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SOL (MSHA) V. KAMTECH INCORPORATED  
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION  
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June 29, 1994

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. WEST 93-360-M  
Petitioner : A.C. No. 48-00639-05502 HUR  
 :  
v. : Wyoming Soda Ash  
 :  
KAMTECH INCORPORATED, :  
Respondent :

DECISION

Before: Judge Cetti

This case is before me upon a petition for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. The Secretary seeks a \$50 penalty from Kamtech Incorporated (Kamtech) for an alleged violation of 30 C.F.R. 57.4600(a)(2).

In pertinent part the cited safety standard provides:

- (a) When welding, cutting, soldering, thawing, or bending --- (2) With an open flame in an area where no electrical hazard exists, a multipurpose dry-chemical fire extinguisher or equivalent fire extinguisher or equivalent fire extinguisher equipment for the class of fire hazard present shall be at the worksite.

Kamtech filed a timely answer and response to the Prehearing Order contesting the alleged violation.

On April 20, 1994, Kamtech filed a Motion for Summary Decision along with a (1) Brief in Support of the Motion; (2) Affidavit of M. Hunt; and (3) Affidavit of R. O'Steen.

Kamtech states that it received the citation while performing construction work at T.G. Soda Ash's mine located in Grainger, Sweetwater County, Wyoming, and asserts that the undisputed material facts demonstrate that Kamtech is entitled to summary decision in its favor as a matter of law. It is Kamtech's position that there was no violative condition nor exposure to an employee of a violative condition.

Kamtech further states that the material facts to which there is no genuine issue are as follows:

Kamtech, Inc. is an industrial construction company that performs construction work throughout the United States. On the date of the alleged violation, Kamtech was performing construction work for T.G. Soda Ash, Inc. at its mine and facility located in Grainger, Sweetwater County, Wyoming. (Affid., of R. O'Steen, 3, 4). Although most of Kamtech's employees were engaged in the construction of the package boiler outside of the T.G. Soda Ash facility, a few employees were constructing a pipe system of the T.G. Soda Ash facility near the boiler area. (O'Steen Affid., 4).

On September 16, 1992, while conducting an inspection of the entire mine facility, an MSHA Inspector, Thomas L. Markve, approached a Kamtech employee who was working on a catwalk in the boiler area. (Affid. of M. Hunt, 4, 5). The employee was a pipewelder. (Hunt Affid., 5; O'Steen Affid., 5). Like other pipewelders in the boiler area, Mr. Lish was using a process known as shielded metal arc welding (SMAW), which is a form of electrical welding used to fuse and cut pieces of pipe. Id. At this time, Lish's welding rod had not been "struck" to produce an electric arc, which is the heat source for the weld. (Hunt Affid., 5). The inspector approached the employee and asked him the location of his fire extinguisher. (Hunt Affid., 5; O'Steen Affid., 7). (Footnote 1) Mr. Lish responded by turning around to pick up his fire extinguisher and found it to be missing. (O'Steen Affid., 7). At that time, Mr. Lish's helper returned to the area and explained that he had picked up the fire extinguisher just prior to the inspector's arrival and placed it in the gang box because he thought they were finished welding. Id. Mr. Lish did not begin welding until after the helper returned with the fire extinguisher. Id.

Shortly thereafter, Inspector Markve met with Rick O'Steen, Kamtech's Quality Assurance/Quality Control Safety Inspector, to conduct an inspection of the package boiler construction site. Id. at 6. At this time, the inspector informed Mr. O'Steen that he was issuing a citation to Kamtech because Lish did not have a fire extinguisher in his immediate work area. Id. After Mr. O'Steen questioned the inspector as to the particulars of the citation, Inspector Markve explained that he was issuing the citation because he thought (but did not observe) that Lish had been

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1 The conversation related to O'Steen by Inspector Markve does not constitute hearsay because, as an agent for the Secretary of Labor's office, his statements are admissions. Consolidation Coal Company v. Sec. of Labor,

No. WEVA 81-222-R, 81-361, (FMSHRC February 8, 1992); Secretary of Labor v. Stanbest, Inc., 11 BNA OSHC 1222 (OSHRC No. 76-4355 1983) (decision under OSHA); McWilliams Forge Co., Inc., 8 BNA OSHC 1792 (OHSRCJ No. 79-228 1980) (decision under OSHA).

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welding, or was going to begin welding again.  
(O'Steen Affid., 6, 7; Hunt Affid., 5).

Kamtech asserts these facts do not establish a violation of the cited standard under MSHA. Kamtech contends that it did not violate the cited standard because: (1) the welding process used did not involve an open flame; (2) the Kamtech employee allegedly exposed to the hazard was not engaged in welding, cutting, soldering, thawing, or bending without having a fire extinguisher present; and (3) because suitable extinguishing equipment was present at the worksite.

Kamtech states the type of welding process being used was shielded metal arc welding (SMAW), which is a form of electrical welding. (Hunt Affidavit, 5). Electrical welding does not produce an open flame and, therefore, is not subject to 30 C.F.R. 57.4600(a)(2). See *Secretary of Labor v. LeBlanc's Concrete Mortar Sand Company*, No. CENT 88-106-M, (FMSHRC April 24, 1989).

Kamtech further contends that even if the cited standard applies, Kamtech did not violate it because its employee was not engaged in welding when the fire extinguisher was removed from the immediate work area. Just prior to the MSHA inspector arriving at the allegedly exposed employee's work area, the employee (Lish) stopped welding and the employee's helper removed the fire extinguisher they had been using, mistakenly thinking that they had finished welding. Lish did not begin welding again until after the helper returned with the fire extinguisher. Inspector Markve never observed Kamtech employee Lish welding without a fire extinguisher. Instead, he assumed that the employee was going to begin welding again and, therefore, concluded that a citation was appropriate.

In order to establish a prima facie case of a violation, Kamtech asserts the Secretary must show that a violative condition existed and that an employee was exposed. E.g., *Secretary of Labor v. Cathedral Bluffs Shell Oil Company*, No. WEST 81-186-M, (FMSHRC August 29, 1984); *Anning-Johnson Co.* 4 OSHC 1193 (Rev. Comm'n 1976) (decision under OSHA). In this case, neither is established since Inspector Markve intervened before actual welding operations had recommenced. Kamtech points out that Lish's welding rod had not been "struck" to produce an electrical arc, which is the heat source for the weld. Speculation that an employee may commit a violation will not satisfy the Secretary's burden of proof. *Id.*; *Secretary of Labor v. Patch Coal Company*, No. CENT 88-2, (FMSHRC June 24, 1988). E.g., *Secretary of Labor v. Southeastern Paper Products Export, Inc.*, 16 BNA OSHC 1276 (OSHRJC April 23, 1993) (decision under OSHA). An "anticipatory" violation would be inappropriate in this case because the facts indicate that had the inspector not intervened, the welder's helper would have retrieved the fire extinguisher or

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stopped the welder once he realized that the welder intended to weld again.

In addition, Kamtech contends it did not violate the cited standard because proper fire extinguishing equipment was present "at the worksite." As discussed above, when it was discovered that the welder had not completed welding and was going to begin welding, the helper retrieved the fire extinguisher from the gang box, which is portable and was used to store tools. The term "worksite" is not defined by the regulations. Therefore, Kamtech contends a reasonable employer would interpret such a term in accordance with its ordinary meaning. The term "worksite," in its ordinary meaning, would certainly include a nearby gang box which was readily accessible. See Secretary of Labor v. LeBlanc's Concrete & Mortar Sand Co., (noting fire extinguisher required at work location, which was described as a 100' X 200' shop); Secretary of Labor v. Western Steel Corporation, No. WEST 81-132-RM, (FMSHRC March 29, 1983) (term "worksite" used in reference to large work area); Westwood Energy Properties v. Secretary of Labor, No. PENN 88-42-R, 3 FMSHRC (January 1989).

No objection has been filed to the "Statement of Material Facts As to Which There Is No Genuine Issue" nor to the Motion for Summary Decision.

#### CONCLUSION

Based upon the "Statement of Material Facts As to Which There Is No Genuine Issue," including the affidavits of M. Hunt and R. O'Steen, I find that in this case there was no violation of the cited safety standard 30 C.F.R. 57.4600(a)(2).

#### ORDER

Citation No. 3908981 and its related proposed penalty are VACATED and this case is DISMISSED.

August F. Cetti  
Administrative Law Judge

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