United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR, Complainant, v. THE TIMKEN COMPANY, Respondent, and UNITED STEELWORKERS OF AMERICA, GOLDEN LODGE L.U. 1123, Authorized Employee Representative.	OSHRC Docket No. 95-962

APPEARANCES:

Maureen Cafferkey, Esquire
Office of the Solicitor
U. S. Department of Labor
Cleveland, Ohio
For Complainant

William S. Cline, Esquire
Day, Ketterer, Raley, Wright & Rybolt
Canton, Ohio
For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission pursuant to section 10 of the Occupational Safety and Health Act of 1970 (29 U.S.C. §651, *et seq.*), hereafter referred to as the "Act."

Respondent, The Timken Company (Timken), at all times relevant to this action, maintained a place of business at 1835 Dueber Avenue, S.W., Canton, Ohio, where it manufactures tapered roller bearings. Other production facilities are located in Ohio, Virginia, North Carolina, and South Carolina. The roller bearings are used in cars, trucks, tractors, and almost all heavy machinery (Tr. 202). Timken employs approximately 10,000 employees in the United States (Tr. 230). At the Canton Bearing Plant, there are approximately 1,000 employees (Tr. 252). Timken admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act (Tr. 4).

Based on a complaint, Compliance Officer Thomas Henry of the Occupational Safety and Health Administration (OSHA) inspected Timken's Canton Bearing Plant and the Gambrinus Bearing Plant in April 1995 (Tr. 19). Henry had already inspected the Gambrinus plant in January 1995.[1] As a result of Henry's inspection of the Canton Bearing Plant, Timken received citations alleging violations of the confined space standards at 29 C.F.R. §1910.146, including a willful violation of §1910.146(g)(1). Timken filed a timely notice of contest to the citations. The United Steelworkers of America received party status as authorized employee representative.

The hearing was held on November 1, 1995, in Akron, Ohio. At the hearing, the parties announced settlement as to the violations alleged in the serious citation. A partial stipulation and settlement agreement was filed with the court and is approved by this Decision and Order. Therefore, the issues remaining in controversy involve the alleged willful violation of the confined space training standard at §1910.146(g)(1). A penalty of $35,000 was proposed.

ALLEGED VIOLATION

The citation alleges that "on or before 4/11/95 in Department 71: Employees who were not trained were required to enter permit required confined spaces such as the 19C and/or the 23V

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[1] Citations issued from the two inspections of the Gambrinus Bearing Plant (Docket Nos. 95-599 & 95-961) were settled and orders approving settlement were entered on January 9, 1996 (Exhs. C-1, C-4). The earlier inspection of the Gambrinus plant resulted in the issuance of a serious citation on March 2, 1995, alleging among others violations of the confined space standards, a violation of §1910.146(g)(1). As part of the settlement of this citation, the Secretary vacated the alleged violation of §1910.146(g)(1) (Exh. C-1).

vertical pit furnace areas where there was a potential hazardous exposure to carbon monoxide, gas or heat" in violation of §1910.146(g)(1).

Facts

In heat treat Department 71 at the Canton Bearing Plant, there are two vertical pit furnace areas, designated as 19C and 23V (Exh. Jt. 2). The furnaces are adjacent carburizing furnaces used in the heat treatment of roller-bearing components. The furnaces are located below the floor grating and are accessible by ladders (Exh. Jt. 3; Tr. 29). In the 19C furnace pit area there are six furnaces, and in the 23V pit area there are five furnaces (Tr. 131, 142). The furnaces are roughly 5 to 6 feet in diameter in the 23V pit and a little smaller in the 19C pit (Tr. 104). The furnaces, operating for over twenty-five years, use natural gas to heat (Tr. 28, 63). The two-pit furnace areas are separated by a wall and are entered through door openings in the grating floor (Exh. Jt. 3). The pit areas are approximately 8 feet high and are described as very hot and dirty with a maze of pipes carrying the natural gas which heats the furnaces. Some of the areas around the furnaces are tight and close; "you have to squeeze against the wall of the furnace to get behind it" (Tr. 29, 32, 104, 127). Also, there is electrical conduit, and in some areas channel iron crosses to the wall (Tr. 105).

Department 71 is tended to by one process operator and three or four attendants who schedule the furnaces for carburizing and monitor the furnaces' temperatures (Tr. 155, 171, 179). Since 1993, the 19C and 23V pit furnace areas were designated by Timken as permit-required confined spaces (Exh. C-2; Tr. 122-123, 234). At the 23V pit area, Timken placed a sign that read "DANGER-CONFINED SPACE-Enter by Permit Only." There was no sign posted at the 19C furnace pit (Exh. Jt. 1; Tr. 66, 122). Timken identified twenty-three other confined spaces at the Canton Bearing Plant (Exh. C-2). Also, Timken developed a company written permit-required confined space program (Exh. C-9). The permits required by Timken to enter the 19C and 23V pit furnace areas identify the potential hazards as oxygen deficiency, flammable gases, airborne combustible dust, fire, and physical and mechanical hazards (Exh. C-5, Tr. 35). The record shows that in 1995, prior to the OSHA inspection, Timken employees made six permit-required entries into the Department 71 pit furnace areas (Exh. C-5).

There are three pyrometer repairmen located at the Gambrinus Bearing Plant who perform services on the furnaces at the Gambrinus and Canton Bearing plants (Tr. 85, 204). Their duties include maintaining the carburizing and heat treat furnaces at proper temperatures, changing thermocouples, and transporting gauges between plants (Tr. 204). The thermocouples[2] are changed every three months or as needed. In Department 71, the thermocouples are changed inside the 19C and 23V pit furnace areas (Exh. C-10; Tr. 82, 101, 142, 144).

Compliance Officer Henry testified that he did not personally go into the 19C or 23V pit furnace areas or observe employees entering the areas (Tr. 30, 56). Also, he did not test the atmosphere (Tr. 60). Based on employee interviews, he identified the hazards to employees in the 19C and 23V pit areas as asphyxiation and heat stress (Tr. 61). However, in reviewing the OSHA 200 logs, Henry found no record of injuries from asphyxiation or heat stress (Tr. 62). Henry testified that the three pyrometer repairmen (Wolgamott, Babe and Wagner) and two of the process operators (Echeles and Parks), whom he believed entered the Department 71 pit furnace areas, were not trained in confined space entry (Tr. 84). He based his findings on the statements of Wolgamott and Echeles (Exhs. C-7, C-8; Tr. 41-42, 66, 84).

Wolgamott, a pyrometer repairman for Timken since 1966, testified he changes the thermocouples on the furnaces in Department 71 every three months (Exh. C-10; Tr. 96). To change the thermocouples, he enters the 19C or 23V pit furnace areas (Tr. 114, 123, 130). It takes thirty to forty-five minutes to change the thermocouples (Tr. 131, 138-139). Wolgamott stated he was not aware the furnace areas in Department 71 were designated confined spaces (Tr. 149). He testified he did not obtain an entry permit or test the atmosphere before entering the pit furnace areas. Also, he acknowledged having not received confined space training before April 1995 (Tr. 106-107). Wolgamott testified he receives his work assignments from a monthly printout prepared by the metallurgical department (Exh. C-10; Tr. 101). If other problems develop during the month, he is advised by the department's supervisor or informed by his supervisor, Frank Fondriest (Tr. 102-103). At the end of the month, he turns his completed work schedule into Fondriest

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[2] Heat sensors for the furnace (Tr. 101).

(Tr. 115-116, 135). Because of his number of years of experience, he stated he does not discuss his work with Fondriest. Also, he did not make Fondriest aware he had no training in confined space entry (Tr. 119, 125). Wolgamott testified he did not know whether the other pyrometer repairmen (Babe and Wagner) have entered the 19C or 23V pit furnace areas or if they were trained in confined space entry (Tr. 110, 147-148). The work assignment record reflects that from January 1994 only Wolgamott changed the thermocouples in the 19C and 23V pit furnace areas (Exh. C-10; Tr. 147). In 1995, prior to the OSHA inspection, the record shows Wolgamott entered the two-pit furnace areas twice to change thermocouples (Exh. C-10). Wolgamott also testified he performed troubleshooting calls such as checking the firing, fixing piping, and lighting the furnaces in the pit areas which are not documented unless thermocouples are changed. According to Wolgamott, such troubleshooting calls occur a couple times a month (Tr. 133).

Echeles, a process operator for twenty-nine years with Timken, described his job as maintaining and scheduling the furnaces in Department 71 for carburizing and hardening (Tr. 155, 171). As process operator, he testified he enters the 19C furnace area to re-light the furnaces (Tr. 182). Echeles testified from the grating floor he lights the furnaces in the 23V pit with a long torch which fits through the grating (Tr. 159). He does not enter the 23V pit area. However, for the 19C furnaces, he lights the top burners from inside the pit furnace area (Tr. 163-164). He testified that prior to the OSHA inspection, the last time he lit the furnaces in 19C was December 1994[3] (Tr. 165). He does not re-light the furnaces daily, but only when they have been shut down for cleaning (Tr. 182). Before entering the 19C furnace area, Echeles testified he did not obtain an entry permit, test the atmosphere, or receive confined space training (Tr. 166). He stated he was not aware if other process operators went into the 19C or 23V furnace areas (Tr. 170). Echeles testified he regularly discussed furnace problems with his supervisors (Bill Reiger and Charlie Lewis) and has had them call a pyrometer repairman to replace a thermocouple (Tr. 171). He stated his supervisors are regularly in Department 71 to check and schedule product (Tr. 178). Echeles testified that the

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[3] Department 71 requires one process operator per shift to monitor the furnaces. There are six separate assignments which are rotated weekly among the process operators. Therefore, a process operator works in Department 71 once every six weeks. There are eighteen process operators with six operators working per shift (Tr. 166-168).

confined space sign at the 23V furnace area was placed in 1992 (Tr. 174). At that time, he was told by his supervisor Lewis to "ignore that sign because we haven't decided whether that's a confined space yet or not" (Tr. 175). According to Echeles, nothing further was said about the sign (Tr. 176). He characterized the sign as a "joke," and that "nobody said anything to us about the sign" (Tr. 174). During his employment with Timken, Echeles testified he was not aware of any injuries from working in the 19C or 23V furnace areas. However, he identified his safety concerns from working in the pit furnace areas as being burned or overcome by heat and gas fumes (Tr. 176).

Frank Fondriest, a supervisor of the three pyrometer repairmen and other employees, testified that pyrometer repairmen have been working in the vertical pit furnace areas in Department 71 for twenty-five to thirty years and that the work basically has not changed (Tr. 206). He described the other pyrometer repairmen as having similar experience and longevity as Wolgamott (Tr. 206). One pyrometer repairman works per shift. He testified he worked in Department 71 two years ago as an acting supervisor (Tr. 207). At that time, he became aware that the 19C and 23V pit furnace areas were designated as confined spaces. He saw the confined space poster (Tr. 210). He testified he was not responsible for scheduling training and was not aware that the pyrometer repairmen had not received confined space training (Tr. 207, 209-211). They never told him. However, he acknowledged it was Timken's responsibility to train employees (Tr. 212). Fondriest stated he had received Timken's confined space training prior to the OSHA inspection (Tr. 213). He opined the pyrometer repairmen did not receive training because they were overlooked due to their odd working hours--pyrometer repairmen do not work the same shift hours as other employees (Tr. 205, 210). He testified he never instructed pyrometer repairmen to enter confined spaces knowing they were not trained (Tr. 209-210). However, he knew that a pyrometer repairman's job included changing thermocouples and that it was necessary to enter the19C and 23V pit areas to change thermocouples (Tr. 215, 224).

Kenneth Kushner, Timken's principal occupational safety and industrial hygienist, testified he was responsible for drafting the corporate plan of compliance with the confined space standards (Tr. 231). He developed the corporate written permit-required confined space program (Exh. C-9, R-1; Tr. 232). He stated Timken identified approximately 2,000 confined spaces at its nine facilities (Exh. C-2 [list of twenty-four confined spaces identified at Canton Bearing plant]; Tr. 239). He

stated training of employees began in April 1993 and was provided by Cleveland State University (Exh. R-3; Tr. 234). In deciding who was to receive training, department managers provided a list of occupations. Training in the Canton area was at two locations concurrently. There were 500 to 600 employees initially trained in the Canton area and a total of 900 employees trained throughout the United States (Tr. 237). For Department 71, training records reflect confined space training provided to twenty-one employees, including supervisors Lewis and Rieger (Exh C-3; Tr. 252). The record does not reflect the three pyrometer repairmen (Woglamott, Babe and Wagner) or two of the process operators (Echeles and Parks) received training. Additionally, Kushner stated Timken provides forty-five or forty-six other training programs required by OSHA. He described Timken's problem in scheduling what training programs each employee needs (Tr. 244). Kushner agreed that the 19C and 23V pit furnace areas are permit-required confined spaces based on the limited access to the areas and their unsuitability for continuous occupancy (Tr. 253-255).

DISCUSSION

Alleged Standard Violated

Section 1910.146(g)(1) provides:

> 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.

The confined space standards at §1910.146 were promulgated on January 14, 1993 (58 F.R. 4,549). The stated purpose of the standards is to provide employers with the requirements necessary to protect employees from the hazards of entry into permit-required confined spaces. As an important aspect of an employer's confined space program, the standards require employee training. Section 1910.146(g)(1) specifically directs an employer to provide training "to all employees whose work is regulated" by §1910.146. The standard identifies two classes of employees involved in confined space entry procedures as the "authorized entrant" and the "attendant." Authorized entrant is defined at §1910.146(b) as "an employee who is authorized by the employer to enter a permit space." An attendant is "an individual stationed outside one or more permit spaces who monitors

the authorized entrants and who performs all attendant's duties assigned in the employer's permit space program." Section 1910.146(g)(2) requires the employer to provide training to each of these employees (i) before the employee is first assigned duties under the confined space standards; (ii) before there is a change in assigned duties; (iii) whenever there is a change in permit space operations that presents a hazard about which an employee has not previously been trained; and (iv) whenever the employer has reason to believe either that there are deviations from the permit space entry procedures or that there are inadequacies in the employee's knowledge or use of the confined space procedures. Further, §1910.146(g)(4) requires the employer to certify that the training required by the standard has been accomplished. The certification is to contain the employee's name, the signatures or initials of the trainers, and the dates of training.

Timken's duty to train employees as required by §1910.146(g) is specifically recognized in its written permit-required confined space program (Exh. C-9, pg. 14). Timken does not dispute that the 19C and 23V pit furnace areas in Department 71 are permit-required confined spaces within the meaning of §1910.146(a). Timken specifically designated the pit areas as permit-required, posted a permit-required sign at the 23V furnace area, developed an acceptable written permit-required confined space program, and initiated confined space training through Cleveland State University for its employees. Also, Timken initiated permit-required procedures for entrance into the 19C and 23V furnace areas (Exh. C-5).

Further, the record establishes, and Timken does not dispute, that Wolgamott and Echeles[4] entered the 19C or 23V furnace areas to perform work without receiving Timken's confined space training (Respondent's Brief, pg. 6). However, the record fails to support a finding that the other pyrometer repairmen or process operators entered the 19C or 23V furnace areas. Neither Wolgamott nor Echeles could state whether other employees entered the 19C or 23V furnace areas. The work records show only Wolgamott as changing thermocouples in the pit areas (Exh. C-10). The

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[4] Timken questions Echeles' testimony that he entered the furnace area in either September or December 1994 on the basis that the September date is outside the six-month limitation period. However, more weight is given to Echeles' interview statement of April 13, 1995, which identifies January 1995 or December 1994 as the last time (Exh. C-7). Further, the six-month limitation does not apply in that §1910.146(g)(1) creates an affirmative duty on an employer to keep employees trained. Therefore, a violation occurs whenever the employer fails to carry out its duty and the employee has access to the source of the hazard.

Secretary failed to present objective evidence that the two other pyrometer repairmen (Babe and Wagner) or the other process operator (Parks) had entered the 19C or 23V pit areas. Thus, exposure as a result of failing to provide confined space training is limited to Wolgamott and Echeles.

Accordingly, the court finds that §1910.146(g)(1) is applicable; the standard was violated in that Wolgamott and Echeles did not receive confined space training; and they were exposed to the violative condition in that as part of their job duties, they entered the 19C or 23V pit furnace areas without appropriate training in confined space (Tr. 260). The issues in dispute are whether Timken knew or with reasonable diligence should have known of Wolgamott's and Echeles' lack of training; whether the failure to train them was willful; and whether a penalty of $35,000 is reasonable (Tr. 258).

I. KNOWLEDGE

As an element in establishing a violation of a standard, the Secretary must prove that Timken had actual or constructive knowledge of the violative condition. *Bland Constr. Co.*, 15 BNA OSHC 1031, 1032, 1991-93 CCH OSHD ¶ 29,325, p. 39,392 (No.87-992, 1991). Actual knowledge is shown by proving that an employer or supervisory employee knew of the violative condition. An employer is chargeable with knowledge of conditions which are plainly visible to its supervisory personnel. *A.L. Baumgartner Constr., Inc,*. 16 BNA OSHC 1995, 1998, 2000, 1994 CCH OSHD ¶ 30,554 (No 92-1022, 1994). Constructive knowledge, on the other hand, is found when an employer should have known of the noncomplying condition with the exercise of reasonable diligence. *General Electric Co.*, 9 BNA OSHC 1722, 1728, 1981 CCH OSHD ¶ 25,345, p. 31,455 (No.13732, 1981). An employer who lacks actual knowledge can nevertheless be found to have constructive knowledge of conditions that could be detected through an inspection of the worksite. An employer must make a reasonable effort to anticipate the particular hazards to which its employees may be exposed in the course of their scheduled work. *Automatic Sprinkler Corp. of America*, 8 BNA OSHC 1384, 1387, 1980 CCH OSHD ¶ 24,495, p. 29,926 (No 76-5089, 1980); *Pace Constr. Corp.*, 14 BNA OSHC 2216, 2221, 1991-93 CCH OSHD ¶ 29,333, p. 39,431 (No. 86-758, 1991). Where an employer maintains an appropriate monitoring or inspection program, the burden is on the Secretary to demonstrate the employer's failure to discover the violative conditions

was due to a lack of reasonable diligence. *Milliken & Co.,* 14 BNA OSHC 2079, 2083, 1991-93 CCH OSHD ¶ 29,243, pp. 39,177-78 (No. 84-767, 1991), *aff'd,* 947 F.2d 1483 (llth Cir. 1991).

The record in this case establishes that Timken had constructive, if not actual, knowledge that Wolgamott and Echeles were not trained in confined space entry and were entering designated permit-required confined spaces, *i.e.,* the 19C and 23V pit furnace areas. Fondriest, the pyrometer repairman's supervisor, knew prior to April 1995 that the furnace areas in Department 71 were designated as permit-required confined spaces. He also knew that changing thermocouples was performed from inside the furnace areas. Fondriest acknowledged reviewing Wolgamott's monthly work printout which showed that he changed thermocouples in 19C and 23V pit areas approximately every three months. Thus, Fondriest knew that an employee under his supervision was entering designated confined spaces. Based on this information, it is reasonable to expect Fondriest to know whether Wolgamott had received confined space training, particularly since Fondriest had received the training. Fondriest's failure as supervisor to exercise reasonable diligence is imputed to Timken. The fact that training is scheduled by another department does not excuse Timken from its responsibility as an employer. Also, the supervisors in Department 71 (Lewis and Reiger) should have known that Wolgamott was not trained. Wolgamott did not obtain a permit before entry or conduct an atmospheric test, which are basic requirements for a confined space program. Such requirements are recognized in Timken's written program (Exh. C-9). Lewis and Reiger were identified as requesting Wolgamott's services to check the furnaces, and both had received confined space training--Reiger in December 1993 and Lewis in February 1994 (Exh. C-3). Without obtaining a permit or conducting atmospheric tests, Wolgamott should not have been allowed to enter the furnace pit areas. Similarly, Echeles stated he re-lit the furnaces in the 19C pit area without obtaining a permit or conducting atmospheric tests. He was in plain view. His supervisors (Lewis and Reiger) were identified as regularly being in the Department 71 furnace areas. Thus, Timken, through its supervisors, was on notice that Wolgamott and Echeles failed to

comply with its written confined space entry program[5] and should have questioned their training. Timken failed to exercise reasonable diligence.

Therefore, the record establishes Timken's constructive knowledge that Wolgamott and Echeles were not trained in confined space entry. The fact that Wolgamott or Echeles failed to notify their supervisors of the lack of confined space training does not relieve Timken from compliance with the standard. While employees have a responsibility for their own safety, the Commission has repeatedly held that it is the employer, and not the employee, who has ultimate responsibility for complying with the Act. *Jersey Steel Erectors,* 16 BNA OSHC 1162, 1991-93 CCH OSHD ¶ 29,456 (No. 90-1307, 1991); *Atlantic & Gulf Stevedores*, 3 BNA OSHC 1003, 1010, 1974-75 CCH OSHD ¶ 19,525 p. 23,304 (No. 2818, 1975).

Accordingly, having established Timken's constructive knowledge that Wolgamott and Echeles lacked confined space training, the court finds Timken in violation of §1910.146(g)(1).

II. WILLFUL

The main issue raised by Timken is whether the violation of §1910.146(g)(1) was willful. To establish a willful violation, the Secretary must prove that it was committed with intentional, knowing, or voluntary disregard for the requirements of the Act or with plain indifference to employee safety. *Conie Construction, Inc.*, 16 BNA OSHC 1870, 1872, 1994 CCH OSHD ¶ 30,474, p. 42,089 (No. 92-0264, 1994), petition for review denied, No. 94-1592 (D.C. Cir 1995); *L.E. Myers Co.*, 16 BNA OSHC 1037, 1046, 1993 CCH OSHD ¶ 30,016, p. 41,132 (No. 90-945, 1993); *Williams Enterp.*, 13 BNA OSHC 1249, 1256, 1986-87 CCH OSHD ¶ 27,893, p. 36,589 (No. 85-355, 1987). A willful violation is "differentiated from other types of violations by a heightened awareness--of the illegality of the conduct or conditions--and by a state of mind--conscious disregard or plain indifference. However, a violation is not willful if the employer had a good faith belief that it was not in violation. The test of good faith for these purposes is an objective--whether the

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Timken was also cited for serious violations of §§ 1910.146(d)(5)(I) and 1910.146(e)(1) for failing to obtain an entry permit and take atmospheric tests. As part of the settlement of the serious citation, these violations were grouped together.

employer's belief concerning a factual matter, or concerning the interpretation of a rule, was reasonable under the circumstances." *General Motors Corp., Electro-Motive Division*, 14 BNA OSHC 2064, 2068, 1991-93 CCH OSHD ¶ 29,240 p. 39,168 (No. 82-630, 1991) (consolidated). Willfulness is not justified if an employer has made a good faith effort to comply with a standard or to eliminate a hazard, even though the employer's efforts are not entirely effective or complete. *Keco Indus., Inc.*, 13 BNA OSHC 1161, 1169, 1986-87 CCH OSHD ¶ 27,860, p. 36,478 (No. 81-263, 1987).

In this case, the Secretary did not establish that Timken's failure to provide training was intentional, knowing, or the result of plain indifference to employees' safety. It is not enough for the Secretary to show that Timken was aware of conduct or conditions constituting a violation. Instead, the Secretary must show that Timken had a "heightened awareness" and that its conduct violated the standard or its attitude exhibited plain indifference to the requirements. Of primary consideration is the employer's attitude toward the applicable standards. In this regard, the record reflects that Timken made a good faith effort to comply with the confined space training requirements of §1910.146(g)(1). It initiated a confined space training program through Cleveland State University immediately upon the effective date of the confined space standards. It identified 2,000 confined spaces throughout its plants in the United States and trained 900 employees in confined space entry. For Department 71, the record shows twenty-four employees having received the training. It posted permit signs at confined space locations and developed a written program. The quality and substance of Timken's written program and training program are not questioned by OSHA. The failure to post a confined space sign at the 19C furnace area, take an atmospheric test, or obtain an entry permit were cited by OSHA as part of the serious citation which was settled by the parties prior to hearing. Similarly, Timken's failure to train Wolgamott and Echeles has not been shown to rise to the level of willful.

Timken is a large employer with nine production facilities in the United States. According to Kushner, Timken has implemented forty-five other training programs required by OSHA standards which cause the company a problem in selecting which employees need what training and then scheduling the employees for the training. Further, the record establishes that only two employees (Wolgamott and Echeles) entered the designated confined spaces without training. This

is out of a work force of 1,000 employees at the Canton Bearing Plant. The court accepts the explanation of Fondriest that Wolgamott was "overlooked in the scheduling process due to the odd hours that they work" (Tr. 210). Although this does not excuse Timken from the training requirements, it does not establish plain indifference towards compliance with §1910.146(g)(1). Also, it is noted that Wolgamott and Echeles have been doing the same jobs for over twenty years without substantive change, and their immediate supervisors are not directly involved in supervising their daily work activity. Other employees and supervisors were trained, and appropriate confined space entries were made in Department 71. Thus, the record establishes that Timken made a good faith effort to comply with the training requirements.

The Secretary's reliance on the March 2, 1995, citation to show willfulness is misplaced. The citation was issued only a month before the current inspection. Thus, little weight is given to the prior citation. The requirements of the training standard were already recognized by Timken's written confined space program developed in 1993 (Exh. C-9, pg. 14). Also, the prior citation provided insufficient time to show plain indifference based on any inaction by Timken in response to the citation. Further, the citation involved an alleged failure to train employees in Department 753 at the Gambrinus Bearing Plant, which was withdrawn by the Secretary as part of the settlement agreement (Exh. C-1).

Accordingly, the court concludes that the record fails to establish that Timken's violation of §1910.146(g)(1) was willful.

III. SERIOUS

The Commission generally will reclassify an unsubstantiated willful violation as other than serious "unless the parties have expressly or impliedly consented to try the issue of whether the violation was serious" or the seriousness of the violation was "evident." *Trico Technologies Corp.*, 17 BNA OSHC 1497, 1504, ___ CCH OSHD ¶ ___ (No. 91-110, 1996).

In this case, the court finds the violation of §1910.146(g)(1) was serious within the meaning of §17(k) of the Act based on the obvious seriousness of Timken's failure to train Wolgamott and Echeles. Also, Timken impliedly consented to try the issue (Respondent's Brief, pgs. 17-19). The record establishes that employees, entering the 19C or 23V furnace areas, were exposed to

substantial heat.[6] Timken recognized the potential hazards in its entry permits for the 19C or 23V furnace areas as oxygen deficiency, flammable gases or vapors, airborne combustible dust, physical hazards, and mechanical hazards (Exh. C-5). These hazards were also identified by Wolgamott and Echeles. Although there is no evidence of any accidents, Timken clearly acknowledged the potential hazards. It initiated an entry program. The Commission has long held that, in determining whether a violation is serious, the issue is not whether an accident is likely to occur; it is rather whether the result would likely be death or serious harm if an accident should occur. *Whiting-Turner Contracting Co.*, 13 BNA OSHC 2155, 2157, 1989 CCH OSHD ¶ 28,501, p. 37,772 (No. 87-1238, 1989). Training in the appropriate procedures and recognition of the potential hazards is fundamental to an effective confined space program. Timken's failure to train Wolgamott and Echeles renders an otherwise good written program meaningless and subjected the employees to potential hazards for which they lacked understanding and knowledge as to how to protect themselves. Timken should have known of the violative condition in that its supervisor knew that the 19C and 23V furnace pits were designated as permit-required confined spaces. Timken's supervisors who had received training exhibited a lack of diligence in determining whether Wolgamott and Echeles were trained in confined space entries.

Accordingly, Timken's failure to train Wolgamott and Echeles in the confined space program was a serious violation.

IV. PENALTY

In that it is concluded that the violation of §1910.146(g)(1) was not willful, the proposed penalty of $35,000 is not appropriate. For a serious violation, the Act limits the penalty to no more than $7,000 for a violation of a standard. 29 U.S.C. §666(b).

The court, in considering a reasonable penalty, finds that Timken is a large employer with 10,000 employees and has a history of previous serious citations. Therefore, no credit is given for size and history. However, Timken is given credit for good faith based on having written safety programs and its attempts at complying with the standards. As for gravity, the record establishes

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[6] The furnace must reach a temperature of 1,000 degrees before the top burners can be lit (Tr. 163).

that two employees lacked training in confined space. Potential hazards existed and were recognized by Timken. The employees' entries without testing or a permit exhibited a total lack of training. However, the record reflects that the employees' entries were sporadic and of short duration such as the thirty to forty-five minutes to change thermocouples every three months. Also, there was no record of any accident or injuries due to confined space entries. Further, this is a relatively new standard which became effective in April 1993.

Accordingly, a penalty of $3,000 is assessed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

All findings of fact and conclusions of law relevant and necessary to a determination of the contested issues have been found specially and appear in the decision above. See Rule 52(a) of the Federal Rules of Civil Procedure.

ORDER

It is hereby ORDERED:

CITATION NO. 1:

1. Item 1, violation of §1910.146(c)(2), is affirmed pursuant to the settlement agreement as an other than serious violation with no penalty assessed.

2. Item 2a, violation of §1910.146(d)(5)(I); Item 2b, violation of §1910.146(d)(6); Item 3a, violation of §1910.146(e)(1); and Item 3b, violation of §1910.146(e)(2), is affirmed pursuant to settlement as serious violations with a grouped penalty of $5,000 assessed.

CITATION NO. 2:

1. Item 1, violation of §1910.146(g)(1), is affirmed as a serious violation with a penalty of $3,000 assessed.

/S/ KEN S. WELSCH
KEN S. WELSCH
Judge

Date: April 9, 1996