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

SECRETARY OF LABOR, Complainant, v. S.K. WELLMAN FRICTION COMPANY, Respondent.	OSHRC DOCKET NO. 98-1318

APPEARANCES:

For the Complainant:
Patrick L. DePace, Esquire, U.S. Department of Labor, Office of the Solicitor, Cleveland, Ohio

For the Respondent:
Kenneth B. Stark, Esquire, Duvin, Cahn & Hutton, Cleveland, Ohio

Before: Administrative Law Judge Ann Z. Cook

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to section 10 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq*. ("the Act"). The trial of this matter was held in conjunction with that in Docket No. 98-0648 in Cleveland, Ohio on January 26 and 27, 1999, after which both parties filed post-hearing briefs.[1] The citation at issue in this proceeding alleges eleven serious violations arising from an Occupational Safety and Health Administration ("OSHA") inspection in June, 1998 at the S.K. Wellman Friction Company ("Wellman") facility in Cleveland, Ohio. Wellman timely contested the citation. Wellman does not contest that it is an employer engaged in a business affecting interstate commerce and that it is subject to the requirements of the Act. (Answer ¶ 4; J-1).

[1] A separate decision is being issued for Docket No. 98-0648.

THE BURDEN OF PROOF

To establish a violation of a standard, the Secretary has the burden of proving, by a preponderance of the evidence:

> (a) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, (c) employee access to the violative conditions, and (d) the employer's actual or constructive knowledge of the violation (*i.e.*, the employer either knew, or with the exercise of reasonable diligence could have known, of the violative conditions).

Atlantic Battery Co., 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

ALLEGED SERIOUS VIOLATIONS OF 29 CFR 1910.146(d) and (f)

The Secretary alleges eight separate violations of the permit-required confined spaces standard arising from a March 5, 1998 entry into a "bag house" at Wellman's facility. The function of the bag house is to clean the air leaving the plant's molding and machine operations before it is released into the environment. The bag house, which contains approximately 240 air filters, is 20 feet long, 10 feet wide and 20 feet high. Air from the plant operations is drawn into the bag house and through the air filters where the particulate matter is removed and collects on the outside of the filter bags. Periodically, the particulate dust is removed from the outside of the bags by a blast of compressed air that shakes the bags and causes the dust to fall off. The bottom of the bag house is a V-shaped hopper through which an auger runs to convey the fallen dust out of the bag house. The auger is covered by a grate that forms the floor of the bag house. Kent Yaeger, the plant safety director, designated the bag house a permit-required confined space. (Tr. 338-43, 355). Wellman was cited in 1996 for failure to develop written procedures for entry into confined spaces. (C-1).

The air entering the bag house from the factory carries microcrystalline cellulose, graphite and amorphous silica. These substances all have a permissible exposure limit of 15 milligrams per cubic meter ("mg/m^3"). At the permissible exposure level they are visible as dust in the air, and, at explosive levels, concentrations of each would be so great that vision would be obscured at 5 feet. The fan moves 35,000 cubic feet of air every minute, which, Yaeger testified, causes the air in the hopper section of the bag house to change about every second. Outside air is used for ventilation, which is uniform throughout the bag house. (Tr. 130-31, 280-89, 342-43, 349, 357; C-7-9).

On April 18, 1997, in preparation for maintenance personnel's entry into the bag house, Yaeger removed the access door and used a three-gas meter to check for flammable gases and the oxygen content. He found no flammable gases, and the oxygen content was 21%, about that of the outside air being drawn in by the fan. Looking in, he did not see dust in the air and was able to see to the other end of the building. Yaeger prepared and retained an entry permit form, although employees did not in fact enter the bag house that day. (Tr. 339-45; R-4).

On May 5, 1998, Yaeger prepared for employees to enter the bag house to repair the auger. He measured the oxygen content and found it to be 21%, and he checked for flammable gases and found none. He also made a visual check for airborne dust and was able to see clearly through to the other end of the bag house. The bag cleaning mechanism had been activated to remove dust on the outside of the bags, and there was little visible surface dust. The bag cleaning mechanism was then deactivated, and the auger was locked out. Two maintenance men entered, wearing white Tyvek suits and goggles, and a third employee stood by. The three employees had been trained for confined space entry, which included an instruction to leave the confined space if conditions changed. Yaeger had prepared an entry permit before the employees entered, and he looked in every five or ten minutes after the entry to assure that conditions had not changed. (Tr. 346-53, 359-63; C-6).

Alternate Entry Procedures

In Citation 1, Items 1a-1c and 2a-2f, the Secretary alleges various violations of the permit and pre-entry evaluation provisions of the confined spaces standard set out in paragraphs (d) and (f). Wellman contends that since it complied with the alternate procedures specified in paragraph (c)(5), compliance with paragraphs (d) and (f) was not required. Wellman has the burden of proving the exception. *Trinity Indus., Inc.*, 18 BNA OSHC 1635, 1639 (No. 95-0455, 1999).

Paragraph (c)(5)(i) lists six requirements an employer must fulfill before qualifying to use the alternate procedure described in (c)(5)(ii). The first is that the employer demonstrate that the only hazard in the permit space is an actual or potential atmospheric hazard. The second is that the employer demonstrate that continuous forced-air ventilation alone is sufficient to maintain the space safe for entry. Assuming for the moment that Wellman has satisfied the first two requirements, the third requirement, set out in paragraph (c)(5)(i)(D), is that the employer demonstrate that it "develop[ed] monitoring and inspection data to substantiate" the first two requirements.

Wellman argues that the two entry permits completed by Yaeger on April 18, 1997, and May 5, 1998, satisfy the third requirement. (R. Brief p. 7). The two permits report zero toxic material, zero explosives, and 21% oxygen, without noting how the measurements were obtained. (C-6, R-4). Neither permit documents the air flow, and the 1997 permit erroneously indicates natural instead of forced ventilation. The permits do not show the three airborne dusts identified by Yaeger as potentially explosive or Yaeger's calculation that the air changed about every second.

What developing "monitoring and inspection data" requires is not set out in the standard, and neither party has argued it. However, in the preamble to the standard, OSHA stated the required data "are essential for the employer and employees, as well as OSHA, to be able to determine whether or not the space can be maintained safe for entry with the use of ventilation alone." 58 Fed. Reg. 4462, 4488 (1993). To be available to OSHA and employees, measurements and calculations cannot be recorded solely in the mind of the person collecting the data. I conclude that Yaeger's unrecorded calculations and measurements did not meet the standard and that Wellman did not develop monitoring and inspection data to demonstrate that the permit space posed only an atmospheric hazard and that ventilation alone was sufficient to maintain it safe for entry. Wellman has therefore failed to establish that its entry on May 5, 1998, came within the exception in paragraph (c)(5)(i).

Citation 1, Item 1a

This item alleges that Wellman did not properly identify and evaluate the potential hazards of the bag house, including exposure to potentially explosive dust concentrations of graphite and microcrystalline cellulose, and exposure to respirable nuisance dusts of graphite and amorphous silica. Wellman, it is alleged, thereby violated 1910.146(d)(2), which directs employers to identify and evaluate the hazards of permit spaces before employees enter them.

OSHA compliance officer ("CO") Carolyn Donovan testified that her discussion with two maintenance men and her review of the material safety data sheets ("MSDS") for graphite, amorphous silica and microcrystalline cellulose led her to believe that the hazards in the bag house on May 5, 1998, included "flammable dusts, combustible dusts, mechanical hazards, potential engulfment hazard." She concluded that Wellman had not adequately evaluated these hazards prior to entry. (Tr. 88-89, 102). However, Donovan was not a persuasive witness, often professing lack of knowledge or memory, and often appearing to provide only those facts she thought appropriate.

(*See, e.g.*, Tr. 87, 97, 103-05, 120-29, 139-43). Moreover, her testimony was directly and persuasively countered by that of Yaeger and Dr. Antone Lott, an expert in industrial hygiene.

Yaeger testified that prior to entry, his meter readings of the bag house air showed no flammable gases and 21% oxygen. Having previously consulted the MSDS of microcrystalline cellulose, graphite and amorphous silica, and knowing at what concentrations they may become explosive or endanger human health, he checked visually to see if there were concentrations of dust, found none, and concluded there was no explosive danger. The auger was locked out and the bag cleaning mechanism deactivated, thus eliminating mechanical hazards. The forced-air ventilation was pulling in outside air so that the air changed completely about every second. (Tr. 343-49). Lott's expert opinion was that under these circumstances, the bag house was safe for entry. (Tr. 290-92).

CO Donovan's conclusion that a potential engulfment hazard existed appeared to be based on an employee's statement to her that conditions were so dusty in the bag house that the whites of his eyes had turned black, a condition that Lott maintained was physically impossible. (Tr. 102, 293). The employee did not testify, and no corroborating evidence was offered. The record provides no persuasive evidence of an engulfment hazard.

The Secretary has not shown that Wellman failed to identify and evaluate hazards in the bag house before employees entered it on May 5, 1998. This citation item is vacated.

Citation 1, Item 1b

The Secretary alleges that Wellman did not determine acceptable entry conditions, in particular, exposure to potentially explosive dust concentrations, and thereby violated paragraph (d)(3)(i), which provides, in pertinent part, as follows:

> [T]he employer shall: ... (3) Develop and implement the means, procedures, and practices necessary for safe permit space entry operations, including ... (i) specifying acceptable entry conditions.

The Secretary appears to assert Wellman violated this provision by failing, or using improper means, to evaluate the explosive potential of dust in the bag house. The method Wellman used was to check visually for airborne dust. The dust in the bag house was what remained after purifying air known to contain microcrystalline cellulose, graphite and amorphous silica, and, therefore, contained these substances. At their explosive levels, these substances would be so concentrated that visibility

would be no more than a few inches.[2] (Tr. 284, 287-88). CO Donovan conceded these substances would be very visible at their permissible exposure levels, which are much lower than their explosive levels. (Tr. 130-31, 133-34). Since there is no instrument that reads combustible dust levels, appropriate monitoring measures vary. (Tr. 100-01). However, in defining "hazardous atmosphere" in paragraph (b), the standard notes that when vision is obscured at 5 feet, airborne dust concentrations approximate those at or exceeding lower flammable limits. I find that the Secretary has not shown that Yaeger's visual evaluation was inadequate to rule out an explosive dust hazard. The Secretary accordingly has failed to prove the alleged violation, and this citation item is vacated.

Citation 1, Item 1c

This item alleges that Wellman "did not verify that conditions in the bag house were acceptable throughout the duration of the entry," in violation of paragraph (d)(3)(v). That paragraph provides, in pertinent part, that:

> T]he employer shall: ... (3) Develop and implement the means, procedures, and practices necessary for safe permit space entry operations, including ... (v) Verifying that conditions in the permit space are acceptable for entry throughout the duration of an authorized entry.

The Secretary has not explained how Wellman's monitoring of the entry was inadequate. Apparently, the Secretary believes conditions in the bag house changed, becoming very dusty, without Wellman detecting it. CO Donovan testified that she was told by one of the employees who entered the bag house on May 5, 1998, that the conditions were or became so dusty he had to leave to get goggles and that the whites of his eyes turned black and he got dust in his ears. (Tr. 88-89, 102). However, as noted *supra*, Lott's opinion was that blackening of the whites of the eyes is an impossibility. (Tr. 293). Moreover, Yaeger testified that both employees wore goggles when they entered, that no one had complained to the nurse on duty that day, and that employees were trained to observe conditions and to leave the permit space if conditions changed. (Tr. 350, 362). Yaeger further testified that he checked on the two employees who entered about every ten minutes and that a third employee remained just outside the entrance to the space. (Tr. 350-54, 362). The Secretary

[2]The explosive levels of these substances are as follows: microcrystalline cellulose - 55,000 mg/m^3; graphite - 25,000 mg/m^3; amorphous silica - 30,000-70,000 mg/m^3.

has not shown that Wellman's procedure was inadequate to verify that conditions remained acceptable for entry throughout the entry. This citation item is vacated.

Citation 1, Items 2 a, 2b, 2c, 2d, 2e

The Secretary alleges Wellman violated 1910.146(f) by failing to include on the May 5, 1998, entry permit the following information: (1) the purpose of the entry as required by paragraph (f)(2); the hazards of the space entered, including potentially explosive dust concentrations and exposure to airborne respirable dusts such as graphite and microcrystalline cellulose, as required by paragraph (f)(7); (3) the acceptable entry conditions, as required by paragraph (f)(9); (4) the results of initial and periodic tests with the names or initials of the testers and an indication of when the tests were performed; as required by paragraph (f)(10); and (5) other information the inclusion of which was necessary to ensure employee safety, such as the levels of respirable amorphous silica, graphite and microcrystalline cellulose, and information related to the dust explosion potential, as required by paragraph (f)(14).

The entry permit is a crucial element of the permit-required confined spaces standard, summing up the employer's efforts to identify and control conditions in permit spaces. Its preparation is a central part of an employer's determination that conditions are safe for entry. It also provides entrants with a means of assessing the adequacy of pre-entry preparation. The permit should provide a concise summary of the requirements for a particular entry. In adopting the standard, OSHA emphasized that the permit is "considerably more than a simple checklist; it requires careful thought and planning. All measures necessary for making the particular permit space safe for entry must be listed, otherwise, it is likely that some procedures will be omitted, with serious consequences." 58 Fed. Reg. 4462, 4503 (1993).

Wellman's May 5, 1998 entry permit was a single page, fill-in-the-blank type form, completed and signed by Yaeger, which identified the location, personnel and date as well as the protective equipment to be used. *See* C-6. Under the heading "Environment checks," the spaces were completed as follows: Toxic materials "0"; Oxygen level "0K 21"; Explosives "none." However, there was no notation of what tests were done, when they were done, or who did them. Under the heading "What has been done to assure above conditions?" natural ventilation was checked erroneously. There was no entry under the heading "Special considerations necessary to safely

perform the tasks assigned," and graphite, microcrystalline cellulose and amorphous silica were not mentioned anywhere on the form. Similarly, there was no mention of the lockout of the auger or the deactivation of the dust removal mechanism. The permit lacked the information specified by the cited paragraphs, and fell below far below what is required.

The Secretary has established the alleged violations. The failure to provide the required information on the permit deprived entrants and potential rescuers of information that might have been needed to exit safely or to undertake a successful rescue and could have led to serious injury or death had conditions changed during the entry. These items are affirmed as serious violations.

Penalty

The Secretary grouped Items 2a-2e of Citation 1 for penalty purposes and, without explaining her calculations, proposed a total penalty of $1,500 for these items. In determining appropriate penalties for violations, due consideration is to be given to the gravity of the violation and to the employer's size, history and good faith. The gravity of the violation is generally "the primary element in the penalty assessment." *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2214 (No. 87-2059, 1993). While the violations could have caused very serious injuries, I find the probability of that occurring low. Wellman had accounted for mechanical, atmospheric and engulfment hazards, although the permit gave little notice of it. Since Wellman employs 350 individuals and has a history of prior citations, including one in 1996 for not having written procedures for entry into confined spaces, no reduction for size, history or good faith is appropriate. Based on the gravity of the violations, a total penalty of $900 is appropriate and is accordingly assessed for these items.

ALLEGED SERIOUS VIOLATION OF 29 CFR 1910.157(c)(4)

Citation 1 Item 3 alleges that a portable fire extinguisher was missing from its designated location adjacent to the bell furnace area, in violation of 1910.157(c)(4), which provides:

> The employer shall assure that portable fire extinguishers are maintained in a fully charged and operable condition and kept in their designated places at all times except during use.

After refreshing her memory, CO Donovan testified that a fire extinguisher was missing from its designated location adjacent to the bell furnace. No evidence was introduced to contradict her observation. Donovan also testified that the hazard of the missing extinguisher was that it would not

be available for an employee to use in a fire situation. (Tr. 108-09). Wellman's policy was that in case of a fire, employees were to evacuate. (Tr. 187). However, it is simply not credible that Wellman's emergency action plan would not call for the extinguisher's use by someone in case of a fire. Presumably, the designated fire extinguisher place was there for a purpose.

The uncontradicted evidence shows noncompliance with the standard, and, since the absence of the extinguisher from its designated place would have been visible to any supervisor walking past, both employee exposure and employer knowledge are also established. Had someone needed the extinguisher in an emergency, its absence could have resulted in serious injury. The Secretary, however, has produced no evidence to show serious injury was at all probable. No evidence was offered about the number of employees in the area, the proximity of other extinguishers, the presence of combustible materials, or an increased danger because of the type of work being done in the area. On this record, I conclude that the proposed penalty of $1,500 is excessive, particularly since the Secretary did not explain its basis. I also conclude that the gravity is low and that a $100 penalty is appropriate. This item is affirmed as a serious violation, and a penalty of $100 is assessed.

ALLEGED SERIOUS VIOLATION OF 29 CFR 1910.179(j)(2)(i)

Citation 1 Item 4 alleges that Wellman did not maintain a daily to monthly inspection program for the cranes used in various locations in the facility, in violation of 1910.179(j)(2)(i), which requires daily inspections of all functional operating mechanisms for maladjustment interfering with proper operation. In support of this allegation, the Secretary offered only the testimony of CO Donovan that she asked for and did not receive crane inspection records. This is clearly inadequate to establish that daily inspections were not done. This citation item is vacated.

ALLEGED SERIOUS VIOLATION OF 29 CFR 1910.242(b)

Citation 1 Item 5 alleges that employees in the bell furnace area used compressed air measured at 90 psi for cleaning purposes, in violation of 1910.242(b), which provides:

> Compressed air shall not be used for cleaning purposes except where reduced to less than 30 p.s.i. and then only with effective chip guarding and personal protective equipment.

The Secretary's proof consisted of CO Donovan's cursory testimony, after she had refreshed her memory by reading the citation, that she "vaguely recall[ed]" that she "saw an employee using

compressed air for a purpose, cleaning, that was greater than 90 psi." She further testified that while she did not recall if she had seen the employee working with the hose, she knew it was used in that condition. Donovan stated that use of a hose with excessive pressure created the chance of a foreign body embedding in the eye or under the skin, or of air being injected under the skin. (Tr. 109-10).

With such an inadequate memory of what she saw, Donovan's unsubstantiated testimony is insufficient to establish the violation. This is especially true since other of her opinions and conclusions, set out *supra*, have been shown to be ill-founded. Without a fuller description of what she observed, including where it occurred, whether it was in plain view, and what investigation she conducted, her conclusory statements are unpersuasive. This citation item is vacated.

FINDINGS OF FACT

The foregoing constitutes my findings of fact in accordance with Federal Rule of Civil Procedure 52(a). Any proposed findings of fact inconsistent with this decision are hereby denied.

CONCLUSIONS OF LAW

1. Wellman is engaged in a business affecting commerce and has employees within the meaning of section 3(5) of the Act. The Commission has jurisdiction of the parties and the subject matter of the proceeding.

2. Wellman was in serious violation of section 5(a)(2) of the Act as alleged in Citation 1, Items 2a, 2b, 2c, 2d, 2e and 3.

3. Wellman was not in violation of section 5(a)(2) of the Act as alleged in Citation 1, Items 1a, 1b, 1c, 4 and 5.

4. A total civil penalty of $1,000.00 is appropriate for the serious violations of the Act.

ORDER

On the basis of the foregoing Findings of Fact and Conclusions of Law, it is ordered that:

1. Items 2a, 2b, 2c, 2d, 2e and 3 of Citation 1 are affirmed as serious violations, and a total penalty of $1,000.00 is assessed.

2. Items 1a, 1b, 1c, 4 and 5 of Citation 1 are vacated.

Ann Z. Cook
Judge, OSHRC

Dated:
Washington, D.C.