employees frequently used a cigarette lighter to ignite the fire in the burn barrel near the table in the demilling work area; however, the Secretary has not shown that explosives

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The record also establishes that leadperson McKinnerney knew that the crew frequently used a lighter to ignite fires in the burn barrel. In fact, she herself used it to ignite fires on numerous occasions. In addition, her testimony is consistent with that of Laurent and Thomas, that the first thing the employees did on the morning of the accident was get parts and start "their job." McKinnerney also testified that on that day the lighter was used to light the burn barrel. Her actual knowledge may be imputed to Propellex. *Pressure Concrete Constr. Co.,* 15 BNA OSHC 2011, 2018, 1991-93 CCH OSHD ¶ 29,902, p. 40,813 (No. 90-2668, 1992).

We further find that it was within the Secretary's discretion to cite separate "open flames" violations of section 1910.109(e)(1) for the burn barrel and lighter. Although these conditions are closely related, the language of the standard "no one . . . shall possess matches, open light or other fire or flame" - can reasonably be read to permit separate citations of each potential ignition source; or, in other words, each individual act of possession of matches, open light or other fire or flame. *See Sanders Lead Co.,* 17 BNA OSHC 1197, 1200, 1201, 1993-95 CCH OSHD ¶ 30,740, p. 42,692 (No. 87-260, 1995) (standard requiring employer to remove from work any employee with an exposure to lead at or above the action level permits the Secretary to cite as many violations as there are failures to remove). Accordingly, separate citation of the lighter's open flame and the maintenance of open flames in the burn barrel is permissible under the standard. *Hoffman Constr Co.,* 6 BNA OSHC 1274, 1275, 1977-78 CCH OSHD ¶ 22,489, p. 27,120 (No. 4182, 1978); *see H.H. Hall Constr.,* 10 BNA OSHC 1042, 1046, 1981 CCH OSHD ¶ 25,712, p. 32056 (No. 76-4765, 1981); *A.L. Baumgartner Constr.,* 16 BNA OSHC 1995, 1998 & n.4, 1993-95 CCH OSHD ¶ 30,554, p. 42,273 & n.4 (No. 92-1022, 1994).

C. Citation 1, Item 1c:
Smoking

The Secretary alleged that Propellex violated 29 C.F.R. § 1910.109(e)(1) by permitting the employees to smoke in the demilling area. The judge found that there was

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[10](...continued)
were regularly present when the employees used the lighter.

uncontradicted evidence that the employees smoked in the demilling area and that management knew or could have known of this practice. He affirmed the item.

We agree with the judge. It is undisputed that four of the five members of the demilling crew, including leadperson McKinnerney, smoked at the demilling site. The employees testified that they smoked within fifteen or twenty feet of the work table, throughout the day on their numerous breaks and, consequently no employees were actually holding primers or black powder while smoking. Contrary to Propellex's assertion, however, the evidence shows that spilled black powder remained on the table and on the ground in the demilling work area while the employees smoked. Although on occasion a particularly large accumulation of black powder might be cleaned up early in the day, the usual practice was to permit the spilled powder to accumulate on the table and clean it up at the end of the day. One demilling employee testified specifically that there was black powder on the table and the ground while they smoked at the demilling site. While we agree with Propellex's argument that "the Secretary has the burden of proving the presence of black powder near any smoking[,]" we find, contrary to Propellex's contention, that the Secretary has met her burden.[11] Thus, the evidence establishes that the employees smoked at the demilling site near black powder. Accordingly, we find that Propellex violated the standard.

Finally, we also find that the Secretary established Propellex's knowledge of the hazard. The employees testified that McKinnerney authorized smoking at the site. She admitted that she knew that there was black powder on the table and the ground, yet she smoked at the site and permitted the other demilling employees to smoke at the site for several weeks, up to and including the day of the accident. Her actual knowledge is imputable to Propellex.[12] *See Tampa Shipyards*, 15 BNA OSHC at 1537, 1991-93 CCH

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[11]Propellex apparently recognized that there is a risk of explosion whenever black powder is present, as evidenced by its own safety policy which prohibits smoking outside of designated areas *at all times* and not simply when primers are being punctured or detonated. *See* Part III(B), *infra.*

[12]Because McKinnerney acted with supervisory authority and her actual knowledge is (continued...)

OSHD at p. 40,100. Accordingly, we affirm the judge's finding that Propellex violated 29 C.F.R. § 1910.109(e)(1) by permitting its employees to smoke while explosives were being handled or used.

III. Unpreventable Employee Misconduct

The judge mistakenly focused on the cause of the accident, and did not address the elements of the affirmative defense of unpreventable employee misconduct raised by Respondent. Under Commission precedent, to establish unpreventable employee misconduct, an employer must prove that it has: (a) established work rules designed to prevent the violation, (b) adequately communicated those work rules to its employees, (c) taken steps to discover violations, and (d) effectively enforced the rules when violations were discovered. *American Sterilizer Co. ("AMSCO"),* 18 BNA OSHC 1082, 1087, 1995-97 CCH OSHD ¶ 31,451, p. 44,485 (No. 91-2494, 1997). For the reasons discussed below, we conclude that Propellex failed to establish the defense as to either the open flames or smoking items.

A. Open Flames Items

Propellex had a rule designed to prohibit the presence of fire and flames near the explosives. *See id.* at 1087, 1995-97 CCH OSHD at p. 44,485. Its safety handbook provides, in relevant part, that "[e]xcept by authority of a valid flame permit, the carrying of matches, lighters, or other fire, flame or spark-producing devices within the plant area is absolutely prohibited." The record shows that no flame permits were issued; thus, under Propellex's rule, the fire should not have been maintained in the burn barrel and the lighter should not have been used at the demilling site.

We conclude that this rule was not adequately communicated. The record shows that the demilling employees signed acknowledgments indicating that they had read the safety handbook, but most of the acknowledgments are dated several years before the accident. The employees were required to read and sign a document describing the demilitarization

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imputable to Propellex, we find it unnecessary to address conflicts in the record as to whether Niemann also knew of the smoking hazard. *See* n.13, *infra.*

procedure, and the record shows that they actually read it several times during the course of their employment. However, it merely incorporates the safety rules by brief reference. Finally, vice president of operations Russ Phinney testified that Propellex conducts special training on the effects of black powder. However, the demilling employees testified that they only received training on the demilling procedures. In addition, none of the signed black powder training acknowledgments in the record were signed by any of the members of the demilling crew and they are all dated after the accident and inspection. Thus, although the record shows that the employees received training on general safety matters and the demilling procedure, there is insufficient evidence to establish that this specific rule prohibiting fire and flames near explosives was communicated to employees. *See Hamilton Fixture,* 16 BNA OSHC at 1090, 1993-95 CCH OSHD at p. 41,185.

Effective implementation of a safety program requires "a diligent effort to discover and discourage violations of safety rules by employees." *AMSCO*, 18 BNA OSHC at 1087, 1995-97 CCH OSHD at p. 44,486. Propellex argues that it took appropriate steps to discover violations; however, its argument is not supported by the record. While Niemann testified that he made unscheduled visits to ensure that the safety regulations were being adhered to, his efforts were, by his own admission, inadequate to discover the lighter or the barrel. The burn barrel was an obvious breach of Propellex's own safety rules that was ongoing for a period of weeks. Additionally, the fact that leadperson McKinnerney, violated the rule and permitted others to do so is strong evidence that Propellex's safety program was lax. *Daniel Constr. Co.*, 10 BNA OSHC 1549, 1552, 1982 CCH OSHD ¶ 26,027, p. 32,672 (No. 16265, 1982).

The final element of the unpreventable employee misconduct defense requires that an employer effectively enforce its rules when violations are discovered. *AMSCO*, 18 BNA OSHC at 1087, 1995-97 CCH OSHD at p. 44,485.

> The conventional way to prove the enforcement element is for the employer to introduce evidence of a disciplinary program by which the company reasonably expects to influence the behavior of employees. . . . To prove that its disciplinary system is more than a "paper program," an employer must

> present evidence of having actually administered the discipline outlined in its policy and procedures.

Precast Serv., Inc., 17 BNA OSHC 1454, 1455, 1995-97 CCH OSHD ¶ 30,910, p. 43,035 (No. 93-2971, 1995), *aff'd without published opinion*, 106 F.3d 401 (6th Cir. 1997). The judge found that "[f]or any infraction of safety regulations, the Respondent issued safety memos and warning notices[;]" however, this finding is not supported by the record. Propellex introduced a number of memoranda and employee warning notices dated between 1990 and 1994 that concern general safety infractions and other wrongful acts. While these memos and notices show that Propellex has disciplined its employees for noncompliance with some safety rules, the record does not show that Propellex regularly and effectively enforced its rule requiring that employees obtain flame permits before any "lighters, or other fire, flame, or spark-producing devices" are carried within the plant area. Indeed, no permit was issued authorizing the burning of a fire in a barrel anywhere in the plant area. Yet, Niemann, who had primary responsibility for disciplining the demilling employees, saw the burn barrel and failed to ask the employees to extinguish the fire, to refrain from relighting it, or to remove it. Niemann also did nothing to otherwise enforce the rules. Moreover, leadperson McKinnerney not only failed to enforce the flame permit rule, she violated it herself. The unpreventable employee misconduct defense cannot be sustained where, as here, the employer has not shown that it effectively disciplines violations of its rules. *L.E. Myers Co.*, 16 BNA OSHC 1037, 1042, 1993-95 CCH OSHD ¶ 30,016, p. 41,128 (No. 90-945, 1993); *P. Gioioso & Sons*, 115 F.3d 100, 115 (1st Cir. 1997). Additionally, the fact that *all* of the demilling employees lit or at least utilized the burn barrel in violation of the rule also suggests that the rule was ineffectively enforced. *GEM Indus., Inc.*, 17 BNA OSHC 1861, 1865, 1995-97 CCH OSHD ¶ 31,197, p. 43,690 (No. 93-1122, 1996), *aff'd without published opinion*, 149 F.3d 1183 (6th Cir. 1998).

Thomas' suspension and eventual termination after the accident do not alter our conclusion. It is true that "Commission precedent does not rule out consideration of *post*-inspection discipline, provided that it is viewed in conjunction with pre-inspection discipline." *Precast*, 17 BNA OSHC at 1456, 1995-97 CCH OSHD at p. 43,036 (emphasis

in original). Here, the record shows that fires were ignited and maintained in the burn barrel for several weeks before the accident and that Thomas had repeatedly thrown black powder into the fire in violation of Propellex's safety rules; however, Propellex failed to discipline him until after the inspection.

For the reasons stated above, we find that Propellex did not prove that the open flames violation was the result of unpreventable employee misconduct.

B. Smoking Item

The record shows that Propellex had a rule designed to prohibit smoking near the explosives. Propellex's safety handbook provides, in relevant part, that "[s]moking in any portion of the plant area is prohibited, except in designated places where electric lighters are provided. Lighters, cigars and cigarettes must be extinguished and dropped in receptacles provided before leaving such places in which smoking is permitted." Propellex has failed to show, however, that this rule was adequately communicated. None of the safety memoranda or warning notices introduced by Propellex address smoking, and there were no "no smoking" signs at the demilling site. Again, although Propellex asserts that it gave its employees special safety training on the hazards of black powder, the record shows that most of the employees read the safety handbook several years before the accident, and the employees testified that formal training involved little more than demonstrations of the demilling procedure. At least one employee testified that he did not know smoking was prohibited and assumed that it was acceptable because Propellex had not asked them to stop. McKinnerney testified repeatedly that she would not have permitted the employees to smoke at the demilling site if Niemann had told her that it was not acceptable.

Propellex also failed to enforce its rule against smoking, as evidenced by leadperson McKinnerney's failure to report any of the employees she witnessed smoking at the demilling site and by her own violation of the rule. *See Daniel Constr.*, 10 BNA OSHC at 1552, 1982 CCH OSHD at p. 32,672. Clearly, the unpreventable employee misconduct defense cannot be sustained.

IV. Willfulness

Commission precedent defines a willful violation as one "committed with intentional, knowing or voluntary disregard for the requirements of the Act or with plain indifference to employee safety." *Valdak Corp.*, 17 BNA OSHC 1135, 1136, 1993-95 CCH OSHD ¶ 30,759, p. 42,740 (No. 93-239, 1995), *aff'd*, 73 F.3d 1466 (8th Cir. 1996). "[I]t is not enough for the Secretary to show that an employer was aware of conduct or conditions constituting the alleged violation; such evidence is already necessary to establish any violation. . . . A willful violation is differentiated by heightened awareness of the illegality of the conduct or conditions and by a state of mind of conscious disregard or plain indifference . . . ." *Hern Iron Works*, 16 BNA OSHC 1206, 1214, 1993-95 CCH OSHD ¶ 30,046, p. 41,256-57 (No. 89-433, 1993) (citations omitted). The Secretary must show that the employer was actually aware, at the time of the violative act, that the act was unlawful, or that it possessed a state of mind such that if it were informed of the standard, it would not care. *Johnson Controls*, 16 BNA OSHC 1048, 1051, 1993-95 CCH OSHD ¶ 30,018, p. 41,142 (No. 90-2179, 1993) (citing *Brock v. Morello Bros. Constr.*, 809 F.2d 161, 164 (1st Cir. 1987)). The Commission has found heightened awareness "where an employer has been previously cited for violations of the standards in question, is aware of the requirements of the standards, and is on notice that violative conditions exist." *J.A. Jones Constr.*, 15 BNA OSHC 2201, 2209, 1991-93 CCH OSHD ¶ 29, 964, p. 41,029 (No. 87-2059, 1993); *E.L. Davis Contrac.*, 16 BNA OSHC 2046, 2051-52, 1993-95 CCH OSHD ¶ 30,580, p. 42,342 (No. 92-35, 1994) (employer allowed three employees to work in an unprotected excavation despite prior citations and a city inspector's warning); *Calang Corp.*, 14 BNA OSHC 1789, 1791, 1987-90 CCH OSHD ¶ 29,080, p. 38,870 (No. 85-0319, 1990) (employer ignored compliance officer's warning that the trench was not properly sloped and that a pile of excavated material was too close to the edge of the trench); *A.C. Dellovade Inc.*, 13 BNA OSHC 1017, 1019, 1986-87 CCH OSHD ¶ 27,786, p. 36,342 (No. 83-1189, 1987) (employer neither instructed employees to tie off nor provided necessary equipment after compliance officer recommended specific methods of fall protection and general contractor provided a booklet containing the applicable regulations).

We find that the Secretary failed to establish that the violations were willful. The evidence does not show that Propellex had a heightened awareness of the violations. While Niemann may have known of employee smoking and the use of the burn barrel near the explosives,[13] the evidence in the record is insufficient to show that even if he did know, he appreciated the hazards these conditions posed. Indeed, even DOD inspector Vernon Buscher, who visited the demilling site in November 1995 and saw the employees warming their hands at the burn barrel approximately fifteen feet from the table, did not recognize the hazard. As Buscher testified, "[i]t never highlighted in my mind that there was a problem." Accordingly, the evidence does not establish that Niemann had the requisite heightened awareness for a willful violation. *J.A. Jones Constr.*, 15 BNA OSHC at 2209, 1991-93 CCH OSHD at p. 41,029; *Williams Enterp.*, 13 BNA OSHC 1249, 1256, 1986-87 CCH OSHD ¶ 27,893, p. 36,589 (No. 85-355, 1987) (willful violation requires heightened awareness of the illegality of the conduct and conscious disregard or plain indifference).

Nor is there evidence to establish that McKinnerney had a heightened awareness of the violations. McKinnerney testified that she did not believe that the burn barrel was problematic because it was already at the demilling site when she started working there and because nobody asked her to move it. She believed that the use of the barrel was "safe." She allowed employees to smoke in the demilling area on their breaks because she believed Niemann authorized it. She insisted four times during her testimony that if Niemann had told them not to smoke, she would not have permitted the employees to smoke. Although McKinnerney signed documents in 1989 and 1991, several years before this case arose, indicating that she had read Propellex's safety manual, and although she exercised poor judgment in permitting the hazardous conditions to persist, we cannot conclude that she acted willfully. *McLaughlin v. Union Oil*, 869 F.2d 1039, 1047 (7th Cir. 1989) (more than

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[13]There is conflicting evidence as to whether Niemann knew that the employees used the burn barrel near the demilling table and as to whether he knew that they smoked. Although the judge did not resolve this conflict, we conclude that the Secretary has not established that the violations are willful, even if we rely on the evidence about Niemann's knowledge proffered by the Secretary.

negligence is necessary to show willfulness); *Johnson Controls,* 16 BNA OSHC at 1051, 1993-95 CCH OSHD at p. 41,142 (citing *Wright & Lopez, Inc.*, 8 BNA OSHC 1261, 1265, 1980 CCH OSHD ¶ 24,419, p. 29,777 (No. 76-3743, 1980)) (mere familiarity with the applicable standard does not establish heightened awareness of the violation).

We are also unpersuaded by the Secretary's argument that the violations here are willful because "an employer which puts employees to work with explosives undertakes a heightened duty to adequately supervise . . . employees and maintain in proper working order all safety devices[,]" and that a "[f]ailure to respond appropriately to this duty is in itself a sufficient index of willfulness." In support of her argument, the Secretary relies on *Ensign Bickford Co. v. OSHRC,* 717 F.2d 1419, 1422 (D.C. Cir. 1983), in which the United States Court of Appeals for the District of Columbia Circuit found a willful violation where the employer, an explosives manufacturer, ignored known industry standards and the production manager, who was thoroughly familiar with the design requirements of a vacuum collection system for explosive materials, delegated the design and implementation of the system to a worker who had no expertise and was unaware of available safety devices. The court held that "[d]espite petitioner's expertise in the manufacture of explosive and pyrotechnic products and knowledge of the applicable industry safety standards, petitioner violated those standards in disregard of . . . the safety of its employees." *Id.* at 1422. In our view, willfulness in *Ensign-Bickford* is based on the employer's heightened awareness of the specific conditions at its plant and its failure to remedy the violations, not on the nature of the work itself. Propellex was not shown to have had such heightened awareness of the conditions cited here.

Accordingly, we affirm Citation 1, Items 1a, 1b, and 1c as serious violations, as alternatively alleged in the complaint.

V. Penalty

In determining appropriate penalties for violations, the Commission must give "due consideration to . . . the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations." OSH Act, 29 U.S.C. § 666(j). The four factors are not necessarily accorded

equal weight. *J.A. Jones Constr.*, 15 BNA OSHC at 2214, 1991-93 CCH OSHD at p. 41,033. The gravity of the violation is generally the primary consideration in assessing penalties. *Id.* at 2214, 1991-93 CCH OSHD at p. 41,033. "The gravity of a particular violation depends on such matters as the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood that any injury would result." *Id.*

Here, five employees worked with explosives in close proximity to open flames and lit cigarettes and were exposed to the risk of death and disabling injury for several weeks. The gravity of these violations, therefore, is high. Propellex is a medium-sized employer. Phinney testified that Propellex employed approximately 230 workers during 1994 and the early part of 1995, but that by the end of 1995, there were approximately 100 employees. We find, based on the employer's moderate and variable size, that a slight reduction in the penalty is appropriate. The Commission must also consider an employer's good faith in determining the amount of a penalty. In this case, because Propellex supervisory personnel tolerated and participated in the violations for several weeks and because Propellex evinced a lax attitude toward the enforcement of safety rules and standards, we do not believe that a reduction for good faith is appropriate. Finally, the judge pointed out that Propellex has received only two citations in a twenty-five year period. Because the record shows that at least one of the citations was issued within two years of the violations at issue here and was classified as serious, we decline to give Propellex credit for its history. Therefore, we assess $6,500.00 each for the burn barrel and smoking items. As to the lighter, we note that the record establishes its use only to ignite the burn barrel. While we have concluded that the lighter may be cited separately, its subordinate role warrants a significantly lower penalty. Accordingly, we assess a penalty of $1,000.00 for the lighter item.

VI. Order

For the reasons set forth above, we affirm Citation 1, Items 1a, 1b, and 1c as serious violations of 29 C.F.R. § 1910.109(e)(1) and assess a total penalty of $14,000.

/s/
Stuart E. Weisberg
Chairman

/s/
Thomasina V. Rogers
Commissioner

Date: March 30, 1999

SECRETARY OF LABOR, Complainant,	
v.	OSHRC DOCKET NO. 96-0265
PROPELLEX CORPORATION, Respondent.	

APPEARANCES:

Steven E. Walanka, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois

John J. Gazzoli, Esq., Lewis, Rice & Fingersh, L.C., St. Louis, Missouri

Before: Administrative Law Judge Sidney J. Goldstein

DECISION AND ORDER

This is an action by the Secretary of Labor against Propellex Corporation to enforce a citation issued by the Occupational Safety and Health Administration to the company for the alleged violation of a regulation relating to explosives and blasting agents. The matter arose after a compliance officer for the Administration investigated an explosion at the Respondent's munitions plant, concluded that the company was in willful violation of the particular safety regulation and recommended that the citation be issued. The Respondent disagreed with the citation and filed a notice of contest. After a complaint and answer were filed with this Commission, a hearing was held in Edwardsville, Illinois.

The three items of the citation are shown below:

Citation 1 Item 1a Type of Violation: **Willful**

29 C.F.R. §1910.109(e)(1)

On or about ll-27-95, employee(s) were allowed to handle explosives in such a way as to constitute an undue hazard to life in that, during the Demilling Operation of Mark 45 Explosive Devices, open flames were located approximately nine feet away. Sparks and/or burning debris from a burn barrel made contact with black powder residue and the explosive devices which caused an explosion, injuring five employees.

Citation 1 Item 1b Type of Violation: **Willful**

29 C.F.R. §1910.109(e)(1)

On or about 11-27-95, employee(s) were allowed to possess a cigarette lighter which was used to ignite a fire in a burn barrel located approximately nine feet away from the Mark 45 Demilling Operation. Sparks and/or burning debris from the burn barrel made contact with black powder residue and Mark 45 Explosive Devices which caused an explosion, injuring five employees.

Citation 1 Item 1c Type of Violation: **Willful**

29 C.F.R. §1910.109(e)(1)

On or about 11-27-95, employee(s) were allowed to smoke in the Demilling Area, which is a recognized "No Smoking Area".

Copied below is the regulation in issue:

> (e) *Use of Explosives and blasting agents--(1) General provisions.* (i) While explosives are being handled or used, smoking shall not be permitted and no one near the explosives shall possess matches, open light or other fire or flame. No person shall be allowed to handle explosives while under the influence of intoxicating liquors, narcotics, or other dangerous drugs.

The historical salient facts are not in substantial dispute and may be briefly summarized. During the period in issue, the Respondent manufactured ammunition, including Mark 45 Primers, at its Illinois worksite. Output which failed to meet Department of Defense standards were set aside and later destroyed or demilled in an open area a few hundred yards from the plant. A crew of five employees, including a supervisor, was assigned to this task. The rejected Mark 45 Primers were held in a magazine until the crew loaded the crates in a van and were driven to the

explosion area. The primers were then set on a table and prepared for destruction. In the demil process some black powder fell on the table and to the ground.

Two burn barrels were in the demil area. One was utilized to warm the employees on cold days; the other was used to burn trash. Near the table was a butt can, about the size of a one pound coffee can, partially filled with sand, used to extinguish cigarettes.

The demilling process continued without incident for a number of months until November 17, 1995. On that date, a member of the crew, in a mischievous and prankish mood, scooped up some of the black powder, placed it in some wrapping, and dropped it into the warming barrel. An immediate series of explosions and fires rocked the area, sending all five employees to hospitals with serious burns.

At the hearing the compliance officer testified that the Respondent cooperated with him in his investigation, furnishing him with copies of its safety handbook, demilling procedures, and black powder safety data sheet. The company gave a copy of the safety handbook to all new employees before assigning them to a lead person for continuing training. After a review of the company documents and interviews with its employees, the officer concluded that it had a poor safety program. The basis for this impression was: (1) Respondent did not comply with Department of Defense regulations forbidding matches and cigarette lighters in a hazardous area; (2) Respondent's safety handbook was too vague; (3) Respondent failed to enforce safety regulations; and (4) Respondent did not abate open flames in the demilling area. He also classified the infractions as willful because management was aware of the violations of the standard relating to smoking and made no effort to eliminate the hazardous condition.

Upon further examination the officer stated that he was not aware of any situation where an employee of the Respondent committed an unsafe act and was not disciplined. He also agreed that the Department of Defense did not press the company for hasty production, and previous citations revealed but two infractions in twenty-five years.

The Secretary also called upon three civilian employees associated with the department of Defense. They confirmed that the Respondent met all governmental safety standards before it was awarded the munition contracts. They investigated the mishap and were concerned about smoking and a burn barrel in the demil area, a wind velocity over 15 mph during the demil process,

inadequate training, excessive personnel in the demil operation, too much ammunition near the burn barrel, and a van too close to the demil area. One safety inspector also believed that the Respondent did not take its safety program seriously, although there was nothing in his inspections to support this view.

On the other hand these safety specialists always gave the Respondent a satisfactory (highest) safety rating, were impressed with its housekeeping, gave a "good" or "yes" rating in pre-award safety surveys, did not complain to the Respondent concerning its safety program, and had no problem with its procedures. One investigator thought the burn barrel was too close to the table with ammunition, but he did not indicate this was improper or report it to management. Questions of safety were always corrected. Federal rules provide that if an inspection revealed an unsatisfactory report or if there were an imminent danger situation, government employees could be restricted from the area or ordered away from the plant. This never happened with the Respondent.

The five employees in the demil process gave their version of the events. They received safety training in both their prior production assignments and in demilling duties. Additional training was given by the demil supervisor who was stationed in a hut about twelve feet from the demilling table. In the destruction work, an awl was used to punch holes in the primers, resulting in some black powder falling on the table and on the ground. Four of the five employees smoked on the site a few times daily. There were no "No Smoking" signs in the demil area. They smoked in front of management during their work breaks, and Mr. Niemann, the production manager, was present when they warmed their hands at the burn barrel. They did not smoke while handling ammunition, and they never thought smoking was a threat to their safety. The lead person added that management was safety minded.

The Respondent called as witnesses two members of its management team and three veteran employees. Bradley Niemann, production manager, testified that the demilling process started in the summer of 1995 and operated without incident until the day of the explosion. Previously, the company submitted a written demilling procedure, which plan was approved by the government. He was at the site almost daily, saw a burn barrel, but did not note a butt can or anyone smoking. Smoking was not allowed in the demil area. He considered company

procedures to be the most expensive way to dispose of ammunition. He disagreed with the belief that the wind velocity was more than 15 mph on the accident date. OS HA people previously inspected the area with no resulting citations. Government safety inspectors never complained about lack of safety at the demolition site.

Russ Phinney, Respondent's vice president of operations, stated that in pre-award contracts the Respondent was evaluated for a number of factors, including safety. The company was required to comply with safety rules adopted by the Department of Defense, Environmental Protective Agency, Bureau of Alcohol, Tobacco and Firearms and OSHA. The Defense Department also performed quarterly reviews to assure compliance with and verification of safety rules. Respondent always received the highest marks for its safety program and its insurance carrier approved the safety procedures six months before the accident.

The vice president went on to say that safety was always important to the company. Employees were indoctrinated with the type of clothing to wear as well as safety eye glasses and shoes. Safety was an ongoing study. For any infraction of safety regulations, the Respondent issued safety memos and warning notices.

Two veteran employees of the Respondent confirmed their safety training and ongoing safety meetings. Respondent's maintenance supervisor added that he visited the demit operation from time to time but did not see fire in the barrels when explosives were on site.

As previously noted, the Willful citation alleged that:

(1) On or about 11-17-95, employee(s) were allowed to handle explosives in such a way as to constitute an undue hazard to life in that, during the Demilling Operation of Mark 45 Explosive Devices, open flames were located approximately nine feet away. Sparks and/or burning debris from a burn barrel made contact with black powder residue and the explosive devices which caused an explosion, injuring five employees.

(2) On or about 11-27-95, employee(s) were allowed to possess a cigarette lighter which was used to ignite a fire in a burn barrel located approximately nine feet away from the Mark 45 Demilling Operation. Sparks and/or burning debris from the burn barrel made contact with black powder residue and Mark 45 Explosive Devices which caused an explosion, injuring five employees.

(3) On or about 11-17-95, employee(s) were allowed to smoke in the Demilling Area, which is a recognized "No Smoking Area".

All in violation of the regulation found at 29 C.F.R. §1910.109(e)(1) which reads as follows in pertinent part:

> (e) *Use of explosives and blasting agents--(1) General provisions.* (i) While explosives are being handled or used, smoking shall not be permitted and no one near the explosives shall possess matches, open light or other fire or flame.

Item 1a of the citation alleges that employees handled explosives within nine feet from open flames, and that sparks and/or burning debris contacted black powder residue, causing an explosion. However, the regulation makes no reference to distance between explosives and open flames; nor does it discuss sparks and burning debris contacting black powder.

Since item 1a does not address smoking or matches, open light or other fire or flame, this portion of the citation has no application to the regulation, and it is vacated.

Item 1b of the citation states that the regulation was violated in that an employee was allowed to possess a cigarette lighter which was used to ignite a fire in a burn barrel. Again, regulation admonition is for the possession of matches, open light or other fire or flame. Cigarette lighters are not addressed, and possession of a cigarette lighter does not equate with matches, especially if the cigarette lighter is contained in a purse located in a hut at a distance away from the table or nearby ground where black powder was found. Item 1b is therefore vacated.

Item 1c charged that employees were allowed to smoke in the demilling area. The evidence is uncontradicted that smoking took place there. Five employees who worked in the demit area testified to this effect, and there was no evidence to the contrary. This item of the citation is affirmed.

Willful Violation

The term "willful violation" has been defined as follows:

A willful violation is one committed with intentional, knowing or voluntary disregard for the requirements of the Act, or with plain indifference to employee safety. E.g., *Williams Enterprises, Inc*., 13 BNA OSHC 1249, 1256-57, 1986-87 CCH OSHD ¶27,893, p.26,589 (No. 85-355, 1987). It is differentiated from other types of violations by a "heightened awareness --

of the illegality of the conduct or conditions -- and by a state of mind -- conscious disregard or plain indifference." *Id.*

Calang Corp., 14 BNA OSHC 1789, 1791, 1990 CCH OSHD ¶29,531 (No. 85-319, 1990).

In this case the Secretary adopted the compliance officer's recommendation that the infractions were willful in nature. The classification was based upon his opinion that the company safety program was poor; that its safety handbook was too vague, that safety enforcement was lacking; that it did not abate open flames in the demilling area and that management was aware of the regulation but made no effort to eliminate the hazardous condition.

On the other hand, the five employees in the demilling assignment received safety training in their production and demilling duties. They did not smoke while handling explosives and did not believe that smoking was a threat to their safety. In their opinion management was careful with respect to smoking rules. The lead person was also under the impression that management was safety minded.

Further, the Respondent satisfactorily met all safety requirements before the government awarded it the munitions contracts. Respondent's safety program always received Department of Defense's highest safety ratings. These safety officers were impressed with Respondent's housekeeping and its safety procedures. None of the government safety people complained to the Respondent regarding its safety program or procedures. One Defense Contract Command officer saw the burn barrel near the ammunition table but did not complain to the lead person or report this observation to management. All questions of safety were corrected when called to the attention of the company.

The record discloses that it was not until after the explosion that Department of Defense officials learned that some of the respondent's procedures did not comply with military safety requirements.

Finally, I make the observation that this calamity was caused by the idiosyncratic behavior of an employee, and not because there was an open flame within a few feet of demilling operations or because the lead person had a cigarette lighter in her purse located in a nearby hut.

Because Respondent passed all pre-award requirements for safety in order to obtain contracts to manufacture ammunition for the Department of Defense and other governmental agencies; because management was devoted to safety in the workplace; because all employees who testified felt secure with respect to their safety on the job; because periodically the Respondent received the highest marks for safety by governmental inspectors; because OSHA compliance officers inspected Respondent's demilling operations and issued no citations; and because the Respondent was accident free, with the exception of two incidents in a 25-year period, I cannot conclude that the Respondent was in willful violation of the regulation in issue.

While the respondent's failure to comply with the regulation in issue was not willful, it does come within the definition of "serious" which is defined in Section 17(k) of the Occupational Safety and Health Act of 1970 as follows:

> (k) For purposes of this section, a serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

I find that the Respondent violated the regulation found at 29 C.F.R. §1910.109(e)(1) in that the regulation applied to the cited condition; that five employees had access to the hazardous condition; that Respondent knew or could have known of the hazardous situation with the exercise of reasonable diligence; and that serious injury resulted.

In summary, items 1a and 1b of the citation are VACATED; item 1c of the citation is AFFIRMED; and a penalty of $5,000.00 is assessed.

Sidney J. Goldstein
Judge, OSHRC

Dated: