United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR Complainant, v. NI INDUSTRIES-RIVERBANK ARMY AMMUNIT Respondent.	OSHRC DOCKET NO. 94-1767

NOTICE OF DOCKETING OF ADMINISTRATIVE LAW JUDGE'S DECISION

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on June 15, 1995. The decision of the Judge will become a final order of the Commission on July 17, 1995 unless a Commission member directs review of the decision on or before that date. ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW. Any such petition should be received by the Executive Secretary on or before July 5, 1995 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary
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Petitioning parties shall also mail a copy to:

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If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 606-5400.

FOR THE COMMISSION

Ray H. Darling, Jr./SKA

Date: June 15, 1995

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 94-1767

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SECRETARY OF LABOR, Complainant, v. NI INDUSTRIES, RIVERBANK ARMY AMMUNITIONS PLANT, Respondent.	OSHRC DOCKET NO. 94-1767

APPEARANCES:

For the Complainant:

Jeanne M. Colby, Esq., Office of the Solicitor,
U.S. Department of Labor, San Francisco, CA

For the Respondent:

Robert D. Peterson, Esq., Rocklin, CA

DECISION AND ORDER

Loye, Judge:

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C., Section 651, et. seq, hereafter referred to as the Act).

Respondent, NI Industries, Riverbank Army Ammunitions Plant (NI), at all times relevant to this action maintained a worksite at 5300 Claus Road, Riverbank, California, where it was primarily engaged in manufacturing ammunitions. Respondent is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

On May 26, 1994, pursuant to an inspection of NI's Riverbank worksite, the Occupational Safety and Health Administration (OSHA) issued citations, together with proposed penalties, alleging violations of the Act. By filing a timely notice of contest Respondent brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

On January 12-13 and February 2, 1995 a hearing was held in San Jose, California on the contested matters. Following the hearing, Complainant withdrew "serious" citation 1, item 5 (Tr. 733). The parties have submitted briefs on the matters remaining at issue, and this case is ready for disposition.

FACTS

In early 1994 NI employees were engaged in cleaning the influent sump at NI's waste water treatment plant (Tr. 82). The influent sump is an underground storage chamber for non- RCRA hazardous waste from NI's plant (Exh. R-2). The sump is approximately 25 feet deep, 30 feet long and 12-15 feet wide (Tr. 56). The sump is accessed by means of a ladder through a manhole on the surface (Tr. 56, 78; Exh. C-3a). Ventilation is limited to the manhole opening and some small openings in the roof (Exh. C-3b through C-3e). A catwalk runs through the sump approximately 10 feet above the floor (Tr. 57). At the time of the alleged violations, between 5 and 10 feet of solid sludge was contained behind wood cribbing (Tr. 57, 582-85, 617; Exh. R-8). A foot or two of sludge was loose in the open areas (Exh. R-8). The sludge entered the sump through a 21" pipe in the area behind the cribbing (Tr. 570). Liquid waste ran into the pit from two drains, 3" and a 6" respectively (Tr. 96; Exh. R-8, R-9).

Prior to initiating the cleaning NI performed a confined space analysis on the sump and its contents and established procedures for conducting the clean-up, based on the sump's potential hazards (Tr. 639-43; Exh. C-2, R-2). NI determined that the sump was a permit only confined space, with limited access and reduced visibility. NI found the sump contained toxic materials, and that an oxygen deficient atmosphere, or an atmosphere containing hydrogen sulfide or methane might be present. NI found that entrants could be subject to engulfment, noise and mechanical hazards (Tr. 248-52; Exh. C-2). NI determined that entry should be by permit only, after the sump's atmosphere was purged and tested for

oxygen levels, flammable atmosphere and toxics; all energy sources locked out; and all lines blocked and/or bled and locked out (Exh. C-2).

The evidence establishes that two permits were issued for the influent sump; one dated 2/28/94 - 3/4/94, the other for the period from 3/8/94 - 3/10/94 (Tr. 58, 550, 607, 721; Exh. R-5, R-13). Permit #301 reflects that the sump's atmosphere was tested on 2/28/94 at 7:45, 9:25, 10:30 a.m., and 1:10 p.m. (Tr. 549, 558). It was tested on 3/3/94 at 1:50 p.m., and on 3/4/94 at 7:10, 9:40, 11:50 a.m. and 2:00 p.m. (Tr. 564-65; Exh. R-5). Permit #274 documents atmospheric testing at 1:50 and 2:45 p.m. on 3/8/94, and at 7:28, 8:28, 10:20 a.m. and at 12:00 noon on 3/9/94 (Tr. 722-23; Exh. R-13).

Entrants were provided with Tyvek protective suits, rubber boots and gloves (Tr. 79).

The air in the sump was monitored with a Combo 434 gas detection instrument (Tr. 577; Exh. R-10). The instrument was at times hung from a strap five or six feet down from the entrance to the hole. On February 28, Russ Hart moved it into the area of the sump where the men were working (Tr. 118, 131). Testimony indicates that at various times the monitor was suspended 5-6 feet, or 10-15 feet from overhead openings (Tr. 147, 162), and "very close to where the work was going on" (Tr. 601).

An 18" industrial fan with a capacity to move air at 12,000 cubic feet a minute was placed at the entrance to the sump on the afternoon of 2/28/94 after an incident where entrants were evacuated following the sounding of the alarm indicating excessive carbon monoxide and/or low oxygen conditions in the sump (Tr. 106, 588-92, 625; Exh R-5, R-10).

Neither the effluent pipe, nor the drains into the sump were isolated prior to cleaning operations (Tr. 624, 634). Because NI was not in production, no new waste was being pumped into the effluent line (Tr. 635). Water ran into the sump from NI's environmental services laboratory the entire time the cleaning project was going on (Tr. 62, 133, 187, 594, 635-37).

Russell Brian Hart, a maintenance mechanic at NI, testified that on or around February 28, 1994 he entered the influent sump to clean out the sludge that had accumulated (Tr. 51, 57, 63). Hart stated that at one point "a few hundred gallons" of water that had built up behind the sludge broke loose and came rushing into the sump, causing him and two other workers, Gus Rodriguez and Roy Fife, to run for the exit (Tr. 63,

112). Hart also testified that on that day an alarm sounded while he was inside the sump, after Fife started up a gas powered chain saw in the sump (Tr. 66-67, 92). He and the other employees evacuated the sump following that incident (Tr. 67). Hart testified that he developed a headache after working one day in the sump (Tr. 60).

Roy Fife testified that he began working in the influent sump in the early part of March (Tr. 128). With the exception of the exact dates and times, Fife's testimony corroborates that of Hart. Fife testified to using the gas powered chain saw to remove a cross-beam on the crib (Tr. 132, 149), and setting off the gas detector's sensor and alarm (Tr. 135-36). Fife further stated that during the same time period, while he was acting as a stand-by at the top of the sump, a maintenance crew consisting of Gus Rodriguez and Ron Perreira were operating the chain saw inside the sump, and set off the alarm. In that instance, the crew did not evacuate the sump, they merely waited for the air to clear before continuing work (Tr. 136-37, 152). The alarm sounded for between five and fifteen seconds (Tr. 153, 172).

Joseph Valenzuela worked at the influent sump late in February and in early March (Tr. 158-59, 184). Valenzuela recalled the sensor alarm sounding while he was standing by at the top (Tr. 159). Valenzuela stated that Rodriguez and Perreira were working in the sump, removing beams with a chain saw when the alarm went off (Tr. 160). Valenzuela alerted Rodriguez and Perreira to the alarm, but they did not evacuate the hole (Tr. 161).

Both Fife and Valenzuela stated that their supervisor, Renaud Fortin, was told about the alarm, but did not require Rodriguez and Perreira to evacuate (Tr. 150, 165, 174).

Rex Ille testified that he entered the influent sump sometime after March 7, 1994. Upon his entry, Ille signed a permit dated with the previous day's date (Tr. 190, 194). Ille recalled incidents when he was working outside the sump where the sensor alarm went off in the sump while the gas chain saw was in use (Tr. 193-95). Ille stated that on one occasion where Valenzuela, Rodriguez and Perreira were working in the sump, they did not evacuate when the alarm sounded. Rather the workers shut off the saw and waited for the fumes to clear (Tr. 196).

Richard Carpenter, NI's chief fire officer, stated that he was present on February 28 when the sensor alarm sounded in the sump. Carpenter stated that he mistakenly wrote

CO_2, 15.0 under the *toxic* heading on permit #301; Carpenter stated the toxic alarm indicated elevated levels of carbon monoxide, or CO (Tr. 559-61). Carpenter stated that all the entrants were removed from the sump for the day, and that he wrote "out" on the permit at 13:10 p.m. (Tr. 562). Carpenter testified that he determined a gas chain saw used to cut away cribbing holding up the sludge in the sump was the source of the carbon monoxide, and that an electric chain saw was purchased a week later, on March 4 (Tr. 586, 6047). Carpenter stated that he was unaware of any other alarms sounding in the sump (Tr. 566).

Fortin testified that he was not on the worksite on February 28, and that he had never heard an alarm sound in the sump (Tr. 718, 724). Fortin testified that he did see the meter change color to register a toxic atmosphere while employees in the sump were using the chain saw (724). Fortin told the men to shut off the chain saw and waited for the meter to return to green (Tr. 725). After that Fortin told the employees to use the chain saw sparingly (Tr. 730).

DUE PROCESS

NI argues that Complainant did not notify it of the exact dates on which the alleged violations occurred. NI maintains that it was thereby deprived of due process in that it had no notice of the charges it was to defend against. The undersigned finds that the citation and complaint in this matter placed NI on full notice of the nature of the allegedly hazardous conditions found at its workplace, and of the standards those conditions were alleged to violate. It is clear from the evidence that NI was also informed at the time of the OSHA inspection of the incidents leading to the citations and the time period during which they allegedly occurred. OSHA Compliance Officers (CO) Overmyer and Thompson held a conference with NI representatives on April 20, 1994, during which they discussed the findings of their March 1994 inspection (Tr. 255). Any confusion regarding exact dates on which specific events occurred result from the faulty and conflicting memories of the witnesses and in no way hindered NI in mounting a complete defense to the allegations at the hearing.

NI was not denied due process of law.

APPLICABILITY OF §1910.146 *et seq.*

NI maintains that the confined space regulations are inapplicable to its influent sump. Respondent argues that none of the hazards deemed possible by its own evaluators were actually present at the time NI employees entered the sump, and that the sump, therefore, was not a permit only confined space as defined by the standard. NI's argument that its sump, identified by NI as a permit only confined space, ceased to be one once NI ascertained the absence of identified possible hazards, is contrary to the evidence, as well as the provisions of the standard itself.

Section 1910.146 *et seq.* is a performance standard. A performance standard differs from a specifications standard in that rather than directing specific measures to be taken whenever a hazard identified by the Secretary is present, it allows the employer, within the standard's general guidelines, to identify the hazards peculiar to its own workplace and determine the steps necessary to abate them.

Section 1910.146(c)(1) requires employers to evaluate its workplace to determine if any spaces are permit required confined spaces. Subsection (c) (7) specifically provides for the reclassification as a non-permit confined space of a confined space previously classified by the employer as permit only. That subsection states:

> (i) If the permit space poses no actual or potential atmospheric hazards and if all hazards within the space are eliminated without entry into the space, the permit space may be reclassified as a non-permit confined space for as long as the non-atmospheric hazards remain eliminated. (ii) If it is necessary to enter the permit space to eliminate hazards. . .such entry shall be performed under paragraphs (d) through (k) of this section. If testing and inspection during that entry demonstrate that the hazards within the permit space have been eliminated, the permit space may be reclassified as a non-permit confined space for as long as the hazards remain eliminated.
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> * * *
>
> (iii) The employer shall document the basis for determining that all hazards in a permit space have been eliminated, through a certification that contains the date, the location of the space, and the signature of the person making the determination. . .
>
> .

The evidence clearly establishes that NI determined the influent sump to be a permit only confined space, subject to potential atmospheric, as well as other hazards. NI introduced no evidence that it ever reclassified the influent sump as a non-permit confined

space, or that it made a determination that all hazards had been eliminated prior to allowing employee access to the space. Rather the use of permits, the provision of protective suits, ventilation and continuous atmospheric monitoring suggest that NI continued to consider the sump a permit only confined space.

Moreover, the evidence clearly establishes that potential atmospheric hazards continued to exist in the sump due to its limited ventilation, as demonstrated by the build-up of toxic gases inside the sump with NI's use of a gas chain saw, which set off NI's gas monitor.

This judge agrees with NI's initial assessment, and finds that at the time of the alleged violations, the influent sump remained a permit only confined space subject to the cited provisions.

Alleged Violation of §1910.146(d)(3)(ii)

Serious citation 1, item 1 alleges:

29 CFR 1910.146(d)(3)(ii): Under the permit-required confined space program required by 29 CFR 1910.146(c)(4), the employer did not develop and implement the means, procedures, and practices necessary for safe permit space entry operations, including isolating the permit space:
a) Employees were required to work in permit required confined space without properly isolating the space.

Facts

CO Overmyer testified that the failure to isolate the sump created a drowning hazard.[1] In addition, Overmyer stated that if the influent reacted chemically with the

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[1] Complainant, in its brief, for the first time raises the allegation that the introduction of the gas powered chain saw into the sump constitutes a violation of the cited standard. The undersigned finds that the issue was not timely raised, but notes that, in any event, nothing in the standard supports such an interpretation.

Section 1910.146(b) defines isolation as:

> ...the process by which a permit space is removed from service and completely protected against the release of energy and material into the space by such means as: blanking or blinding; misaligning or removing sections of lines, pipes, or ducts; a double block and bleed system; lockout or tagout of all sources of energy; or blocking or disconnecting all mechanical linkages.

Nothing in the definition prohibits the use of motorized hand tools. Rather the standard specifically contemplates atmospheric changes due to work being performed, such as welding and coating, and anticipates

sludge, a hazardous substance or atmosphere could be created, which might cause chemical burns, asphyxiation, or gas explosions (Tr. 257-58).

The evidence establishes that NI originally developed procedures for entry into the effluent sump that included locking out effluent pumps and stopping all liquid influent sources (Exh. C-2). Fortin testified, however, that at the time of entry he was told by his boss that the lab pipes did not need to be shut down (Tr. 731). The decision not to break or blank the lines was recorded on permits 301 and 274 (Exh. R-5, R-13). The record establishes that influent from the labs consisted mainly of tap water and dish detergent (Tr. 654-659). Michael Kummer, an NI chemical engineer, testified that water, and water soluble components, mainly acids, including sulfuric, hydrochloric and nitric acids are sometimes discharged into the system leading to the effluent sump in a highly diluted form (Exh. 655-56). Kummer stated that wastes containing cyanide, chromium and organic reagents are not disposed of in the waste water system (Exh. 658-59).

Discussion

Subsection (d)(3)(ii) requires the employer to develop and implement procedures *necessary* for safe permit space entry, including isolation of the permit space. The standard, as noted above, is a performance standard and does not specify the exact conditions under which isolation of a confined space is deemed necessary. The preamble to the cited standard states only that "[t]he permit space must be isolated from serious hazards." 58 FR 4497 (January 14, 1993).

NI argues that Complainant failed to show a drowning hazard, or to show that the influent from the labs could have caused a hazardous chemical reaction with the sludge.

The undersigned agrees that Complainant failed to establish a drowning hazard. The effluent pipe was effectively isolated in that it was out of service; any residual liquid in that pipe was already in the sump prior to the start of cleaning operations. The flow from the influent pipes was insufficient to fill a space the size in the sump without more than adequate warning for employees in the sump to evacuate, or, as was done here, pump it out.

Prior to its employees entering the sump NI determined that isolation of the space

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the control of fumes through the use of proper ventilation. *See*, example 3, following the cited standard.

to prevent chemical and/or atmospheric hazards was not necessary. Nothing in the record would allow the undersigned to conclude otherwise, *i.e.* that the influent from NI's labs might pose a serious hazard necessitating isolation. Complainant introduced no testimony indicating that the chemicals NI might reasonably expect to be disposing of through its waste water system might be hazardous in and of themselves, or that those chemicals might react with the sludge in the sump to create a hazardous atmosphere. The Secretary's speculation that some unidentified chemical which NI might or might not use in its labs might react with the contents of the sump, is insufficient to establish a *prima facie* case.

Citation 1, item 1 will be vacated.

Alleged Violation of §1910.146(d)(3)(iii)

Serious citation 1, item 2 alleges:

29 CFR 1910.146(d)(3)(iii): Purging, inserting, flushing or ventilation of space as necessary to eliminate or control atmospheric hazards.
a) Employees worked in permit required confined spaces without forced air ventilation provided to the confined space.

Facts

CO Overmyer testified that ventilation in a confined space is designed to move large volumes of air through ductwork into the area of the confined space where employees are working. Overmyer stated that the fan in use at NI was insufficient to ventilate the sump (Tr. 260).

The evidence establishes that no ventilation was provided in the sump prior to February 28, when the operation of a chain saw in the sump caused NI's gas monitor's alarm to sound. Moreover, the undersigned finds that an atmospheric hazard developed at least once after the February 28 incident, and after a fan was installed by NI. During the second incident, which apparently took place on March 3, employees Rodriguez and Perreira were told to shut off the chain saw they were using in the sump when the gas monitor's

alarm warned of a toxic atmosphere. The gas powered chain saw remained in use, however, until it was replaced with an electric chain saw on March 4.[2]

Discussion

Subsection 1910.146(d) requires the employer to develop a program which will allow employees to perform their work in the permit space safely. The program must include procedures to purge, flush or ventilate permit spaces "as necessary" to eliminate or control atmospheric hazards. When the work required includes the use of equipment capable of producing atmospheric hazards, the ventilation provided must be adequate to control any hazards produced by that equipment. Here, no ventilation was initially provided; once ventilation was provided it proved inadequate to eliminate the carbon monoxide fumes created by the gas chain saw used by Respondent's employees.

NI argues that its gas monitor was factory calibrated to sound its alarm at 35 ppm for carbon monoxide, well below the 50 ppm which OSHA has established as the permissible exposure limit (PEL) for carbon monoxide. *See*, §1910.1000. The alarm is set to sound at a low of 19.5 percent oxygen (Tr. 580-82; Exh. R-10). Section 1910.146(b) defines an oxygen deficient atmosphere as any atmosphere containing less than 19.5 percent oxygen by volume. NI argues that the sounding of its alarm, therefore, fails to show that its ventilation failed to control the atmospheric hazard created by the chain saw.

The evidence establishes that the use of a gas chain saw repeatedly caused a build-up of carbon monoxide to 35 ppm or above, and/or a drop in the oxygen level to 19.5, and set off NI's gas monitor alarm (Exh. R-5). It is clear that NI's fan failed to eliminate the chain saw's exhaust fumes from the permit space. That the ventilation allowed toxic gases to build up in the sump is enough to establish the violation. To prove its *prima facie* case, it is not necessary for the Complainant to show that the atmosphere actually reached dangerous levels, because the standard is preventative in nature. *See; Dravo Corporation*, 7 BNA OSHC 2095, 1980 CCH OSHD ¶24,158 (No. 16317, 1980) [Discussing

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[2] Based on their non-antagonistic demeanor and on the cumulative nature of their testimony, this judge credits the testimony of those employee witnesses who worked in the sump over that of NI foreman Fortin. Fortin was the only management representative with first hand knowledge of the events at the sump, and as the supervisor on duty at the sump bears the ultimate responsibility for the employees' continued presence in the sump following the development of alarm conditions.

§1916.31(b)(1), requiring ventilation in confined spaces when welding; the Commission noted that allowing the employer to withhold ventilation until excessive fumes were actually detected might result in injury in the event of untimely detection].

Respondent recorded a 15.0 reading for carbon monoxide and a reading of 19.5 for oxygen on February 28, at which time employees were evacuated from the permit space. On March 3, no evacuation took place, and no records were made of the monitor readings which resulted in an alarm situation. Taking into account the error factor present in any monitor, and the noise hazard present in the sump with the chain saw running, the undersigned finds a significant risk of an undetected dangerous atmosphere building up in the sump. The evidence establishes that the ventilation provided was inadequate, in and of itself, to eliminate that dangerous atmosphere.

The cited violation has been established.

Penalty

Complainant characterizes the cited violation as serious. CO Overmyer testified without contradiction that the build-up of hazardous gasses could have resulted in asphyxiation, unconsciousness, and death. A penalty of $3,500.00 was proposed. NI stipulates to OSHA's computation of its size, history of previous violations, and good faith (Tr. 48). Based on the high gravity of the violation, and the absence of any new mitigating evidence, the penalty is deemed appropriate and will be assessed.

Alleged Violation of §1910.146(d)(5)(ii)

Serious citation 1, item 3 alleges:

29 CFR 1910.146(d)(5)(ii): Under the permit-required confined space program required by 29 CFR 1910.146(c)(4), the employer did not evaluate permit space conditions when entry operations were conducted by testing or monitoring the permit space as necessary to determine if acceptable entry conditions were being maintained during the course of entry operations:
(a) Employees entered confined spaces without the benefit of atmospheric testing being accomplished daily prior to entry. Dates were changed on confined space entry permit from previous day to current day without testing confined space.

Complainant maintains that the monitoring done was inadequate, in that it failed to take into account the layering of atmospheres in the pit (Tr. 261).

The permits indicate that the sump was purged or inerted prior to the employees initial entry (Exh. R-5). The evidence establishes that NI performed continuous monitoring of atmospheric conditions in the sump, and that readings reflecting the monitoring were recorded several times a day, though not always first thing in the morning. NI supervisor Fortin testified that the sump was not continuously occupied, and that for half of a day the sump might be unoccupied (Tr. 721). Fortin also testified that there was never an occasion during which employees entered the sump without monitoring being performed while he was on duty (Tr. 727). The testimony places the gas monitor all over the sump during the work shift. There is no testimony indicating where the recorded readings were obtained. Based on the evidence, this judge cannot conclude that monitoring did not reflect the breathing areas of NI employees.

The evidence fails to support Complainant's assertion that NI's atmospheric monitoring was inadequate. Citation 1, item 3 will be vacated.

Alleged Violation of §1910.146(e)(5)(ii)

Serious citation 1, item 4 alleges:

29 CFR 1910.146(e)(5)(ii): The entry supervisor did not terminate the entry and cancel the entry permit when a condition that was not allowed under the entry permit arose in or near the permit:
(a) Employers worked in permit required confined space when conditions not allowed occurred, 0_2 sensor sounded alarm and employees were not evacuated from permit space and no cancelled permit.

Discussion

The cited standard requires the entry supervisor to terminate the entry and the permit authorizing it whenever conditions not allowed under the permit arise in the permit space. Unlike the ventilation requirement discussed above, the standard cited here is premised upon proof of a non-complying condition; in order to make out a *prima facie* case, the Secretary must show that a condition that was not allowed under the entry permit arose in the permit space.

The evidence establishes that an alarm condition arose in the sump as a result of the use of a gas chain saw. None of the testimony, however, establishes that the alarm was due to conditions disallowed by NI's entry permit. NI's permit allows entry at oxygen levels of

19.5% and above. There is no evidence that the oxygen levels in the sump ever fell below that point. The only testimony on this issue was that of R. Carpenter, who stated that the alarm was caused by a 15.0 carbon monoxide (CO) reading. NI's permit allows entry where toxic gases are below the established PEL. Complainant introduced no evidence which might tend to establish that a 15.0 reading represents a CO level in excess of the PEL.

No other measurements were recorded or testified to by the employees.

A violation has not been established, and citation 1, item 5 will be vacated.

Alleged Violations of §1910.146(h)(5)(iii) and (i)(6)(i)

Serious citation 1, item 6 alleges:

29 CFR 1910.146(h)(5)(iii): The employer did not ensure that all authorized entrants exited from the permit space as quickly as possible whenever the entrants detected a prohibited condition:
(a) Authorized entrants failed to evacuate permit required confined space when prohibited condition occurred.

Serious citation 1, item 7 alleges:

29 CFR 1910.146(i)(6)(i): The employer did not ensure that each attendant monitored activities inside and outside the space to determine if it was safe for entrants to remain in the space and ordered the authorized entrants to evacuate the permit space immediately when the attendant detected a prohibited condition:
(a) Attendant did not require employees to evacuate confined space when prohibited condition occurred.

Discussion

For the reasons discussed above, the Complainant failed to establish a *prima facie* case. Citation 1, items 6 and 7 will be vacated.

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

1. Serious citation 1, item 1, alleging violation of §1910.146(d)(3)(ii) is VACATED.

2. Serious citation 1, item 2, alleging violation of §1910.146(d)(3)(iii) is AFFIRMED as a "serious" violation and a penalty of $3,500.00 is ASSESSED.

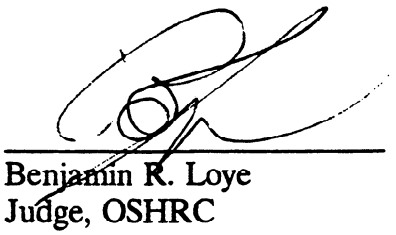
3. Serious citation 1, item 3, alleging violation of §1910.146(d)(5)(ii) is VACATED.

4. Serious citation 1, item 4, alleging violation of §1910.146(e)(5)(ii) is VACATED.

5. Serious citation 1, item 5, alleging violation of §1910.146(g)(3) is VACATED.

6. Serious citation 1, item 6 alleging violation of §1910.146(h)(5)(iii) is VACATED.

7. Serious citation 1, item 7 alleging violation of §1910.146(i)(6)(i) is VACATED.



Benjamin R. Loye
Judge, OSHRC

Dated: June 9, 1995