

IN THE MATTER OF

* BEFORE THE

* COMMISSIONER OF LABOR

UPS GROUND FREIGHT, INC.

* AND INDUSTRY

* MOSH CASE NO. Z5812-028-09
* OAH CASE NO. DLR-MOSH-41-
● 09-12614

* * * * *

FINAL DECISION AND ORDER

This matter arose under the Maryland Occupational Safety and Health Act, Labor and Employment Article, Title 5, *Annotated Code of Maryland*. On or about February 18, 2009, the Maryland Occupational Safety and Health Unit of the Division of Labor and Industry (“MOSH”) issued a citation to UPS Ground Freight, Inc. (“UPS”) for violating 29 C.F.R. §1910.133(a)(1). The citation stemmed from an inspection that MOSH performed at the Employer’s facility in Federalsburg, Maryland.

The Employer contested the citation and a hearing was held on July 8, 2009 at the Office of Administrative Hearings in Hunt Valley, Maryland. Judith Jacobson, Administrative Law Judge, presided as the Hearing Examiner (“HE”). The HE issued a proposed decision recommending that the citation and proposed penalty of \$2,550.00 be affirmed.

The employer appealed the proposed decision and the Commissioner of Labor and Industry (“Commissioner”) held a review hearing on February 16, 2010. Based upon a thorough review of the factual record, the relevant law, the arguments made by both parties and the employer’s review petition, the Commissioner reverses the decision of the HE and vacates the citation.

FINDINGS OF FACT

On or about February 5, 2009, MOSH conducted an inspection of the Employer's facility located at 1100 Industrial Park Road in Federalsburg, Maryland. It was a planned inspection, but UPS was not given advance notice. (Tr. 26-27.) Several citations were issued as a result of the inspection. The parties were able to reach agreement with respect to all but one of the citations. The agreement was put on the record before the hearing examiner. (Tr. 10-11.) The remaining item was:

Citation1, Item 3(a): Violation of 29 C.F.R. §1910.133(a)(1). The Employer did not ensure that protective eye and face equipment were used where there was a reasonable probability of injury that could be prevented by such equipment.

The facts giving rise to the citation are largely undisputed. UPS employees utilize liquefied petroleum gas ("LPG") to fuel forklifts used at its facility. (Jt. Ex. 1.) Once or twice per month, UPS employees change the 60 lb. propane tanks for the forklifts without wearing face and eye protection. (Jt. Ex. 1.) There are approximately five employees at the Federalsburg facility who perform the task of changing the propane tanks. (Jt. Ex. 1.) Prior to changing the tank, UPS procedures provide that an employee should burn all the propane fuel in the line. (Employer Ex. 1; Tr. 119.) When changing the propane tank, an employee must turn the valve completely off, disconnect the hose, unclamp the tank, install the new tank, reconnect the assembly, and then turn the nozzle back on to allow the propane to flow through the hose. (Tr. 31.) UPS provides the employees who change the propane tanks with work gloves but does not provide or require the employees to wear eye and face protection. (Jt. Ex. 1.)

The material safety data sheet ("MSDS") for odorized commercial propane or LPG states that LPG can cause freezing of tissue if it comes in contact with the eye. (Jt.

Ex. 1; MOSH Ex. 6.) The MSDS further provides that safety glasses are recommended when handling the LPG cylinders. (Jt. Ex. 1; MOSH Ex. 6.)

DISCUSSION

Both parties agree that the issue in this case is whether a reasonable person reviewing the process for handling and changing the propane containers would determine that a hazard exists, that employees were exposed to the hazard, and that it warrants the use of personal protective equipment (“PPE”), more specifically, safety glasses. At the hearing, MOSH presented the testimony of Richard Hatcher, the Compliance Officer Lead who performed the inspection at the UPS facility, as well as that of Roger Campbell, the former Assistant Commissioner for MOSH and a certified safety professional who was admitted as an expert witness in the field of occupational safety and health.

Mr. Hatcher testified that during the course of his inspection, he examined some of the stored propane containers at the UPS facility. At least one of the containers that he examined had a label depicting safety gloves as well as goggles. (Tr. 41-42; MOSH Ex. 5.) Mr. Hatcher took a photograph of this label and testified that this indicated to him that the manufacturer recommends the use of safety goggles when handling the propane cylinders. (Tr. 42.) Mr. Hatcher acknowledged on cross examination that he did not know whether all the cylinders had such a label nor did he know whether the cylinder that he photographed was used to fuel a forklift. (Tr. 63-65.)

Mr. Campbell testified that when the tanks are changed, there is a risk of a leak. (Tr. 94.) He further testified that because the gas is pressurized, if a leak occurred, it could stir up debris or foreign objects which could result in eye injuries. (Tr. 94.) Direct

exposure to the gas from a leak could cause tissue damage or frostbite to the eye. (Tr. 94.) Mr. Campbell testified that, as a safety professional, he would recommend to an employer that employees utilize safety glasses when changing propane tanks or any pressurized gas. (Tr. 98-99.) On cross examination, however, Mr. Campbell acknowledged that despite his many years of experience in the field of occupational safety and health, he was not aware of a single instance where an employee was changing a propane tank and an eye injury occurred. (Tr. 104-106.) He also acknowledged that UPS' procedures for changing the tanks would reduce significantly the potential for a leak. (Tr. 107.) He maintained, however, that because of the nature of a compressed gas, it is not possible to eliminate all the pressure in the container so there is always the possibility of a leak. (Tr. 110-111.)

UPS offered the testimony of Logan Kerr, a Regional Manager for Safety and Human Resources. (Tr. 116.) Mr. Kerr testified to the UPS procedure for changing the tanks on the forklifts. He explained that prior to changing a propane cylinder, employees are expected to turn off the fuel supply and then let the engine run until it burns all the remaining fuel in the line. (Tr. 118-120.) Mr. Kerr testified that this procedure had been in place for several years, however, he testified that it was not reduced to writing until after the MOSH inspection. (Tr. 125.) Mr. Kerr also testified about an assessment that was performed by a safety and health consulting company called Pekron Consulting. (Tr. 134-136.) UPS offered a letter from Phil Pekron dated February 17, 2009. (Employer Ex. 3.) The letter stated that after observing the procedures for the handling of the propane containers, he "concluded that gloves are warranted." (Employer Ex. 3).

The Hearing Examiner found that MOSH met its burden and recommended affirming Citation 1, Item 3(a) with the proposed penalty of \$2,550.00. On review, UPS argues that the HE did not perform the proper risk analysis and that MOSH failed to prove that there was a significant risk of harm from the handling of the LP containers. The Commissioner agrees.

In order to uphold the citations, the Commissioner must find that MOSH has demonstrated by a preponderance of the evidence that (1) the standard at issue applies; (2) the Employer failed to comply with the standard; (3) employees were exposed to the violative conditions; and (4) the Employer knew or with the exercise of reasonable diligence should have known of the condition. *See e.g., Astra Pharmaceutical Products, Inc.*, 9 O.S.H. Cas. (BNA) 2126 (R.C. 1981), *aff'd in part* 681 F.2d 69 (1st Cir. 1982).

There is no dispute about the applicability of the standard or the fact that employees were not wearing eye and face protection. The central issue before the Commissioner is whether UPS violated §1910.133(a)(1) by failing to ensure that its employees wore eye protection when changing the LP cylinders. Under long established Review Commission case law, the standard at issue is so broadly worded that a reasonable person test is applied when assessing compliance. *Atlantic Battery Co., Inc.*, 16 O.S.H. 2131 (BNA) (1994), *Philadelphia, Bethlehem & New England R.R.*, 11 O.S.H. 1345 (BNA) (1983). As previously stated, both parties agree this is the appropriate test.

When applying the reasonable person test, personal protective equipment is mandated only “if a reasonable person familiar with the circumstances surrounding an allegedly hazardous condition, including any facts unique to a particular industry, would recognize a hazard warranting the use of personal protective equipment.” *Atlantic*

Battery, 16 O.S.H (BNA) 2153. To satisfy this standard, MOSH must demonstrate that changing the LP fuel canisters created either (1) a “significant” risk of harm or (2) a “reasonable probability” of eye injury. *Atlantic Battery* 16 OSHC 2153. In applying the reasonable person test under 1910.132(a)¹, the Review Commission has held that “a violation of [the] standard cannot be founded on a mere unsubstantiated possibility that a hazard could occur.” *Secretary of Labor v. ConAgra Flour Milling Co.*, 16 O.S.H. (BNA) 1141. In the *ConAgra* case, the employer used electrically powered forklifts at one of its facilities. One employee was responsible for regularly servicing the forklifts, including recharging them daily, and checking the battery fluid (“electrolyte”) once a week. When the level of electrolyte was low, the employee was required to add water using a funnel. The compliance officer determined that the water mixed with the electrolyte in the battery in combination with the removal of the funnel made it “possible” for the fluid to splash or drip on the employee. The employer was cited for failing to provide PPE including goggles, gloves and an apron. *ConAgra* 16 OSH 1138. The Commission vacated the citation finding that the hazard was only possible and not probable.

UPS argues that MOSH failed to establish a significant risk of harmful exposure. It goes on to argue that because MOSH failed to prove that a line failure or valve rupture is likely, “there cannot be significant risk of harm when the possibility of something occurring is remote.” (Brief p. 5.) The Commissioner agrees.

Decisions of the Review Commission and courts have consistently held that it is not necessary to prove that there is a substantial probability that an accident will occur.

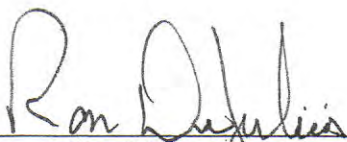
¹ While 1910.132(a) is not the standard under which UPS was cited, it is also a PPE standard that utilizes the “reasonable person” test.

Rather, it is only necessary to prove that an accident is possible and that serious physical harm could result. *Secretary of Labor v. Trinity Industries, Inc.*, 504 F.3rd 397(1997); *Illinois Power Co. v. OSHRC*, 632 F.2nd 25, 28 (7th Cir. 1980); *Bethlehem Steel Corp. v. OSHRC*, 607 F.2d 1069, 1073 (3rd Cir. 1979). Under the standard at issue in this case, however, decisions of the Commission have held that the mere possibility of an injury is not sufficient. The Commissioner finds that MOSH has not met this burden. The MSDS recommends but does require that safety glasses be worn. Mr. Campbell testified that he believed they should be worn. However, he was unable to cite a single instance in all his years of experience where an eye injury occurred when an employee was changing an LP fuel canister. The Commissioner finds that this is not sufficient in this instance and therefore finds that the citation should be vacated..

Therefore, on this 16th day of January, 2015, the Commissioner hereby
ORDERS:

1. Citation 1, Item 3(a) for a serious violation of 29 C.F.R. §1910.133(a)(1) with a proposed penalty of \$2,250.00 is VACATED.

This Order becomes final 15 days after it issues. Judicial review may be requested by filing a petition for review in the appropriate circuit court. Consult Labor and Employment Article, § 5-215, *Annotated Code of Maryland*, and the Maryland Rules, Title 7, Chapter 200.



J. Ronald DeJuliis
Commissioner of Labor and Industry