

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

2520 Venture Oaks Way, Suite 300  
Sacramento, CA 95833  
(916) 274-5751  
FAX (916) 274-5785

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FEB 28 2012

APPEAL FOR MOSH Appeals Board

314572660

Inspection Number on Citation

2012-R2D1-0632

Titan Propane, LLC, dba Northern Energy

Employer Name on Citation

1. You only have 15 working days from receipt of a citation to appeal.

Employer Legal Name or DBA (Optional)

2. A copy of this form must be attached to each citation or notification appealed. Failure to file a completed form may result in dismissal of the appeal.

980 - 9th Street

Address

Lincoln, CA 95648

FIRST READ IMPORTANT INFORMATION ON THE REVERSE SIDE  
THEN COMPLETE ONE APPEAL FORM FOR EACH CITATION

1. This is an Appeal from:

CITATION NO(s): 1 Item No(s): 1, 2, 3

NOTIFICATION OF FAILURE TO ABATE ALLEGED VIOLATION  
CITATION NO(s): Item No(s):

SPECIAL ORDER/SPECIAL ACTION NO:  
Item No(s):

2. Specific ground(s) for this appeal are: (Check all that apply)

The safety order was not violated.

The classification (i.e. serious, willful, repeat) is incorrect.

The abatement requirements are unreasonable.

Required changes  Time allowed to complete changes

The proposed penalty is unreasonable.

3. Explain any other reasons for appeal or issues to be raised on appeal. Affirmative defenses must be specifically stated. Some important affirmative defenses are listed on the OSHAB website at: <http://www.dir.ca.gov/OSHAB/oshab.html>

Please see Attachment to Appeal Form.

4.

J. J. Jgl 2-24-12  
 (Signature of Employer or Employer's Representative)  
 {If there is any change in representation after you file your appeal, you must notify the Appeals Board in writing}

JAMES T. ANWYL  
 (Type or print name)

Attorney for Titan Propane, LLC, dba Northern Energy  
 (Title)

P.O. Box 269127  
 (Address) {Address where all communications from the Appeals Board will be sent}

Sacramento CA 95826-9127  
 (City) (State) (Zip Code)

(916) 565-1800 JTAnwyl@anwylaw.com 2-24-12  
 (Telephone) (E-Mail Address) (Date)

{All correspondence from the Appeals Board will be sent to the representative above at the address above. If there is any change in address, telephone number, and/or e-mail address after you file your appeal, you must notify the Appeals Board of the change(s). All such notifications must be in writing}

**IMPORTANT INFORMATION**

- A. Use this form to appeal a Citation, Notification of Failure to Abate Alleged Violation, or Special Order/Special Action.
- B. You must complete *a separate appeal form for each citation or notification* you wish to appeal and *attach a copy of the complete citation or notification that you are appealing.*
- C. If the citation or notification being appealed includes more than one item **do not use separate appeals forms for each item.** Instead, specify the items you are appealing in the space provided in No. 1 on the front of this form. (for example, "Citation No. 1, Item Nos. 2, 5, and 8)
- D. **Be sure to sign your appeal form and provide all the information requested in No. 4 above.**
- E. Your appeal form shall be deemed not completed unless you attach a copy of each citation or notification that you are appealing, and failure to file a completed appeal form may result in dismissal of the appeal.
- F. If you or your representative change address, telephone number, and/or e-mail address, it is your responsibility to notify the Appeals Board in writing of the change(s). Otherwise the Appeals Board will continue to use the address it has on file and you risk not receiving notices or other communications from the Appeals Board. Appeals Board regulations make it the employer's obligation to notify the Appeals Board of any changes to the employer's and/or representative's contact information.
- G. Mail each completed Appeal form and citation or notification to the Occupational Safety and Health Appeals Board, 2520 Venture Oaks Way, Suite 300, Sacramento, CA 95833.
- H. Late appeals will not be accepted unless good cause is shown.

Inspection Number on Citation -- 3145 72 660  
Citation No. 1, Item No. 1, 2, 3 (General)

T8 CCR 3203(a)(4): Injury and Illness Prevention Program  
T8 CCR 3380(f)(1)(A): Personal Protective Devices  
T8 CCR 4650(e): Storage, Handling and Use of Cylinders

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Attachment to Appeal Form

Response to Citation No. 1, Item No. 1, 2, 3:

Titan Propane, LLC, dba Northern Energy ("Titan"), alleges the following affirmative defenses:

1. Independent employee action defense.
2. The Safety Order was not violated.
3. Absence of employer knowledge of serious violation (Labor Code § 6432).
4. The Citation is unduly vague, lacks clarity and thus void, in that it does not describe with particularity the nature of the violation.
5. The underlying standard is vague and thus, the Citation is void.
6. The underlying standard as charged is inapplicable to the citations alleged.
7. The Citation, the investigation leading up to the Citation and any alleged violations related thereto constitute selective enforcement by the Division of Occupational Safety and Health ("Division"), and evidence the Division singling out Titan for enforcement.
8. Given the unduly vague and confusing nature of the Citation, Titan reserves its right to allege other affirmative defenses as they may become known and hereby specifically reserves the right to amend its Appeal to allege any additional and other affirmative defenses at such time as they become known.
9. The factual allegations cited in support of the Citation did not occur in the manner alleged.
10. The Division cannot enforce a rule which it did not formally adopt through procedures established by the Administrative Procedure Act ("APA") (California Government Code § 11340, *et seq.*). By the investigation and inspection conducted, the issuance of the Citation, and the putative "enforcement" of the cited regulation, the Division is enforcing or using a rule or regulation which it did not adopt formally. The Division's conduct in this regard constitutes an "underground regulation" and is illegal and improper under the APA.
11. Statement of witness Richard Martinelli that as of the date of the subject incident, Titan did have in place an Injury and Illness Prevention Program (effective 8/5/11) and Titan had

completed a required Hazard Assessment Survey with a determination of the need for Personal Protective Equipment (PPE) effective 12-22-09.

12. Titan did have in effect at the time of the subject Citation the appropriate Plan, Procedure or Program in place addressing the issues raised in this subject Citation.

Occupational Safety and Health Appeals Board  
2520 Venture Oaks Way, Suite 300  
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**CAL/OSHA Report No. 314572660**  
**Optional Report No. 015-12**  
**Inspection Date: 08/24/2011 - 11/23/2011**  
**Issuance Date: 02/13/2012**  
**CSHO ID: Q0442**  
**SE/IH Identification No. 00442**  
**Region 2**  
**District 1**

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**Citation 1, Item 1 - T8 CCR 3203(a)(4):  
Injury and Illness Prevention Program**

**Citation 1, Item 2 - T8 CCR 3380(f)(1)(A):  
Personal Protective Devices**

**Citation 1, Item 3 - T8 CCR 4650(e):  
Storage, Handling and Use of Cylinders**

**Citation 2, Item 1 - T8 CCR 6775(a):  
Static Electricity**

**Citation 3, Item 1 - T8 CCR 5603:  
Source of Ignition**

**Citation 4, Item 1 - T8 CCR 3383(b):  
Body Protection**

**Citation 5, Item 1 - T8 CCR 3382(a):  
Eye and Face Protection**

### **PREFATORY STATEMENT**

On August 23, 2011, at approximately 11:00 a.m., a fire occurred in a rail tank car containing liquid propane (LPG) while at the Titan Propane facility at 980 Ninth Street, Lincoln, California. Titan Propane, LLC, dba Northern Energy, is a division of Heritage Propane. The fire started as Mr. Sean Scalise, District Manager for Titan Propane, was in the process of completing a required three-step safety check prior to unloading the rail tank car.

The railroad tank car in question was owned by Union Tank Car (UTLX) and leased to British Petroleum. The tank car was further identified as UTLX 951013 with DOT number 112J340W.<sup>1</sup>

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<sup>1</sup> The subject railcar was one of four which had arrived at the Titan facility on August 22, 2011. The first three of those railcars had already been safety checked by Mr. Scalise at the time of the fire. The first of those three cars had been pushed into position at the loading and unloading platform and its contents were being unloaded when Mr. Scalise was performing his inspection of the fourth railcar. This fourth railcar was located on a spur approximately 100 feet from the unloading platform. Had the fire not occurred, Mr. Scalise would have completed all three steps of the pre-unloading safety inspection and the car would have been moved into position behind the other two cars to later unload the propane gas.

Mr. Scalise has been employed in the propane industry since 1996. He began his employment in 1996 with Northern Energy in Adelanto, California. He worked his first year as a delivery driver. In 1997, he took a position with Placer Propane in Rocklin, California, also serving as a delivery driver. He held that position for four years, until 2001. At that time, Placer Propane was acquired by Titan Propane, following which Mr. Scalise continued his employment as a delivery driver. In October 2003, Mr. Scalise assumed the responsibilities as District Manager for the Titan facility in Lincoln, California.

During his course of employment with Northern Energy, Mr. Scalise has undergone numerous training sessions and holds various certifications germane to the propane industry. Among those certifications, and the one most applicable to the task he was performing at the time of this incident, was his Railcar Employee Training Record and Certification covering the basic safety and unloading procedures for railcars. Mr. Scalise's most recent certification on that subject was March 12, 2010. A copy of the Railcar Training Manual and Mr. Scalise's Certification are attached hereto as **Exhibits A and B**, respectively.

The Titan facility consists of eight fuel storage tanks, each holding approximately 30,000 gallons of liquid propane. Among Mr. Scalise's responsibilities is a safety check of each railcar that comes into the facility prior to the unloading or transferring of LPG from railcars into those fuel storage containers. The containers are numbered sequentially 1 through 8.

On the day in question, it was Mr. Scalise's ultimate intention to unload the contents of this railcar equally into storage tanks 3-8. The railcar has a gross carrying capacity of 30,000 gallons LPG, which on this day measured a net of 29,862 gallons. The unloading process typically involves a time frame of five hours to empty the contents of a single railcar. The initial four hours involves the unloading of the liquid propane, followed by a one-hour purging of the remaining LPG vapors. This task is done at the facilities unloading rack. Before performing any unloading of the LPG, however, a three-step safety check is required to be performed on any railcar before it is positioned at the unloading platform.<sup>2</sup>

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<sup>2</sup> Railroad tank cars are the largest DOT tanks used to transport propane. Unlike other DOT tanks, tank cars are rarely owned by propane dealers. In this instance, the subject tank car was owned by Union Tank Car (UTLX) and leased to British Petroleum. It is rarely required of the propane dealer to inspect, service or repair a DOT-registered tank car, or its valves. It is considered good practice, however, prior to unloading, to check over the tank, tank valves and tank markings to ensure that the tank car is safe to unload. It was that task that Mr. Scalise was performing when the fire started.

DOT tank cars have special features relating to tank openings, heat shields and tank insulation. All valve openings are located in the top of the tank. Typically, there is a large opening in the top of the tank called a manway. On most DOT tank cars, and in this specific car, all of the relief valves, filling and withdrawal valves and liquid level gauges are installed into the opening of a cover plate found within the manway. A protective dome and shroud surrounds this assembly and protects all valving from exterior damage. This particular dome and shroud assembly was approximately 15" high and 3' in diameter. It has a hinged cover which must be removed in order to access the valves and nozzles.

(continued...)

The three-step safety check is customarily performed by two people. One employee will climb to the top of the railcar and manually check the railcar (1) for temperature of the LPG; (2) quantity of the fuel in the car; and (3) absence of contamination with water. The second employee will remain on the ground to assist in any manner necessary. In this instance, Mr. Scalise undertook the initial task of accessing the valves on the top of the tank car and performing the three preliminary safety checks which must take place prior to the initiation of the unloading of the LPG. He was assisted by Glenn Crockett, who works as a service technician for Titan.<sup>3</sup>

To assist in the analysis below, a photograph taken of the interior of the dome of this railcar is attached as **Exhibit C**. As noted in the attached photograph, arrows with sequential numbering have been drawn to the various valves and/or nozzles found within this compartmented area. Reference will be made below to this photograph in describing the activities of Mr. Scalise.<sup>4</sup>

The first step prior to the unloading process is to check the temperature of the liquid propane. This initial step involves the removal of the cap covering the "thermal well." The cap covering the "thermal well" is removed by hand. It does not require the use of any mechanical tools. This is then followed by the insertion of a thermometer into the interior of the tank (please see photograph, **Exhibit C**, arrow #8). The thermometer remains in the thermal well for the next 2-3 minutes, during which time steps 2 and 3 are performed.

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<sup>2</sup> (...continued)

As a safety precaution, Mr. Scalise, or one of his staff, will always inspect the tank valves when a load of propane is delivered to the plant. Mr. Scalise was in the process of performing this three-step safety inspection when the fire occurred.

<sup>3</sup> An estimated 60 railcars per year are unloaded at the Lincoln facility. Mr. Scalise has been performing that task since 2003. In his earlier statement to Mr. Lovell of Cal-OSHA, he indicated that he believed he had unloaded approximately 160+ railcars during his tenure at Heritage. After further reviewing his records, he determined that he had unloaded closer to 240 railcars. It is also of note that this is the first and only incident involving injury or a fire while either inspecting or unloading a railcar at this facility.

<sup>4</sup> A photograph of the dome on this railcar is attached hereto as Exhibit C. That photograph is further labeled with arrows pointing to various valves and nozzles identified with Nos. 1-8. Those component parts are further identified as follows:

1. Dipping rod
2. Relief valve
3. Liquid valve for offloading
4. Liquid valve for offloading
5. Vapor valve for off loading
6. Handle for sample valve
7. Plug for sample valve
8. Thermal well for thermometer

While the temperature is being taken, the second step of the three-step process is undertaken by Mr. Scalise. This involves "gauging" the railcar to determine the volume of propane it is carrying. This involves removing the cap over the gauge and withdrawing the gauge in order to determine and record the quantity of fuel. This process takes approximately one minute. This step is also done by hand and does not require the use of any tools.

After "gauging" the amount of fuel, Mr. Scalise turns to the third step, which is "sampling" the propane. This is a two-step process to confirm both the existence of odorant in the propane gas, as well as to determine if the gas has been contaminated with any water. The first step is the removal of the plug on the sample tube using some form of a wrench or pliers (please see photograph, Exhibit C, arrow #7). In this particular instance, Mr. Scalise used a pair of channel-lock pliers to remove that plug. After removing the plug, he placed the plug and the channel-lock pliers on the top of the tank car, inside the well of the dome.

The next step is to open the "sample valve" for approximately 5-10 seconds to allow a limited evacuation of liquid propane (please see photograph, Exhibit C, arrow #6). That propane will emit a distance of approximately 10" from the sample tube where it will strike the interior edge of the protective shroud housing the dome. Typically, after 5-10 seconds, a sufficient amount of LPG has been released for a determination if an odorant has been added to the gas, and any evidence of the presence of water in the fuel.<sup>5</sup> The determination of water is made visually by Mr. Scalise by examining the area where the liquid propane has struck the edge of the shroud. Ordinarily, one will see a white condensate form on the interior wall of the dome, which is the chilled LPG. If there is water contaminating the load, there will be moisture running from that condensed gas down the side of the dome.

Mr. Scalise will provide testimony that the sampling valve was open for approximately five seconds prior to the onset of the fire. He had no advance warning either by way of an unusual noise or functioning of the valve prior to the onset of the fire. He was standing upright and adjacent to the dome, leaning over slightly bent at the waist. As of this point in time, he had been on the top of the tanker no more than three minutes. During that entire period of time, he had remained upright other than when bending over to lift off the top of the dome or to perform the three test procedures described above. At no time did any part of his body or his clothing come into contact with the railcar other than the bottom of his shoes.

Mr. Scalise was wearing a pair of heavy cotton-mix shorts, a cotton-mix T-shirt, a pair of New Balance 410 GB shoes, leather gloves, cotton boxer briefs and white cotton socks. He was not wearing a belt, a watch or jewelry, nor was he carrying a cell phone while on the tank car. He did have a set of automobile keys in his right front pocket and was carrying a leather wallet in his left, rear pocket. As will more fully be explained in response to Citation No. 5, Item 1, Mr. Scalise was

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<sup>5</sup> After 5-10 seconds a sufficient quantity of LPG has been released in order to check for the presence of an odorant and to determine the presence or absence of water. At that point the sample valve is manually closed by the operator.

also wearing a pair of 3M TEKK Forceflex flexible safety eyewear. Mr. Scalise's eyewear met the applicable standards of ANSI Z87.1-2003.

As a consequence of this incident, Mr. Scalise sustained first and second degree flash burns to both forearms, extending from the wrist to the elbow, and a similar burn to the right leg area from the kneecap down approximately three inches. He suffered no burn injuries to any other part of his body.

Although a complete and comprehensive list of witnesses has not yet been identified, Appellant anticipates that testimony may be offered by Sean Scalise, District Manager; Glenn Crockett, Titan Service Technician; Richard Martinelli, Vice President and Regional Manager. Additional witnesses may be called at the hearing in this matter. The identification of those witnesses will be provided prior to their testimony.

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**CAL/OSHA Report No. 314572660**  
**Optional Report No. 015-12**  
**Inspection Date: 08/24/2011 - 11/23/2011**  
**Issuance Date: 02/13/2012**  
**CS HO ID: Q0442**  
**SE/IH Identification No. 00442**  
**Region 2**  
**District 1**

**OSH Appeals Board**

**EXHIBITS TO "PREFATORY STATEMENT"**

- Exhibit A: Heritage Operating, LP Railcar Training Manual;
- Exhibit B: Railcar Employee Training Record & Certification for Sean Scalise, dated March 12, 2010;
- Exhibit C: Photograph of dome;
- Exhibit D: Heritage Propane Employee Handbook, Revised January 2010;
- Exhibit E: Certifications - Sean Scalise;
- Exhibit F: Heritage Propane December Safety Meeting Bulletin (with attached NPGA No. W105 Bulletin);
- Exhibit G: 3M TEKK Force Flex Safety Eyewear literature;
- Exhibit H: Heritage Propane Hazard Assessment Survey (with survey form);
- Exhibit I: Heritage Propane Injury and Illness Prevention Program (IIPP), dated August 5, 2011; August 5, 2011 Sign-In Sheet; Heritage Propane Injury and Illness Prevention Program (IIPP), dated 9/1/09;
- Exhibit J: Heritage Propane Hazard Assessment Survey, dated 12/22/2009; and
- Exhibit K: Sign-up sheets for Monthly Health and Safety Meetings.

**State of California**

Division of Occupational Safety and Health  
RID 0950621 Index 4021  
2424 Arden Way, Suite 165  
Sacramento, CA 95825

Inspection Number: 314572660  
Inspection Dates: 08/24/2011 - 11/23/2011  
Issuance Date: 02/13/2012  
CSHO ID: Q0442  
Optional Inspection Nbr: 015-12



Phone: (916) 263-2800 Fax: (916) 263-2798

**Citation and Notification of Penalty**

Company Name: Titan Propane, LLC dba Northern Energy  
Inspection Site: 980 9th Street, Lincoln, CA 95648

**Citation I Item 1 Type of Violation: General**

T8 CCR 3203(a)(4): Injury and Illness Prevention Program.

(a) Effective July 1, 1991, every employer shall establish, implement and maintain an effective Injury and Illness Prevention Program (Program). The Program shall be in writing and, shall, at a minimum:

(4) Include procedures for identifying and evaluating work place hazards including scheduled periodic inspections to identify unsafe conditions and work practices. Inspections shall be made to identify and evaluate hazards.

Employer had not included procedures in their Injury and Illness Prevention Program to identify and evaluate work place hazards including scheduled periodic inspections to identify unsafe conditions and work practices, as required.

Date By Which Violation Must be Abated: 02/23/2012  
Proposed Penalty: \$ 900.00

See pages 1 through 4 of this Citation and Notification of Penalty for information on employer and employee rights and responsibilities.

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**Region 2**  
**District 1**

**OSH Appeals Board**

**CITATION NO. 1, ITEM 1 -- VIOLATION OF TITLE 8 CCR 3203(a)(4)**

Citation No. 1, Item 1. Type of Violation: General

“Employer had not included procedures in their Injury and Illness Prevention Program to identify and evaluate work place hazards including scheduled periodic inspections to identify unsafe conditions and work practices, as required.”

Title 8 CCR § 3203(a)(4) states as follows:

“(a) Effective July 1, 1991, every employer shall establish, implement and maintain an effective Injury and Illness Prevention Program (Program). The Program shall be in writing and, shall, at a minimum:

- (4) Include procedures for identifying and evaluating work place hazards including scheduled periodic inspections to identify unsafe conditions and work practices. Inspections shall be made to identify and evaluate hazards.”

**Titan Propane, LLC dba Northern Energy, Comments:**

Titan respectfully requests that this Citation be withdrawn and the proposed penalty dismissed for the following reasons:

As of the date of this incident, August 23, 2011, Titan’s parent company, Heritage Propane, had in effect an Injury and Illness Prevention Program (“IIPP”) which had last been reviewed by Mr. Sean Scalise, District Manager, on August 5, 2011. A copy of this Injury and Illness Prevention Program

is attached hereto as **Exhibit I**. An employee acknowledgment of Training “sign-up” sheet bearing Mr. Scalise’s signature and dated August 5, 2011 is also attached hereto and incorporated within **Exhibit I**. An earlier IIPP dated September 1, 2009 is also attached and incorporated into **Exhibit I**.

This Citation has been issued based on the charge that the “Employer had not included procedures in their Injury and Illness Prevention Program to identify and evaluate workplace hazards, including scheduled periodic inspections to identify unsafe conditions and work practices, as required.”

Reference is made to the Appellant’s Injury and Illness Prevention Program where, at II. Management and Commitment and Responsibility, subparagraph 2, it is noted that “employees will participate in conducting facility hazard assessments, inspections/audits of each facility, review and update of safety practices and procedures, incident investigations, hazard and operability studies and other safety-related activities.”

This facility did, in fact, implement a Hazard Assessment Survey designed to identify problems associated with potential workplace hazards at this particular location. Said surveys were performed by the District Manager, Sean Scalise, with the last such survey performed on December 22, 2009. Please see attached **Exhibit J**.

Further reference is made to Appellant’s IIPP at paragraph IV. Safety Communication Methods, subparagraph 1, where it is noted that “health and safety meetings will be conducted on a monthly basis for all The Company’s employees (meeting documentation is kept on file). Topics include the following: (a) Safety alerts/recalls; (b) Operational topics/recurring safety training; (c) Incident investigations reviews; (d) Audit action item tracking; (e) Area concerns; (f) Employee questions or concerns; (g) Safety awards.:

Such meetings were held as required, covering in part those topics identified above. Documentation concerning such meetings is attached hereto as **Exhibit K**.

Further reference is made to Appellant’s IIPP, subparagraphs 2, 3, 4 and 5 of paragraph IV, wherein further procedures have been implemented for purposes of evaluating workplace hazards and reporting them as required.

Further guidance and guidelines are found in paragraphs V. Hazard Assessment and Control; VI. Accident/Incident Investigation; and VII. Safety Planning, Rules and Work Procedures. Last, reference is made to paragraph VIII. Hazard Correction, where guidelines are offered on both the reporting of, and correction of, workplace hazards, as well IX. Safety and Health Training, where information is offered on the implementation of these programs through training and instruction.

Last, evidence and a more detailed explanation of the implementation of the Appellant’s Injury and Illness Prevention Program will be made through testimony from District Manager Sean Scalise and Vice President and Regional Manager, Richard Martinelli.

**State of California**

Division of Occupational Safety and Health  
RID 0950621 Index 4021  
2424 Arden Way, Suite 165  
Sacramento, CA 95825

Inspection Number: 314572660  
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Phone: (916) 263-2800 Fax: (916) 263-2798

**Citation and Notification of Penalty**

Company Name: Titan Propane, LLC dba Northern Energy  
Inspection Site: 980 9th Street, Lincoln, CA 95648

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**Citation 1 Item 2 Type of Violation: General**

T8 CCR 3380(f)(1)(A): Personal Protective Devices.

(f) Hazard assessment and equipment selection.

(1) The employer shall assess the workplace to determine if hazards are present, or are likely to be present, which necessitate the use of personal protective equipment (PPE). If such hazards are present, or likely to be present, the employer shall:

(A) Select, and have each affected employee use, the types of PPE that will protect the affected employee from the hazards identified in the hazard assessment.

On August 23, 2011 the employer failed to ensure that each affected employee used the selected types of PPE that would protect them from the hazards identified in the company's hazard assessment for the task of checking the propane railcar tank.

Date By Which Violation Must be Abated:

02/23/2012

Proposed Penalty:

\$ 900.00

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See pages 1 through 4 of this Citation and Notification of Penalty for information on employer and employee rights and responsibilities.

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**CITATION NO. 1, ITEM 2 -- VIOLATION OF TITLE 8 CCR 3380(f)(1)(A)**

Citation No. 1, Item 2. Type of Violation: General

“On August 23, 2011 the employer failed to ensure that each affected employee used the selected types of PPE that would protect them from the hazards identified in the company's hazard assessment for the task of checking the propane railcar tank.”

Title 8 CCR § 3380(f)(1)(A) states as follows:

“(f) Hazard assessment and equipment selection.

(1) The employer shall assess the workplace to determine if hazards are present, or are likely to be present, which necessitate the use of personal protective equipment (PPE). If such hazards are present, or likely to be present, the employer shall:

(A) Select, and have each affected employee use, the types of PPE that will protect the affected employee from the hazards identified in the hazard assessment.”

**Titan Propane, LLC dba Northern Energy, Comments:**

Titan respectfully requests that this Citation be withdrawn and the proposed penalty dismissed for the following reasons:

Reference is made to the Hazard Assessment Survey dated December 23, 2009, and attached hereto as **Exhibit J**. In that Hazard Assessment Survey, at subpart 1, reference is made to Personal

Protective Equipment (“PPE”). Within that subpart, instructions are given regarding clothing requirements, inspection requirements, how to put on and wear PPE, when to dispose of PPE and cleaning and storing of PPE. Attached to this document is a Hazard Assessment Survey prepared in conformance with 29 CFR, part 1910.132. Therein, 11 tasks are identified wherein PPE is required. As to each of those tasks, specific reference is made to the type of protective equipment required and a recommendation as to the type of equipment to be used. Please see attached **Exhibit J**.

In the absence of further specificity as to the type of PPE being referenced, Appellant will assume that it relates to Citation No. 5, Item No. 1, charging that Mr. Scalise was not wearing safety glasses with side shields, chemical goggles or chemical goggles with a face shield, as required. (See Title 8 CCR § 3382(a).) Without repeating that which is found in response to Citation No. 5, Item No. 1, reference is made to the type of eyewear to be used in Appellant’s Hazard Assessment Survey (see **Exhibit J**). More particularly, specific reference is made to the utilization of eyewear that meets the requirements of ANSI Z87.1 -- 2003. The eyewear being worn by Mr. Scalise at the time of this incident, did meet those ANSI standards (please see **Exhibit G**). Additionally, Mr. Scalise will provide testimony concerning his selection and utilization of that eyewear in conjunction with the task he was performing at the time of this incident.

**State of California**

Division of Occupational Safety and Health  
RID 0950621 Index 4021  
2424 Arden Way, Suite 165  
Sacramento, CA 95825

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Phone: (916) 263-2800 Fax: (916) 263-2798

**Citation and Notification of Penalty**

Company Name: Titan Propane, LLC dba Northern Energy  
Inspection Site: 980 9th Street, Lincoln, CA 95648

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**Citation 1 Item 3 Type of Violation: General**

T8 CCR 4650(e): Storage, Handling, and Use of Cylinders.

(e) Compressed gas cylinders shall be stored or transported in a manner to prevent them from creating a hazard by tipping, falling or rolling. Liquified fuel-gas cylinders shall be stored or transported in a position so that the safety relief device is in direct contact with the vapor space in the cylinder at all times.

On or about August 25, 2011 at the location of the inspection two tall compressed gas cylinders containing propane were not secured or stored to prevent them from creating a hazard by tipping, falling or rolling, as required.

Date By Which Violation Must be Abated:

02/23/2012

Proposed Penalty:

\$ 675.00

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See pages 1 through 4 of this Citation and Notification of Penalty for information on employer and employee rights and responsibilities.

Occupational Safety and Health Appeals Board  
2520 Venture Oaks Way, Suite 300  
Sacramento, CA 95833

**CAL/OSHA Inspection No. 314572660**  
**Optional Inspection No. 015-12**  
**Inspection Dates: 08/24/2011 - 11/23/2011**  
**Issuance Date: 02/13/2012**  
**CSHO ID: P0442**  
**SE/IH Identification No. 00442**  
**Region 2**  
**District 1**

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**FEB 28 2012**

**OSH Appeals Board**

**CITATION NO. 1, ITEM 3 -- VIOLATION OF TITLE 8 CCR 4650(e)**

Citation No. 1, Item 3. Type of Violation: General

"On or about August 25, 2011 at the location of the inspection two tall compressed gas cylinders containing propane were not secured or stored to prevent them from creating a hazard by tipping, falling or rolling, as required."

Title 8 CCR 4650(e), states as follows:

"(e) Compressed gas cylinders shall be stored or transported in a manner to prevent them from creating a hazard by tipping, falling or rolling. Liquified fuel-gas cylinders shall be stored or transported in a position so that the safety relief device is in direct contact with the vapor space in the cylinder at all times."

**Titan Propane, LLC dba Northern Energy Comments:**

Titan respectfully requests that this citation be withdrawn and the proposed penalty dismissed for the following reasons:

Appellant believes that the two cylinders referenced in the charging Citation were stored at that location for the purpose of being taken to a different location for refurbishing. Both cylinders were believed to have been empty of LPG fuel at the time. Additionally, the area within which they were located is a "secured area" not accessible to the public. The only people who would have come into

contact with them would have been employees who were familiar with the proper use and transport of the gas cylinders.

Appellant reserves its right to provide additional information upon receipt of Cal-OSHA's response to its filed Request for Documents and Witnesses.

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

2520 Venture Oaks Way, Suite 300  
Sacramento, CA 95833  
(916) 274-5751  
FAX (916) 274-5785

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OSH Appeals Board

APPEAL FORM

2012-R2D1-0633

314572660  
Inspection Number on Citation

Titan Propane, LLC, dba Northern Energy  
Employer Name on Citation

Employer Legal Name or DBA (Optional)

980 - 9th Street  
Address  
Lincoln, CA 95648

1. You only have 15 working days from receipt of a citation to appeal.

2. A copy of this form must be attached to each citation or notification appealed. Failure to file a completed form may result in dismissal of the appeal.

FIRST READ IMPORTANT INFORMATION ON THE REVERSE SIDE  
THEN COMPLETE ONE APPEAL FORM FOR EACH CITATION

1. This is an Appeal from:

CITATION NO(s): 2 Item No(s): 1

NOTIFICATION OF FAILURE TO ABATE ALLEGED VIOLATION  
CITATION NO(s): \_\_\_\_\_ Item No(s): \_\_\_\_\_

SPECIAL ORDER/SPECIAL ACTION NO: \_\_\_\_\_  
Item No(s): \_\_\_\_\_

2. Specific ground(s) for this appeal are: (Check all that apply)

The safety order was not violated.

The classification (i.e. serious, willful, repeat) is incorrect.

The abatement requirements are unreasonable.

Required changes     Time allowed to complete changes

The proposed penalty is unreasonable.

3. Explain any other reasons for appeal or issues to be raised on appeal. Affirmative defenses must be specifically stated. Some important affirmative defenses are listed on the OSHAB website at: <http://www.dir.ca.gov/OSHAB/oshab.html>

Please see Attachment to Appeal Form.

Inspection Number on Citation -- 3145 72 660  
Citation No. 2, Item No.1 (Serious)

T8 CCR 6775(a): Static Electricity

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OSH Appeals Board

Attachment to Appeal Form

Response to Citation No. 2, Item No. 1:

Titan Propane, LLC, dba Northern Energy ("Titan"), alleges the following affirmative defenses:

1. Independent employee action defense.
2. The Safety Order was not violated.
3. Logical time defense (see *Nicholson-Brown, Inc.*, 77-024, dec. after recon.) 12/20/79.
4. Absence of employer knowledge of serious violation (Labor Code § 6432).
5. The Citation is unduly vague, lacks clarity and thus void, in that it does not describe with particularity the nature of the violation.
6. The underlying standard is vague and thus, the Citation is void.
7. The underlying standard as charged is inapplicable to the Citation as alleged.
8. The Citation, the investigation leading up to the Citation and any alleged violations related thereto constitute selective enforcement by the Division of Occupational Safety and Health ("Division"), and evidence the Division singling out Titan for enforcement.
9. Given the unduly vague and confusing nature of the Citation, Titan reserves its right to allege other affirmative defenses as they may become known and hereby specifically reserves the right to amend its Appeal to allege any additional and other affirmative defenses at such time as they become known.
10. The Citation does not constitute a "Serious" violation under Title 8 of the California Code of Regulations (the "Regulations") and/or the California Labor Code (the "Code") as alleged in the Citation.
11. The Division cannot enforce a rule which it did not formally adopt through procedures established by the Administrative Procedure Act ("APA") (California Government Code § 11340, *et seq.*). By the investigation and inspection conducted, the issuance of the Citation, and the putative "enforcement" of the cited regulation, the Division is enforcing or using a rule or regulation which it did not adopt formally. The Division's conduct in this regard constitutes an "underground regulation" and is illegal and improper under the APA.

12. Titan did have in effect at the time of the subject Citation the appropriate Plan, Procedure or Program in place addressing the issues raised in this subject Citation.
13. The factual allegations cited in support of the Citation did not occur in the manner alleged.

4.

J. Myl 2-24-12  
(Signature of Employer or Employer's Representative)  
{If there is any change in representation after you file your appeal, you must notify the Appeals Board in writing}

JAMES T. ANWYL  
(Type or print name)

Attorney for Titan Propane, LLC, dba Northern Energy  
(Title)

P.O. Box 269127  
(Address) {Address where all communications from the Appeals Board will be sent}

Sacramento CA 95826-9127  
(City) (State) (Zip Code)

(916) 565-1800 JTAnwyl@anwylaw.com 2-24-12  
(Telephone) (E-Mail Address) (Date)

{All correspondence from the Appeals Board will be sent to the representative above at the address above. If there is any change in address, telephone number, and/or e-mail address after you file your appeal, you must notify the Appeals Board of the change(s). All such notifications must be in writing}

### IMPORTANT INFORMATION

- A. Use this form to appeal a Citation, Notification of Failure to Abate Alleged Violation, or Special Order/Special Action.
- B. You must complete *a separate appeal form for each citation or notification* you wish to appeal and *attach a copy of the complete citation or notification that you are appealing.*
- C. If the citation or notification being appealed includes more than one item do not use separate appeals forms for each item. Instead, specify the items you are appealing in the space provided in No. 1 on the front of this form. (for example, "Citation No. 1, Item Nos. 2, 5, and 8)
- D. Be sure to sign your appeal form and provide all the information requested in No. 4 above.
- E. Your appeal form shall be deemed not completed unless you attach a copy of each citation or notification that you are appealing, and failure to file a completed appeal form may result in dismissal of the appeal.
- F. If you or your representative change address, telephone number, and/or e-mail address, it is your responsibility to notify the Appeals Board in writing of the change(s). Otherwise the Appeals Board will continue to use the address it has on file and you risk not receiving notices or other communications from the Appeals Board. Appeals Board regulations make it the employer's obligation to notify the Appeals Board of any changes to the employer's and/or representative's contact information.
- G. Mail each completed Appeal form and citation or notification to the Occupational Safety and Health Appeals Board, 2520 Venture Oaks Way, Suite 300, Sacramento, CA 95833.
- H. Late appeals will not be accepted unless good cause is shown.

**State of California**

Division of Occupational Safety and Health  
RID 0950621 Index 4021  
2424 Arden Way, Suite 165  
Sacramento, CA 95825

Inspection Number: 314572660  
Inspection Dates: 08/24/2011 - 11/23/2011  
Issuance Date: 02/13/2012  
CSHO ID: Q0442  
Optional Inspection Nbr: 015-12



Phone: (916) 263-2800 Fax: (916) 263-2798

**Citation and Notification of Penalty**

Company Name: Titan Propane, LLC dba Northern Energy  
Inspection Site: 980 9th Street, Lincoln, CA 95648

**Citation 2 Item 1 Type of Violation: **Serious****

T8 CCR 6775(a): Static Electricity.

(a) Where not effectively grounded and/or bonded by contact or connection, provision shall be made to prevent the accumulation of static electrical charges which may create a source of ignition in the presence of flammable vapors or gases.

On or about August 23, 2011 (A) An employee wearing rubber (type) soled athletic shoes was releasing extremely flammable propane from the top of a railcar tank filled with liquid propane (LPG) when it ignited. This employee was not effectively grounded or bonded by contact or connection. (B) No provision had been made to bond and/or ground the propane railcar tank to prevent the accumulation of static electrical charges which may create a source of ignition in the presence of flammable vapors or gases, as required.

Date By Which Violation Must be Abated:	02/23/2012
Proposed Penalty:	\$ 10125.00

See pages 1 through 4 of this Citation and Notification of Penalty for information on employer and employee rights and responsibilities.

Occupational Safety and Health Appeals Board  
2520 Venture Oaks Way, Suite 300  
Sacramento, CA 95833

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**FEB 28 2012**

**CAL/OSHA Inspection No. 314572660**  
**Optional Inspection No. 015-12**  
**Inspection Dates: 08/24/2011 - 11/23/2011**  
**Issuance Date: 02/13/2012**  
**CSHO ID: P0442**  
**SE/IH Identification No. 00442**  
**Region 2**  
**District 1**

**OSH Appeals Board**

**CITATION NO. 2, ITEM 1 -- VIOLATION OF TITLE 8 CCR § 6775(a)**

Citation No. 2, Item 1. Type of Violation: Serious

"On or about August 23, 2011, (A) An employee wearing rubber (type) soled athletic shoes was releasing extremely flammable propane from the top of a railcar tank filled with liquid propane (LPG) when it ignited. This employee was not effectively grounded or bonded by contact or connection. (B) No provision had been made to bond and/or ground the propane railcar tank to prevent the accumulation of static electrical charges which may create a source of ignition in the presence of flammable vapors or gases, as required."

Title 8 CCR § 6775(a) states as follows:

"(a) Where not effectively grounded and/or bonded by contact or connection, provision shall be made to prevent the accumulation of static electrical charges which may create a source of ignition in the presence of flammable vapors or gases. This order applies specifically, but is not necessarily limited, to the following operations:

- (1) Blowing or agitating with air.
- (2) Loading and unloading tank cars and tank trucks.
- (3) Filling metal drums or containers.
- (4) Abrasive blasting.
- (5) Hydroblasting.

Exception: Bonding is not required where vehicles are loaded or unloaded exclusively with products not having a static accumulating tendency."

**Titan Propane, LLC dba Northern Energy Comments:**

Titan respectfully requests that this citation be withdrawn and the proposed penalty dismissed for the following reasons:

Initially, it must be noted that notwithstanding the investigative efforts of the U.S. Department of Transportation Federal Railroad Administration, California Public Utilities Commission Consumer Protection and Safety Division, and privately retained forensic fire experts, a determination has yet to be made as to either the ignition source or the cause of the railcar fire. More specifically, there has been no demonstrative evidence or finding that the ignition source for this fire was a static electrical charge. Furthermore, there has been no finding or determination that the actions of Mr. Scalise in any fashion contributed to or caused the fire.

It is respectfully submitted that reliance on Title 8 CCR § 6775(a) is inapplicable in this particular instance. The provisions of Title 8 CCR § 6775 do not apply to the actions of Mr. Scalise either prior to or at the moment of the fire. As noted in the attached Prefatory Statement, Mr. Scalise was performing a 3-step safety check procedure that is, and was, customarily followed prior to the unloading of the railcar tanks. As further noted in the Prefatory Statement, the railcar would have been moved from its current location to the facility loading rack, where it would have been positioned and grounded before any steps would have been taken to unload the railcar. In short, none of the operations listed in Title 8 CCR § 6775 were being performed by Mr. Scalise when this fire occurred.

Bonding and grounding requirements for liquid propane gas are addressed in NFPA documents and other industry literature. These documents, however, address the transfer of fuels between tanks or containers. Bonding and grounding is necessary between the transfer tank and the receiving tank to ensure any static generated by the flowing fuel does not create a difference in volting potential between the two. Bonding and grounding of a railcar sitting on a spur line is not required in the absence of transfer of that fuel.

Appellant anticipates that further evidence and testimony may be offered at the hearing of this matter concerning the issue of Mr. Scalise having been effectively bonded and grounded at the time of this incident. That testimony and evidence will involve the following considerations. In the science of electrostatics, materials are divided into three categories:

1. "Conductive." These are materials which will readily "throw" a spark. Most metals, some liquids, and the human body are common examples. In order to do so, the surface resistance must be below  $1 \times 10^6$  OHMS/SQ

2. "Dissipative." These materials will conduct static electricity, but at a greatly reduced speed thereby eliminating the incendive spike of current. Some natural materials have this property but is usually found in specifically designed single "ESD Safe" products.
3. "Insulators." These materials do not conduct electricity and will not spark under normal conditions. They include plastics, polys and other materials. They may generate charge, but tend to retain the charge until atmospheric ionization takes place. A common example is rubbing a balloon on your hair and then sticking the balloon to the wall. The wall and the balloon are both nonconductors (or insulators), and do not lose their charge to contact. The speed of static decay, or neutralization is dependent upon relative humidity and temperature in addition a variety of other factors.

Mr. Scalise was wearing leather gloves at the time of this incident. Typically, leather gloves fall into the static "dissipative" range. As a consequence, Mr. Scalise in all probability became bonded to the tanker when he first touched the exterior ladder when accessing the railcar. After climbing to the top, he walked down the gangway to the hatch, on what is believed to have been insulating footwear. Whereas his clothing or footwear may have developed and transferred charge to his body as he walked, one of three events would have taken place under these circumstances. (1) If the gloves are insulators, there would have been no discharge of static electricity. (2) If the gloves were dissipative, the static charge would drain within a few milliseconds, at a rate far below incendive levels. (3) If the gloves were conductive, the discharge would be a spark. In order for the spark to be incendive, however, the voltage on Mr. Scalise's body would have to exceeded 1500 volts. It is believed that the footwear being worn by Mr. Scalise would have prevented the generation of that degree of voltage over the period of time and distance that he walked on the top of the railcar.

Safety order was not violated from an employer obligation perspective. Titan respectfully submits they have taken the appropriate actions as a reasonable prudent employer in providing our employees the necessary equipment, resources and training to perform this job task safely. The training and resources provided were as follows:

- Certification and training of Mr. Scalise in the safe and appropriate method of safety checking railcars brought into this facility prior to the unloading of liquid propane gas.
- A copy of Mr. Scalise's training is found in the attached Heritage Operating Railcar Training Manual, **Exhibit A**. Furthermore, Mr. Scalise was properly certified relative to that training with his latest certification completed on March 12, 2010. Please see attached **Exhibit B**.

Proposed penalty is unreasonable.

- Attached are the Safety Rules and Guidelines to support Titan's contention it does have guidelines in place, and on which our employees were trained to perform the task of safety checking and the subsequent unloading of LPG fuel. Please see attached **Exhibits A & B**.

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

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APPEAL FORM OSH Appeals Board

314572660  
Inspection Number on Citation

2012-R2D1-0634

Titan Propane, LLC, dba Northern Energy  
Employer Name on Citation

1. You only have 15 working days from receipt of a citation to appeal.

Employer Legal Name or DBA (Optional)

2. A copy of this form must be attached to each citation or notification appealed. Failure to file a completed form may result in dismissal of the appeal.

980 - 9th Street  
Address  
Lincoln, CA 95648

FIRST READ IMPORTANT INFORMATION ON THE REVERSE SIDE  
THEN COMPLETE ONE APPEAL FORM FOR EACH CITATION

1. This is an Appeal from:

CITATION NO(s): 3 Item No(s): 1

NOTIFICATION OF FAILURE TO ABATE ALLEGED VIOLATION  
CITATION NO(s): \_\_\_\_\_ Item No(s): \_\_\_\_\_

SPECIAL ORDER/SPECIAL ACTION NO: \_\_\_\_\_  
Item No(s): \_\_\_\_\_

2. Specific ground(s) for this appeal are: (Check all that apply)

The safety order was not violated.

The classification (i.e. serious, willful, repeat) is incorrect.

The abatement requirements are unreasonable.

Required changes     Time allowed to complete changes

The proposed penalty is unreasonable.

3. Explain any other reasons for appeal or issues to be raised on appeal. Affirmative defenses must be specifically stated. Some important affirmative defenses are listed on the OSHAB website at: <http://www.dir.ca.gov/OSHAB/oshab.html>

Please see Attachment to Appeal Form.  
\_\_\_\_\_  
\_\_\_\_\_

Attachment to Appeal Form

Response to Citation No. 3, Item No. 1:

Titan Propane, LLC, dba Northern Energy ("Titan"), alleges the following affirmative defenses:

1. Independent employee action defense.
2. The Safety Order was not violated.
3. Logical time defense (see *Nicholson-Brown, Inc.*, 77-024, dec. after recon.) 12/20/79.
4. Absence of employer knowledge of serious violation (Labor Code § 6432).
5. The Citation is unduly vague, lacks clarity and thus void, in that it does not describe with particularity the nature of the violation.
6. The underlying standard is vague and thus, the Citation is void.
7. The underlying standard as charged is inapplicable to the Citation as alleged.
8. The Citation, the investigation leading up to the Citation and any alleged violations related thereto constitute selective enforcement by the Division of Occupational Safety and Health ("Division"), and evidence the Division singling out Titan for enforcement.
9. Given the unduly vague and confusing nature of the Citation, Titan reserves its right to allege other affirmative defenses as they may become known and hereby specifically reserves the right to amend its Appeal to allege any additional and other affirmative defenses at such time as they become known.
10. The Citation does not constitute a "Serious" violation under Title 8 of the California Code of Regulations (the "Regulations") and/or the California Labor Code (the "Code") as alleged in the Citation.
11. The Division cannot enforce a rule which it did not formally adopt through procedures established by the Administrative Procedure Act ("APA") (California Government Code § 11340, *et seq.*). By the investigation and inspection conducted, the issuance of the Citation, and the putative "enforcement" of the cited regulation, the Division is enforcing or using a rule or regulation which it did not adopt formally. The Division's conduct in this regard constitutes an "underground regulation" and is illegal and improper under the APA.

12. Titan did have in effect at the time of the subject Citation the appropriate Plan, Procedure or Program in place addressing the issues raised in this subject Citation.
13. The factual allegations cited in support of the Citation did not occur in the manner alleged.

4.

*J. Jyl*      2-24-12

---

(Signature of Employer or Employer's Representative)  
 {If there is any change in representation after you file your appeal, you must notify the Appeals Board in writing}

JAMES T. ANWYL  
 (Type or print name)

Attorney for Titan Propane, LLC, dba Northern Energy  
 (Title)

P.O. Box 269127  
 (Address) {Address where all communications from the Appeals Board will be sent}

<u>Sacramento</u>	<u>CA</u>	<u>95826-9127</u>
(City)	(State)	(Zip Code)

<u>(916) 565-1800</u>	<u>JTAnwyl@anwylaw.com</u>	<u>2-24-12</u>
(Telephone)	(E-Mail Address)	(Date)

{All correspondence from the Appeals Board will be sent to the representative above at the address above. If there is any change in address, telephone number, and/or e-mail address after you file your appeal, you must notify the Appeals Board of the change(s). All such notifications must be in writing}

### IMPORTANT INFORMATION

- A. Use this form to appeal a Citation, Notification of Failure to Abate Alleged Violation, or Special Order/Special Action.
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- G. Mail each completed Appeal form and citation or notification to the Occupational Safety and Health Appeals Board, 2520 Venture Oaks Way, Suite 300, Sacramento, CA 95833.
- H. Late appeals will not be accepted unless good cause is shown.

**State of California**

Division of Occupational Safety and Health  
RID 0950621 Index 4021  
2424 Arden Way, Suite 165  
Sacramento, CA 95825

Inspection Number: 314572660  
Inspection Dates: 08/24/2011 - 11/23/2011  
Issuance Date: 02/13/2012  
CSHO ID: Q0442  
Optional Inspection Nbr: 015-12



Phone: (916) 263-2800 Fax: (916) 263-2798

**Citation and Notification of Penalty**

**Company Name:** Titan Propane, LLC dba Northern Energy  
**Inspection Site:** 980 9th Street, Lincoln, CA 95648

**Citation 3 Item 1 Type of Violation: **Serious****

T8 CCR 5603: Sources of Ignition.

In locations where flammable vapors may be present, precautions shall be taken to prevent ignition by eliminating or controlling sources of ignition. Sources of ignition may include open flames, lightning, smoking, cutting and welding, hot surfaces, frictional heat, sparks (static, electrical and mechanical), spontaneous ignition, chemical and physical-chemical reactions and radiant heat.

On August 23, 2011 the employer created a fire and explosion hazard when they did not take precautions to prevent ignition by eliminating or controlling sources of ignition such as sparks (mechanical) by using spark proof tools such as brass or aluminum in areas where flammable vapors may be present, as required.

Date By Which Violation Must be Abated: 02/23/2012  
Proposed Penalty: \$ 10125.00

See pages 1 through 4 of this Citation and Notification of Penalty for information on employer and employee rights and responsibilities.

Occupational Safety and Health Appeals Board  
2520 Venture Oaks Way, Suite 300  
Sacramento, CA 95833

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FEB 28 2012

CAL/OSHA Inspection No. 314572660  
Optional Inspection No. 015-12  
Inspection Dates: 08/24/2011 - 11/23/2011  
Issuance Date: 02/13/2012  
CSHO ID: P0442  
SE/IH Identification No. 00442  
Region 2  
District 1

OSH Appeals Board

**CITATION NO. 3, ITEM 1 -- VIOLATION OF TITLE 8 CCR § 5603**

Citation No. 3, Item 1 Type of Violation: Serious

"On August 23, 2011, the employer created a fire and explosion hazard when they did not take precautions to prevent ignition by eliminating or controlling sources of ignition such as sparks (mechanical) by using spark proof tools such as brass or aluminum in an area where flammable vapors may be present, as required."

Title 8 § CCR 5603 states as follows:

"In locations where flammable vapors may be present, precautions shall be taken to prevent ignition by eliminating or controlling sources of ignition. Sources of ignition may include open flames, lightning, smoking, cutting and welding, hot surfaces, frictional heat, sparks (static, electrical and mechanical), spontaneous ignition, chemical and physical-chemical reactions and radiant heat."

**Titan Propane, LLC dba Northern Energy Comments:**

Titan respectfully requests that this citation be withdrawn and the proposed penalty dismissed for the following reasons:

The designed purpose of Section 5603 is to avoid the use of tools which might generate sparks where flammable vapors may be present. In other words, to control the potential for an ignition source under those circumstances where flammable vapors *may be present*. In this particular instance, however, the procedure Mr. Scalise was following, and which he always followed, was to utilize a pair of channel lock pliers to remove the sample valve plug. Please see attached **Exhibit**

C, Arrow #7. After removing the sample valve plug, he would (and did) place the plug along with the channel lock pliers at the base of the well. It was only after completing that task Mr. Scalise would (and did) open the handle for the sample valve allowing the discharge of a brief stream of LPG into the well. Please see attached **Exhibit C**, Arrow No. 6. In this instance, Mr. Scalise completed the task requiring use of a tool prior to the release of any potentially flammable material in the area where he was working.

Whereas Heritage Propane does not disagree with the applicability of Title 8 CCR § 5603 and the use of spark-proof tools when flammable vapors are present, the procedure established by the company and being following by Mr. Scalise did not present a risk of flammable vapors being present when tools were being used during this 3-step safety check.

The only tool being used by Mr. Scalise prior to the fire was a set of "channel locks." Evidence will be provided that these pliers are not large enough to retain significant incindive levels of charge. The electrical capacitance of a tool of this approximate size is below 5 pF. The metal to metal contact between the pliers and the valve would not have produced an electrostatic charge sufficient to explain the ignition of the LPG. Additionally, and as noted above, the pliers were placed in the well before the fuel was released. Any charge on the pliers transferred by Mr. Scalise would have been drained when the pliers touched the valve before the emission of the LPG fuel.

Safety order was not violated from an employer obligation perspective. Titan respectfully submits they have taken the appropriate actions as a reasonable prudent employer in providing our employees the necessary equipment, resources and training to perform this job task safely. The training and resources provided were as follows:

- Employee Handbook, revised January 2010. Please see attached **Exhibit D**.
- Mr. Scalise was trained and certified through Heritage's Employee Training Program at the time he was promoted to the position of District Manager. Please see attached certifications, **Exhibit E**.

Proposed penalty is unreasonable.

- Attached are the training materials provided to Mr. Scalise as well as all Heritage employees concerning the proper equipment and tools to use in connection with their employment with Heritage. Please see attached **Exhibits A & D**.

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

2520 Venture Oaks Way, Suite 300  
Sacramento, CA 95833  
(916) 274-5751  
FAX (916) 274-5785

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APPEAL FORM OSH Appeals Board

314572660

Inspection Number on Citation

2012-R2D1-0635

Titan Propane, LLC, dba Northern Energy

Employer Name on Citation

1. You only have 15 working days from receipt of a citation to appeal.

Employer Legal Name or DBA (Optional)

2. A copy of this form must be attached to each citation or notification appealed. Failure to file a completed form may result in dismissal of the appeal.

980 - 9th Street

Address

Lincoln, CA 95648

FIRST READ IMPORTANT INFORMATION ON THE REVERSE SIDE  
THEN COMPLETE ONE APPEAL FORM FOR EACH CITATION

1. This is an Appeal from:

CITATION NO(s): 4 Item No(s): 1

NOTIFICATION OF FAILURE TO ABATE ALLEGED VIOLATION  
CITATION NO(s): \_\_\_\_\_ Item No(s): \_\_\_\_\_

SPECIAL ORDER/SPECIAL ACTION NO: \_\_\_\_\_  
Item No(s): \_\_\_\_\_

2. Specific ground(s) for this appeal are: (Check all that apply)

The safety order was not violated.

The classification (i.e. serious, willful, repeat) is incorrect.

The abatement requirements are unreasonable.

Required changes     Time allowed to complete changes

The proposed penalty is unreasonable.

3. Explain any other reasons for appeal or issues to be raised on appeal. Affirmative defenses must be specifically stated. Some important affirmative defenses are listed on the OSHAB website at: <http://www.dir.ca.gov/OSHAB/oshab.html>

Please see Attachment to Appeal Form.

Attachment to Appeal Form

OSH Appeals Board

Response to Citation No. 4, Item No. 1:

Titan Propane, LLC, dba Northern Energy ("Titan"), alleges the following affirmative defenses:

1. Independent employee action defense.
2. The Safety Order was not violated.
3. Logical time defense (see *Nicholson-Brown, Inc.*, 77-024, dec. after recon.) 12/20/79.
4. Absence of employer knowledge of serious violation (Labor Code § 6432).
5. The Citation is unduly vague, lacks clarity and thus void, in that it does not describe with particularity the nature of the violation.
6. The underlying standard is vague and thus, the Citation is void.
7. The underlying standard as charged is inapplicable to the Citation as alleged.
8. The Citation, the investigation leading up to the Citation and any alleged violations related thereto constitute selective enforcement by the Division of Occupational Safety and Health ("Division"), and evidence the Division singling out Titan for enforcement.
9. Given the unduly vague and confusing nature of the Citation, Titan reserves its right to allege other affirmative defenses as they may become known and hereby specifically reserves the right to amend its Appeal to allege any additional and other affirmative defenses at such time as they become known.
10. The Citation does not constitute a "Serious" violation under Title 8 of the California Code of Regulations (the "Regulations") and/or the California Labor Code (the "Code") as alleged in the Citation.
11. The Division cannot enforce a rule which it did not formally adopt through procedures established by the Administrative Procedure Act ("APA") (California Government Code § 11340, *et seq.*). By the investigation and inspection conducted, the issuance of the Citation, and the putative "enforcement" of the cited regulation, the Division is enforcing or using a rule or regulation which it did not adopt formally. The Division's conduct in this regard constitutes an "underground regulation" and is illegal and improper under the APA.

12. Titan did have in effect at the time of the subject Citation the appropriate Plan, Procedure or Program in place addressing the issues raised in this subject Citation.
13. The factual allegations cited in support of the Citation did not occur in the manner alleged.

4.


2-24-12

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(Signature of Employer or Employer's Representative)  
 {If there is any change in representation after you file your appeal, you must notify the Appeals Board in writing}

**JAMES T. ANWYL**  
 (Type or print name)

**Attorney for Titan Propane, LLC, dba Northern Energy**  
 (Title)

**P.O. Box 269127**  
 (Address) {Address where all communications from the Appeals Board will be sent}

<b>Sacramento</b>	<b>CA</b>	<b>95826-9127</b>
(City)	(State)	(Zip Code)

<b>(916) 565-1800</b>	<b>JTAnwyl@anwylaw.com</b>	<b>2-24-12</b>
(Telephone)	(E-Mail Address)	(Date)

{All correspondence from the Appeals Board will be sent to the representative above at the address above. If there is any change in address, telephone number, and/or e-mail address after you file your appeal, you must notify the Appeals Board of the change(s). All such notifications must be in writing}

### IMPORTANT INFORMATION

- A. Use this form to appeal a Citation, Notification of Failure to Abate Alleged Violation, or Special Order/Special Action.
- B. You must complete *a separate appeal form for each citation or notification* you wish to appeal and *attach a copy of the complete citation or notification that you are appealing.*
- C. If the citation or notification being appealed includes more than one item do **not use separate appeals forms for each item.** Instead, specify the items you are appealing in the space provided in No. 1 on the front of this form. (for example, "Citation No. 1, Item Nos. 2, 5, and 8)
- D. **Be sure to sign your appeal form and provide all the information requested in No. 4 above.**
- E. Your appeal form shall be deemed not completed unless you attach a copy of each citation or notification that you are appealing, and failure to file a completed appeal form may result in dismissal of the appeal.
- F. If you or your representative change address, telephone number, and/or e-mail address, it is your responsibility to notify the Appeals Board in writing of the change(s). Otherwise the Appeals Board will continue to use the address it has on file and you risk not receiving notices or other communications from the Appeals Board. Appeals Board regulations make it the employer's obligation to notify the Appeals Board of any changes to the employer's and/or representative's contact information.
- G. Mail each completed Appeal form and citation or notification to the Occupational Safety and Health Appeals Board, 2520 Venture Oaks Way, Suite 300, Sacramento, CA 95833.
- H. Late appeals will not be accepted unless good cause is shown.

**State of California**

Division of Occupational Safety and Health  
RID 0950621 Index 4021  
2424 Arden Way, Suite 165  
Sacramento, CA 95825

Inspection Number: 314572660  
Inspection Dates: 08/24/2011 - 11/23/2011  
Issuance Date: 02/13/2012  
CSHO ID: Q0442  
Optional Inspection Nbr: 015-12



Phone: (916) 263-2800 Fax: (916) 263-2798

**Citation and Notification of Penalty**

**Company Name:** Titan Propane, LLC dba Northern Energy  
**Inspection Site:** 980 9th Street, Lincoln, CA 95648

**Citation 4 Item 1** Type of Violation: **Serious**

T8 CCR 3383(b): Body Protection.

(b) Clothing appropriate for the work being done shall be worn. Loose sleeves, tails, ties, lapels, cuffs, or other loose clothing which can be entangled in moving machinery shall not be worn.

On August 23, 2011 an employee wearing a short sleeve t-shirt and shorts was burned when the extremely cold, flammable liquid propane (LPG) he was releasing ignited. The employee's body, arms and legs were not protected from flames or cold burns from the liquid propane, as required.

Date By Which Violation Must be Abated:	02/23/2012
Proposed Penalty:	\$ 10125.00

See pages 1 through 4 of this Citation and Notification of Penalty for information on employer and employee rights and responsibilities.

Occupational Safety and Health Appeals Board  
2520 Venture Oaks Way, Suite 300  
Sacramento, CA 95833

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FEB 28 2012

CAL/OSHA Inspection No. 314572660  
Optional Inspection No. 015-12  
Inspection Dates: 08/24/2011 - 11/23/2011  
Issuance Date: 02/13/2012  
CSHO ID: P0442  
SE/IH Identification No. 00442  
Region 2  
District 1

OSH Appeals Board

**CITATION NO. 4, ITEM 1 -- VIOLATION OF TITLE 8 CCR § 3383(b)**

Citation No. 4, Item 1 Type of Violation: Serious

“On August 23, 2011, an employee wearing a short sleeve t-shirt and shorts was burned when the extremely cold, flammable liquid propane (LPG) he was releasing ignited. The employee’s body, arms and legs were not protected from flames or cold burns from the liquid propane, as required.”

Title 8 CCR § 3383(b) states as follows:

“(b) Clothing appropriate for the work being done shall be worn. Loose sleeves, tails, ties, lapels, cuffs, or other loose clothing which can be entangled in moving machinery shall not be worn.”

**Titan Propane, LLC dba Northern Energy Comments:**

Titan respectfully requests that this citation be withdrawn and the proposed penalty dismissed for the following reasons:

At the time of this incident, Mr. Scalise was wearing a pair of heavy cotton-mix shorts, a cotton-mix t-shirt, a pair of New Balance 410 GB shoes, leather gloves, cotton boxer briefs and white cotton socks. Historically, this apparel was typical of the type of “uniform” worn by Heritage Propane personnel in this geographical area and during this time of the year. It is anticipated further research will confirm this contention, but it is believed the ambient temperature was close to 90 degrees

Fahrenheit on the date and time Mr. Scalise was performing this task. It was for that reason Mr. Scalise was wearing a short-sleeved t-shirt and short pants.

Heritage Propane does instruct its employees on appropriate apparel, and Mr. Scalise (as District Manager) was aware of these instructions. A copy of a November 30, 2009 safety meeting bulletin is attached as **Exhibit F**. Attached to that bulletin was a copy of National Propane Gas Association Bulletin No. W105 - "Proper Clothing Promotes Safety". Perhaps the most significant aspect of that article is the emphasis on the wearing of heavy gloves and safety eyewear. In this particular instance, in addition to his outer clothing, Mr. Scalise was wearing heavy weather gloves and safety eyewear.

Although referenced as supporting this citation, Title 8 CCR § 3383(b) does not speak either generally or specifically to this citation. Section 3383(b) requires "Clothing appropriate for the work being done shall be worn." In this particular instance, the task Mr. Scalise was involved in (i.e. a 3-step safety check) did not, and would not ordinarily, require the wearing of clothing different than he was wearing at the time he was performing that task. As noted in the attached Prefatory Statement, Mr. Scalise had performed this task on at least 240 prior occasions without any injury or incident.

Further reference must be given to Title 8 CCR § 3383(b) as it relates to the statement that "loose sleeves, tails, ties, lapels, cuffs, or other loose clothing which can be entangled in moving machinery shall not be worn." That sentence gives clarity to the intent behind this code section but does not provide support for the citation that has been suggested. This is not a situation where Mr. Scalise was wearing clothing which did, or could conceivably, become entangled in moving machinery. This particular task did not involve the use of moving machinery, much less an entanglement in moving machinery. It is respectfully submitted that Title 8 CCR § 3383(b) was not violated by Mr. Scalise or his employer in connection with the task he was engaged in at the time of this accident.

In assessing the issue of compliance or non-compliance with Title 8, Guidelines relative to the industry must be given consideration. National Fire & Protection Agency ("NFPA") 58, Liquefied Petroleum Gas Code, 2004 edition is the LPG Code of Regulations followed by the industry. It makes no mention of any clothing requirement.

NFPA 77, Recommended Practice on Static Electricity, 2007 edition discusses clothing in section 7.6.4.1. It limits its discussion, however, to hospital operating rooms, explosives manufacturing or other occupations where exposure to flammable chemicals is ongoing and part of the process. Propane cylinder fill operations and truck tank delivery undoubtedly account for hundreds if not more exposures per day. NFPA 77 is, however, silent on any requirement for static safe clothing when dealing with LPG cylinder fill operations or truck tank delivery.

Safety order was not violated from an employer obligation perspective. Titan respectfully submits they have taken the appropriate actions as a reasonable prudent employer in providing our employees the necessary equipment, resources and training to perform this job task safely. The training and resources provided were as follows:

- Employee Handbook, revised January 2010. Please see attached **Exhibit D**.
- Heritage Propane December Safety Meeting Bulletin with attached NPGA No. W105 Bulletin. Please see attached **Exhibit F**.

Proposed penalty is unreasonable.

- Attached are the training materials provided to Mr. Scalise as well as all Heritage employees concerning the proper clothing to use in connection with their employment with Heritage. Please see attached **Exhibits D & F**.

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD

2520 Venture Oaks Way, Suite 300  
Sacramento, CA 95833  
(916) 274-5751  
FAX (916) 274-5785

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FEB 28 2012

OSH Appeals Board

APPEAL FORM

2012-R2D1-0636

314572660

Inspection Number on Citation

Titan Propane, LLC, dba Northern Energy  
Employer Name on Citation

Employer Legal Name or DBA (Optional)

980 - 9th Street  
Address  
Lincoln, CA 95648

1. You only have 15 working days from receipt of a citation to appeal.

2. A copy of this form must be attached to each citation or notification appealed. Failure to file a completed form may result in dismissal of the appeal.

FIRST READ IMPORTANT INFORMATION ON THE REVERSE SIDE  
THEN COMPLETE ONE APPEAL FORM FOR EACH CITATION

1. This is an Appeal from:

CITATION NO(s): 5 Item No(s): 1

NOTIFICATION OF FAILURE TO ABATE ALLEGED VIOLATION  
CITATION NO(s): Item No(s):

SPECIAL ORDER/SPECIAL ACTION NO: Item No(s):

2. Specific ground(s) for this appeal are: (Check all that apply)

The safety order was not violated.

The classification (i.e. serious, willful, repeat) is incorrect.

The abatement requirements are unreasonable.

Required changes  Time allowed to complete changes

The proposed penalty is unreasonable.

3. Explain any other reasons for appeal or issues to be raised on appeal. Affirmative defenses must be specifically stated. Some important affirmative defenses are listed on the OSHAB website at: <http://www.dir.ca.gov/OSHAB/oshab.html>

Please see Attachment to Appeal Form.

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FEB 28 2012

OSH Appeals Board

Attachment to Appeal Form

Response to Citation No. 5, Item No. 1:

Titan Propane, LLC, dba Northern Energy ("Titan"), alleges the following affirmative defenses:

1. Independent employee action defense.
2. The Safety Order was not violated.
3. Logical time defense (see *Nicholson-Brown, Inc.*, 77-024, dec. after recon.) 12/20/79.
4. Absence of employer knowledge of serious violation (Labor Code § 6432).
5. The Citation is unduly vague, lacks clarity and thus void, in that it does not describe with particularity the nature of the violation.
6. The underlying standard is vague and thus, the Citation is void.
7. The underlying standard as charged is inapplicable to the Citation as alleged.
8. The Citation, the investigation leading up to the Citation and any alleged violations related thereto constitute selective enforcement by the Division of Occupational Safety and Health ("Division"), and evidence the Division singling out Titan for enforcement.
9. Given the unduly vague and confusing nature of the Citation, Titan reserves its right to allege other affirmative defenses as they may become known and hereby specifically reserves the right to amend its Appeal to allege any additional and other affirmative defenses at such time as they become known.
10. The Citation does not constitute a "Serious" violation under Title 8 of the California Code of Regulations (the "Regulations") and/or the California Labor Code (the "Code") as alleged in the Citation.
11. The Division cannot enforce a rule which it did not formally adopt through procedures established by the Administrative Procedure Act ("APA") (California Government Code § 11340, *et seq.*). By the investigation and inspection conducted, the issuance of the Citation, and the putative "enforcement" of the cited regulation, the Division is enforcing or using a rule or regulation which it did not adopt formally. The Division's conduct in this regard constitutes an "underground regulation" and is illegal and improper under the APA.
12. Statement of witness Sean Scalise that he was wearing approved and appropriate safety eyewear at the time of the subject incident.

13. Titan did have in effect at the time of the subject Citation the appropriate Plan, Procedure or Program in place addressing the issues raised in this subject Citation.
14. The factual allegations cited in support of the Citation did not occur in the manner alleged.

4.

 2-24-12

(Signature of Employer or Employer's Representative)  
{If there is any change in representation after you file your appeal, you must notify the Appeals Board in writing}

JAMES T. ANWYL  
(Type or print name)

Attorney for Titan Propane, LLC, dba Northern Energy  
(Title)

P.O. Box 269127  
(Address) {Address where all communications from the Appeals Board will be sent}

Sacramento CA 95826-9127  
(City) (State) (Zip Code)

(916) 565-1800 JTAnwyl@anwylaw.com 2-24-12  
(Telephone) (E-Mail Address) (Date)

{All correspondence from the Appeals Board will be sent to the representative above at the address above. If there is any change in address, telephone number, and/or e-mail address after you file your appeal, you must notify the Appeals Board of the change(s). All such notifications must be in writing}

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**State of California**

Division of Occupational Safety and Health  
RID 0950621 Index 4021  
2424 Arden Way, Suite 165  
Sacramento, CA 95825

Inspection Number: 314572660  
Inspection Dates: 08/24/2011 - 11/23/2011  
Issuance Date: 02/13/2012  
CSHO ID: Q0442  
Optional Inspection Nbr: 015-12



Phone: (916) 263-2800 Fax: (916) 263-2798

**Citation and Notification of Penalty**

**Company Name:** Titan Propane, LLC dba Northern Energy  
**Inspection Site:** 980 9th Street, Lincoln, CA 95648

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**Citation 5 Item 1 Type of Violation: Serious**

T8 CCR 3382(a): Eye and Face Protection.

(a) Employees working in locations where there is a risk of receiving eye injuries such as punctures, abrasions, contusions, or burns as a result of contact with flying particles, hazardous substances, projections or injurious light rays which are inherent in the work or environment, shall be safeguarded by means of face or eye protection. Suitable screens or shields isolating the hazardous exposure may be considered adequate safeguarding for nearby employees.

On August 23, 2011 an employee was exposed to liquid propane (LPG), which is extremely cold and capable of causing burns similar to frostbite (tissue destruction) to the eyes and face, when he bent down and reached into a protective housing (manway) on top of a railcar tank and opened a valve letting LPG shoot out under pressure into the side of the manway. The employee was not wearing safety glasses with side shields, chemical goggles or chemical goggles with a face shield, as required.

Date By Which Violation Must be Abated: 03/01/2012  
Proposed Penalty: \$ 10125.00

Compliance Officer/District Manager

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See pages 1 through 4 of this Citation and Notification of Penalty for information on employer and employee rights and responsibilities.

Occupational Safety and Health Appeals Board  
2520 Venture Oaks Way, Suite 300  
Sacramento, CA 95833

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**CAL/OSHA Inspection No. 314572660**  
**Optional Inspection No. 015-12**  
**Inspection Dates: 08/24/2011 - 11/23/2011**  
**Issuance Date: 02/13/2012**  
**CSHO ID: P0442**  
**SE/IH Identification No. 00442**  
**Region 2**  
**District 1**

**OSH Appeals Board**

**CITATION NO. 5, ITEM 1 -- VIOLATION OF TITLE 8 CCR § 3382(a)**

Citation No. 5, Item 1 Type of Violation: Serious

"On August 23, 2011, an employee was exposed to liquid propane (LPG), which is extremely cold and capable of causing burns similar to frostbite (tissue destruction) to the eyes and face, when he bent down and reached into a protective housing (manway) on top of a railcar tank and opened a valve letting LPG shoot out under pressure into the side of the manway. The employee was not wearing safety glasses with side shields, chemical goggles or chemical goggles with a face shield, as required."

Title 8 CCR § 3382(a) states as follows:

"(a) Employees working in locations where there is a risk of receiving eye injuries such as punctures, abrasions, contusions, or burns as a result of contact with flying particles, hazardous substances, projections or injurious light rays which are inherent in the work or environment, shall be safeguarded by means of face or eye protection. Suitable screens or shields isolating the hazardous exposure may be considered adequate safeguarding for nearby employees.

The employer shall provide and ensure that employees use protection suitable for the exposure."

**Titan Propane, LLC dba Northern Energy Comments:**

Titan respectfully requests that this citation be withdrawn and the proposed penalty dismissed for the following reasons:

Heritage Propane embraces and agrees with the compliance required by Title 8 CCR § 3382(a). It trains its employees in this area and insists its employees comply with the mandates of this code section. In this instance, however, Mr. Scalise was wearing appropriate eyewear for the task he was engaged in.

As noted in the attached Prefatory Statement, Mr. Scalise was wearing a pair of 3M TEKK Force Flex Impact Resistant eyewear when this incident occurred. A copy of the written material which accompanied the purchase of this eyewear is attached hereto as **Exhibit G**. Most notably, the product material expressly specifies it “meets ANSI Z87.1-2003 standards”.

Title 8 CCR § 3382(a) does not end with subdivision (a). In looking further at this regulation, subsection (b)(1) also comes into play. Subsection (b)(1) provides as follows:

“Design, construction, testing and use of devices for eye and face protection purchased after January 12, 1995 shall be in accordance with American National Standard, Practice for Occupational and Educational Eye and Face Protection, Z87.1-1989, which is hereby incorporated by reference, except that integral lens and frame design will be allowed if the lens frame combination provides unit strength, as well as impact, penetration, heat and flammability resistance, optical qualities and eye zone coverage equal to or greater than as required by ANSI Z87.1-1989.”

This code section was initially enacted July 11, 1974. It was thereafter amended on October 5, 1977; April 16, 1980; July 8, 1985; January 12, 1995; and, most recently September 30, 1996. At the date of its last revision, ANSI Z87.1-1989 was the operative ANSI standard. Since then, ANSI Z87.1-2003 has been enacted. This new ANSI section supercedes the 1989 standards. As noted in the attached product literature (**Exhibit G**) the eyewear Mr. Scalise was wearing at the time in all respects complies with the requirements of Title 8 CCR § 3382(a).

Additionally, Heritage Propane is required to comply with the provisions of the Code of Federal Regulations (29 CFR Part 1910.132) requiring a Hazard Assessment Survey be conducted at each workplace to determine the need and appropriateness of Personal Protective Equipment (PPE). Attached as **Exhibit H** is a copy of the Hazard Assessment Survey Form Heritage Propane utilizes in determining if its Personal Protective Equipment satisfies the required standards. Attached to the narrative General Instructions is a two-page Hazard Assessment Survey which provides further guidance relative to the use of safety eye wear. At page 2 of the Survey, under “Common Operational Tasks”, is noted the need to utilize side-shield goggles meeting the standards of ANSI Z87.1-2003. Please see attached **Exhibit H**. Heritage Propane does require its employees to wear appropriate eyewear and, as noted in **Exhibit G** above, the safety glasses being worn by Mr. Scalise at the time of this incident complied in all respects with both the company’s requirements as well as Federal and State requirements.

Safety order was not violated from an employer obligation perspective. Titan respectfully submits they have taken the appropriate actions as a reasonable prudent employer in providing our employees the necessary equipment, resources and training to perform this job task safely. The training and resources provided were as follows:

- Purchase of appropriate safety eyewear for the tasks required by Mr. Scalise. Please see attached literature pertaining to 3M TEKK Force Flex Impact Resistant eyewear accompanying the eyewear purchased for Mr. Scalise. **Exhibit G.**
- Mr. Scalise and other employees were provided training and literature pertaining to the appropriate eyewear required to be used on the job. Please see attached **Exhibits D, G & H.**

Proposed penalty is unreasonable.

- Mr. Scalise was wearing the appropriate safety eyewear at the time of the subject incident with said eyewear meeting ANSI Z87.1-2003 standards.