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SECRETARY OF LABOR,

Complainant,

v.

MCNALLY CONSTRUCTION AND  
 TUNNELING COMPANY,

Respondent.

OSHRC Docket No. 90-2337

**DECISION**

BEFORE: FOULKE and MONTOYA, Commissioners.\*

BY THE COMMISSION:

At issue is whether the portions of the underground construction standard, 29 C.F.R. § 1926.800, that deal with electrical hazards preempt the general electrical standard for construction, 29 C.F.R. § 1926.407(b), cited here by the Secretary.<sup>1</sup> Administrative Law Judge Paul L. Brady held that section 1926.800 did preempt section 1926.407(b) and vacated

\* This case was voted upon before Chairman Weisberg joined the Commission. Accordingly, Chairman Weisberg did not participate in this case in order not to further delay the issuance of this decision.

<sup>1</sup> That standard provides:

**§ 1926.407 Hazardous (classified) locations.**

.....  
 (b) *Electrical installations.* Equipment, wiring methods, and installations of equipment in hazardous (classified) locations shall be approved as intrinsically safe or approved for the hazardous (classified) location or safe for the hazardous (classified) location.

**§ 1910.5 Applicability of standards.**

....  
 (c)(1) If a particular standard is specifically applicable to a condition, practice, means, method, operation, or process, it shall prevail over any different general standard which might otherwise be applicable to the same condition, practice, means, method, operation, or process. . . .

(2) On the other hand, any standard shall apply according to its terms to any employment and place of employment in any industry, even though particular standards are also prescribed for the industry . . . to the extent that none of such particular standards applies.

It is well settled that a general standard prescribing compliance action is not preempted by a specific standard unless both address the same particular hazard. *See Brock v. Williams Enterp. of Georgia, Inc.*, 832 F.2d 567, 570 (11th Cir. 1987) (citing *L.R. Willson & Sons v. Donovan*, 685 F.2d 664, 670 (D.C. Cir. 1982)). In this case, it is clear that both sections 1926.800 and 1926.407(b) address the same hazard. We must then determine whether, as applied in this case, the specific standard, section 1926.800, preempts the application of the general standard, section 1926.407(b). We make that inquiry here in the context urged by the Secretary in his brief:

[T]he test for applicability of any statutory provision must look first to the text and structure of the statute or regulations whose applicability is questioned. If no determination can be reached, courts may then refer to contemporaneous legislative histories of that text. If this inquiry into the meaning of the text does not settle the question, the courts then defer to a reasonable interpretation developed by the agency charged with administering the challenged statute or regulation.

*See also Unarco Commercial Prods.*, 16 BNA OSHC 1499, 1502-03, 1993 CCH OSHD ¶ 30,294, p. 41,732 (No. 89-1555, 1993); *Securities Indus. Ass'n. v. Board of Governors of the Federal Reserve Sys.*, 847 F.2d 890 (D.C. Cir. 1988) (citing *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842 (1984)).

**A. Text and Structure**

**1. Section 1926.800**

The underground construction standard, section 1926.800, is a comprehensive standard that addresses virtually all safety and health hazards encountered in tunneling. It

§ 1926.800(h)(1), and is required to have “acceptable electrical systems, including fan motors” in its ventilation system. 29 C.F.R. § 1926.800(k)(11)(ii).<sup>6</sup>

A tunneling operation is classified as “gassy” under section 1926.800(h)(2) if (i) air monitoring discloses 10 percent or more of the LEL for methane or other flammable gases in any underground work area for three consecutive days, or if (ii) there has been an ignition indicating the presence of gases, or if (iii) “[t]he underground construction operation is both connected to an underground work area which is currently classified as gassy and is also subject to a continuous course of air containing the flammable gas concentration.” Section 1926.800(i)(1) requires “gassy” operations to use only “acceptable” equipment. Should a tunneling operation warrant a “gassy” classification, all operations in the affected area must stop until the operation is brought into compliance with all of the requirements for a “gassy” operation, or until the tunneling operation has been declassified to “potentially gassy.” 29 C.F.R. § 1926.800(i)(6).<sup>7</sup> “Gassy” operations may be declassified to “potentially gassy” when air monitoring results remain under 10 percent of the LEL for methane or other flammable gases for three consecutive days. 29 C.F.R. § 1926.800(h)(3).

Section 1926.800(s) of the underground construction standard also refers to Subpart K, which includes sections 1926.407 and 1926.449, as follows:

(s) *Electrical safety.* This paragraph applies in addition to the general requirements for electrical safety which are found in Subpart K of this part.

Sections 1926.800(s)(1) through (3) discuss the requirements for electric power lines, lighting circuits, and oil-filled transformers.

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<sup>6</sup> “Potentially gassy” operations are also subject to additional gas monitoring requirements, (29 C.F.R. § 1926.800(j)(2)(i)-(v)) including provision for manual electrical shut-down control near the heading (29 C.F.R. § 1926.800(j)(2)(iii)), as well as ventilation systems constructed of fire-resistant materials (29 C.F.R. § 1926.800(k)(11)(i)).

<sup>7</sup> Employers with “gassy” operations are also required to: post signs warning of the “gassy” classification (29 C.F.R. § 1926.800(i)(3)), prohibit smoking and collect all personal sources of ignition (29 C.F.R. § 1926.800(i)(4)), provide fire watches during hot work (29 C.F.R. § 1926.800(i)(5)), and provide above-ground controls for reversing the air flow (29 C.F.R. § 1926.800(k)(12)).

hazardous through failure or abnormal operations of the ventilating equipment . . . .

29 C.F.R. § 1926.449. Here, the Secretary claims that the tunnel is Class I, Division 2 because test borings<sup>9</sup> indicated the possibility that ignitable concentrations of methane could accumulate in the tunnel which might then become hazardous if the tunnel ventilation failed. Sections 1926.407 and 1926.449 require that such locations have “approved”<sup>10</sup> equipment if combustible levels of gas, which is 100 percent of the LEL, *might* accumulate. If section 1926.800 did not exist, it appears that these provisions would govern here.

### 3. Preemption of Section 1926.407 by 1926.800

Having examined the text and structure of the two standards, we hold that the provision of sections 1926.407 and 1926.449 are preempted by the provisions of section 1926.800. We reach this conclusion not only because section 1926.800 addresses the same hazard as section 1926.407 but also because these two standards set forth conflicting requirements, rather than complementary ones, as the Secretary contends. We recognize that general safety standards can complement specific standards by filling in the interstices necessarily remaining after the promulgation of the specific standards. *See generally, Dravo Corp. v. OSHRC*, 613 F.2d 1227, 1234 (3d Cir. 1980); *International Union, UAW v. General Dynamics Land Systems Div.*, 815 F.2d 1570 (D.C. Cir. 1987). Here, however, there is no gap left unregulated by the specific standard, section 1926.800. If an employer simultaneously complied with the two standards at issue here, it would not only be taking different steps to abate the same hazard, but section 1926.407 would effectively preempt section 1926.800.

Perhaps the most striking example of the standards’ collision is found in examining section 1926.800’s requirements for “potentially gassy” operations against those of the

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<sup>9</sup> Bore holes were drilled along the tunnel route prior to tunnel construction to determine whether methane might be encountered during construction. Methane was detected in 9 of the 20 test bore holes drilled.

<sup>10</sup> While section 1926.407 describes spark-proof equipment as “approved,” section 1926.800 refers to such equipment as “acceptable.”

The conflict between the standards is also highlighted by analyzing the Secretary's comparison of the interaction of the two standards to a "two-story house," with the first story occupied by section 1926.800 with an initial threshold action level of 5 percent<sup>12</sup> for a "potentially gassy" operation, and the second story occupied by section 1926.407, which he describes as having a higher action level of 100 percent. However, this analogy does not describe the standards' relationship. As we have seen, section 1926.800 requires an employer to take certain steps, from increasing the tunnel ventilation when 5 percent of the LEL is reached up to evacuating the tunnel when 20 percent of the LEL is reached. It also requires gas measurement over time to determine the proper classification of the tunneling operation with such classifications as "potentially gassy" or "gassy," with each classification noting the types of electrical equipment to be used. Into this full house of provisions designed to prevent methane ignition, the Secretary also would have the employer speculate whether there is a potential for 100 percent of the LEL. If there is, the employer would be required to install approved electrical equipment throughout the tunneling operation regardless of what section 1926.800 would have required.

This is not an isolated example of how the two standards are not additive and complementary as the Secretary alleges, but instead are directly conflicting. Section 1926.800 permits the reclassification of a "gassy" operation to "potentially gassy" if gas concentrations diminish, but under Subpart K a tunneling operation could never be declassified from "gassy" to "potentially gassy" as permitted by section 1926.800. Section 1926.800 requires "acceptable" equipment to meet the requirements of either Subpart K or the Mine Safety and Health Administration ("MSHA"), but section 1926.407 only permits equipment approved under Subpart K. We also note that if the Secretary intended that equipment required in Class I, Division II locations also be required for "potentially gassy" operations, he could have specifically required it in section 1926.800, as he did in section 1926.800(m)(9)(ii), which requires that "[l]ighting fixtures in storage areas, or within 25 feet

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<sup>12</sup> During oral argument, the Secretary argued that section 1926.800 "starts by requiring the employer to take actions if he detects just 10 percent of the LEL." However, the actual starting point at which the employer must take action is 5 percent of the LEL (*see* section 1926.800(j)(1)(vii)).

hazard is left unaddressed by the more specifically applicable standard. *See, e.g., Williams Enterprises*, 832 F.2d at 570. Section 1926.800, as we have seen, requires employers to take numerous steps to address the hazard. In addition to requiring “acceptable” equipment, the standard requires that potential sources of ignition be extinguished well before the methane reaches combustible levels. Even the presence of 20 percent of the LEL of methane requires employers to withdraw employees, except those necessary to eliminate the hazard, “to a safe location above ground.” 29 C.F.R. § 1926.800(j)(1)(ix)(A). Work in the tunnel stops well before the 100 percent of the LEL is reached. In addition, electrical power, except for “acceptable” pumping and ventilation equipment, is cut off to the area endangered by the flammable gas so as to further reduce the chance of electrical ignition of the gas. 29 C.F.R. § 1926.800(j)(1)(ix)(B).

The legislative history of section 1926.800 further clarifies the preemption question.

### **B. Legislative History**

The version of section 1926.800 in effect prior to August 1, 1989, entitled “Tunnels and shafts,” expressly required electrical equipment used in tunnel construction to conform to the requirements of Subpart K of Part 1926, which includes section 1926.407.<sup>15</sup> On June 2, 1989, OSHA promulgated the version of section 1926.800 McNally relies on here. Now entitled “Underground construction,” it became effective on August 1, 1989. 54 Fed. Reg. 23,824 (1989). In the preamble to the new standard, OSHA stated that “[t]he revised standard clarifies the existing 17-year old standard, covers hazards not effectively addressed previously, and reflects the current technology and methods used in underground construction.” *Id.* It classifies tunnels into “gassy” and “potentially gassy” operations and sets out specific requirements for both. OSHA also “recognize[d] that the substantial costs associated with graduating immediately from a non-gassy to a gassy classification [were] not

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<sup>15</sup> Paragraph 1 of the prior version of 29 C.F.R. § 1926.800, in effect until August 1, 1989, stated as follows:

(1) *Electrical equipment.* (1) Electrical equipment shall conform to the requirements of Subpart K of this part.

continued for three consecutive days would the more stringent classification of "gassy" be required. This phased-in approach allows an assessment to be made of the duration and extent of the flammable gas concentration while providing the opportunity to control or dilute the gas before "gassy" conditions are achieved.

*Id.* at 23,833. OSHA thus introduced the classification of "potentially gassy" as a middle ground between "gassy" operations and "non-gassy" operations. "Gassy" operations were to have approved electrical equipment. "Potentially gassy" operations were to have approved ventilation equipment only. The "phased-in" approach described in the preamble passage above would be illusory if section 1926.407(b) applied; it requires approved electrical equipment in tunnels that are only "potentially gassy."

The discussion of the costs of implementing the standard in the preamble to the final rule, as well as OSHA's Office of Regulatory Analysis report, *Regulatory Impact and Regulatory Flexibility Analysis of the Underground Construction Standard* (April 5, 1989), also demonstrates that section 1926.800 was intended to preempt section 1926.407. In the preamble, the Secretary lists separately the cost estimates for operations classified as "gassy" and "potentially gassy." 54 Fed. Reg. at 23,848. We cannot imagine why OSHA would have gone to the trouble of noting the costs of employing "acceptable" equipment in the costs of classifying a tunnel as "gassy" if it believed that the equipment was already required by section 1926.407(b). Nor would OSHA have included the costs of employing "acceptable" equipment only in the ventilation systems of "potentially gassy" tunnels if such tunnels were already required to employ "acceptable" equipment throughout the entire tunnel under section 1926.407(b).

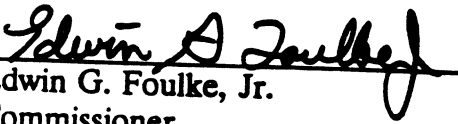
The Regulatory Analysis report provides further support for our conclusion. It states OSHA's finding that, under the proposed standard, which did not include the "potentially gassy" designation, compliance costs might have doubled for half of all tunnel projects. *Report* at V-64. The report noted that, "[c]learly, compliance costs of this magnitude would have had a serious impact on the underground construction industry." *Id.* at V-64 to -65. OSHA's report at V-66 notes its support for a gradual phase-in of the requirements based on gas concentrations encountered. The report also includes a revealing chart of requirements on page V-67 that conspicuously omits a requirement of "acceptable"


specific, applicable standard, section 1926.800. Section 1926.407 is hardly nullified by our conclusion. It continues to govern those aspects of electrical safety in underground construction that are not directly addressed by section 1926.800, as well as general electrical safety in all construction.<sup>20</sup>

After determining that section 1926.800 preempts section 1926.407, we would ordinarily consider whether to amend the citation to allege noncompliance with § 1926.800. *Vicon Corp.*, 10 BNA OSHC 1153, 1156-7, 1981 CCH OSHD ¶ 25,749, p. 32,159 (No. 78-2923, 1981), *aff'd without published opinion*, 691 F.2d 503 (8th Cir. 1982). We do not reach the amendment issue here because there is a lack of evidence to support a finding of a violation of section 1926.800. The Secretary acknowledges that the tunnel construction was at most a "potentially gassy" operation, and there is no evidence in the record that McNally failed to meet the requirements for a "potentially gassy" operation.

### III. Order

For the reasons given above, the decision of the administrative law judge vacating the Secretary's citation alleging a serious violation of 29 C.F.R. § 1926.407(b) is affirmed.

  
Edwin G. Foulke, Jr.  
Commissioner

  
Velma Montoya  
Commissioner

Dated: July 13, 1994

<sup>20</sup> Since our examination of the language and structure of the standards settle the applicability issue, we need not consider the Secretary's deference arguments.





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SECRETARY OF LABOR,

Complainant,

v.

MCNALLY CONSTRUCTION AND  
 TUNNELING COMPANY,

Respondent.

Docket No. 90-2337

**NOTICE OF COMMISSION DECISION**

The attached decision by the Occupational Safety and Health Review Commission was issued on July 13, 1994. **ANY PERSON ADVERSELY AFFECTED OR AGGRIEVED WHO WISHES TO OBTAIN REVIEW OF THIS DECISION MUST FILE A NOTICE OF APPEAL WITH THE APPROPRIATE FEDERAL COURT OF APPEALS WITHIN 60 DAYS OF THE DATE OF THIS DECISION.** See Section 11 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 660.

FOR THE COMMISSION

*Ray H. Darling, Jr.*  
 Ray H. Darling, Jr.  
 Executive Secretary

July 13, 1994  
 Date



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SECRETARY OF LABOR  
Complainant,

v.

MCNALLY CONSTRUCTION & TUNNELING  
Respondent.

OSHRC DOCKET  
NO. 90-2337

**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 February 27, 1992. The decision of the Judge will become a final order of the Commission on March 30, 1992 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 March 18, 1992 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  
Occupational Safety and Health  
Review Commission  
1825 K St. N.W., Room 401  
Washington, D.C. 20006-1246

Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.  
Counsel for Regional Trial Litigation  
Office of the Solicitor, U.S. DOL  
Room S4004  
200 Constitution Avenue, N.W.  
Washington, D.C. 20210

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) 634-7950.

FOR THE COMMISSION

*Ray H. Darling, Jr.*  
Ray H. Darling, Jr.  
Executive Secretary

Date: February 27, 1992



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SECRETARY OF LABOR,

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v.

MC NALLY CONSTRUCTION AND  
TUNNELING COMPANY,

Respondent.

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OSHRC Docket No. 90-2337

**APPEARANCES:**

Christopher J. Carney, Esq.  
Office of the Solicitor  
U. S. Department of Labor  
Cleveland, Ohio  
For Complainant

Keith A. Ashmus, Esq.  
Thompson, Hine & Flory  
Cleveland, Ohio  
For Respondent

Before: Administrative Law Judge Paul L. Brady

**DECISION AND ORDER**

McNally Construction and Tunneling Company ("McNally") was issued three citations alleging numerous violations of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("Act"), on July 24, 1990. All except two of the alleged violations were settled prior to the hearing (Tr. 5). The partial settlement agreement reached on the eleven resolved items will be incorporated into the order issued with this decision.

equipped with one prior to the inspection (Tr. 29-32, 77). A limit switch is a fail safe device designed to prevent the operator from inadvertently running the load into the boom tip (Tr. 30, 77). **Frank Fisher was the operator of the Bucyrus-Erie crane. Fisher used the crane on a daily basis, often in the presence of his supervisor, Tony Counts (Tr. 29-31). On one occasion, Fisher used the crane to lower Counts and an electrician into a shaft to repair an elevator (Tr. 31-32).**

McNally offers two defenses to this charge, both of which are without merit. McNally argues that it was not in violation of 29 C.F.R. §1926.800(t)(2) because the violation was the result of unpreventable employee misconduct, and because complying with the standard would have resulted in a greater hazard.

#### A. Unpreventable Employee Misconduct

To prove the defense of unpreventable employee misconduct, “an employer must establish that it had work rules that were intended to prevent the violation, that those rules were adequately communicated to its employees, and that those rules were effectively enforced.” *Ormet Corp.*, 14 BNA OSHC 2134, 1991 CCH OSHD ¶29,254, p. 39,203 (No. 85-531, 1991).

McNally argues that Tony Counts, one of its supervisors, acted alone in ordering Fisher to use the Bucyrus-Erie crane to lower personnel, in contravention of McNally’s work rules prohibiting such use. The evidence does not bear out this argument. McNally states that no one from management at McNally ordered Counts to do this, and cites to the transcript at pages 32 and 33. This is a misinterpretation of the testimony. At that point in the hearing, Fisher was being cross-examined by McNally’s counsel (Tr. 32):

Q. Mr. Fisher, do you know whether any upper management at McNally instructed Mr. Counts to have you lower an individual?

A. My orders just came from him.

Rather than affirmatively supporting McNally’s contention that no one from management ordered Counts to take this action, Fisher’s testimony only establishes that Fisher received the order from Counts. There is no indication Fisher would have reason to inquire of Counts as to the original source of the order. The cited testimony does not establish that Counts acted alone.

*Lauhoff Grain Co.*, 13 BNA OSHC 1084, 1987 CCH OSHD ¶27,814, pp. 36,397-36,398 (No. 81-984, 1987).

**McNally** offered no evidence whatsoever that a variance was sought, or that a variance was **unavailable** or inappropriate. The greater hazard defense must fail.

McNally also asserts that a limit switch is unnecessary on the Bucyrus-Erie crane when it is used for hauling muck because “the emptying of muck cars does not require the lifting of the load to anywhere close to the boom tip . . . . There is thus little or no chance of ever having a situation where a limit switch would come into play.” (McNally’s Brief, p. 34).

This is not a matter left to McNally’s discretion. The standard mandates in unequivocal language: “Cranes shall be equipped with a limit switch . . . .” There is no opportunity for choice in this matter. If an employer uses a crane which is not equipped with a limit switch, the employer is in violation of § 1926.800(t)(2), as is McNally in the present case.

The hazard of not having a limit switch is “the possibility of over-running the boom tip that would cause the load to fall.” (Tr. 81). In the case of the employees who were hoisted by the crane, the danger to them would be falling to the ground, “a considerable distance.” (Tr. 83). The hazard to the employees working in the tunnel below the crane would be that of being crushed to death under the crane’s load (Tr. 81-83). The Secretary has established a serious violation of § 1926.800(t)(2).

Upon due consideration of the factors specified in section 17(j) of the Act (size of the employer’s business, the gravity of the violation, the good faith of the employer, and the history of previous violations), it is determined that a penalty of \$700.00 is appropriate for this item.

## CITATION NO. 2

### Item 1: 29 C.F.R. § 1926.407(b)

29 C.F.R. § 1926.407(b) provides, in pertinent part:

Equipment, wiring methods, and installations of equipment in hazardous (classified) locations shall be approved as intrinsically safe or approved for the hazardous (classified) location or safe for the hazardous (classified) location.

**One feasible and acceptable method of abatement would be the installation of Class 1, Division 1, electrical and lighting equipment on the tunnel boring machine and Class 1, Division 2, lighting from the portal to the trailing end of the unit.**

**Compliance Officers Henry and Pappas entered the tunnel by way of an elevator at access shaft 17. Henry estimated the shaft to be 80 feet in depth. Once inside the tunnel, Henry and Pappas went past access shafts 16, 15 and 14 in order to reach the leading edge of the tunnel, referred to as the tunnel face. The tunnel face was approximately 2,000 feet past access shaft 14 (Tr. 74-75).**

**The tunnel was 11 feet in diameter and supported by steel and wood ribbing. The tunnel was excavated with a tunnel boring machine. The cutting wheel of the boring machine chips and scrapes away rock from the tunnel face and propels it onto a conveyor belt, which then loads the material into muck cars. The muck cars transport the material by rail to the access shaft where the cars are lifted by crane out of the tunnel and dumped (Tr. 49, 75-76).**

**Henry observed that the lighting used to illuminate the tunnel was not approved for a Class I, explosion-proof environment. The tunnel boring machine itself was not approved for a Class I, explosion-proof environment (Tr. 90-93). Class I, explosion-proof equipment and wiring is sealed so that if the equipment were to arc or spark, the arc or spark would be unable to ignite explosive gases that may be in the atmosphere (Tr. 85-86).**

**There is no dispute that the tunnel portion of Contract VI was constructed in Cleveland shale, a formation which produces methane gas. The geotechnical report prepared for Contract VI states:**

**The Cleveland Shale is known to be a formation which produces combustible gas. Although the gas is apparently contained in pockets, there is a high probability that significant quantities of combustible gas will be encountered in isolated sections of the alignment. (Exh. C-3)**

**Woodward-Clyde Consultants, commissioned by the sewer district to provide the report, found that methane gas was detected in 9 of 20 bore holes tested. Methane ranged in quantities from 10% to 100% of the lower exposure limit ("LEL") (Tr. 49-50, Exh. C-4).**

**Keith Mast, an engineer who produced the report, testified that when methane is encountered in a bore hole, it is also likely to be encountered in a tunnel constructed in the**

Mr. Al Matthews, one of Respondent's expert witnesses, testified that his views on the classification of tunnels was accepted by OSHA in drafting the new tunnel regulation (Tr. 217, 221). He stated one of the reasons the tunnel standard was promulgated was to eliminate the attempt to classify tunnels under 29 C.F.R. § 1926.407 (Tr. 229-230).

Safety regulations are generally construed liberally to allow broad coverage in carrying out the Congressional intent to provide safe and healthful working conditions. Courts have noted that:

An employer, however, is entitled to fair notice in dealing with his government. Like other statutes and regulations which allow monetary penalties against those who violate them, an occupational safety and health standard must give an employer fair warning of the conduct it prohibits or requires, and it must provide a reasonably clear standard of culpability to circumscribe the discretion of the enforcing authority and its agents. . . .

*Diamond Roofing Co. v. OSHRC*, 528 F.2d 645, 649-50 [4 OSHC 1001, 1003-1004] (5th Cir. 1976).

The regulation at 29 C.F.R. § 1926.800 is captioned **underground construction**. Under scope and application, it is stated "this section applies to the construction of **underground tunnels**. . . ."

Provisions under this regulation apply to both hazardous classification of tunnels, as well as proper use of electrical equipment. These provisions under the specific regulation must therefore take precedent over application of the general provisions of 29 C.F.R. §§ 1926.407(b) and 1926.449.

A contrary holding allows the arbitrary application of two different standards for the same alleged violation. Such action leaves a good faith employer to speculate regarding his responsibility to comply with safety standards under the Act and in determining which standard is appropriate in his workplace.

The standard at 29 C.F.R. § 1926.407(b) does not apply in this case and, accordingly, Citation No. 2 is vacated.

#### FINDINGS OF FACT AND CONCLUSIONS OF LAW

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