United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR, Complainant, v. ACTIVE OIL SERVICE, INC., Respondent	:	OSHRC Docket No. 00-0482

DECISION

Before: RAILTON, Chairman; STEPHENS and ROGERS, Commissioners.

Active Oil Service, Inc. (Active) is based in Newark, New Jersey, and engaged in the business of cleaning, servicing, and removing fuel tanks. On August 2, 1999, Active sent four employees to Tirenergy Corporation's (Tirenergy) tire recycling facility in Windgap, Pennsylvania, to clean a 10,000 gallon underground storage tank containing pyro-oil, a flammable liquid made from recycled tires.[1] To clean inside the tank, employees first had to enter a separate, underground concrete vault that was situated on top of the tank over its manhole cover. Employee Joseph Vincent was killed when an explosion occurred while he was using an oxy-acetylene torch inside the vault to burn off bolts, which secured the manhole cover to the tank. Active's designated foreman, Rudy Jezercak, was seriously burned in the explosion.

[1] Pyro-oil is a fuel oil produced through a recycling process called pyrolysis, which involves chopping, shredding, and heating old tires.

Compliance officer Mark Stelmack conducted an investigation of the incident for the Occupational Safety and Health Administration (OSHA). As a result of his investigation, the Secretary issued three citations alleging three serious violations of OSHA's respiratory protection standard in 29 C.F.R. § 1910.134; one willful violation of OSHA's welding, cutting and brazing standard in 29 C.F.R. § 1910.252; and multiple serious and willful violations of OSHA's confined space standard in 29 C.F.R. § 1910.146. Judge Covette Rooney affirmed each of the cited items.

At issue on review is whether the judge properly affirmed three of the willful items and three of the serious items. We first address the threshold issue of whether the judge erred in finding that the confined space standard applies to the cited conditions.

Applicability of the Confined Space Standard

Section 1910.146(b) defines a confined space as follows:

> "Confined space" means a space that: (1) Is large enough and so configured that an employee can bodily enter and perform assigned work; and (2) Has limited or restricted means for entry or exit (for example, tanks, vessels, silos, storage bins, hoppers, vaults, and pits are spaces that may have limited means of entry.); and (3) Is not designed for continuous employee occupancy.

Active concedes that the cube-shaped vault located above the storage tank's manhole was large enough and so configured that it was possible for employees to bodily enter and perform assigned work, and also that it was not designed for continuous employee occupancy. Active argues only that the vault was not a confined space because its depth, estimated to be between 36 to 50 inches, was shallow enough to permit unrestricted entry and exit.

We disagree. In *General Dynamics Land Systems Div., Inc.*, 15 BNA OSHC 1275, 1991-93 CCH OSHD ¶ 29,467 (No. 83-1293, 1991) ("*General Dynamics*"), a decision relied upon by Active, the Commission did not regard depth as a decisive factor in making a confined space determination. Noting that

the shallowness of a space "may make [it] even more confined," the Commission found that while depth "may play a part in determining whether certain spaces are confined, …the limited nature of the ventilation, and the difficulty of ingress/egress … appear to be the more pivotal factors." *Id*. at 1284, 1991-93 CCH OSHD at p. 39,756. Here, employee Vincent entered the vault through a narrow 22-inch manhole and was almost completely inside the vault while using a torch to remove bolts from the lid of the tank below. Based on these facts, we find that the vault was large enough and so configured that an employee could bodily enter and perform assigned work; had limited or restricted means for entry or exit (the narrowness of the entry and exit in light of the manhole's configuration); and was not designed for continuous employee occupancy. Accordingly, we conclude that the vault was a confined space.[2]

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[2] While he fully concurs with this conclusion, Commissioner Stephens questions whether it is still apropos to rely upon the assessment in *General Dynamics* that the limited nature of the ventilation and the difficulty of ingress/egress are "more pivotal factors" than others for defining a "confined space." *General Dynamics*, 15 BNA OSHC at 1284, 1991-93 CCH OSHD at p. 39,756. At the time of the decision in 1991, the confined space regulation had not been finally promulgated and the Commission found "[t]here is no single definition of a 'confined space'" to apply in that case. *Id.* at 1281, 1991-93 CCH OSHD at p. 39,752. Thus, the Commission derived what it described as a consensus definition from various standards and expert testimony. In contrast, section 1910.146(b) sets forth a three-prong definition. Nevertheless, Commissioner Stephens regards *General Dynamics* as relevant in confirming that the 22-inch wide manhole here satisfied the clause (2) requirement of a space having a limited or restricted means of entry or exit. That Vincent "was almost completely inside" the vault conceivably may have a bearing on whether the vault satisfied clause (1), which requires that a space must be "large enough and so configured so that an employee can bodily enter and perform assigned work." As explained by the Preamble in the Notice of Final Rule for Permit-Required Confined Spaces, the intent of this clause is to have the regulation "cover only spaces that were large enough for the *entire body* of an employee to enter." 58 Fed. Reg. 4462, 4477 (1993) (emphasis added). However, in view of Respondent's concession that the vault met the requirement of clause (1), Commissioner Stephens finds it is unnecessary to decide the

We also find that the vault was a permit-required confined space, which the standard defines as follows:

> "Permit-required confined space (permit space)" means a confined space that has one or more of the following characteristics: (1) Contains or has a potential to contain a hazardous atmosphere; (2) Contains a material that has the potential for engulfing an entrant; (3) Has an internal configuration such that an entrant could be trapped or asphyxiated by inwardly converging walls or by a floor which slopes downward and tapers to a smaller cross-section; or (4) Contains any other recognized serious safety or health hazard.

Here, the tank contained a flammable fuel that the record shows was the only possible source for an explosive atmosphere inside the vault. Notwithstanding Active's argument that the cover to the tank was closed, we find that vapors from the tank must have infiltrated the vault while employee Vincent was using the torch to burn off bolts from the lid of the tank, creating a hazardous atmosphere that resulted in an explosion. Furthermore, the potential for a hazardous atmosphere in the vault is supported by the record. The assigned work specifically required removing the tank's manhole cover, thus allowing the tank's atmosphere to enter the vault. Active's president, Conrad Manisera, admitted that when the manhole covers to both the vault and the tank were open, the vault had the potential to contain a hazardous atmosphere if there was a "cross wind" or if the temperature of the pyro-oil inside the tank were to exceed "60 some odd degrees." Based on these circumstances, we find that the vault was a permit-required confined space.

Willful Citation 2, Item 1

Under this item, the Secretary alleged a violation of section 1910.146(c)(9)(i), which requires contractors in a workplace to "obtain any available information regarding permit space hazards and entry operations from

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implications of Vincent evidently having a portion of his body outside the vault during at least part of the performance of his assigned duties.

the host employer."[3] We affirm this item as a serious violation. The record as a whole shows that Manisera did not obtain available information to determine whether pyro-oil was a flammable material and not a combustible material as he had assumed.[4] Before bidding on the job, he made a site visit and viewed a sample of pyro-oil that he described as "a heavy sludge like material, consistent [with a] cold 6-oil." He stated that 6-oil is a petroleum product that can be "as hard as … asphalt when it's cold, [s]o in a lot of cases, depending on the grade, it has to be heated before it actually flows." A representative for Tirenergy's broker, LTC,[5] told Manisera during the site visit that pyro-oil had a flashpoint of "around 100 degrees" Fahrenheit.[6] This information was not consistent with the Material Safety Data Sheet (MSDS) for pyro-oil, which was available from Tirenergy and states that the material has a flashpoint of 50 degrees Fahrenheit. Compliance officer Stelmack testified that the flashpoint information from LTC – albeit incorrect – should have triggered further inquiry on Manisera's part because a flashpoint of 100 degrees Fahrenheit is the "cut off between a flammable liquid and a combustible liquid."

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[3] Section 1910.146(c)(9)(i) provides:

> (c) *General requirements*. … (9) In addition to complying with the permit space requirements that apply to all employers, each contractor who is retained to perform permit space entry operations shall: (i) Obtain any available information regarding permit space hazards and entry operations from the host employer.

[4] As the compliance officer explained, a flashpoint of 100 degrees is the "cut off between a flammable liquid and a combustible liquid." *See* sections 1910.106(a)(18) (combustible liquid is any liquid with flashpoint at or above 100 degrees) and 1910.106(a)(19) (flammable liquid is generally any liquid with flashpoint below 100 degrees).

[5] Tirenergy used LTC to coordinate the tank cleaning, and LTC contracted with Active to perform the tank cleaning services.

[6] A flash point is the temperature at which a liquid will produce sufficient vapors to sustain combustion.

Instead of inquiring further to determine the true nature of pyro-oil, Manisera simply bid the job assuming it was a combustible fuel oil. He admitted that had he bid the job as a flammable like gasoline, the cost would have been higher because of the "higher concern or respect" for gasoline and the differences in "pumping the liquid out and recycling and disposing of the material." According to Manisera, despite bidding the job as a combustible fuel oil, he told designated foreman Jezercak on the day of the job to treat the material like flammable gasoline because Manisera believed that an August "heat wave" on the day of the scheduled work would mean that "the temperature outside was going to be close to the *suspected flash point*" (emphasis added).[7] Manisera also conveyed to Jezercak the incorrect 100 degree Fahrenheit flash point information provided by LTC. At the jobsite, further confusion arose when Tirenergy representatives told employee Vincent that pyro-oil was like number 2-oil, a fuel oil that has a flashpoint higher than both gasoline and pyro-oil. Upon receiving this information, Vincent and another crewmember, Samuel Vaccaro, made several attempts to "test" the flammability of the material by trying to ignite samples of it. According to Manisera, after the explosion Active "sent the material out to be analyzed, at which point it came back having a flash point of about 80 degrees." Active then reclassified the material as flammable for the purposes of transporting it to another facility.

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[7] Manisera's explanation was confusing when asked on direct examination by Active's attorney, "Why did you tell [the crew] to treat it as gasoline?":

> Because going up with a flash point, which was discussed earlier, the flash point is the temperature at which something would sustain combustion; and knowing that the room temperature or the temperature outside was going to be close to the suspected flash point, that simply a spark could ignite the tank. It was that hot. Or the material, given that precaution, we decided to tell them to treat it as if it was gasoline because the ambient temperature, any spark or ignition source could ignite."

Under these circumstances, we find that Manisera's failure to inquire further about the precise nature of pyro-oil constitutes a violation of section 1910.146(c)(9)(i). Accordingly, we affirm Item 1 of Willful Citation 2.

Willful Citation 2, Item 2

Under this item, the Secretary alleged that the "[e]mployee designated to be Entry Supervisor for the permit-required confined space entry operation was not trained so as to acquire the knowledge, understanding, and skills necessary for safe performance of duties as assigned" in violation of section 1910.146(g)(1).[8]

We conclude that Active was in violation of the cited standard. The evidence of record considered as a whole demonstrates that Jezercak did not have "the understanding, knowledge, and skills necessary for the safe performance" of his duties as confined space entry supervisor. It is undisputed that Jezercak had not previously performed the duties of a confined space entry supervisor for Active nor had he ever filled out a confined space entry permit. Jezercak testified: "I couldn't even tell you what a [confined space] permit is or what [a] permit looks like."[9] His testimony at the hearing was consistent with statements he gave

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[8] Section 1910.146(g)(1) provides:

> (g) *Training.* (1) The employer shall provide training so that all employees whose work is regulated by this section acquire the understanding, knowledge, and skills necessary for the safe performance of the duties assigned under this section.

[9] Active argues that Jezercak's testimony was not reliable because of his selective memory, and argumentative and uncooperative conduct during cross-examination. However, Active fails to cite any specific testimony that demonstrates a selective memory or argumentative, uncooperative conduct on the part of Jezercak.

Active also maintains that the judge's refusal to permit Manisera to testify about Jezercak's pending litigation denied it an opportunity to impeach Jezercak's testimony. This argument is a misrepresentation of the record. In response to a question by Active's counsel, Manisera confirmed that Jezercak had pending litigation, and when the Secretary objected on the grounds of relevance, the judge agreed that the questioning was not relevant but added, "be that as it may, the response is in the record." Active's counsel did not pursue any further questioning

to compliance officer Stelmack during the investigation following the accident. According to Stelmack, Jezercak stated at that time that he was not aware of any of the OSHA requirements for confined space entry, had never filled out an entry permit for a permit-required confined space, and did not know that Active had a confined space program.

Active presented a certificate for an 8-hour refresher course that Jezercak attended on March 14, 1998, when he worked for another company. However, the certificate states that the course covered hazardous waste operations and emergency response under section 1910.120, not confined space entry procedures under section 1910.146. Active also submitted a confined space training certificate dated December 4, 1998, which Manisera stated that he issued to Jezercak after providing him with confined space "field" training. However, only Manisera's signature appears on the certificate, and when Jezercak was shown the certificate at trial, he stated that he had no recollection of any confined space training and had never received a copy of the certificate.

We further note that Manisera's testimony regarding the nature of the training he provided to Jezercak was vague and confusing. For example, when asked if his training of Jezercak included an explanation of "who was in charge of making the determination on entry and things like that," Manisera testified:

> The protocol at the office. There is a hierarchy of employees going from laborers to someone like Rudy [Jezercak], like a supervisor, someone that fluctuates. We do a lot of different things. So, it's a jack of all trades. Going up to the drivers having responsibilities over the laborers; and if someone is appointed, being in charge of the drivers and the laborers. And on a larger site, the operators are actually the ones that are, if you want to say, supervisors. They are also the operators of the equipment.

When asked specifically whether he trained Jezercak on "the steps to determine when to issue a confined space entry permit," Manisera stated:

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on the matter, nor did it argue, as it does in its brief, the relevance of the matter in showing bias.

> To be specific as far as the issuing, all of our confined space entry permits in our program are not necessarily permits. They are documentation showing that air monitoring had been done, the lock out, tag out and other necessities. If you look on the actual permits that we submitted to OSHA over the years or our current documents, if the levels are below a certain rate, it's a non-permit required confined space, although the actual permit as we speak is used to document. You know, when you reclassify it, you have to show documentation that the air was monitored, to show that the hazards did not exist.

It is undisputed that Jezercak did not issue a confined space permit or even have any permits with him on the Tirenergy job, and although he had an air-monitor available on the job, he not did use it to obtain air-monitoring readings inside the vault. He testified that while he had seen Active supervisors, including Manisera, using monitors on previous gas tank cleaning jobs, he was not aware of any Active policy on recording monitor readings. Under these circumstances and on this record, we agree with the judge that Manisera's testimony regarding the "field" training he provided to Jezercak was unpersuasive. For the foregoing reasons, we find a violation of section 1910.146(g)(1) and affirm Item 2 of Willful Citation 2.

Willful Citation 2, Item 3

Under this item, the Secretary alleged a violation of section 1910.252(a)(3)(i) for Active's failure to clean the underground storage tank prior to using an oxy-acetylene torch to remove the manhole cover.[10] The judge affirmed this item based on the undisputed fact that employee Vincent used an

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[10] The standard states:

> **§ 1910.252 General requirements.** … (a) *Fire prevention and protection* — … (3) *Welding or cutting containers*—(i) *Used containers.* No welding, cutting, or other hot work shall be performed on used drums, barrels, tanks or other containers until they have been cleaned so thoroughly as to make absolutely certain that there are no flammable materials present or any substances such as greases, tars, acids, or other materials which when subjected to heat, might produce flammable or toxic vapors. Any pipe lines or connections to the drum or vessel shall be disconnected or blanked.

oxy-acetylene torch to burn off the bolts of the tank's manhole cover before the tank had been thoroughly cleaned. With respect to knowledge, she noted that designated foreman Jezercak assisted Vincent while he was burning the bolts off the manhole cover, and found that his actions were foreseeable and preventable based on evidence that Active had no company work rule prohibiting the use of oxy-acetylene torches on tanks and had actually condoned it in some circumstances.[11]

On review, Active challenges only the judge's finding that it had knowledge of the cited conditions. Specifically, Active argues that it had a policy prohibiting the use of burning equipment on tanks and that Jezercak's decision to ignore that policy was unforeseeable. Because this case arises in the Third Circuit, the Commission will apply the precedent of that circuit, which states that where employer knowledge is based on supervisory misconduct, the Secretary bears the burden of proving that the supervisor's conduct "could have been foreseen and prevented by the employers with the exercise of reasonable diligence and care." *Pennsylvania Power & Light Co. v. Secretary*, 737 F.2d 350, 357-58 (3d Cir. 1984); *see also Kerns Bros. Tree Svc.*, 18 BNA OSHC 2064, 2068-69, 2000 CCH OSHD ¶ 32,053, p. 48,004 (No. 96-1719, 2000).

Here, the record shows that Active did not establish and communicate a work rule prohibiting the cited conduct. At the hearing, Manisera referred to no company rules regarding cutting, burning or welding, and was unable to articulate the company policy pertaining to these activities. Employee Walter Swiderski, a vacuum truck driver with Active's Tirenergy crew, testified that he did not know of any company rule prohibiting the conduct. Swiderski also testified that when he questioned Manisera at Vincent's funeral about "who planted the seeds" for

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[11] Although Jezercak testified that he lost consciousness after the explosion and could not remember the events immediately preceding it, employee Walter Swiderski testified that Jezercak obtained a bucket of water to pour on the manhole cover to "keep it cool" as Vincent burned the bolts.

Vincent to use the oxy-acetylene torch to cut the tank's manhole bolts, Manisera defended the practice by insisting that cutting bolts with an oxy-acetylene torch is "an acceptable practice as long as it's done correctly with somebody that's trained to do that work." Compliance officer Stelmack testified that during an interview after the accident Manisera made a similar statement to him that "it was not unusual to burn bolts off of fuel oil tanks, and that you could burn bolts off of certain oil tanks a million times without any incident." At the hearing, Manisera claimed that Active never used oxy-acetylene torches on gasoline tanks, but he did not dispute the testimony that he approved of the use of torches on fuel oil tanks.

On this record, we find that Active did not have a work rule designed to prohibit the use of a welding torch on an unclean tank. Indeed, Active appeared to condone the use of a torch in these circumstances, and therefore we conclude that Active could have foreseen that Jezercak would have allowed, and even assisted in, the use of the torch to remove bolts on the tank at the Tirenergy job. Accordingly, we find a violation of section 1910.252(a)(3)(i) and affirm Item 3 of Willful Citation 2.[12]

Willful Characterization of Items 1, 2, & 3

In affirming these items as willful, the judge applied Third Circuit precedent, which defines a willful violation as "equivalent to a knowing, conscious, and deliberate flaunting of the Act[,] … more than merely voluntary action or omission - it involves an element of obstinate refusal to comply." *Frank*

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[12] Because Active failed to establish and communicate a work rule that was designed to prevent the hazard, we find no merit to Active's claim that the use of the torch as alleged in the welding violation was the result of unpreventable employee misconduct. *See Jersey Steel Erectors*, 16 BNA OSHC 1162, 1168, 1993 CCH OSHD ¶ 30,041, p. 41,220 (No. 90-1307, 1993), *aff'd without published opinion*, 19 F.3d 643 (3d Cir. 1994) (unpreventable employee misconduct requires showing that employer had "thorough safety program, which was adequately communicated and enforced, and that the violative conduct of the employee was idiosyncratic and unforeseeable").

Irey, Jr., Inc. v. OSHRC, 519 F.2d 1200 (3d Cir. 1974), *aff'd en banc*, 519 F.2d at 1215, *aff'd sub nom. Atlas Roofing Co. v. OSHRC*, 430 U.S. 442 (1977).[13] *See also American Wrecking Corp. v. Secretary of Labor*, 351 F.3d 1254, 1264 (D.C. Cir. 2003) (willful violation differentiated from lesser violations by an intentional or conscious disregard for the applicable safety standard or for employee safety). For the following reasons, we find that the record supports willfulness with respect to Items 2 and 3, but does not establish the willfulness of Item 1.

Active was previously cited in 1989 (before the promulgation of OSHA's confined space standard in section 1910.146) for a willful violation of the general duty clause, section 5(a)(1), based on its failure to follow proper confined space entry procedures at a tank-cleaning job in Newark, New Jersey. According to Manisera, as a result of that willful violation, Active developed a written confined space program. The written program was dated 1995 and was developed to comply with the new confined space standard. Thus, the record shows that Active was aware of the requirements of the confined space standard and failed to comply with the standard.

With respect to the characterization of Item 1, the record shows that Manisera visited the site to view the tank and discuss the job with Tirenergy representatives. Although the standard required Manisera to obtain available information regarding the flammable hazards of pyro-oil, the evidence fails to establish that his noncompliance with this requirement was due to anything more than a lack of diligence. "Mere negligence or lack of diligence is not sufficient to establish an employer's intentional disregard for or heightened awareness of a

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[13] As noted in the judge's decision, the Third Circuit's definition of willful differs little from those of other circuits. *See Babcock & Wilcox Co. v. OSHRC*, 622 F.2d 1160 (3d Cir. 1980) (Third Circuit test for willfulness views "intentional disregard" and "obstinate refusal" as analogous). *See also Universal Radiator Mfg. Co. v. Marshall*, 631 F.2d 20, 23 (3d Cir. 1980), *quoted in George Campbell Painting Corp.*, 17 BNA OSHC 1979, 1982, 1995-97 CCH OSHD ¶ 31,293, p. 43,978 (No. 93-984, 1997).

violation." *American Wrecking Corp.*, 351 F.3d at 1264. Therefore, we find that the Secretary has not shown the requisite state of mind to establish the willfulness of this violation. We also find that although Item 1 was not cited as serious, the record establishes the seriousness of the violation within the meaning of section 17(k) of the Act. 29 U.S.C. 666(k).[14] *See also, E. L. Davis Contracting Co.*, 16 BNA OSHC 2046, 2052, 1993-95 CCH OSHD ¶ 30,580, p. 42,342 (No. 92-35, 1994) (citing *Simplex Time Recorder Company*, 12 BNA OSHC 1591, 1596-97, 1984-85 CCH OSHD ¶ 27,456, p. 35,572 (No. 82-12, 1985) (violation found serious rather than willful where seriousness was evident from record).

Regarding Item 2, alleging a failure to train Jezercak in his duties as confined space entry supervisor, it was undisputed that Manisera was well aware of his obligation to provide training on confined space entry procedures. The evidence further shows that he had no basis for believing that Jezercak had acquired the understanding, knowledge, or skills necessary for the safe performance of his assigned duties as confined space entry supervisor. Manisera admitted to the compliance officer that he had no recollection of Jezercak ever having worked as a confined space entry supervisor before assigning him that responsibility on the morning of the Tirenergy job. On this basis, we find that because the record here establishes Active's conscious disregard for OSHA's training requirements, the violation was willful.

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[14] Section 17(k) states:

> For purposes of this section, a serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

Finally, with regard to Item 3, alleging the improper use of the oxy-acetylene torch to burn the bolts off the tank's manhole before cleaning, Manisera's admission that such conduct was an "acceptable practice" when done correctly by someone trained to do that work belies his claim that it was prohibited by Active. Active's heightened awareness of the hazards associated with tank cleaning, and its decision to condone the use of a torch rather than communicate a work rule prohibiting its use establish that it ignored a known duty in conscious disregard for employee safety. Accordingly, we affirm this item as willful.

Serious Citation 1, Items 1, 2a, 2b, 2c, and 3

Active argues that the provisions of the confined space standard cited under these items do not apply because the vault was not a confined space. Because we have found that the record establishes that the vault met the criteria of a permit-required confined space, and Active presents no other challenge to these items, we affirm these violations as alleged.

Penalties

The judge affirmed the Secretary's proposed penalties for the items directed for review. She assessed $42,000 for Citation 2, Item 1, which we find was serious rather than willful. We therefore modify this penalty to $4,200, giving due consideration to the penalty factors in section 17(j) of the Act.[15] Because Active does not specifically challenge the other penalty assessments, and we see no basis for disturbing them, we affirm the judge's penalty assessments for Serious Citation 1, Items 1, 2a, 2b, 2c and 3, and Willful Citation 2, Items 2 and 3.

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[15] Section 17(j) of the Act provides that the Commission shall assess an appropriate penalty for each violation, giving due consideration to the gravity of the violation, and to an employer's size, previous history, and good faith. 29 U.S.C. 666(j). Here, we accord some credit for Active's small size of approximately 13 employees, but find that the gravity of the violation cited in Item 1 is high based on the death of one employee and the serious injury to another.

ORDER

Accordingly, we affirm the judge's decision with respect to Serious Citation 1, Items 1, 2a, 2b, 2c, and 3, and Willful Citation 2, Items 2, and 3, and her penalty assessments for these items totaling $96,600. We affirm Citation 2, Item 1, as serious rather than willful, and we assess a penalty of $4,200 for that item.

/s/_____
W. Scott Railton
Chairman

/s/_____
James M. Stephens
Commissioner

/s/_____
Thomasina V. Rogers
Commissioner

Dated: April 20, 2005

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SECRETARY OF LABOR, Complainant,	:	
v.	:	OSHRC DOCKET NO. 00-0482
ACTIVE OIL SERVICE, INC., Respondent.	:	

Appearances: John M. Strawn, Esquire
Maria L. Spitz, Esquire
U.S. Department of Labor
Office of the Solicitor
Philadelphia, Pennsylvania
For the Complainant.

Carl R. Woodward, Esquire
Carella, Byrne, Bain, Gilfillan,
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Roseland, New Jersey
For the Respondent.

Before: COVETTE ROONEY
Administrative Law Judge

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq*. ("the Act"). Respondent, Active Oil Service, Inc. ("Active Oil"), at all times relevant to this case maintained a work site at a tire recycling facility in Wind Gap, Pennsylvania, where it was engaged in cleaning an underground storage tank. Active Oil admits that it is an employer engaged in a business affecting commerce within the meaning of section 3(5) of the Act and that it is subject to the requirements of the Act.

On August 2, 1999, one employee was killed and two more were injured as a result of an explosion at the site. The Occupational Safety and Health Administration ("OSHA") conducted an inspection of the site and issued to Active Oil three citations alleging willful, serious and other-than-

serious violations with a proposed total penalty of $140,100.00. Active Oil filed a timely notice of contest, and a hearing was held August 27-29, 2001, in Philadelphia, Pennsylvania. The parties have submitted post-hearing briefs and reply briefs, and this matter is ready for disposition.

Background

The subject site is a tire recycling facility called Tirenergy, where used tires are recycled into "pyro oil" through a process called pyrolysis.[1] In May 1999, Ron Kashner from LTC Environmental Services, Inc. ("LTC") contacted Active Oil in order to have it pump out and transfer pyro oil from a 10,000-gallon underground tank at the Tirenergy site.[2] Mr. Kashner contacted Active Oil again in July 1999 to have it pump out the same tank, and Conrad Manisera, the president of Active Oil, visited the site because one of his employees had reported some debris and heavy sludge from the first job. On August 2, 1999, Mr. Manisera assigned four employees–Rudy Jezercak, Sam Vaccaro, Walter Swiderski and Joseph Vincent–to pump out and clean the tank. Mr. Manisera designated Mr. Jezercak as the foreman or supervisor for the job, and he told him to take air supply and tank cleaning equipment as well as a gas monitor. Although Mr. Manisera did not tell him specifically what was in the tank other than to treat it as gas, Mr. Jezercak was supposed to enter it to clean it. Mr. Vaccaro was to attend Mr. Jezercak while he was in the tank. (Tr. 85-89, 94, 99, 131, 143, 153, 196-97, 253, 258, 367-77.)

On August 2, 1999, Mr. Jezercak and Mr. Vaccaro traveled to the Tirenergy site in a pickup truck with an attached equipment trailer; Mr. Swiderski drove a vacuum truck to the site, and Mr. Vincent also went to the site in a separate vehicle. Mr. Jezercak and Mr. Vaccaro were en route when one of the tires on the equipment trailer became flat. While they waited for a road service vehicle to come to their aid, Mr. Swiderski went on to the site; when he arrived, Mr. Vincent was already there. A Tirenergy representative escorted Mr. Swiderski and Mr. Vincent to the tank. On top of the underground tank, there was a large concrete vault with a covered manhole. Inside this vault, there was another covered manhole which was the entry to the tank itself, and its cover was secured with

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[1]Pyrolosis involves "cooking" shredded used tires at a high temperature. Pyro oil, a byproduct of the process, is stored at the site in underground storage tanks. (Tr. 196-97, 315-19.)

[2]LTC served as a broker for Tirenergy for the contract to pump out the tank. (Tr. 198.)

nuts and bolts. According to the Tirenergy representative, the nuts and bolts were "hand-tight" because service had been performed on the tank a couple of weeks before. The representative further stated that they should treat the material in the tank "like 2 oil."[3] (Tr. 20-30, 36, 88.)

When Mr. Jezercak and Mr. Vaccaro arrived at the site, Mr. Swiderski had already put a 2-inch hose down the fill pipe and had begun pumping it out.[4] Mr. Vincent went into the vault and checked the bolts on the manhole cover. He then retrieved an "oxy-acetylene" torch and prepared to light it to see if he could ignite a piece of rubber with it. Mr. Swiderski warned Mr. Vincent that "this stuff is going to go up like napalm," and, when Mr. Vincent lit the torch, Mr. Swiderski pulled the hose out of the tank. Mr. Vaccaro wiped the oil from the hose with a rag and attempted to ignite the rag with the torch, after which Mr. Swiderski got in his truck and left the site. Mr. Vincent then went into the vault, lit the torch, and bent over in order to begin cutting the bolts off of the manhole cover. Mr. Jezercak was standing outside the vault at the time, and, shortly thereafter, an explosion occurred. As a result of the explosion, Mr. Vincent was killed, Mr. Jezercak was severely burned, and Mr. Vaccaro had minor injuries. (Tr. 47-55, 95, 146-50, 160-61, 181, 231-32.)

Whether the Concrete Vault was a Permit-Required Confined Space

A number of the citation items in this case allege violations of the confined space standard. The standard defines a "confined space" as a space that (1) is large enough and so configured that an employee can bodily enter and perform assigned work; (2) has limited or restricted means for entry or exit; and (3) is not designed for continuous employee occupancy. The standard further defines a "permit-required confined space" as a confined space that has one or more of the following characteristics: (1) contains or has a potential to contain a hazardous atmosphere; (2) contains a material that has the potential for engulfing an entrant; (3) has an internal configuration such that an entrant could be trapped or asphyxiated by inwardly converging walls or by a floor which slopes downward and tapers to a smaller cross-section; or (4) contains any other recognized serious safety or health hazard. *See* 29 C.F.R. § 1910.146(b).

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[3]Mr. Swiderski testified that the material was more like "6 oil." (Tr. 27, 54, 65-66.)

[4]Mr. Swiderski did not clearly explain how he did this, but it appears that the fill pipe was a means of inserting a hose into the tank other than through the tank's manhole. (Tr. 48.)

Respondent concedes that the storage tank itself was a confined space, but argues that the concrete vault on top of the tank was not a confined space. Respondent asserts that because a manhole cover separated the vault from the tank, and because the vault was not physically attached to the tank, the vault was a separate, distinct space from the tank. Respondent further asserts that the vault was not large enough to be classified as a confined space on its own and that the permit-required confined space requirements thus did not apply. (R. Brief, pp. 20-21.)

The record shows that the top of the box-like concrete vault was flush or nearly flush with the surface of the ground. (Tr. 31-34.) The vault was 36 to 50 inches deep, and the means of entry into the vault was through its 22-inch manhole.[5] (Tr. 28-34, 164-72, 210-11, 320, 340.) Although it is reasonable to infer from the size of the vault and its underground location that it was not easily movable, even though it was not physically and permanently attached to the storage tank, I agree with Respondent that the vault was a separate, distinct space from the tank. The vault, however, was nonetheless a confined space. It is undisputed that the vault was not designed for continuous employee occupancy and that the only means of entry or exit was through its 22-inch manhole. In addition, an employee would have to enter the vault to get to the manhole on the tank and would have to bend or kneel down inside the vault to loosen the nuts and bolts securing the manhole cover on top of the tank. While Respondent is correct that an employee standing up in the vault would not be fully inside, it is clear that an employee bending or kneeling down inside the vault would be fully within it. It is also clear that Mr. Vincent was in this latter position when the explosion occurred. Based on the evidence of record, I find that the concrete vault fell within the standard's definition of a confined space.

I further find that the concrete vault was a permit-required confined space. While the vault arguably might not have contained a dangerous atmosphere when the manhole cover to the storage tank was closed, it did have the potential for a dangerous atmosphere once the cover was opened. The atmosphere within the tank was clearly flammable, and it is reasonable to infer that, when the

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[5]The depth of the concrete vault is in dispute. The OSHA compliance officer ("CO") testified he measured its depth to be 48 to 50 inches, but Respondent asserts that its employees measured the depth to be 36 to 38 inches. (Tr. 169, 210-11, 320.) Although this discrepancy is significant, I find that it is irrelevant to the determination of whether the vault is a confined space, because, under either measurement, Mr. Vincent was able to bodily enter the vault.

manhole cover to the tank was opened, the hazardous atmosphere inside the tank would commingle with the atmosphere of the vault. The vault, accordingly, was a permit-required confined space.

The Secretary's Burden of Proof

To establish a violation of a standard, the Secretary must show by a preponderance of 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). In the Third Circuit, the jurisdiction in which this case arises, the Secretary must demonstrate foreseeability in order to establish employer knowledge. *Pennsylvania Power & Light Co. v. OSHRC ("PP & L")*, 737 F.2d 350, 357 (3d Cir. 1984). As in *PP & L*, the Secretary here attempts to prove employer knowledge by demonstrating that a supervisor violated the standards. "In cases where the Secretary proves that a company supervisor held knowledge of, or participated in, conduct violating the Act, we do not quarrel with the logic of requiring the company to come forward with some evidence that it has undertaken reasonable safety precautions." *Id.* at 357. According to the court, the key to determining foreseeability and preventability is the adequacy of the company's safety program. *Id.* at 358. However, "the Secretary may not shift to the employer the ultimate risk of non-persuasion in a case where the inference of employer knowledge is raised only by proof of a supervisor's misconduct." *Id.* at 358.

The Willful Citation

Item 1 of Citation 2 alleges a willful violation of 29 C.F.R. § 1910.146(c)(9)(i), which requires contractors to "obtain any available information regarding permit space hazards and entry operations from the host employer." I find the cited standard applies and that Respondent violated it. It is undisputed that Respondent is a contractor, and, as discussed *supra*, the vault was a permit-required confined space. Further, the record shows that Respondent failed to obtain even the most basic information that was available regarding permit space hazards and entry operations from Tirenergy. Although Mr. Manisera visited the site before the job, there was no evidence that he obtained the required information from Tirenergy or that he passed that information on to the employees he assigned to the site. In fact, he admitted that the only information he obtained from

Tirenergy was that pyro oil was a fuel oil with a flashpoint of around 100 degrees. (Tr. 372-74.) He also admitted that, contrary to his company's policy, he did not request a copy of the material safety data sheet ("MSDS") for the pyro oil, despite the confusion after his visit about whether it was like "2 oil" or "6 oil" and whether it was combustible or flammable.[6] (Tr. 241, 245, 248, 372-80, 390-91, 405-08.) As to exposure, the accident clearly demonstrates that four of Respondent's employees were exposed to the cited condition. In addition, I find that Respondent had knowledge of the cited condition, particularly in light of Mr. Manisera's own admission that he failed to request the MSDS for the pyro oil. (Tr. 379-80.) Based on the foregoing, the Secretary has established the alleged violation.

Item 2 of Citation 2 alleges a willful violation of 29 C.F.R. § 1910.146(g)(1), which requires employers to "provide training so that all employees whose work is regulated by this section acquire the understanding, knowledge, and skills necessary for the safe performance of the duties assigned under this section." I find that the cited standard applies and that Respondent did not comply with its terms. The employees at the site, including Mr. Jezercak, who was designated as the foreman or supervisor of the crew, were not adequately trained to safely perform their duties in the permit-required confined space. Mr. Jezercak testified that he did not know much about the confined space standard, including the requirement for an entry permit and an entry supervisor. (Tr. 98-101.) He further testified that he did not remember getting any safety training focusing on confined space entry while he worked for Active Oil, and he had no knowledge of the company's own written confined space program. (Tr. 102-03.) Mr. Swiderski's testimony confirmed that Mr. Jezercak did not have the requisite "understanding, knowledge and skills" necessary to work in a permit-required confined space and also confirmed that the other employees were similarly not trained to work safely in a permit-required confined space. (Tr. 59-60.) All four of the employees were exposed to the violation, and it is clear that Respondent had knowledge of the violation. Three of the four employees who were assigned to the site previously performed duties related to permit-required confined spaces, but

[6]Respondent's argument that the MSDS for the pyro oil was not accurate is disingenuous in view of the fact that the company never even requested it. In any case, I find the information in the MSDS to be more accurate than the information that Mr. Manisera obtained.

there was no evidence to show that they received any specialized training for these duties.[7] Mr. Manisera, who would have been responsible for providing such training, offered no testimonial or documentary evidence as to any confined space training for these employees, and his testimony that employees were trained based on their positions and duties was simply not credible. (Tr. 409-20; R-2.) On the basis of the record, the Secretary has demonstrated the alleged violation.

Item 3 of Citation 2 alleges a willful violation of 29 C.F.R. § 1910.252(a)(3)(i), which provides as follows:

> [n]o welding, cutting, or other hot work shall be performed on used drums, barrels, tanks or other containers until they have been cleaned so thoroughly as to make absolutely certain that there are no flammable materials present or any substances such as greases, tars, acids, or other materials which when subjected to heat, might produce flammable or toxic vapors. Any pipe lines or connections to the drum or vessel shall be disconnected or blanked.

I find that the cited standard applies and that Respondent violated its terms. It is undisputed that Mr. Vincent used an oxy-acetylene torch to cut off the bolts securing the manhole cover to the storage tank that had not yet been cleaned. It is also undisputed, and clear from the accident itself, that Active Oil's employees were exposed to the cited condition. I further find that Respondent had knowledge of the condition. Not only did the foreman, Mr. Jezercak, have actual knowledge that Mr. Vincent was using the torch to cut the bolts off, he himself participated in violating the standard. (Tr. 52-54, 149-50.) Another employee, Mr. Swiderski, even warned of the danger, just before Mr. Vincent lit the torch. (Tr. 50-51.) While Respondent argues that the violation was a result of unpreventable employee misconduct, the violation was foreseeable and preventable with the exercise of reasonable diligence. The evidence demonstrates that Active Oil failed to take reasonable safety precautions to prevent such violations, and Mr. Manisera could not clearly articulate what the company policy was regarding welding. (Tr. 435-36, 491-93, 507-08.) He testified that torches were used on tanks six or seven years ago and that it was no longer company policy to cut, burn or weld. (Tr. 435-36, 491-93.) This testimony, however, contradicted a statement he made in the presence of Mr. Swiderski that using torches in tanks was "an acceptable practice as long as it's done correctly."

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[7]Mr. Swiderski, a tanker truck driver, had cleaned out tanks at least three times, and Mr. Vaccaro, a laborer, testified that he had been inside tanks by himself as well as with others. Mr. Vincent, who was assigned to be a driver, died while working inside the vault. (Tr. 64, 151.)

(Tr. 57.) In addition, Mr. Manisera could not point to any specific rules regarding cutting, burning or welding, and he could not explain what steps Active Oil took to discover such violations. (Tr. 507-08.) Based on the foregoing, the Secretary has met her burden of proving the alleged violation.[8]

The Secretary has classified the violations in Citation 2 as willful. The Third Circuit, the jurisdiction in which this case arises, has held that a willful violation is:

> equivalent to a knowing, conscious, and deliberate flaunting of the Act. Willful means more than merely voluntary action or omission–it involves an element of obstinate refusal to comply.[9]

Frank Irey, Jr., Inc. v. OSHRC, 519 F.2d 1200 (3d Cir. 1974), *aff'd en banc*, 519 F.2d at 1215, *aff'd sub nom. Atlas Roofing Co. v. OSHRC*, 430 U.S. 442 (1977). I conclude that Respondent's conduct showed such reckless disregard for the Act and employee safety that these violations are properly classified as willful. As a company that specializes in tank cleaning, Active Oil was clearly cognizant of OSHA's confined space and permit-required confined space requirements. This was evidenced by its confined space program, which an outside consultant developed, and by Mr. Manisera's testimony, which showed his heightened awareness of the standard's requirements and the violations in this case. (Tr. 365-66, 415-20, 505-06.)

With respect to Item 1, Mr. Manisera had ample opportunity and reason to obtain available information on the contents of the tank. Active Oil had previously removed and transported pyro oil from the same tank. (Tr. 372-73.) An employee from that job told Mr. Manisera that the material in the tank was not what he had expected, causing Mr. Manisera to go to the site to take a closer look at it. (Tr. 374-80.) Despite the contradictory information he was given about the material, he only visually inspected it and did not request further information, such as the MSDS, or send a sample to a lab for analysis. (Tr. 379-80.) Rather than ascertaining the exact nature of the material, Mr. Manisera left the facility with just enough information to make an estimate for the job. (Tr. 374-80.) The fact that Mr. Manisera did not even ask for the most basic of information plainly demonstrates

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[8]The Secretary also alleged a violation of 29 C.F.R. § 1910.252(a)(2)(vi)(C) in the alternative for this item. I need not address this standard, having found a violation of section 1910.252(a)(3)(i), and the violation alleged in the alternative is therefore vacated.

[9]The Third Circuit ruled in *Babcock & Wilcox Co. v. OSHRC*, 622 F.2d 1160 (3d Cir. 1980), that its definition of willful bore little difference from the other circuits.

his obstinate refusal to comply with the standard, and therefore, the willfulness of the violation.

As to Item 2, I find that Mr. Manisera was well aware of the dangers involved in cleaning out tanks and that he knowingly sent employees who were inadequately trained to the subject site. While Mr. Manisera testified that he believed that Mr. Jezercak was adequately trained, all of the other evidence of record contradicts his testimony.[10] (Tr. 98-08, 121-30.) The evidence also shows that the three other employees at the site were likewise insufficiently trained to safely perform confined space tasks. (Tr. 59-64; R-2.) The fact that no one on the crew was sufficiently trained is no mere omission. Rather, it shows a clear pattern of disregard for OSHA's training requirements, especially in light of Item 4c of Citation 1, *infra*. This item was appropriately characterized as willful.

As to Item 3, the record establishes that it was a common practice for Active Oil employees to use torches in tank, despite Mr. Manisera's claim that it was no longer company policy to do so. (Tr. 435-37.) On at least two occasions, Mr. Jezercak had "burned off" bolts from fuel oil tanks. (Tr. 56-57, 257-58.) In addition, Mr. Manisera admitted to Mr. Vincent's brother, in the presence of Mr. Swiderski, that "it's an acceptable practice [cutting bolts off with a torch] as long as it's done correctly with somebody that's trained to do that work." (Tr. 57.) Mr. Manisera also admitted to the CO that, in the past, it had not been unusual to burn bolts off of fuel oil tanks. (Tr. 257.) This evidence, along with the unconcerned attitude of three of the employees about using a torch on an uncleaned tank, leads me to conclude that Respondent condoned the practice and that the violation of the standard was knowing, conscious and deliberate. This item was properly classified as willful.

Based on the foregoing, Items 1, 2 and 3 of Citation 2 are affirmed as willful violations. The Secretary has proposed a penalty of $42,000.00 for each of these items. In view of the willful classification, and the penalty assessment discussion set out at the end of this decision, I find the proposed penalties to be appropriate.[11] The penalties as proposed are accordingly assessed.

The Serious Citation

Item 1 of Citation 1 alleges a serious violation of 29 C.F.R. § 1910.146(d)(1), which requires

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[10]Mr. Manisera asserted he had trained Mr. Jezercak himself at a previous site; however, Mr. Jezercak testified he could not recall much "training" from that site. (Tr. 121-26, 414-20.)

[11]The penalty assessment discussion applies equally to the serious items set out *infra*.

the employer to "implement the measures necessary to prevent unauthorized entry" under its permit space program. Based on the record and my findings above, showing that the vault and the tank were both permit-required confined spaces, I find that the cited standard applies. I also find that Respondent violated the standard. While Active Oil's confined space program addresses entry procedures, it is clear these procedures were not followed at the subject site. *See* C-7. Mr. Jezercak, the foreman, allowed Mr. Vincent to enter the vault without following the procedures in C-7. (Tr. 48-54, 145-50.) In addition, at least two crew members, including Mr. Jezercak, had not seen the written program before the accident. (Tr. 98-04.) Finally, in light of the accident, employees were exposed to the cited condition, and Mr. Jezercak, the foreman, had actual knowledge that Mr. Vincent was entering the vault. (Tr. 48-54, 145-50.) Respondent asserts unpreventable employee misconduct in defense of this item. However, as in Citation 2, Item 3 above, the violation here was reasonably foreseeable and preventable. Active Oil did not take reasonable precautions to prevent this violation, and while it had a written confined space program, Mr. Jezercak testified he had not previously seen it and had not received confined space training. (Tr. 98-04.) This testimony paralleled that of other employees who were similarly not trained. (Tr. 59-60, 98-09, 173; R-2.) Active Oil did not explain how it ensured employees were adequately trained for their job duties, and Mr. Manisera's testimony in this regard was vague and unconvincing. (Tr. 426-35.) Further, there was no evidence the company took reasonable steps to discover safety violations. This item is affirmed as a serious violation. The proposed penalty of $4,200.00 is appropriate for this item and is therefore assessed.

Item 2a of Citation 1 alleges a serious violation of 29 C.F.R. § 1910.146(d)(2), which requires the employer to identify and evaluate the hazards of the permit-required confined space before employee entry. I find that the standard applies and that Respondent failed to comply with its terms. As indicated above, Mr. Manisera did not identify and evaluate the hazards of working in the vault and tank when he visited the site, and, from all accounts, no one on the crew identified and evaluated the hazards before the employees began their work. (Tr. 374-80.) Both Mr. Vincent and Mr. Vaccaro attempted to test the pyro oil in the tank by using the torch to burn a piece of rubber and a rag that was covered with the material. (Tr. 51-52, 147-48.) However, these methods do not meet the requirements of the standard, and the record clearly establishes employee exposure to and

employer knowledge of the cited condition. Item 2a is affirmed as a serious violation.

Items 2b and 2c of Citation 1 allege serious violations of 29 C.F.R. §§ 1910.146(d)(5)(i) and 1910.146(d)(5)(ii), which require the testing and monitoring of conditions within the permit-required confined space before entry and during the course of entry operations. I find that the standards apply and that Respondent did not comply with them because, while the crew had an appropriate gas monitor at the site, it was not used to test and monitor the conditions within the permit-required confined space as required. (Tr. 263-65; C-14.)[12] The record shows that the monitor was not calibrated before use and that it was turned on once and then turned off after its alarm sounded. (C-14, pp. 27-35, 39-42.) The record also shows that the monitor was turned on again about 54 minutes later and that shortly thereafter, and just before the explosion, the alarm sounded again. *Id.* On both of these occasions, the monitor was on for less than a minute before the alarm sounded. *Id.* On the basis of this evidence, Respondent did not meet the terms of the standards, and, for the reasons set out above, employees were exposed to and Active Oil had knowledge of the cited conditions. Items 2b and 2c are affirmed as serious violations. A total penalty of $4,200.00 was proposed for Items 2a, 2b and 2c. The proposed penalty is appropriate, and a penalty of $4,200.00 is assessed for Item 2.

Item 3 of Citation 1 alleges a serious violation of 29 C.F.R. § 1910.146(e)(1), which requires the preparation of an entry permit before entry is authorized. I find that the standard applies and that Respondent failed to comply with it. Since the vault and tank were permit-required confined spaces, the standard required the preparation of an entry permit at the site. It is undisputed that this did not occur. I also find that employees were exposed to and Respondent had knowledge of the cited condition, for the reasons given above. The company's knowledge is particularly underscored by Mr. Jezercak's specific testimony that he was not familiar with the requirements of entry permits and had never filled one out while employed by Active Oil. (Tr. 98-99.) This violation is affirmed as a serious violation, and the Secretary's proposed penalty of $4,200.00 for this item is appropriate. A

[12]At the hearing, the Secretary offered into evidence C-14, the deposition of Craig Gestler of Mine Safety Appliances, the manufacturer of the subject monitor. In C-14, Mr. Gestler testified that he had reached the conclusions set out above based on his examination of the monitor and its data log. C-14 was admitted *de bene esse*, and the record was held open so that Mr. Gestler could review the transcript from his deposition. Neither party has raised specific objections to the admission of C-14, and, since I find it relevant and reliable, it is received in evidence.

penalty of $4,200.00 is accordingly assessed.

Items 4a and 4b of Citation 1 allege serious violations of 29 C.F.R. §§ 1910.134(e)(1) and 1910.134(f)(2), which require medical evaluations of employees who must use respirators and fit testing of employees who must use tight-fitting face-piece respirators, respectively. I find that the standards apply and that Respondent did not comply with them. First, some of the employees at the site clearly were required to use respirators since their job duties required them to work in a permit-required confined space. Second, the CO's interviews with the employees and Mr. Swiderski's testimony confirmed that the crew members at the site did not receive medical evaluations to determine their ability to wear respirators.[13] (Tr. 60, 267-69.) Third, the testimony of the three surviving employees confirmed that Active Oil did not fit test employees for tight-fitting face-piece respirators. Mr. Swiderski and Mr. Jezercak both testified that they had not been fit tested, and while Mr. Vaccaro testified that he had been, he could not recall if this had occurred before the accident. (Tr. 61, 104, 152-54.) Given Active Oil's failure to fit test the other employees, I find it reasonable to infer that Mr. Vaccaro was not fit tested before the accident. I have noted Respondent's assertion that Mr. Swiderski was not required to wear a respirator, because he was a truck driver, and its further assertion that Mr. Jezercak had been fit tested by a prior employer. However, it is clear from the record that Mr. Swiderski previously had been assigned duties where he would have needed a respirator. (Tr. 59-64.) Moreover, fit testing by a prior employer does not meet the terms of the standard, which specifically require the employer to fit test employees for each kind of respirator used.

Item 4c of Citation 1 alleges a serious violation of 29 C.F.R. § 1910.134(k), which requires the employer to provide effective training to employees who must wear respirators. I find that the standard applies and that Respondent failed to comply with its terms. Although Active Oil had a written respirator program, the evidence supports a conclusion that the company did not train employees as required. Specifically, Mr. Swiderski and Mr. Jezercak testified that they had not been

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[13]The only evidence the company provided in this regard was R-2, a physical examination for Mr. Swiderski, which I find insufficient to determine his ability to wear a respirator. In any case, the examination clearly was not intended to satisfy the standard in light of the testimony of Mr. Manisera that Mr. Swiderski's job did not require him to wear a respirator. (Tr. 475-76.)

trained and that they had not seen any employee receive training in respirator use. (Tr. 60, 104-07.) Active Oil did not rebut this testimony with any evidence to show that the employees had been trained as required, and I find as fact that they were not.

Having found that Respondent did not comply with the respirator requirements noted above, I further find that employees were exposed to the alleged violations and that Respondent had the requisite knowledge of the violations. Mr. Manisera was well acquainted with OSHA's respirator requirements. (Tr. 365-66, 433, 505-06.) Furthermore, from the evidence of record, and especially in light of his responsibility for employee training, I find it difficult to believe that Mr. Manisera would not have been aware that all four of the employees assigned to the site had not been medically evaluated or fit tested and that at least three of the four employees had not been adequately trained in respirator use. Even if Mr. Manisera did not have actual knowledge, the company could have discovered the violations with the exercise of reasonable diligence. Items 4a, 4b and 4c are affirmed as serious violations, and I conclude that the Secretary's total proposed penalty of $1,500.00 for these items is appropriate. A penalty of $1,500.00 for Item 4 is therefore assessed.

The "Other" Citation

Item 1 of Citation 3 alleges an other-than-serious violation of 29 C.F.R. § 1910.146(g)(4), which states as follows:

> The employer shall certify that the training required by paragraphs (g)(1) through (g)(3) of this section has been accomplished. The certification shall contain each employee's name, the signatures or initials of the trainers, and the dates of training. The certification shall be available for inspection by employees and their authorized representatives.

I find that the cited standard applies and that Respondent failed to comply with its terms. The OSHA CO testified that Active Oil could not provide any records or certification for Mr. Vincent in regard to confined space entry training. (Tr. 274.) Further, while the company submitted certifications for hazardous materials training and an eight-hour OSHA refresher course for Mr. Vincent, it submitted no certification for confined space entry training for any employee except Mr. Jezercak. *See* R-2. Employees were exposed to the hazards of confined space entry without the requisite training and certification, as evidenced by the accident, and Respondent clearly had knowledge that employees were not adequately trained. (Tr. 274.) Based on the foregoing, this item is affirmed as an other-than-

serious violation. No penalty was proposed, and none is assessed.

Penalty Assessment

Pursuant to section 17(j) of the Act, the Commission when assessing penalties must give "due consideration" to four factors: (1) the size of the employer's business, (2) the gravity of the violation, (3) the employer's good faith, and (4) the employer's prior history of OSHA violations. *See also J. A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2213-14 (No. 87-2059, 1993). The gravity of the violation is generally the principal element in penalty assessment. *See, e.g.*, *Trinity Indus., Inc.*, 15 BNA OSHC 1481 (No. 88-2691, 1992), and cases cited therein. I find the gravity of the violations in this matter to be high, based upon the CO's conclusions in this regard. (Tr. 250, 255, 259-62, 269.) I also find that no adjustments are appropriate for good faith or prior history. Respondent provided minimal training to employees who were performing dangerous duties, and, as set out *supra*, three of the violations were willful. In addition, Respondent has been previously cited for similar confined space violations. Finally, I find that the Secretary's reduction for size is warranted, in light of the size of Respondent's business. I conclude that the Secretary's penalties as proposed are appropriate, and they are accordingly assessed.

Findings of Fact and Conclusions of Law

The foregoing decision constitutes my findings of fact and conclusions of law in accordance with Federal Rule of Civil Procedure 52(a).

ORDER

Based upon the foregoing, it is hereby ORDERED that:

1. Citation 1, Item 1, alleging a serious violation of 29 C.F.R. § 1910.146(d)(1), is AFFIRMED, and a penalty of $4,200.00 is assessed.

2. Citation 1, Item 2, alleging serious violations of 29 C.F.R. §§ 1910.146(d)(2), 1910.146(d)(5)(i) and 1910.146(d)(5)(ii), is AFFIRMED, and a penalty of $4,200.00 is assessed.

3. Citation 1, Item 3, alleging a serious violation of 29 C.F.R. § 1910.146(e)(1), is AFFIRMED, and a penalty of $4,200.00 is assessed.

4. Citation 1, Item 4, alleging serious violations of 29 C.F.R. §§ 1910.134(e)(1), 1910.134(f)(2) and 1910.134(k), is AFFIRMED, and a penalty of $1,500.00 is assessed.

5. Citation 2, Item 1, alleging a willful violation of 29 C.F.R. § 1910.146(c)(9)(i), is

AFFIRMED, and a penalty of $42,000.00 is assessed.

6. Citation 2, Item 2, alleging a willful violation of 29 C.F.R. § 1910.146(g)(1), is AFFIRMED, and a penalty of $42,000.00 is assessed.

7. Citation 2, Item 3, alleging a willful violation of 29 C.F.R. § 1910.262(a)(3)(i), is AFFIRMED, and a penalty of $42,000.00 is assessed.

8. Citation 3, Item 1, alleging an other-than-serious violation of 29 C.F.R. § 1910.146(g)(4), is AFFIRMED, and no penalty is assessed.

/s/

Covette Rooney
Judge, OSHRC

Dated: March 8, 2002
Washington, D.C.