NEVADA OCCUPATIONAL SAFETY AND HEALTH

REVIEW BOARD

CHIEF ADMINISTRATIVE OFFICER OF THE OCCUPATIONAL SAFETY AND HEALTH ENFORCEMENT SECTION, DIVISION OF INDUSTRIAL RELATIONS OF THE DEPARTMENT OF BUSINESS AND INDUSTRY,

Complainant,

vs.

DEPRESSURIZED TECHNOLOGIES INTERNATIONAL, INC.,

Respondent.
_____/

Docket No. RNO 01-127

D E C I S I O N

This matter having come before the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** at a hearing commenced on the 10th day of April, 2002, and continued on May 15 and 16, 2002 and concluded on July 10, 2002, in furtherance of notices duly provided according to law, MR. JOHN WILES, ESQ., counsel appearing on behalf of the Complainant, **Chief Administrative Officer of the Occupational Safety and Health Enforcement Section, Division of Industrial Relations** (OSHES); and MR. NOEL MANOUKIAN, ESQ., appearing on behalf of Respondent, **Depressurized Technologies International, Inc.**; the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD** finds as follows:

Jurisdiction in this matter has been conferred in accordance with Nevada Revised Statute 618.315.

The complaint filed by the OSHES sets forth allegations of

violations of Nevada Revised Statutes as referenced in Exhibit "A", attached thereto.

Citation 1, Item 1 charges a "willful" violation of NRS 618.375(1) commonly known as the "General Duty Clause". Complainant alleges that the respondent employer failed to effectively evaluate the foam extraction process relating to the respondent's aerosol can recycling business. The aerosol personal care products recycled by the respondent contained highly flammable propellants such as isobutane and propane. It is alleged that respondent failed to adequately capture the flammable propellants, and that as a result thereof, the atmosphere in the work environment became volatile and exceeded the lower explosive limit resulting in a fire and explosion in which an employee eventually died, and four other employees were seriously injured when they sustained first, second and third degree burns.

Citation 1, Item 2a and Item 2b were grouped together. Citation 1, Item 2a charges a "willful" violation of 29 CFR 1910.1343(e)(1). Complainant alleges that the respondent employer did not provide medical evaluations to employees before they were required to wear respirators in connection with their work at the respondent's aerosol can recycling plant. Citation 1, Item 2b alleges a "willful" violation of 29 CFR 1910.134(f)(2). The complaint alleges that the respondent employer did not ensure that employees who were required to use a tight-fitting facepiece respirator were fit tested as required by the regulation prior to the initial use of the respirator. The proposed penalty for the grouped willful violations is the amount of SIXTY THREE THOUSAND DOLLARS ($63,000.00).

Citation 2, Item 1a alleges a "serious" violation of 29 CFR 1910.178(c)(2)(i). The complainant alleges that the respondent employer did not provide the required power-operated industrial truck that was appropriate for use around high concentrations of flammable vapors and gasses such as isobutane and propane. Citation 2, Item 1b and Citation 2, Item 1a were grouped together. Citation 2, Item 1b alleges a violation of 29 CFR 1910.178(l)(1)(i). The complaint alleges that the respondent employer failed to make sure that employees that were required to operate powered industrial trucks, received operator training for the safe operation of the vehicle as required by the regulation. The proposed penalty for the "serious" violations referenced in Citation 2, Item 1a and Citation, Item 1b, is in the amount of FIVE THOUSAND SIX HUNDRED DOLLARS ($5,600.00).

Citation 2, Item 2 alleges a "serious" violation of 29 CFR 1910.307(b). The complaint alleges that the respondent employer failed to provide approved and safe wiring methods and installations consistent with a class 1, division 1 environment. The violation referenced as Citation 2, Item 2 was classified as "serious" because of an alleged hazard that could cause death or serious bodily injury. The proposed penalty for the citation is in the amount of FIVE THOUSAND SIX HUNDRED DOLLARS ($5,600.00).

Citation 2, Item 3 alleges a violation of 29 CFR 1910.1200(h)(1). The complaint alleges that the respondent's employees were not provided with effective information and training with respect to the hazardous chemicals that were present in their work area at the time of their initial assignment and whenever a new hazard was introduced into their work area. The complaint alleges

that the respondent's employees did not recognize the dangers that were presents with respect to the extremely flammable products and propellants that were contained in the aerosol cans that they were recycling. The violation was classified as "serious" due to the existence of an alleged hazard which could cause death or serious bodily injury. The proposed penalty for the serious violation is in the amount of FIVE THOUSAND SIX HUNDRED DOLLARS ($5,600.00).

Citation 3, Item 1 alleges a violation of 29 CFR 1910.132(f)(4). The complaint alleges that the respondent employer did not verify that it had provided the training required by the regulation through a written certification that met the requirements of the regulation. The violation was classified as "other" because the alleged violative condition would not result in death or serious bodily injury. The proposed penalty for the "other" violation is in the amount of EIGHT HUNDRED DOLLARS ($800.00).

FACTS

On the evening of September 17, 2001, an explosion and fire occurred at the aerosol can recycling facility that was owned and operated by respondent Depressurized Technologies International, Inc. (DTI) located at 2185 Park Place (Meridian Business Park), Minden, Nevada. Employees that were working on the night shift at DTI suffered first, second and third degree burns, and one of the employees later died from injuries that were sustained in the fire and explosion. On the evening of September 17, 2001, DTI's employees were puncturing aerosol cans in order to remove the contents for recycling. The employees were using a plastic lined wire mesh container comprised of four sides. One employee could work per side. The aerosol can would be punctured, and the contents

would flow from the can into the plastic lined container. A diagram of the manual decanting device was prepared by supervisor Brigido Beranza, and introduced into evidence as respondent's Exhibit M. The manual decanting device included a hood in which an air hose was inserted to provide suction that was designed to evacuate vapors from the aerosol cans that were punctured to a filtration system. However, at the time of the accident on September 17, 2001, the exhaust hood was not installed and operational. The manual decanting device was located within a 40-foot metal ocean shipping container that was located within the DTI building.

In addition to the manual decanting device, there was also an employee puncturing aerosol cans over a 55 gallon drum that was located immediately outside of the 40 foot metal ocean shipping container. The 55 gallon drum had no vapor recovery apparatus associated with it. At approximately the same time that an employee sat on an electrically operated forklift truck, the explosion occurred which caused the employee injuries. Terrence Taylor, a fire captain and investigator from the East Fork Fire and Paramedic District in Minden, Nevada, stated that it was his opinion that volatile gasses had accumulated as a result of the manual decanting process that was taking place on the evening of September 17, 2001. It was Captain Taylor's opinion that the electrically powered forklift truck had provided the spark that ignited the flammable gasses.

DISCUSSION

A. Nevada Revised Statute (NRS) 618.375(1).

NRS 618.375(1) is as follows:

"Duties of employers. Every employer shall:

1. Furnish employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees."

The obligation that is imposed by NRS 618.375(1) is commonly referred to as the "general duty" clause. In the present case, Walter Gonzalez, the president, sole director and designated safety coordinator for DTI testified that he knew and understood the hazards that were present in recycling the products that DTI recycled at its Minden, Nevada facility. Mr. Gonzalez was aware that many of the aerosol cans that were received by DTI contained highly flammable propellants such as isobutane and propane.

DTI had, prior to moving to Minden, Nevada in the early part of 2001, operated an aerosol can recycling facility in Morgan Hill, California. At the California facility, decanting of aerosol cans using an automatic machine that had been designed and patented by Walter Gonzalez began in December 1994. Manual decanting of aerosol cans also took place at DTI's California facility before the move to Nevada. Most of DTI's California employees moved with the company to Nevada in the early part of 2001. Other employees rejoined the company at DTI's Nevada location in July 2001. Not all of DTI's California employees made the move, but most did eventually rejoin the company in Nevada by July 2001.

The aerosol can process descriptions prepared by DTI related to 1) receiving, 2) sorting, 3) degassing, 4) decapping, 5) decanting, and 6) crushing. (Exhibits 1 through 6 inclusive.) All of the documentation that was provided by DTI to the complainant's representatives pertained to the Morgan Hill, California operation. No specific written documentation pertaining to the Minden, Nevada

operation was provided by DTI, and no written documentation pertaining to the manual decanting process was provided.

The testimony and evidence established more than just a lackadaisical attitude on the part of DTI with respect to employee safety at the Minden, Nevada facility. This course of conduct was entirely inconsistent with the fact that Mr. Gonzalez, as well as Ms. Gonzalez, were very aware of the highly flammable nature of the propellants and some of the products contained in the aerosol cans that were being recycled at the Minden, Nevada facility. Mr. Gonzalez states in his resume that he has "Over 15 years of experience in waste management, emergency control and response procedures." (Exhibit D) Additionally Mr. Gonzalez has worked as an environmental health and safety manager for a separate employer in California, not related to DTI, from February 1994 to the present time. (Exhibit D) The evidence established that while the Morgan Hill, California facility of DTI had been tested and reviewed by outside consultants, no such testing and review had taken place at the Nevada facility from the opening in early 2001 through the date of the accident on September 17, 2001.

The citation relating to NRS 618.375(1) has been cited as "willful". In order to find a willful violation, evidence must be present to support a finding that the violation was committed with (1) intentional knowing, or (2) voluntary disregard for Occupational Safety and Health requirements, or (3) with plain indifference to employee safety. Williams Enter., 13 BNA OSHC 1249, 1256 (No. 85-355, 1986). The focal point of a willful classification is the employer's state of mind at the time that the violation is committed. Brock v. Morello Brothers Construction, 809 F.2d 161,

164 (1st Cir. 1987). A willful charge is not justified if an employer has made a good faith effort to comply with the standard or eliminate a hazard, even though the employer's efforts are not entirely effective or complete. A.G. Mazzocchi, Inc., 2000 OSHD ¶32,095 at p. 48,202.

In the present case, the testimony and evidence established a voluntary disregard and plain indifference on the part of DTI with respect to employee safety. Members of DTI's management had knowledge of safety requirements, and had knowledge that its employees were engaged in a manual decanting process involving highly flammable propellants. In spite of this, inadequate measures were taken to provide a place of employment that was free from recognized hazards that were most definitely likely to cause death or serious physical harm of the type that in fact occurred on the evening of September 17, 2001.

B. 29 CFR 1910.134(e)(1) and 29 CFR 1910.134(f)(2).

Because of the dangerous nature of the contents of the aerosol cans that were recycled at the DTI Minden, Nevada facility, employees were required to wear respirators. 29 CFR 1910.134(e)(1) requires an employer to provide a medical evaluation to determine an employee's ability to use a respirator before the employee is fit tested, or required to use the respirator in the work place. 29 CFR 1910.134(f)(2) requires that employees be fit tested prior to the initial use of a respirator, and whenever a different respirator is to be used and annually thereafter. The testimony and evidence was uncontradicted that the only employee that had ever received the medical evaluation required by 29 CFR 1910.134(e)(1) was supervisor Brigido Beranza. This occurred when Mr. Beranza was hired as an

employee at the Morgan Hill, California facility of DTI. No employee at the Nevada facility of DTI was medically fit tested as required by the regulation. Dora Gonzalez, who was the manager of DTI's Nevada facility, was aware of the medical evaluation requirement. In spite of this knowledge, the employees were not medically evaluated because in Ms. Gonzalez' own words, she did not get around to it because of the press of other obligations. Supervisor Brigido Beranza testified that Ms. Gonzalez had stated to him that the medical evaluation was necessary, and that it would be done at some undefined date in the future. The medical evaluations never occurred.

Supervisor Brigido Beranza assisted employees with the fit testing of their respirators. However, the procedures utilized by Mr. Beranza did not comply with all of the requirements for respirator fit testing. During Mr. Beranza's testimony, he stated that he had no familiarity with the fit testing procedures contained in 29 CFR 1910.134, Appendix A, when he reviewed Exhibit 78 which is a copy of those procedures.

The testimony and evidence unequivocally establish that DTI was not complying with the requirements imposed by 29 CFR 1910.134(e)(1) and 29 CFR 1910.134(f)(2). This noncompliance occurred even though both Mr. Gonzalez and Ms. Gonzalez testified that they were aware of the requirements. Thus, once again the testimony and evidence established a level of voluntary disregard and plain indifference with respect to employee safety. The essentials for a willful violation as cited by the complainant were found to be present.

C. 29 CFR 1910.178(c)(2)(i) and 29 CFR 1910.178(l)(1)(i).

At the DTI facility in Minden, Nevada, the employees used an electric fork lift identified as Type E, Caterpillar Model 70, H2126. Photographs of the forklift are contained in the record as Exhibits 52, 53 and 54. The testimony and evidence established that the forklift truck used by DTI for use in and around the type of volatile vapors that were potentially present in all aspects of the recycling processing that was taking place at DTI's Minden, Nevada facility was inappropriate and inconsistent with the prohibition imposed by 29 CFR 1910.178(c)(2)(i). The testimony of DTI's employees and supervisor Beranza established that the training for an operator of the forklift did not comply with the requirements of 29 CFR 1910.178(l)(1)(i). It was necessary for employees to use the forklift to move materials in connection with the processing of aerosol cans at DTI's Minden, Nevada facility. The testimony established that DTI's forklift operator training consisted of some advice from supervisor Beranza followed by actual operation of the forklift. The brief instruction provided by supervisor Beranza simply did not meet the requirements of the regulation.

A serious violation occurs where there is a substantial probability of death or serious injury as a result of the condition. NRS 618.625(2); Division of Occupational Safety and Health v. Pabco Gypsum, 105 Nev. 371, 372, 775 P.2d 701 (1989). In this instance, the use of the forklift truck at the DTI facility in an environment containing highly flammable gasses, coupled with inadequate operator training, did create a substantial probability of death or serious injury to employees.

D. 29 CFR 1910.307(b).

29 CFR 1910.307(b) requires that "equipment, wiring methods,

and installations of equipment in hazardous (classified) locations shall be intrinsically safe, approved for the hazardous (classified) location, or safe for the hazardous (classified) location." Photographs of DTI's wiring in the vicinity of the ocean shipping container where the manual decanting process took place were introduced into evidence as Exhibits 55, 56 and 57. Joan Tiearney, who is employed as a safety and health inspector by the complainant, testified that the conduit and receptacles depicted in Exhibits 55, 56 and 57 do not comply with the standard imposed by 29 CFR 1910.307(b). In her testimony, Ms. Tiearney referenced Exhibits 25 and 26. Exhibit 25 is an excerpt from the National Electrical Code 1993, and Exhibit 26 is an excerpt from the Fire Protection Handbook, 14th Edition, which references Class 1, Division 1 locations. Ms. Tiearney explained that a Class 1, Division 1 location exists where hazardous concentrations of flammable gasses or vapors exist continuously, intermittently, or periodically under normal conditions. Given the fact that most of the aerosol cans that were being recycled at DTI's Minden, Nevada facility contained highly flammable propellants, and in some cases flammable contents, the complainant did establish that a Class 1, Division 1, location existed at DTI's facility. Ms. Tiearney indicated that DTI had installed standard conduit and receptacles as depicted in Exhibits 55, 56 and 57, and that the installation did not comply with the regulations requirements.

The board finds that the failure of DTI to provide equipment, wiring methods and installations of equipment in the hazardous classified location created a substantial probability that death or serious injury could result from the violative condition. The

reason for the regulation is to eliminate possible ignition sources in an environment where explosive gasses are known to exist. Consequently the board finds a serious violation of 29 CFR 1910.307(b).

E. 29 CFR 1910.1200(h)(1).

The complainant alleges that DTI failed to provide effective information and training on hazard chemicals that were present in an employee's work area at the time of their initial assignment and whenever a new hazard was introduced into their work area. The testimony and evidence established that DTI did provide some training to its employees with respect to hazardous chemical. (Exhibits J, K, L). The regulation requires that employers "provide employees with effective information and training." (Emphasis added.) The testimony of the former and existing employees of DTI established that the employees did not fully appreciate the extent of the hazards that were presented by the propellants and chemicals that were contained in the aerosol cans that they were processing on a daily basis. In particular, there was employee confusion as to whether or not aerosol cans containing water based gels were hazardous. On the evening of September 17, 2001, employees were working with aerosol cans containing water based gels without the benefit of the vapor extraction system being utilized. The testimony of several of the employees who were working on September 17, 2001 indicated that they felt that there was no explosion risk associated with the processing of aerosol cans containing water based gels. Clearly this was not the case. Thus, one must reasonably conclude that DTI failed to provide the "effective information and training" as required by 29 CFR 1910.1200(h)(1).

The failure to provide the required training created a condition containing a substantial probability of death or serious injury.

F. 29 CFR 1910.132(f)(4).

DTI provided very little written documentation to complainant with respect to employee training, except for Exhibits J, K and L which were training materials relating to three employees. No written evidence was provided that other employees had received the training required by the regulation. The testimony unequivocally established that DTI did not comply with the requirement set forth in 29 CFR 1910.132(f)(4). There was evidence that DTI did in fact provide training to its employees. This was testified to by the former and existing employees of DTI, and was verified by supervisor Beranza, Ms. Gonzalez and Mr. Gonzalez. However, no written records for the employees, other than the three previously referenced, were produced by DTI. This does not comply with the regulation. The board finds that the failure to comply with the requirements of 29 CFR 1910.132(f)(4) did not create a condition where there was a probability of death or serious injury to employees. Consequently, the classification of the citation as "other" is appropriate.

CONCLUSION

Based upon the above and foregoing, it is the decision of the Nevada Occupational Safety and Health Review Board as follows:

1. A willful violation of Nevada Revised Statutes did occur as to Citation 1, Item 1, NRS 618.375(1). A penalty in the amount of SEVENTY THOUSAND DOLLARS ($70,000.00) for the willful violation is imposed.

2. A willful violation of Nevada Revised Statutes did occur as to Citation 1, Item 2(a) and Citation 1, Item 2(b), respectively

29 CFR 1910.134(e)(1) and 29 CFR 1910.134(f)(2). A penalty for the willful violations is imposed in the amount of TWENTY THOUSAND DOLLARS ($20,000.00).

3. A serious violation of Nevada Revised Statutes did occur as to Citation 2, Item 1(a) and Citation 2, Item 1(b), respectively 29 CFR 1910.178(c)(2)(i) and 29 CFR 1910.178(l)(1)(i). A penalty for the serious violations is imposed in the amount of FIVE THOUSAND SIX HUNDRED DOLLARS ($5,600.00).

4. A serious violation of Nevada Revised Statutes did occur as to Citation 2, Item 2, 29 CFR 1910.307(b). A penalty is imposed for the serious violation in the amount of FIVE THOUSAND SIX HUNDRED DOLLARS ($5,600.00).

5. A serious violation of Nevada Revised Statutes did occur as to Citation 2, Item 3, 29 CFR 1910.1200(h)(1). During the board's deliberations on July 10, 2002, a penalty in the amount of TEN THOUSAND DOLLARS ($10,000.00) was imposed for this serious violation. However, the maximum penalty that can be imposed for a serious violation, in furtherance of NRS 618.645, is in the amount of SEVEN THOUSAND DOLLARS ($7,000.00). Consequently, a penalty in the amount of SEVEN THOUSAND DOLLARS ($7,000.00) for the serious violation of 29 CFR 1910.1200(h)(1) is imposed.

6. A violation of Nevada Revised Statutes did occur as to Citation 3, Item 1. A penalty for the "other" violation is imposed in the amount of EIGHT HUNDRED DOLLARS ($800.00).

The Board shall serve Findings of Fact and Conclusions of Law signed by the Chairman of the **NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD.** Service of the Findings of Fact and Conclusions of Law signed by the Chairman of the **NEVADA OCCUPATIONAL SAFETY AND**

HEALTH REVIEW BOARD shall constitute the **Final Order** of the **BOARD**.

DATED: This 2nd day of August, 2002.

NEVADA OCCUPATIONAL SAFETY AND HEALTH REVIEW BOARD

/s/
THOMAS A. JENNINGS, CHAIRMAN

NEVADA OCCUPATIONAL SAFETY AND HEALTH

REVIEW BOARD

CHIEF ADMINISTRATIVE OFFICER OF THE OCCUPATIONAL SAFETY AND HEALTH ENFORCEMENT SECTION, DIVISION OF INDUSTRIAL RELATIONS OF THE DEPARTMENT OF BUSINESS AND INDUSTRY,

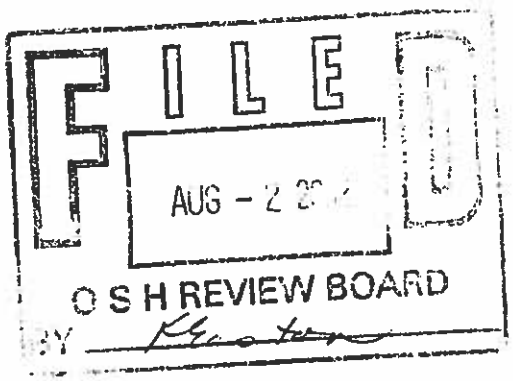
Complainant,

vs.

DEPRESSURIZED TECHNOLOGIES INTERNATIONAL, INC.

Respondent.
_____/

Docket No. RNO 01-1274



CERTIFICATE OF MAILING

Pursuant to NRCP 5(b), I certify that I am an employee of SCARPELLO, HUSS & OSHINSKI, LTD., and that on August 2, 2002, I deposited for mailing, certified mail/return receipt requested, at Carson City, Nevada, a true copy of the **DECISION** addressed to:

John Wiles, Esq.
DIR Legal
1301 North Green Valley Parkway
Suite 200
Henderson NV 89014

Noel Manoukian, Esq.
1466 Hwy. 395
Gardnerville, NV 89410

DATED: August 2, 2002

Karen A. Easton
KAREN A. EASTON

SUBSCRIBED and SWORN to before me this 2nd day of August, 2002.

Cynthia L. Plaskoff
NOTARY PUBLIC