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

SECRETARY OF LABOR, Complainant, v. DANA CONTAINER, INC., Respondent.	OSHRC Docket No. 09-1184

ON BRIEFS:

Ronald Gottlieb, Appellate Attorney; Heather Phillips, Counsel for Appellate Litigation; Joseph M. Woodward, Associate Solicitor of Labor for Occupational Safety and Health; M. Patricia Smith, Solicitor of Labor; U.S. Department of Labor, Washington, DC
For the Complainant

John J. Coleman, III, Marcel L. Debruge, Ryan M. Aday; Burr & Forman LLP, Birmingham, AL
For the Respondent

DECISION

Before: ATTWOOD, Acting Chairman; MACDOUGALL, Commissioner.

BY THE COMMISSION:

Dana Container, Inc. is a New Jersey-based company that operates several industrial truck tank-washing facilities. The Occupational Safety and Health Administration inspected a Dana facility in Summit, Illinois, following an accident involving a Dana employee who required emergency medical assistance after he was found unconscious in a tank at the facility. OSHA issued Dana two citations alleging several serious and willful violations of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678. Most of the items alleged violations of

various sections of the permit-required confined spaces (PRCSs) standard, 29 C.F.R. § 1910.146.[1] The Secretary proposed a total penalty of $314,000.

The parties settled several citation items prior to the hearing, leaving five serious items and four willful items with a total proposed penalty of $238,000 at issue before Administrative Law Judge Sharon D. Calhoun. The judge affirmed two citation items as serious (Serious Citation 1, Item 13 and Willful Citation 2, Item 1a) and two citation items as willful (Willful Citation 2, Items 2 and 3). She vacated the remaining five items (Serious Citation 1, Items 10, 11a, 11b, and 12, and Willful Citation 2, Item 1b). The judge assessed a total penalty of $150,000.

Both parties petitioned for review of the judge's decision. At issue before the Commission are three of the items affirmed by the judge, including the willful characterization of two of those items—Serious Citation 1, Item 13 (non-entry rescue system), and Willful Citation 2, Items 2 (testing of conditions in permit space) and 3 (entry permit preparation). Also at issue are four of the items vacated by the judge based on her finding that Dana complied with

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[1] Under the PRCS standard, an employer must "evaluate the workplace to determine if any spaces are permit-required confined spaces." § 1910.146(c). A PRCS is defined as a confined space that has one or more of the following characteristics:

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

§ 1910.146(b). If the workplace contains PRCSs and employees will enter such spaces, the employer shall clearly identify these locations and "develop and implement a written permit space program." § 1910.146(c)(4). The employer's program shall protect employees from the hazards of PRCSs and regulate employee entry. For example, the employer must: (1) "Implement the measures necessary to prevent unauthorized entry;" (2) "Identify and evaluate the hazards of permit spaces before employees enter them;" (3) "Develop and implement the means, procedures, and practices necessary for safe permit space entry operations;" and (4) provide specified safety equipment at no cost to employees. § 1910.146(d)(1)-(4). Prior to entering a permit-required space, an entry permit must be prepared and authorized. § 1910.146(e). Conditions within the PRCS must be tested prior to entry and during the course of work, *see* § 1910.146(d)(5)(i), and, in general, a retrieval system or method must be in place, *see* § 1910.146(k)(3).

the alternate entry procedures specified in § 1910.146(c)(5)[2]—Serious Citation 1, Items 10 (gas meter maintenance), 11a (program revision/employees not protected), and 11b (program revision/annual permit review), and Willful Citation 2, Item 1b (specify acceptable entry conditions).

For the reasons that follow, we vacate Serious Citation 1, Item 10; affirm Serious Citation 1, Items 11a, 11b, and 13 as serious; affirm Willful Citation 2, Item 1b as serious,[3] and affirm Willful Citation 2, Items 2 and 3 as willful. For the affirmed violations, we assess a total penalty of $110,500.

BACKGROUND

At Dana's Summit facility, employees wash trailer tanks that have been used to transport various liquids, including hazardous materials. When a Dana customer drives an empty tank into Dana's facility for cleaning, the tank is brought to one of four bays, where a Dana employee first drains any residual product through a valve in the bottom of the tank. The employee then commences the cleaning process, which involves administering cleaning agents through a mechanical device called a "spinner." While standing on a catwalk that provides access to an opening in the top of the tank, the employee inserts the spinner into the opening, and the spinner sprays the cleaning agent onto the tank's interior surfaces. The cleaning process can involve hot or cold water, a hot detergent wash, a hot caustic wash, a wash using a solvent, or a combination of these substances, depending on the contents of the tank before cleaning. After this wash, the employee uses the spinner again to spray rinse water into the tank, then uses steam and blow dryers to sanitize and dry the tank.

On occasion, this process does not completely clean the tank. In such instances, a Dana employee must enter the tank to remove the remaining residue. Dana has a written "Permit

[2] The PRCS standard provides for alternative (less stringent than full permit procedures) entry procedures in cases where, essentially, the only hazard in a confined space is atmospheric, and the hazard can be controlled by forced air ventilation. § 1910.146(c)(5)(i). The alternative procedures are allowed only in cases in which specified requirements for substantiation and notification are met. § 1910.146(c)(5)(i)(B) and (E). If the entry operation is done using the alternate entry procedures, the employer does not need to meet §§ 1910.146(d) through (f) and (h) through (k). § 1910.146(c)(5)(i).

[3] We leave undisturbed the parties' agreement on review that Willful Citation 2, Item 1b, if affirmed, should be characterized as serious, not willful as initially alleged in the citation, given that the judge affirmed as serious Item 1a of the same willful citation.

Required Confined Space Entry Program," which includes a provision stating that tank entry is allowed only if a supervisor completes and issues a permit authorizing entry. Before issuing a permit, a supervisor must test the tank's atmosphere for oxygen content and for flammable and toxic vapors. If the supervisor issues a permit, the employee entering the tank must wear a harness attached to a retrieval device to enable non-entry rescue in the event of an emergency. A standby employee or "attendant" must be present outside the tank to monitor the entering employee at all times, and Dana uses blowers to continuously blow outside air into the tank during an entry.

Towards the end of the overnight shift on January 28, 2009, the Dana employee supervising that shift's tank washing crew (Supervisor A) began cleaning a tank that contained a pasty residue. He observed that the residue was not draining properly out of the bottom of the tank, so he decided to enter the tank to clear any obstruction. It is undisputed that Supervisor A did not conduct any atmospheric testing, complete a permit before entering the tank, or use his harness and the non-entry rescue system. Once inside the tank, Supervisor A lost consciousness and had to be rescued by the Summit Fire Department. Emergency personnel took Supervisor A to the hospital where doctors diagnosed him with "Syncope and Collapse, Toxic Effect of Unspecified Gas, Fume, or Vapor." Dana's Facility Manager formally disciplined Supervisor A in writing on the day of the accident.

DISCUSSION

The seven alleged violations before us on review fall into two categories: (1) those based on Supervisor A's entry into the tank, and (2) those for which Dana claims that it complied with the PRCS standard's alternate entry procedures specified in § 1910.146(c)(5).

I. Alleged Violations Based on Supervisor A's Tank Entry

The Secretary alleges three violations based on Supervisor A's conduct before and during his entry into the tank on the day of the accident: Serious Citation 1, Item 13, based on Supervisor A's failure to attach himself to a non-entry rescue system before entering the tank, in violation of § 1910.146(k)(3);[4] Willful Citation 2, Item 2, based on Supervisor A's entry into the

[4] Section 1910.146(k)(3) provides: "To facilitate non-entry rescue, retrieval systems or methods shall be used whenever an authorized entrant enters a permit space, unless the retrieval equipment would increase the overall risk of entry or would not contribute to the rescue of the entrant."

tank without first testing the conditions inside to ensure that it was safe for entry, in violation of § 1910.146(d)(5)(i);[5] and Willful Citation 2, Item 3, based on Supervisor A's failure to complete an entry permit documenting the measures taken to ensure safe entry, in violation of § 1910.146(e)(1).[6] At issue on review is the judge's finding that Dana had knowledge of the conditions alleged under all three items,[7] as well as her characterization of the two items as willful.

A. Knowledge

Under Commission precedent, to establish knowledge, the Secretary must prove that the employer knew or, with the exercise of reasonable diligence, should have known of the conditions constituting the violation. *Jacobs Field Servs. N. Am.*, 25 BNA OSHC 1216, 1218 (No. 10-2659, 2015). The judge concluded that Dana had actual knowledge of the violative conditions by imputing Supervisor A's knowledge of his own violative conduct to Dana, citing *Dover Elevator* for the proposition that "when a supervisory employee has actual or constructive knowledge of the violative conditions, that knowledge is imputed to the employer, and the Secretary satisfies his burden of proof without having to demonstrate any inadequacy or defect in the employer's safety program." *Dover Elevator*, 16 BNA OSHC 1281, 1286 (No. 91-862, 1993).

Here, there is no dispute that Supervisor A had actual knowledge of his own misconduct. Thus, under Commission precedent, Supervisor A's knowledge is imputable to Dana. However, the Third Circuit, one of three circuits to which this case could be appealed,[8] differs from the

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[5] Section 1910.146(d)(5)(i) provides: "[The employer shall] [t]est conditions in the permit space to determine if acceptable entry conditions exist before entry is authorized to begin."

[6] Section 1910.146(e)(1) provides: "Before entry is authorized, the employer shall document the completion of measures required by paragraph (d)(3) of this section by preparing an entry permit."

[7] The Secretary has the burden of proving: (1) the applicability of the cited standard; (2) the employer's noncompliance with the standard's terms; (3) employee access or exposure to the violative conditions; and (4) the employer's actual or constructive knowledge of the violation. *Ormet Corp.*, 14 BNA OSHC 2134, 2135 (No. 85-0531, 1991). Of these elements, only knowledge is at issue in this case.

[8] Under the OSH Act, an employer may seek review in the court of appeals in one of potentially three circuits: the circuit in which the violation occurred; the circuit in which the employer's principal office is located; and the District of Columbia Circuit. 29 U.S.C. § 660(a). The Secretary may seek review in the circuit in which the violation occurred or in which the

Commission, as it requires that in order to impute knowledge from a supervisor who participates in the violative conduct, the Secretary must prove that the supervisor's participation was foreseeable by showing that the employer's safety program was inadequate.[9] *Pa. Power*, 737 F.2d at 357-58; *Otis Elevator Co.*, 21 BNA OSHC 2204, 2208 (No. 03-1344, 2007). Although neither the Seventh nor D.C. Circuit has indicated whether it would adopt the Third Circuit's view, even under the Third Circuit's foreseeability test we would reach the same conclusion because, as discussed below, we find the record shows that Supervisor A's misconduct was foreseeable.[10] *See Otis*, 21 BNA OSHC at 2207-08.

While the judge did not analyze Dana's safety program in the context of her knowledge analysis, she considered its adequacy in her analysis of Dana's affirmative defense of unpreventable employee misconduct (UEM). She rejected the defense, finding that the company failed to take reasonable steps to discover violations of its work rules and failed to enforce those

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employer has its principal office. 29 U.S.C. § 660(b). This case arose in Illinois, which is in the Seventh Circuit, and Dana is based in New Jersey, which is in the Third Circuit. Accordingly, depending on the outcome, the Commission's final order in this case may be appealed to either the Third, Seventh, or D.C. Circuits.

[9] The adequacy of the employer's safety program depends on whether the employer: (1) had work rules designed to prevent the violation; (2) adequately communicated those rules to its employees; (3) took steps to discover violations; and (4) effectively enforced the rules when it discovered violations. *Pa. Power & Light Co. v. OSHRC*, 737 F.2d 350, 358-59 (3d Cir. 1984).

[10] We also note that, in general, "[w]here it is highly probable that a Commission decision would be appealed to a particular circuit, the Commission has . . . applied the precedent of that circuit in deciding the case—even though it may differ from the Commission's precedent." *Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2067 (No. 96-1719, 2000) (citation omitted). And Acting Chair Attwood notes that when there may be differences in the law between relevant circuits, the Commission may apply its own precedent. *See Bethlehem Steel Corp.*, 9 BNA OSHC 1346, 1349 n.12 (No. 76-3444, 1981) (consolidated); *Raybestos Friction Materials Co.*, 9 BNA OSHC 1141, 1143 (No. 80-2793, 1980). Moreover, in her view there is no basis here to predict the likelihood of an appeal or which circuit court may be the first to receive one. Commissioner MacDougall disagrees with Acting Chair Attwood but is of the opinion that any disagreement on this point is immaterial to the disposition herein because, even under applicable Third Circuit precedent—Commissioner MacDougall applies Third Circuit precedent in deciding this case as this is the circuit to which it is highly probable this decision would be appealed—there is agreement that the Secretary has met his burden of proof on proving the element of employer knowledge. *See Kerns*, 18 BNA OSHC at 2068-69 (Commission applied Third Circuit precedent, including *Pennsylvania Power & Light*, which stated that where employer knowledge is based on supervisory misconduct, the Secretary bears the burden of proving that the supervisor's conduct "could have been foreseen and prevented by the employer with the exercise of reasonable diligence and care") (citations omitted).

rules. We agree with the judge that Dana's safety program was inadequate because Dana did not effectively enforce its work rules designed to protect employees from PRCS hazards when violations were discovered.

As the judge found, the record shows that Dana had work rules designed to prevent the violations and had communicated those rules to its employees. Dana's program bars entry into "dirty" tanks, i.e., those that have not been washed. The program does allow entry into "clean" tanks, i.e., those that have gone through a mechanical wash, but employees must treat washed tanks as PRCSs. This includes requiring employees to wear a harness and attach it to a retrieval line to enable non-entry rescue, to test the atmospheric conditions within the tank, and to complete an entry permit before entering a PRCS. These rules were included in the PRCS training program that Dana uses to train its employees and were communicated to Dana's employees, including Supervisor A.

The record also shows that Dana had a reasonable method to discover violations of its rules. First, as the judge points out, Dana could readily discover such violations by reviewing the tank entry permits, which the Facility Manager at the Summit facility acknowledged he did. Second, as described in the table below, each of the 28 entry permits Dana produced to the Secretary had an error or omission, and 11 of those deficient permits—nearly 40%—were completed by Supervisor A.

Tank Entry Permit Deficiencies

Permit Number	Supervisor A Involved?		Lack of Post-Entry Air Monitoring	Duration of Authorization Not Specified	Duration of Authorization Exceeded	Entry and/or Exit Times Missing	No or Missing MSDS Review	Entrant Not Listed	Attendant Not Listed	No supervisor approval and/or permit cancellation	No Toxicity or LEL Levels Recorded
649	No		•	•							
650	No		•	•							
651	No		•	•							
652	No		•	•							
653	No		•	•							
654		**Yes**	•			•	•	•		•	
655	No		•	•							
656	No		•	•							
657	No		•	•							
658	No		•	•							
659	No		•	•			•				
660		**Yes**	•			•	•		•		
661		**Yes**	•				•		•		
662		**Yes**	•				•		•		
663		**Yes**	•		•						
664		**Yes**	•				•		•	•	
665		**Yes**	•								
666	No		•		•					•	
667	No		•				•				
668		**Yes**	•			•	•		•	•	
669	No		•				•				•
670		**Yes**	•		•		•		•	•	
671	No		•								
672		**Yes**	•				•				
673		**Yes**	•				•	•			
674	No		•		•						
675	No		•		•					•	
676	No		•							•	

While none of these deficiencies show the specific violations at issue here with regard to Supervisor A's entry, evidence relating to an employer's entire safety program, not just those aspects specific to the citations at issue, is relevant to assessing the program's adequacy for foreseeability purposes. *See Rawson Contractors Inc.*, 20 BNA OSHC 1078, 1081 (No. 99-0018, 2003) (finding employer's failure to impose discipline for "minor" violations discovered by an outside consultant defeated UEM claim for supervisor's more serious misconduct); *Jensen Constr. Co.*, 7 BNA OSHC 1477, 1479 n.5 (No. 76-1538, 1979) (finding employer's claim that it enforced its safety program was undermined by other instances of a failure to protect employees from the relevant hazard even though those other instances were beyond the scope of the citation).

The deficiencies evident in all 28 tank entry permits show that employees were violating Dana's safety rules.[11] For instance, Dana's PRCS program requires employees to conduct air monitoring subsequent to entry and record the monitoring results on the permits, yet no such results appear on any of the 28 permits in evidence. Both the company's PRCS program and PRCS training program also state that permits must specify the duration for which they are valid, yet seven of the permits show entries exceeding the 20 minutes that the permits specify as the maximum duration—including one showing a 1-hour, 40-minute entry; one showing a 1-hour, 30-minute entry; and one showing a 2-hour entry.[12] In addition, Dana's PRCS training program requires employees to review material safety data sheets (MSDSs), but 12 permits either have no indication of whether MSDSs were reviewed or affirmatively indicate that they were not reviewed at all. Moreover, both the PRCS program and the PRCS training program require the

[11] Dana argues that errors on the entry permits for "clean" tanks did not make Supervisor A's entry into a "dirty" tank foreseeable. But this argument misses the mark. The citation items at issue are not based on the fact that the tank Supervisor A entered was "dirty." Rather, the citation items are based on his failure to follow PRCS procedures required both by OSHA and by Dana's safety program whenever an employee enters a PRCS. Thus, the fact that these tank entry permits show that Supervisor A and other employees failed to follow PRCS procedures when entering clean tanks is sufficient evidence to support a finding that it was foreseeable Supervisor A and other employees would continue to disregard required PRCS procedures, regardless of whether they were entering a "clean" or a "dirty" tank.

[12] Two additional permits, both completed by Supervisor A, specify neither the time the tank was entered nor the time it was exited. Also, 10 of the 28 permits do not include the required language specifying the duration of authorization. The shortest entry on those permits is 45 minutes, and of the remaining nine permits, five have 1-hour entries, three have 2-hour entries, and one has a 3-hour entry.

entrant and the attendant to be listed on the permits before entry. Nonetheless, six permits—all completed by Supervisor A—do not name an entry attendant, and two additional permits, also completed by Supervisor A, name the attendant but not the entrant. Finally, one permit indicates that a Dana employee entered a dirty tank which, if true, would have been a clear violation of Dana's work rule prohibiting such an entry.

Even if the permits are only facially deficient and the required actions were in fact taken, the permits plainly show that employees were violating the work rules Dana had for completing them and, at least in some cases, indicate that employees were failing to comply with other entry work rules as well.[13] The Facility Manager testified that he reviewed these completed permits, and while that demonstrates Dana had a reasonable method of discovering deficiencies, we find that the Facility Manager's failure to follow up on the permit deficiencies he observed demonstrates a failure to enforce the company's program.

Moreover, the Facility Manager never disciplined Supervisor A or anybody else for either the deficient permits or the violations of Dana's safety rules evident on the face of those permits, lending further support to our finding that Dana failed to effectively enforce its rules. Furthermore, Supervisor A admitted that he violated the work rules at issue here because he "was tired, it was cold, and [he] wanted to try to just finish that trailer." *See Jensen*, 7 BNA OSHC at 1480 ("[T]he fact that a supervisor would feel free to breach a company safety policy is strong evidence that the implementation of the policy is lax.") (citing *Nat'l Realty & Constr. Co. v. OSHRC*, 489 F.2d 1257, 1267 n.38 (D.C. Cir. 1973)). Supervisor A's own permits, on their face, show numerous violations of Dana's work rules, and his conduct on the day of the accident is consistent with those previous violations, all of which support the conclusion that he did not fear disciplinary action for violating Dana's safety rules. This misconduct, combined with the

[13] Most of the deficiencies also correspond with requirements of the PRCS standard. Given our conclusion below that Dana failed to qualify for the standard's alternate entry procedures, the Secretary has established that these requirements were mandatory for tank entries at the Summit facility. *See* §§ 1910.146(e)(4) and (f)(3) (requiring employer to establish and document authorized duration of permit, which may not exceed time required to complete assigned task); §§ 1910.146(h)(1), (i)(1), and (j)(1) (requiring entrants, attendants, and supervisors to know hazards that may be faced during entry, including information on mode, signs or symptoms, and consequences of exposure); § 1910.146(f)(4) (requiring permits to identify authorized entrants); § 1910.146(f)(5) (requiring permits to identify personnel serving as attendants).

company's apparent acceptance of deficient entry permits without repercussions, establishes that Dana failed to enforce its safety program.[14]

Accordingly, we conclude that Supervisor A's misconduct was foreseeable, and thus his knowledge of his own misconduct would be properly imputable to Dana even under Third Circuit precedent.[15] As no other elements of the violations are at issue, we affirm Serious Citation 1, Item 13, and Willful Citation 2, Items 2 and 3.[16]

B. Characterization of Willful Citation 2, Items 2 and 3

On review, Dana challenges the judge's willful characterization of Items 2 and 3, which allege violations pertaining to Supervisor A's entry into the tank without testing the atmosphere

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[14] In reaching this conclusion, we do not rely (as the judge did) on a statement made by the Facility Manager during the hearing that he "run[s] a lax discipline, documented discipline, because it opens the door for every employee who gets angry to pick up the phone and call OSHA." We are persuaded that the Facility Manager likely made the statement out of frustration in response to the previous witness's apparent willingness to change his testimony in return for being rehired at the facility. Indeed, the Facility Manager followed this statement with testimony that he has disciplined every employee who entered a dirty tank or failed to use a non-entry rescue system and that he has never refrained from disciplining an employee for fear the employee would contact OSHA or another regulatory agency.

Moreover, we draw no adverse inferences about Dana's enforcement efforts from its seemingly sparse disciplinary record. *See Kerns Bros.*, 18 BNA OSHC at 2070 ("The evidence indicates that [the employer] disciplined employees on the few occasions when it found them violating safety rules."). Given that Summit is a small facility with only twelve non-office employees, the issuance of three notices for two incidents over the 11 years preceding Supervisor A's violative entry is inconclusive with respect to lax enforcement.

[15] For the same reasons that we find Supervisor A's misconduct foreseeable, we affirm the judge's rejection of Dana's UEM affirmative defense. *See Manganas Painting Co.*, 21 BNA OSHC 1964, 1997 (No. 94-0588, 2007) ("To establish th[e UEM] defense, an employer must show that it had: (1) established work rules designed to prevent the violative conditions from occurring; (2) adequately communicated those rules to its employees; (3) took steps to discover violations of those rules; and (4) effectively enforced the rules when violations were discovered."). We note, however, that the judge considered an additional element in analyzing Dana's UEM defense—"that the violative conduct of the employee was idiosyncratic and unforeseeable." However, foreseeability is not an additional element; rather, it is an issue proved or disproved by an analysis of the four UEM elements, and only in the context of imputing a supervisor's knowledge of his own misconduct to the employer in circuits, such as the Third Circuit, which require a showing of foreseeability. *See, e.g.*, *Pa. Power*, 737 F.2d at 358-59.

[16] Dana does not challenge the characterization of Serious Citation 1, Item 13 on review and we find no reason to disturb the judge's findings on this issue. *See, e.g.*, *KS Energy Servs., Inc.*, 22 BNA OSHC 1261, 1268 n.11 (No. 06-1416, 2008) (affirming alleged characterization where issue not in dispute).

and without completing a tank entry permit. "Willful violations are 'characterized by an intentional or knowing disregard for the requirements of the Act or a "plain indifference" to employee safety, in which the employer manifests a "heightened awareness" that its conduct violates the Act or that the conditions at its workplace present a hazard.' " *Barbosa Group, Inc.*, 21 BNA OSHC 1865, 1868 (No. 02-0865, 2007) (citation omitted), *aff'd*, 296 F. App'x 211 (2d Cir. 2008) (unpublished). This state of mind is evident where " 'the employer was actually aware, at the time of the violative act, that the act was unlawful, or that it possessed a state of mind such that if it were informed of the standard, it would not care.' " *AJP Constr. Inc. v. Sec'y of Labor*, 357 F.3d 70, 74 (D.C. Cir. 2004) (citation and emphasis omitted).

The judge affirmed Items 2 and 3 as willful based on Supervisor A's admission that he knew it was wrong to enter the tank without testing it or completing a tank entry permit.[17] We agree with the judge that Supervisor A's conduct was willful. Supervisor A knew he was violating Dana's safety rules and OSHA's PRCS standard when he entered the tank without first testing the atmospheric conditions or completing an entry permit. As noted above, he admitted that he disregarded these rules because it was the end of his shift, he was tired, it was cold, and he "just wanted to finish that trailer." We find that Supervisor A's conduct shows a conscious disregard for known requirements of the standard, and his willful state of mind is imputed to Dana. *See, e.g.*, *Tampa Shipyards, Inc.*, 15 BNA OSHC 1533, 1539 (No. 86-0360, 1992) (consolidated).[18]

We also reject Dana's contention that it made a good faith effort to comply sufficient to overcome a finding of willfulness. *See, e.g.*, *Anderson Excavating & Wrecking Co.*, 17 BNA

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[17] The judge also stated that Supervisor A "committed [the violations] with premeditation." Premeditation is not an element of a willful violation; thus, we do not affirm the items as willful on this basis.

[18] Commissioner MacDougall finds that under Third Circuit precedent on willfulness, the record supports willfulness as Supervisor A's conduct was a deliberate or intentional disregard of the Act. *See Frank Irey, Jr., Inc. v. OSHRC*, 519 F.2d 1200, 1207 (3d Cir. 1974) (defining a willful violation as "equivalent to a knowing, conscious, and deliberate flaunting of the Act[,] . . . more than merely voluntary action or omission—it involves an element of obstinate refusal to comply"), *aff'd en banc*, 519 F.2d 990 (3d Cir. 1975), *aff'd on other grounds sub nom. Atlas Roofing Co. v. OSHRC*, 430 U.S. 442 (1977); *see also Babcock & Wilcox Co. v. OSHRC*, 622 F.2d 1160, 1167 (3d Cir. 1980) (agreeing with DC Circuit that there is "little if any difference" between Third Circuit's willful approach and other courts).

OSHC 1890, 1891 (No. 92-3684, 1997) (an employer's good faith effort to comply with the standard, even if the employer's efforts were not entirely effective, can negate a finding of willfulness), *aff'd*, 131 F.3d 1254 (8th Cir. 1997). Although the company had work rules that it communicated to its employees and submitted evidence of three instances of disciplinary action, the fact remains that Dana's Facility Manager, despite admitting that he reviewed all the permits, never disciplined an employee for improperly completing entry permits or for the violations that were readily apparent on the face of the permits. While Dana's conduct does not amount to an " 'absence of *any* evidence that [the employer] enforced [its] safety rules,' " *Elliot Constr. Corp.*, 23 BNA OSHC 2110, 2118 (No. 07-1578, 2012) (citation omitted), a good faith effort to comply requires *some* action when violations of safety rules are plain, as they certainly were here. Therefore, we affirm both items as willful.

II. Applicability of Alternate Entry Procedures and Other Alleged PRCS Violations

A. Did Dana Meet the "Conditions" Required for Alternate Entry?

Dana asserts that it was not required to comply with the cited provisions of the PRCS standard because, it contends, it was entitled to rely on the alternate entry procedures specified in § 1910.146(c)(5)(ii). *See* § 1910.146(c)(5). Reliance on the alternate entry procedures, however, is only available when certain prerequisites, denoted "conditions" in the standard, are met. *Id*. Section 1910.146(c)(5)(i) provides: "An employer whose employees enter a permit space need not comply with paragraph[] (d) . . . provided that: [alternate entry conditions (A) through (F) are satisfied]." Use of the alternate entry procedures is limited to PRCSs in which the only hazards posed are atmospheric hazards that can be controlled by ventilation. § 1910.146(c)(5)(i)(A). To be exempt from the full permit procedures in paragraph (d), *all* of the conditions detailed in § 1910.146(c)(5)(i)(A)-(F) must be met.[19]

The judge found that Dana complied with all of the specified alternate entry conditions under § 1910.146(c)(5)(i), and therefore she vacated all four citation items that the Secretary alleged under paragraph (d) of the PRCS standard. For the following reasons, we find that Dana

[19] Because OSHA uses the term "paragraph" to refer to both paragraphs and sub-paragraphs, e.g., § 1910.146(d) and § 1910.146(c)(5)(i)(A), we use "paragraph" in the same way.

failed to meet the conditions set forth under paragraphs (B) and (C), and therefore conclude that it did not qualify for use of the alternate entry procedures.[20]

Paragraph (B) requires an employer to "demonstrate that continuous forced air ventilation alone is sufficient to maintain that permit space safe for entry[.]" § 1910.146(c)(5)(i)(B). Paragraph (C) has an associated condition—an employer must "develop[] monitoring and inspection data that supports the demonstrations required by paragraph[] . . . [(B)] . . . ." § 1910.146(c)(5)(i)(C). The judge found that Dana met the requirement in paragraph (B) because Dana's tank entry procedure requires testing for hazards before entry and Dana "established [that] it uses continuous forced air ventilation during entry." The judge also found that Dana's tank entry permits document the monitoring and inspection data requirements of paragraph (C).

Although paragraph (B) itself does not specify what sort of demonstration would be sufficient to show that continuous forced air ventilation alone is sufficient to maintain the permit space safe for entry, the preamble to the PRCS standard reflects OSHA's concern that the demonstration realistically account for the critical role played by the ventilation system where the alternative procedures have displaced other protective measures:

> In order for the space to be considered safe, the atmosphere within the space after ventilation may not be expected to approach a hazardous atmosphere. This is necessary so that, if the ventilation shuts down for any reason (such as loss of power), the employees will have enough time to recognize the hazard and either exit the space or restore the ventilation. A guideline of 50 percent of the level of flammable or toxic substances that would constitute a "hazardous atmosphere" may be used by employers in making the determination required under (c)(5)(i)(B).

Permit-Required Confined Spaces, 58 Fed. Reg. 4,464, 4,488 (Jan. 14, 1993).[21] We agree with the Secretary that to satisfy paragraph (B) in the circumstances here, Dana had to have

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[20] In light of this conclusion, we need not address whether the prerequisites under paragraphs (A) and (D) through (F) were met. *See* § 1910.146(c)(5)(i)(A), (D)-(F).

[21] This concern was echoed in a compliance directive in which OSHA stated that for an employer to demonstrate that ventilation will maintain the air inside a permit space safe for entry, and thus fulfill this condition, the employer should have documentation with data including:

> [v]olume of the space to be entered; [c]apacity and configuration of the ventilation equipment to be used; [i]dentified atmospheric hazards and potential hazards; [t]he sampling results from routine testing of the space from the time

monitoring and inspection data, specified under paragraph (C), proving that ventilation would "maintain" the atmosphere inside its tanks safe for entry. *See Sharon & Walter Constr., Inc.*, 23 BNA OSHC 1286, 1293 (No. 00-1402, 2010) (meaning of statutory language " 'determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.' ") (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)).

While Dana contends that paragraph (B) has been met because its wash process renders tanks free from any potential hazardous atmosphere such that its use of continuous ventilation during entry is an additional, but unnecessary, precaution,[22] the record does not support this claim. Randy McGough, Dana's expert and an engineer who consults with transportation clients on confined space entry compliance, testified that the company's wash process removes any potential hazardous atmosphere from the tanks, which he based on his "first hand evaluation of the procedures used to clean those tank trailers and dry [them] and . . . testing data that I've seen and . . . produced." He did not identify the "data" to which he was referring and his only supporting reference appears to be a report he finalized in July 2009, in which he concluded that "[b]ased on a review of previous atmospheric testing results at the other Dana facilities and the pre-tank entry test results at the Summit terminal, the tank trailer washing procedures are found to be adequate to remove any potential atmospheric or dermal hazards inside the tank trailers."

> ventilating has begun through final determination of acceptable entry conditions; and [a]tmospheric hazards created by work in the space.

Occupational Safety and Health Administration, CPL 02-00-100, Application of the Permit-Required Confined Spaces (PRCS) Standards, 29 C.F.R. 1910.146, App. E, Section (c), No. 7 (1995). OSHA has characterized an employer's burden under paragraph (B) as "significant." *See* OSHA Interpretation Letter from Director John B. Miles to Verne R. Brown (Apr. 24, 1996).

[22] Dana's additional claim that it conducts continuous testing is unsupported by the record. John Clarence Bean, a Dana employee who works on "safety and environmental compliance" at its Demopolis, Alabama, facility, testified that "at the time we're blowing, we [are] continuously testing when we're making an entry into the space." Bean admitted, however, that he did not know what instruments Dana uses to perform atmospheric tests at the Summit facility. In fact, the record shows that at the Summit facility, Dana exclusively uses a four-gas meter with hand bulb aspirator, which cannot function automatically but must be squeezed manually to bring air into the meter's sensors. Furthermore, the Facility Manager never stated that Dana performs continuous *testing* at the Summit facility, only that it uses continuous *ventilation*. He testified that Dana's procedure is to test tanks before entry, maintain continuous ventilation during entry, and retest the atmosphere if employees remain inside the tank after an hour has passed.

We find that this report is of limited value. It does not specify what past "testing results" McGough relied on to reach this conclusion, and, in fact, the report contains no testing data at all. *See* CPL 02-00-100, App. E., Section (c), No. 6 (describing necessary data). Furthermore, the report was dated July 2009, over six months after the January 2009 inspection, so we find it of limited value, if any, in assessing Dana's demonstration, which paragraph (B) requires be made *before* any tank entries occur. *See* 58 Fed. Reg. at 4,488 (employers must satisfy the conditions under (c)(5)(i) "*before* a permit space may be entered under the alternative procedures") (emphasis added).

Dana relies on two reports prepared for Suttles Truck Leasing, whose tank-washing facilities Dana bought in 1999, to support its claim that the wash process used at the Summit facility reduces atmospheric hazards to the extent that ventilation alone is sufficient to keep its employees safe during entry. In relying on these reports, Dana points to McGough's testimony that the wash process at Summit is not materially different from the wash process used by Suttles. Both of the reports—one from 1996 and the other from 1999—contain testing data regarding the atmospheric hazards inside tanks both before and after Suttles' wash process. The 1996 report suggests that Suttles' wash process was successful at keeping toxic hazards below the permissible exposure limit (PEL) in tanks that employees may enter.[23] The Commission previously considered this report in *Suttles Truck Leasing, Inc.*, 20 BNA OSHC 1953, 1966 (No. 97-0545, 2004) (consolidated), and found, based on the report, that Suttles' wash process purged any "*toxic* atmospheres" in the tanks at issue in that case. Dana contends that this report establishes that Dana's wash process eliminated all hazards in the instant case, but we do not agree. As Craig Schroll, the Secretary's expert, pointed out at the hearing, Suttles washed the 20 tanks tested for the 1996 report using only water, while Dana often uses solvents that can, on their own, create atmospheric hazards. Furthermore, as Schroll noted, Dana's wash process has a great deal of variability and leaves much to the discretion of its employees; for example, Dana relies on employees to decide to wash the tanks with water or a solvent and how long to wash

[23] In the 1996 report, 20 washed tanks were tested for chemical compounds identified from MSDSs of typical products contained in tanks cleaned by Suttles, as well as carbon monoxide, lower explosive limits (LELs), oxygen, and volatile organic compounds. The report states that two of the 20 post-wash samples exceeded the PEL for certain substances, but one of those samples was suspected to be a mix-up and the other was from a tank that would not require employee entry.

and dry them. Thus, we find that the 1996 report fails to support Dana's claim. *See U.S. Postal Serv.,* 21 BNA OSHC 1767, 1775 (No. 04-0316, 2006) ("[F]inders of fact are normally accorded wide latitude in determining whether proffered expert testimony would be helpful . . . .").

The 1999 Suttles report is equally lacking. For this report, washed tanks were tested with newly acquired photoionization detectors (PIDs), which are more sensitive in detecting volatile organic compounds than Dana's four-gas meter. The test results from the PIDs showed that two out of Suttles' 20 post-wash tanks had concentrations of hazardous organic vapors *above* the PEL.[24] Additionally, 11 of the 51 total tests showed some level of difference between readings taken in the front, middle, and rear of the tanks, and two of the 51 showed oxygen levels *below* OSHA's acceptable range.[25] Thus, while the 1999 report concluded that "[t]here is *minimal* exposure to a hazardous atmosphere within a tank washed at a Suttles Truck Leasing, Inc. terminal," it does not state if and how ventilation might affect this atmosphere during entry. (Emphasis added.) Under these circumstances, we find that the 1999 and 1996 reports do not demonstrate that Dana's tank wash process removes any potential for a hazardous atmosphere—and in fact suggests that it may not. Accordingly, neither report satisfies paragraph (B), nor contains monitoring and inspection data that satisfy the requirements of paragraph (C).

In addition, we find that Dana's reliance on pre-entry testing does not mitigate the limitations of Dana's tank wash process or its variability among employees who control it. Because the four-gas meter used at the Summit facility is incapable of testing for all potential atmospheric hazards, Dana's pre-entry testing cannot serve as a check to ensure the wash process sufficiently eliminates atmospheric hazards by use of ventilation alone. As Schroll explained, this type of meter does not measure potential volatile organic compounds individually with a reading based on parts per million (ppm)—it measures these compounds all together as a lower explosive limit (LEL) percentage. As a result, Schroll stated that it is possible to have "readings of significant numbers at that parts per million level and still show zero percent LEL." Thus,

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[24] One tank showed nitrobenzene in the "rear-top station" of the tank at 1.33 ppm (PEL is 1 ppm) and one showed aniline in the "rear-middle and rear-bottom stations" at 5.15 ppm and 6.45 ppm, respectively (PEL is 5 ppm). The report points out that these results exceed the respective PELs by 29% and 33% for an 8-hour exposure, but that the amount of time employees are in the tanks for inspections "average[s] only 10 minutes."

[25] The acceptable range from the PRCS standard's definition of "[h]azardous atmosphere" is between 19.5% and 23.5% oxygen. § 1910.146(b). The tests showed 19.3% and 19.4% oxygen.

Dana's meter might not alert employees performing pre-entry testing to volatile organic compounds above the PEL—a real possibility according to the 1999 Suttles report. Indeed, the meter's inability to accurately report volatile organic compound levels—i.e., for purposes of toxicity (rather than explosive levels)—is relevant to the extent Dana must prove that *no* atmospheric contaminant can be expected to approach a hazardous level during entry. *See* 58 Fed. Reg. at 4,488. Accordingly, we find the pre-entry data recorded on the permits does not satisfy the requirements in paragraphs (B) or (C).

Finally, we note that Dana offered no data at all analyzing the effectiveness of its ventilation—no results were recorded of testing conducted after employees were in a tank for longer than an hour, which the Facility Manager identified as an entry requirement.[26] The only evidence of monitoring results during an entry is another report from Suttles, which documents a 20-minute-long tank entry test in 1997. That tank had been washed using hot water only and was tested multiple times for temperature, relative humidity, oxygen, and LEL from eight different locations throughout the 20-minute entry. The test results showed 0.0 LEL throughout the entire entry and oxygen levels that dropped from 20.7% to 20.4%. The report, however, does not state whether there was ventilation during the entry. Accordingly, we do not find that this report, or any other evidence in the record, supports Dana's argument that its use of continuous ventilation eliminated the possibility of a hazard developing during entry. Indeed, none of this evidence addresses or rebuts the testimony of the Secretary's expert that the act of scraping off residue remaining after the wash process "has the potential to disturb the material in such a way that it's going to give off . . . potentially hazardous vapors."[27]

In sum, we find that Dana did not satisfy the conditions specified in § 1910.146(c)(5)(i)(B) and (C) and, therefore, its contention that it could rely on the alternate entry procedures

[26] Even if the permits contained retesting data or other data addressing ventilation effectiveness, those permits would not satisfy the alternate entry requirements for *that* entry because, as discussed previously, employers must satisfy all alternate entry conditions *before* employees enter a permit space. *See* 58 Fed. Reg. at 4,488. If the pre-entry data showed, as Dana argues, that the tank wash process eliminates all hazards before entry, Dana could have relied on the data in *previous* permits to show that in *subsequent* entries the only hazard was an actual or potential hazardous atmosphere. That data by itself, however, still would not prove that continuous air ventilation alone is sufficient to *maintain* that permit space safe for entry.

[27] Schroll testified that on numerous occasions in the past he had done testing in washed tanks to "make assessments about residues and their potential to evolve, particularly when disturbed."

under § 1910.146(c)(5)(ii) is rejected. Accordingly, we reverse the judge's decision to the contrary. We turn next to the four citation items alleging violations of the standard's PRCS program requirements under § 1910.146(d).

B. Serious Citation 1, Item 10

The Secretary alleges that Dana violated § 1910.146(d)(4)(i) by failing to provide and maintain testing and monitoring equipment required to comply with paragraph (d)(5)—in other words, Dana did not have equipment to properly test and monitor the tank's atmosphere before and during entry for acceptable levels of oxygen, combustible gases, and toxic gases.[28] It is undisputed that at the time of the inspection, Dana's four-gas meter (the only one at the facility) would not "zero out" or read the correct oxygen concentration of the normal atmosphere.[29] According to the Secretary, simply turning on the meter would have alerted Dana to this problem, so the meter's inoperability was easily determinable with the exercise of reasonable diligence. *See Greenleaf Motor Express Inc.*, 21 BNA OSHC 1872, 1875 (No. 03-1305, 2007) (reasonable diligence includes a duty to inspect a work area and anticipate hazards, and an employer is charged with constructive knowledge of a condition it could reasonably have been expected to detect or prevent), *aff'd*, 262 F. App'x 716 (6th Cir. 2008) (unpublished); *David Weekley Homes*, 19 BNA OSHC 1116, 1119 (No. 96-0898, 2000). He further asserts that Dana's own maintenance policy required calibrating the machine every 30 days and replacing the sensors every 60 days or sooner, but that Dana's calibration log sheet shows, as of the inspection on January 28, 2009, the meter had not been calibrated since November 20, 2008—thus, for 69 days.

There is no evidence in the record to establish when the meter became inoperable, nor has the Secretary shown that reasonable diligence required Dana to assess its operability any sooner than it did—that is, when it was next turned on. The meter's user manual does not specify how frequently it should be calibrated, stating only to "[p]lease check *frequently* for proper operation and treat the instrument with the respect due a device that can save your life." (Emphasis

[28] Section 1910.146(d)(4) specifies: "Provide the following equipment (specified in paragraphs (d)(4)(i) through (d)(4)(ix) of this section) at no cost to employees, maintain that equipment properly, and ensure that employees use that equipment properly: (i) Testing and monitoring equipment needed to comply with paragraph (d)(5) of this section."

[29] Dana's maintenance employee later determined the meter's sensors needed to be replaced and the device was taken out of service until it was repaired.

added.) The Secretary has not shown what the manual means by "frequently," what Dana considers "frequent," or what the industry considers "frequent." Although he points to McGough's July 2009 report—prepared after the OSHA inspection—as proof that Dana's policy at that time was to calibrate the meter every 30 days and replace the sensors every 60 days, there is no evidence establishing what Dana's policy was at the time of the inspection. Dana's records show that it usually calibrated the meter every one to two months, but we have no basis on which to conclude that this schedule or even 69 days was deficient. Furthermore, the record shows that tank entries at the Summit facility were infrequent and that the meter was not used on a daily basis. Under these circumstances, we find that the Secretary has not established a violation of § 1910.146(d)(4)(i) and vacate Serious Citation 1, Item 10.

C. Serious Citation 1, Items 11a and 11b

Under Item 11a, the Secretary alleges that Dana violated § 1910.146(d)(13) by failing to revise its PRCS program to correct deficiencies documented on tank entry permits reviewed by the Facility Manager, including the lack of entrant and attendant names and signatures.[30] Under Item 11b, the Secretary alleges that Dana violated § 1910.146(d)(14) by failing to revise its PRCS program once entry permits showed employees had failed to follow PRCS requirements when entering tanks.[31] It is undisputed that these provisions apply to the cited conditions, so the only remaining issues are noncompliance and knowledge. For the following reasons, we affirm both items.

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[30] Section 1910.146(d)(13) provides that the employer shall "[r]eview entry operations when the employer has reason to believe that the measures taken under the permit space program may not protect employees and revise the program to correct deficiencies found to exist before subsequent entries are authorized." An accompanying note reads:

> Examples of circumstances requiring the review of the permit space program are: any unauthorized entry of a permit space, the detection of a permit space hazard not covered by the permit, the detection of a condition prohibited by the permit, the occurrence of an injury or near-miss during entry, a change in the use or configuration of a permit space, and employee complaints about the effectiveness of the program.

[31] Section 1910.146(d)(14) provides that the employer shall "[r]eview the permit space program, using the canceled permits retained under paragraph (e)(6) of this section within 1 year after each entry and revise the program as necessary to ensure that employees participating in entry operations are protected from permit space hazards." An accompanying note reads: "Employers may perform a single annual review covering all entries performed during a 12-month period. If no entry is performed during a 12-month period, no review is necessary."

Noncompliance

According to the Secretary, the deficiencies on the entry permits—particularly the failures to record periodic testing when staying in the tanks for over an hour and failing to specify an attendant—gave the Facility Manager who reviewed them "reason to believe" that "measures taken under [Dana's PRCS] program may not protect employees." As the Secretary also notes, under the plain language of the standard, this requires the employer to take corrective action. Dana responds that none of the permit deficiencies trigger the requirement to revise the program because they do not indicate defects in the written program itself—rather, they show failures to *follow* that program.

We disagree. Although the Secretary has not identified any deficiency in Dana's written PRCS program that correlates with the errors on the entry permits, the distinction Dana suggests—that implementation failures are not covered by the cited provisions—lacks merit. Sections 1910.146(d)(13) and (14) both require the employer to review and revise "the program" to ensure employees are adequately protected from PRCS hazards. The standard defines a PRCS program broadly as "the employer's *overall* program for controlling, and, where appropriate, for protecting employees from, permit space hazards and for regulating employee entry into permit spaces." § 1910.146(b) (emphasis added). Indeed, under § 1910.146(d), which is titled "Permit-required confined space program (permit space program)," the first provision requires the employer to "[*i*]*mplement* the measures necessary to prevent unauthorized entry." § 1910.146(d)(1) (emphasis added).

In addition, in the "Note" following § 1910.146(d)(13), one of the listed "[e]xamples of circumstances requiring the review of the permit space program" is of an implementation problem—"any unauthorized entry of a permit space"—as such entries by definition do not comply with the terms of a compliant program. *See* § 1910.146(d)(13), note; § 1910.146(b) (defining "authorized entrant" as "an employee who is authorized by the employer to enter a permit space"); § 1910.146(d)(1) (PRCS program must restrict entry to authorized entrants); *see also* 58 Fed. Reg. at 4,503 (explaining that the note accompanying paragraph (d)(13) contains information intended to assist employers in complying with the requirement). Finally, the very purpose of the cited provisions is to ensure that employees are protected from permit space hazards—they are not protected if they do not follow the requirements of the standard and the employer's PRCS program. *See* §§ 1910.146(d)(13) and (14). Therefore, we find that

compliance with paragraphs (d)(13) and (14) required Dana to revise its PRCS program, either immediately under (d)(13) once it had reason to believe the program may not be protecting employees, or after an annual review of the permits under (d)(14). Dana did neither.

We also reject Dana's argument that the Facility Manager reviewed the program periodically and made changes as needed, as reflected in memoranda he issued in 1997, 2003, and 2008. Although these memoranda discuss new work rules for entering confined spaces—i.e., prohibiting entry into dirty tanks, prohibiting entry into tanks with nitrogen blankets, and prohibiting entry into tanks containing less than 20.9% oxygen—none of them address the other issues raised by the deficient permits; namely, staying in tanks for over an hour without periodic testing and entering tanks without an attendant. Thus, these memoranda were not program revisions that complied with the requirements of paragraphs (d)(13) and (14). Accordingly, we find the Secretary has shown that Dana failed to comply with the requirements of the cited standards.

Knowledge

The Facility Manager acknowledged that he reviewed the entry permits, and deficiencies were evident on the face of these permits; yet, he did not point out errors to employees or discipline employees for permit violations. We find in these circumstances that not only must the Facility Manager have known of the permit deficiencies, he also must have known of the failure to revise Dana's PRCS program in response to these deficiencies. On the record before us, we conclude that there is a sufficient basis for imputing to Dana the Facility Manager's knowledge of the failure to revise its PRCS program to correct deficiencies documented on tank entry permits.

As previously noted, this case can be appealed to three different circuit courts of appeals—the Third, Seventh, and D.C. Circuits. Of these three circuits, only the Third Circuit analyzes the Secretary's burden of proving knowledge differently when it is based on supervisory misconduct. *Pa. Power*, 737 F.2d at 357-58. Under Commission precedent, the Facility Manager's knowledge of the deficiencies and his failure to revise Dana's PRCS program in response to those deficiencies is imputable to Dana. *See Otis*, 21 BNA OSHC at 2207; *Rawson*, 20 BNA OSHC at 1080-81. We also note that this case presents an issue not raised in any of the circuit court foreseeability cases, all of which appear to involve misconduct at a lower

supervisory level.[32] Here, the Facility Manager, who has worked in this position since 1997, ran the day-to-day operations of the entire Summit plant, directed employees' work (with authority to hire, fire, and discipline employees), and had managerial responsibility for all supervisors at the plant. Thus, in light of the Facility Manager's level of authority, a foreseeability analysis may not be necessary. However, it appears likely that even under the Third Circuit's foreseeability precedent, the Facility Manager's knowledge would have been imputable. We are not seeking to impute knowledge here based on an isolated incident of rogue or idiosyncratic supervisory misconduct; but rather, based on the Facility Manager's high level of oversight and involvement in the management and policy decisions at the plant—including those involving written safety documents and safety training—as well as the pervasive degree of deficiencies on tank entry permits and the attendant failure to revise the PRCS program to correct the deficiencies before subsequent entries were authorized. *See N. Landing Line Constr. Co.*, 19 BNA OSHC 1465, 1473 n.9 (No. 96-721, 2001) (applying Fourth Circuit foreseeability analysis to superintendent's "series of conscious decisions" to conclude that his actions were not "an isolated incident of idiosyncratic behavior"). Therefore, we find that Dana had actual knowledge

[32] The Third Circuit addressed the circumstances in which it is appropriate to impute a supervisor's knowledge of his own violative conduct to his employer; so as to not, according to the court, improperly relieve the Secretary of his burden to prove the "knowledge" element of his case. *See Pa. Power*, 737 F.2d at 357-58, 359 (court declined to impute a crew leader's knowledge of his own misconduct—a violation of an OSHA standard that caused his own death—where he had unblemished safety record).

Cases in other circuits also requiring a foreseeability analysis similarly involve the same type of front-line supervisor. *See, e.g.*, *Comtran Group, Inc. v. U.S. Dep't of Labor*, 722 F.3d 1304, 1309 (11th Cir. 2013) (foreman digging in trench created five-foot-high spoil pile at edge of six-foot-deep excavation without cave-in protection, in violation of OSHA standards); *W.G. Yates & Sons Constr. Co.*, 459 F.3d 604, 605 (5th Cir. 2006) (foreman working along dangerous ledge without fall protection, in violation of OSHA standards); *Mountain States Tel. & Tel. Co. v. OSHRC*, 623 F.2d 155, 157 (10th Cir. 1980) (supervisor violated OSHA standards by not wearing rubber gloves as he worked on live wires, resulting in his electrocution and death); *Ocean Elec. Corp. v. Sec'y of Labor*, 594 F.2d 396, 397-98 (4th Cir. 1979) (experienced journeyman electrician foreman opened door to switch gear unit to remove an unenergized ground bus bar and left it open, leading to the electrocution and death of an apprentice electrician assisting him in his work).

of the violative conditions.[33] Accordingly, we affirm grouped Serious Citation 1, Items 11a and 11b as serious.[34]

D. Willful Citation 2, Item 1b

In Willful Citation 2, Item 1b,[35] the Secretary alleges that Dana violated § 1910.146(d)(3)(i) by failing to develop and implement measures necessary for safe permit entry, including "specifying acceptable entry conditions."[36] Specifically, the Secretary claims that Dana's written PRCS program erroneously stated that oxygen levels as low as 16.5% and LELs as high as 14% were acceptable for entry. Although the judge concluded that Dana did not have to comply with this provision because she found Dana complied with the alternate entry procedures, she found that Dana's program "does not specify acceptable entry conditions." Dana does not dispute that the numbers referred to in its program are incorrect, but argues that it provided employees with a subsequent memorandum correcting the oxygen levels and trained employees on the correct oxygen levels and LELs, which, it contends, satisfies compliance with the standard.

We find that Dana's efforts to correct the errors in its main PRCS program document through subsequent training and a memorandum are insufficient under the PRCS standard because the company never corrected the errors in the written PRCS program itself. Section 1910.146(c)(4) requires a "written program," but does not specify that it must be contained within one document. Therefore, we find that the Facility Manager's memorandum correcting

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[33] Commissioner MacDougall believes a finding of knowledge under these facts is in accordance with the Act. *See W.G. Yates & Sons Constr. Co., Inc. v. OSHRC*, 459 F.3d 604, 607 (5th Cir. 2006) (" '[T]he purposes of the Act are best served by limiting citations . . . to conduct that could have been foreseen and prevented by employers with the exercise of reasonable diligence and care.' " (quoting *Pa. Power*, 737 F.2d at 354)).

[34] We also find that Supervisor A's entry on January 28, 2009, establishes exposure, as Dana assigned and expected employees to enter tanks despite knowing that permits contained errors requiring revisions to the PRCS program. In addition, we characterize these grouped violations as serious because the deficiencies on the permits could lead to inappropriate entry and, consequently, exposure to hazardous levels of toxic or flammable substances. OSH Act section 17(j), 29 U.S.C. § 666(k) (defining serious violation as one in which "there is a substantial probability that death or serious physical harm could result").

[35] *See supra* note 3.

[36] Section 1910.146(d)(3) states: "Develop and implement the means, procedures, and practices necessary for safe permit space entry operations, including, but not limited to, the following: (i) Specifying acceptable entry conditions . . . ."

the oxygen levels is part of Dana's overall program. However, we agree with the Secretary that because the uncorrected main document remained available to Dana employees, they "could have used and relied upon [its] erroneous specification of unacceptable entry conditions if they failed to remember their prior training" or consult the subsequent memorandum. Although the standard does not prohibit memorializing program procedures in multiple documents, we find it requires that there be no confusion about which information is correct. *See* § 1910.146(d)(3)(i) (requiring the employer to develop a program that specifies acceptable entry conditions). Here, there was incorrect, and inconsistent, written entry condition information available to employees, and there was no clarification regarding where the correct information was located.

We also find that Dana's oral training on the correct entry conditions did not negate the written program's erroneous information. The cited provision requires that the acceptable entry conditions be specified "[u]nder the permit space program required by paragraph (c)(4)." § 1910.146(d) (introductory paragraph). Because paragraph (c)(4) requires the employer to have a "*written* permit space program," Dana had to specify the acceptable entry conditions *in writing* in order to comply with § 1910.146(d)(3)(i)—communicating the correct entry conditions orally does not satisfy the cited requirement. § 1910.146(c)(4) (emphasis added). Under these circumstances, we find the Secretary has established noncompliance.

We also find the Secretary has established knowledge. The record shows that Dana drafted the PRCS program and the Facility Manager admitted he knew of the deficiencies in the program. The Facility Manager's knowledge is based on his actual knowledge of the contents of the program and its deficiencies, not on any act or omission on his part, so his knowledge does not present a foreseeability issue and is imputable to Dana.[37] *See Pa. Power*, 737 F.2d at 357-58; *Otis*, 21 BNA OSHC at 2207-08. Accordingly, we affirm Willful Citation 2, Item 1b as serious. *See supra* note 3.

[37] We also find the Secretary has established exposure, because Dana was required to provide all employees with accurate written guidance for any assigned tank entries before the entries occurred. *See Fabricated Metal Prods., Inc.*, 18 BNA OSHC 1072, 1074 (No. 98-1853, 1997) (employee exposure established by showing that "it is reasonably predictable either by operational necessity or otherwise (including inadvertence), that employees have been, are, or will be in the zone of danger"); § 1910.146(d)(3)(i). Supervisor A was assigned to clean a tank (which could have required entry) on January 28, 2009, with inaccurate written guidance.

III. Penalties

In assessing a penalty, the Commission gives due consideration to the employer's size, the gravity of the violation, the good faith of the employer, and any history of violations. OSH Act section 17(j), 29 U.S.C. § 666(j). Under Commission precedent, gravity is typically the most important factor. *Capform Inc.*, 19 BNA OSHC 1374, 1378 (No. 99-0322, 2001), *aff'd*, 34 F. App'x 152 (5th Cir. 2002) (unpublished). When determining gravity, the Commission considers the number of exposed employees, the duration of their exposure, whether precautions could have been taken against injury, and the likelihood of injury. *Capform*, 19 BNA OSHC at 1378. The Commission "is the final arbiter of penalties." *Hern Iron Works, Inc.*, 16 BNA OSHC 1619, 1622 (No. 88-1962, 1994), *aff'd*, 937 F.2d 612 (9th Cir. 1991) (table); *see Valdak Corp.*, 17 BNA OSHC 1135, 1138 (No. 93-0239, 1995) ("The Act places limits for penalty amounts but places no restrictions on the Commission's authority to raise or lower penalties within those limits."), *aff'd*, 73 F.3d 1466 (8th Cir. 1996).

For the items she affirmed, the judge assessed the proposed maximum penalties of $7,000 for Serious Citation 1, Item 13 and $70,000 each for Willful Citation 2, Items 2 and 3, based on the compliance officer's testimony that the violations were of high gravity because the incident involving Supervisor A showed there was a greater likelihood of death or serious incapacitation. For the items vacated by the judge that we affirm on review, the Secretary proposed the maximum $7,000 penalty for Serious Citation 1, Items 11a and 11b and a $3,500 penalty for Willful Citation 2, Item 1b[38] for the same reasons.

With regard to gravity, Dana's entry permits show that tank entry was an infrequent occurrence at the Summit facility and only a few employees entered the tanks. The record also establishes that Dana developed and implemented a written PRCS program with specific procedures governing any tank entry, including requirements that employees use a non-entry rescue system when entering a tank, test the conditions inside the tank to ensure that it is safe for entry, and complete an entry permit documenting the measures taken to ensure safe entry. As for the three violations based on Supervisor A's entry into a dirty tank, Dana's program specifically

[38] The judge characterized Willful Citation 2, Item 1a as serious and assessed a $3,500 penalty, and the Secretary proposes the same penalty for Item 1b, also characterized as serious. *See supra* note 3. Together, the grouped penalty amounts add up to the $7,000 maximum penalty for a serious violation. *See* OSH Act section 17(b), 29 U.S.C. § 666(b).

prohibited its employees from entering dirty tanks, and the fact that the tank was dirty increased Supervisor A's risk of exposure. In addition, all three of the violations based on Supervisor A's entry into the tank involve the actions of a single employee. Finally, with respect to Serious Citation 1, Items 11a and 11b, we find that the cited requirements relating to PRCS program revisions overlap considerably. For these reasons, we find that these violations were not of such high gravity to merit the statutory maximum penalty amounts.

Accordingly, we find $3,500 an appropriate penalty for Serious Citation 1, Item 13; $50,000 each an appropriate penalty for Willful Citation 2, Items 2 and 3;[39] $5,000 an appropriate penalty for grouped Serious Citation 1, Items 11a and 11b; and $2,000 an appropriate penalty for Willful Citation 2, Item 1b.

[39] In an effort to reach consensus, Commissioner MacDougall agrees with the penalty assessment of $50,000 *each* for the affirmed willful items. However, she notes that under some circumstances, which may be present here, the Commission may group items for a combined penalty, *see, e.g., Omaha Paper Stock Co.,* 19 BNA OSHC 1584, 1591 (No. 99-0353, 2001), *aff'd*, 304 F.3d 779 (8th Cir. 2002) (eight PRCS violations grouped for combined penalty of $12,000), so long as the combined penalty does not change the number of violations charged and the total penalty assessed is in accordance with the statute covering willful violations, 29 U.S.C. § 666(a) (for willful violations, the penalties provided in § 666 require that *each* willful violation be assessed a penalty within the range of $5,000 to $70,000); *Chao v. OSHRC (Saw Pipes USA, Inc./Jindal United Steel Corp.)*, 480 F.3d 320, 326 (5th Cir. 2007) (holding that Commission's statutory authority to assess penalties requires Commission to assess appropriate penalty within range established by 29 U.S.C. § 666(a)). *See also Hackensack Steel Corp.*, 20 BNA OSHC 1387, 1394 (No. 97-0755, 2003) (as part of its penalty discretion, Commission may find it appropriate to assess a single penalty for distinct but potentially overlapping violations); *Miniature Nut and Screw Corp.*, 17 BNA OSHC 1557, 1559-60 (No. 93-2535, 1996) (combining penalties for items involving violations of separate components of a hearing conservation program); *H.H. Hall Constr. Corp.*, 10 BNA OSHC 1042, 1049 (No. 76-4765, 1981) (assessing a single penalty for overlapping violations that involved allegations that the company failed to reinforce a trench to protect against "superimposed loads" and failed to protect against "moving ground," particularly because both violations could be abated with the proper use of trench boxes); *Alpha Poster Serv., Inc.*, 4 BNA OSHC 1883, 1884 (No. 7869, 1976) (two items involving substantially the same violative conduct should merge into a single violation).

ORDER

We vacate Serious Citation 1, Item 10. We affirm Serious Citation 1, Items 11a, 11b, and 13 as serious; Willful Citation 2, Item 1b as serious; Willful Citation 2, Items 2 and 3 as willful; and assess a total penalty of $110,500.

SO ORDERED.

/s/
Cynthia L. Attwood
Acting Chairman

/s/
Heather L. MacDougall
Commissioner

Dated: November 19, 2015

Some personal identifiers have been redacted for privacy purposes

United States of America

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1924 Building - Room 2R90, 100 Alabama Street, SW
Atlanta, Georgia 30303-3104

Secretary of Labor, Complainant, v. Dana Container, Inc., Respondent.	OSHRC Docket No. 09-1184

Appearances:

Margaret Sewell, Esq., and Kevin M. Wilemon, Esq.,
U. S. Department of Labor, Office of the Solicitor, Chicago, Illinois
For Complainant

John J. Coleman, III, Esq., and Marcel DeBruge, Esq.,
Burr and Foreman, Birmingham, Alabama
For Respondent

Before: Administrative Law Judge Sharon D. Calhoun

DECISION AND ORDER

Dana Container, Inc., operates several tank wash facilities throughout the United States. The Occupational Safety and Health Administration (OSHA) conducted an inspection of Dana's facility in Summit, Illinois, on January 28, 2009, following local media reports that an employee required emergency medical assistance after being found unconscious in one of the tanks at the facility.

Based upon that inspection, the Secretary issued two citations to Dana on July 24, 2009, alleging serious and willful violations of the Occupational Safety and Health Act of 1970 (Act). Most of the items alleged violations of various sections of the permit-required confined spaces (PRCS) standard at 29 C. F. R, § 1910.146. Dana timely contested the citations. The Secretary

and Dana settled several items prior to the hearing. Remaining are the following items alleging serious and willful violations of nine subsections of the PRCS standard:

Item 10 of Citation No. 1 alleges a serious violation of 29 C. F. R. § 1910.146(d)(4)(i), for failing to ensure that testing and monitoring equipment was maintained properly. Item 11a of Citation No. 1 alleges a serious violation of 29 C. F. R. § 1910.146(d)(13), for failing to review entry operations when the employer had reason to believe that the measures taken under the PRCS program would not protect employees and for failing to revise the program to correct deficiencies. Item 11b of Citation No. 1 alleges a serious violation of 29 C. F. R. § 1910.146(d)(14), for failing to review and revise the PRCS program to ensure employees participating in entry operations were protected. Item 12 of Citation No. 1 alleges a serious violation of 29 C. F. R. § 1910.146(g)(3), for failing to establish employee proficiency in the duties required by the PRCS standard. Item 13 of Citation No. 1 alleges a serious violation of 29 C. F. R. § 1910.146(k)(3), for failing to use a retrieval system for a non-entry rescue. The Secretary proposed a penalty of $7,000.00 each for Items 10, 12, and 13. The Secretary proposed a penalty of $7,000.00 for grouped Items 11a and 11b.

Item 1a of Citation No. 2 alleges a willful violation of 29 C. F. R. § 1910.146(c)(4), for failing to develop and implement a written permit space entry program. Item 1b of Citation No. 2 alleges a willful violation of 29 C. F. R. § 1910.146(d)(3)(i), for failure to specify acceptable entry conditions under its PRCS program. Item 2 of Citation No. 2 alleges a willful violation of 29 C. F. R. § 1910.146(d)(5)(i), for failing to evaluate the PRCS conditions before authorizing entry. Item 3 of Citation No. 2 alleges a willful violation of 29 C. F. R. § 1910.146(e)(1), for failing to document the completion of measures taken to ensure safe PRCS entry. The Secretary proposed a penalty of $70,000.00 each for Items 2 and 3. The Secretary proposed a penalty of $70,000.00 for grouped Items 1a and 1b.

The undersigned held a hearing in this case in Chicago, Illinois, from October 25 to October 29, 2010, and from January 10 to January 12, 2011. Dana stipulates the Commission has jurisdiction over the proceeding under § 10(c) of the Act, and that it is a covered business under § 3(5) of the Act (Tr. 13). The parties have each filed a post-hearing brief[1]. Dana argues the PRCS

[1] Dana filed a post-hearing motion to strike portions of the Secretary's brief. The Secretary referred, in a footnote, to Exhibit C-20A, which was rejected at the hearing (Secretary's brief, p. 14, footnote 11). Dana's motion is granted. References to Exhibit C-20A will not be considered.

standard does not apply to the tanks in its facility. The company also asserts the affirmative defense of unpreventable employee misconduct on the part of the employee who entered the tank.

For the reasons discussed below, Items 10, 11a, 11b, and 12 of Citation No 1 are vacated. Item 13 of Citation No. 1 is affirmed, and a penalty of $7,000.00 is assessed. Item 1b of Citation No. 2 is vacated. Item 1a of Citation No. 2 is affirmed as serious, and a penalty of $3,500.00 is assessed. Items 2 and 3 of Citation No. 2 are affirmed as willful, and a penalty of $70,000.00 for each item is assessed.

Background

This hearing was particularly contentious. Witnesses and counsel for Dana accused each other of various unethical or illegal activities that are not within the purview of this court. For this reason, most of the employee and ex-employee witnesses will not be referred to by name. Many of the allegations of illicit conduct are extraneous to the issues in this case. At times, some allegations must be discussed as part of the credibility determination for certain witnesses. The following two paragraphs represent the few facts upon which the parties agree:

Dana cleans the interiors of stainless steel industrial tanks (also referred to as "wagons" and "tankers") used to transport various commercial non-food liquid substances throughout the United States. Dana operates a facility in Summit, Illinois, which has been managed by [redacted] since 1997. Including [redacted], Dana employs fourteen employees at the Summit facility (Tr. 1353). Dana operates three different shifts daily (Tr. 1056).

After one of Dana's customers delivers a load to its destination, the driver brings the tank to Dana's facility. Its Summit facility contains five tank wash bays. Each bay has a catwalk structure from which employees can open the hatch at the top of the tank and visually inspect the interior of the tank. The hatch also serves as the entryway for an employee required to enter the tank. Dana's tank washers drain the tank of any residual product (referred to as "heel"). The tank washers then insert a mechanical device known as a "spinner" into the tank, which moves from one end of the tank to the other for an initial rinsing and scrubbing with soap. Sometimes tank washers use solvents, including toluene, to clean the tank's interior. After a final rinse, Dana considers the tank to be "industry clean," which means the tank is clean enough to haul a new load without contaminating the new product. The tank washers use blow dryers to completely dry the tank. Occasionally an employee must enter a cleaned tank to scrape off residue left in the tank (Tr. 1023-1027, 1033-1036, 1545, 1565-1566).

January 28, 2009, Incident

At the time of the hearing, Supervisor #1 had worked for Dana for six years, and had been a supervisor for the previous three years. He was the supervisor for the third shift, which operates from 11:00 p.m. to 7:30 a.m. (Tr. 1924). At the time in question, Supervisor #1 supervised two other employees on his shift, Employee #5 and Ex-Tank Washer. On January 28, 2009, at approximately 6:00 a.m., Supervisor #1 was in the process of washing a tank. Supervisor #1 claims the valve of the tank was blocked, preventing the tank from draining properly. Dana's normal procedure in such a situation is to back flush the valve, which usually removes the blockage. Supervisor #1 testified he deviated from this procedure on January 28, 2009:

> Well, I was hosing [the tank] down, and it sort of clogged up, and I know I made a mistake I really shouldn't have went into [the tank], but I just went in there trying to clear it out for a minute, and I turned and I slipped, and I must have hit my head or something, and that was the last thing I remember.

(Tr. 1595-1596).

Another employee discovered Supervisor #1 in the tank and called 911.[2] Emergency personnel from the Summit Fire Department responded to the call. A news crew from a local television station also arrived at the site. The television station carried the story live on its morning news show, which is how OSHA compliance officer Jami Bachus happened to see it as she prepared to go to work that morning. Bachus testified:

> Well, I was headed to my office anyway. It was a regular work day. I don't recall—I thought it was a Monday, but I don't recall right now. And, I made reference to the appropriate people at my office location that I had heard about this incident.
>
> And you know, there was some discussion about who would respond to this. I volunteered. I'm not sure if I volunteered was the only reason I ended up going, but, you know, it was decided that I would head to the facility.

(Tr. 149).

---

[2] There are significant gaps in the record concerning the circumstances of Supervisor #1's entry into the tank, and the discovery of his unconscious body. Supervisor #1 was discovered at approximately 6:00 a.m. The compliance officer did not arrive until approximately 9:00 a.m. Dana, therefore, was in the best position to provide information regarding who discovered Supervisor #1, how the discovery came about, and what attempts were made to rescue him. None of this information was provided. At the hospital, Supervisor #1 told medical personnel he was cleaning inside the tank with another employee. This runs counter to the narrative Dana presented at the hearing. The undersigned regards Dana's account of Supervisor #1's entry into the tank as dubious.

Bachus arrived at Dana's facility at approximately 9:00 a.m. (Tr. 150). By the time she arrived, paramedics had transported Supervisor #1 by ambulance to a hospital (Tr. 155). Bachus met with [redacted], Dana's plant manager, and held an opening conference (Tr. 152). Approximately twenty minutes into the conference, [redacted] handed Bachus a document purported to be a transcript of a statement made to [redacted] by Supervisor #1 before he was taken away by the paramedics (Tr. 1130). The typed, unsigned document reads:

> JANUARY 28, 2009
>
> INCIDENT STATEMENT OF [SUPERVISOR #1]
>
> I WAS SETTING UP TO CLEAN A TRAILER. THE VALVE HAD A RESTRICTION CAUSING THE CLEANING SOLUTION NOT TO CIRCULATE. I PUT THE FRESH AIR BLOWER IN THE TANK AND MY RESPIRATOR ON AND WENT IN THE TANK TO REMOVE THE OBSTACLE. I SLIPPED ON SOMETHING AND APPARENTLY HIT MY HEAD.

(Exh. C-14).

[redacted] also provided Bachus with a second document, which was a written notice of discipline from [redacted] to Supervisor #1, which stated:

> JANUARY 28, 2009
>
> FROM: [redacted]
>
> TO: [SUPERVISOR #1]
>
> SUBJECT: VIOLATION OF SAFETY RULES
>
> ON JANUARY 28, 2009, AT APPROXIMATELY 6:00 AM YOU ENTERED A TANK THAT YOU KNEW DID NOT MEET SAFETY REQUIREMENTS. ALTHOUGH YOU PUT THE FRESH AIR LINES INTO THE TRAILER AND WORE YOUR RESPIRATOR, YOU APPARENTLY SLIPPED AND FELL, MAKING IT HARD TO BRING YOU OUT OF THE TRAILER.
>
> AS A SUPERVISOR, YOU OF ALL PEOPLE KNOW BETTER. YOU HAD NO BUSINESS ENTERING THE TRAILER AT ALL.
>
> YOU ARE GIVEN 3 DAYS OFF WITHOUT PAY, STRIPPED OF YOUR SUPERVISOR TITLE AND REQUIRED TO REDO ALL OF YOUR SAFETY TRAINING.

(Exh. C-15).

At the hearing, Supervisor #1 denied he spoke with [redacted] after he was removed from the tank. Supervisor #1 did not see [redacted] until the next work day (Tr. 1601). When he was shown a copy of the above-quoted statement, Supervisor #1 testified, "I don't remember saying

that," and said he was not aware [redacted] had given a copy of the statement to Bachus and represented to her that it was Supervisor #1's statement (Tr. 1609).

This is one of many discrepancies that appear in the record, which is replete with instances of contradictory and conflicting statements. The testimony of some witnesses differed from their deposition testimony, or from their testimony on direct examination to cross examination, or sometimes from their immediately previous sentences. It was not uncommon for two witnesses present at the same event to recount the event in dramatically divergent narratives. Other witnesses suffered significant lapses in memory, repeatedly responding, "I don't recall" or "I don't remember" to routine questions relating to the issues. At times, some witnesses' testimony seemed scripted, as they repeated certain phrases, regardless of the questions they were asked. This case requires a number of credibility determinations, some of which will be resolved not by determining who is a more credible witness, but by deciding who is the least incredible.

The pattern of conflicting testimony and faulty memory was set by the first two witnesses who appeared on the first day of the seven-day hearing. Richard Gallaga and Todd Maylath both worked for the Summit Fire Department at the time of the hearing, and both responded to the 911 call on January 28, 2009. Unlike the majority of the witnesses at the hearing, Gallaga and Maylath are disinterested individuals with no personal stake in the outcome of this case. They had no motive to shade their testimony, either to protect their jobs or to undermine an ex-employer. They responded to the call as trained professionals, presumably less affected by emotions produced by the stressful situation. Yet, their testimony differs on a number of key points.

Richard Gallaga was the assistant chief of operations for the Summit Fire Department at the time of the hearing. On January 28, 2009, he had just started working his shift at 6:00 a. m., when the call came in requesting assistance at Dana's facility (Tr. 45-46). The Summit Fire Department's ambulance was dispatched to Dana's facility, and Gallaga arrived shortly afterward. The tank at issue was parked in a bay, next to a catwalk structure. Gallaga climbed the stairs to the catwalk and looked down into the hatch of the tank. He observed Supervisor #1 lying at the bottom of the tank. Gallaga testified:

> He was laying somewhat flat on his side. Because of the way the dimensions are on the tank, it was like a circular cylinder type. He was lying on his side, looked to be moving very slowly, wasn't talking or anything. I noticed that he did have a respirator around his neck area.

(Tr. 47).

Gallaga stated that Supervisor #1 was conscious: "I saw his eyes were open. He was doing slow movements of both his hands and legs" (Tr. 69). When asked about Supervisor #1's breathing, Gallaga stated, "I would say it was labored breathing. I mean, he was breathing, there was movement, eyes were open" (Tr. 82). Gallaga saw some residual product in the tank, which he described as gray and pasty. Gallaga recalled that Supervisor #1 was wearing a long sleeve shirt and work pants and boots (Tr. 71).

The Summit Fire Department requires its employees to file a report for all emergency calls (Tr. 48). In the report Gallaga filed the day of the incident, his assessment of Supervisor #1 differed somewhat from his hearing testimony:

> Subject was unconscious and not responding to verbal commands. Upon arrival [Gallaga] and SQ-954 crews met up with [the ambulance crew] who related that the man inside tanker was cleaning tanker and only had on an air purification respirator, regular work clothes and no safety harness or safety line. Subject was not responsive but slowly moving. . . Two crew members entered the tank to retrieve unconscious subject.

(Exh. C-7).

After the crew members removed Supervisor #1 from the tank, they took him to an adjacent building to be "deconned," or decontaminated. Gallaga stated that decon is "where they take the individual and take him to a shower unit, strip him of his clothing, what he was wearing, and just flood him with copious amounts of water to take away any residue or any product that he may still have on himself" (Tr. 60). Gallaga saw Supervisor #1 five to eight minutes after he had been removed from the tank. Gallaga described Supervisor #1's condition: "As he was being assisted as he was coming out of the building, he seemed to be in a happy-go-lucky state, more like he was just confused, but indicating to all that he was fine and didn't need any further attention of any sort" (Tr. 61). Supervisor #1 did not report he hit his head and was not treated for head injuries (Tr. 61).

At the time of the hearing, Todd Maylath was a firefighter-paramedic with the Summit Fire Department. He was the first paramedic to arrive at Dana's facility on January 28 (Tr. 88). Maylath and his partner donned "turn-out gear," (protective clothing, gloves, a face mask, and a self-contained breathing apparatus) because they smelled "polar solvents, alcohol-based solvents, a real strong odor of an alcohol solvent" (Tr. 97-98). Maylath climbed up to the catwalk and looked down through the hatch of the tank. He saw"[a] man face down in the product that was in there" (Tr. 98). Maylath testified, "[I]t was most of his face in the product. He had a respirator

on. The respirator was not covering his nose and mouth completely. It appeared to be jarred loose from whenever he fell in the product" (Tr. 99).

Maylath described the man as "African-American wearing blue overalls, coveralls" (Tr. 98). Supervisor #1 was not wearing a harness (Tr. 109). Maylath and his partner, Jim Tolf, entered the tank. Maylath stated the gray product at the bottom of the tank was a foot to a foot and a half deep (Tr. 101). Maylath testified he flipped Supervisor #1 over so that he was on his back. Supervisor #1 was unconscious when he flipped him over (Tr. 102). Maylath attempted to revive Supervisor #1 by giving him "painful stimuli to try to see if he could come to[,] . . . what we call a sternum rub where you take your knuckles, and you rub on their sternum pretty hard. That's a painful area, and when somebody is incoherent like that or unconscious, sometimes you can get a response out of them to bring them back to consciousness" (Tr. 102). Supervisor #1 did not respond to the sternum rub. Maylath examined Supervisor #1's head and saw no signs of trauma (Tr. 125).

Maylath and Tolf looped webbing around Supervisor #1's body and the firefighters above lifted him out. Supervisor #1 was still unconscious as he was lifted out. After Maylath and Tolf exited the tank, Maylath saw Supervisor #1 walking down the catwalk stairs with assistance. Maylath stated that Supervisor #1 was "in a state of malaise, very lethargic, confused, muttering" (Tr. 103).

Supervisor #1 was taken to Loyola University Medical Center. Exhibit C-16 is a copy of Supervisor #1's certified medical records detailing his stay at Loyola. Under "Chief Complaint," his Chart Report states: "Chemical Exposure" and "cleaning tank exposure to toluene." The Chart Report states the diagnosis is "Syncope and Collapse, Toxic Effect of Unspecified Gas, Fume, or Vapor" (Exh. C-16, 22nd page). No mention of Supervisor #1 hitting his head, or of head trauma appears in the report. Dr. Mary Boyle wrote the following "History of Present Illness":

> 51 year old male, cleans inside of tanker trucks as occupation, states this morning he was in tanker and shoveling out a thicker substance that he was under the impression was printing ink residue. He often uses toluene in his work, he states this a.m. it had not been open. He wears a respirator covering his nose and mouth. As he worked further into the tanker, his partner turned around and found him passed out. He next remembers people trying to awaken him. He did not have any pre-syncopal symptoms and feels fine now. No prior such incidents. HAZMAT at scene and as per emt paperwork the FD recorded the fumes inside the tank to be >800ppm of toluene. Per their note he was "unconscious for about 15

> min prior to getting patient out of hazard." The chemical identification sheets list toluene and also ethyl alcohol and ethyl silicate. Patient feels fine, no HEENT complaints, no skin complaints, no shortness of breath, no chest pain, no n/v/d, no focal neuro complaints. No cardiac hx, no sudden deaths in family, no HL.

(Exh. C-16, 24th page).

With respect to Supervisor #1's physical condition in the tank, Maylath's testimony that Supervisor #1 was unconscious is credited over Gallaga's testimony that Supervisor #1 was awake. Gallaga stated he responds to emergency calls "to assist in the command structure" (Tr. 45). He observed Supervisor #1 in the tank from the vantage point of the catwalk. He did not physically assist Supervisor #1 or examine him. In addition, the report Gallaga wrote up the day of the incident twice states Supervisor #1 was unconscious.

Maylath responded to the emergency call in his capacity as a paramedic. He entered the tank and physically assisted Supervisor #1. He turned him over, performed a sternum rub, and examined his head. With the assistance of Tolf, he looped webbing around Supervisor #1 so that he could be retrieved from the tank. Maylath was in a better position to determine that Supervisor #1 was unconscious.

The undersigned also finds that Supervisor #1's purported statement to [redacted] (Exh. C-14) prior to being taken to the hospital is not credible. Supervisor #1 does not recall talking to [redacted] or making the statement. Neither Gallaga nor Maylath recalled seeing Supervisor #1 talk to [redacted] prior to being taken by ambulance to the hospital. Supervisor #1 testified regarding his memory of events following his return to consciousness:

> The rescue people taking me out of there, down the ramp, and they started to cut my clothing off me, and I said, "Wait one minute," I said, "I can take this off," because I was kind of scared they was going to cut me with that thing he was cutting it with. And, he said, "You got to calm down, and you got to take a shower, and we're going to the hospital." And, I said, "Okay." I went in to take a shower, and the ambulance person said, "Come on, you got to go," and they took me out of there butt naked.

(Tr. 1596-1597).

It is not credible that, during this sequence of events, [redacted] was able to step in and take the purported statement from Supervisor #1. Supervisor #1 was surrounded by numerous emergency personnel focused on getting him into an ambulance and then to a hospital as quickly as possible. Exhibit C-14 is given no weight.

ELEMENTS OF A VIOLATION

The Secretary has the burden of establishing the employer violated the cited standards.

> To prove a violation of an OSHA standard, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies; (2) the employer failed to comply with the terms of the cited standard; (3) employees had access to the violative condition; and (4) the cited employer either knew or could have known with the exercise of reasonable diligence of the violative condition.

JPC Group Inc., 22 BNA OSHC 1859, 1861 (No. 05-1907, 2009).

Applicability of the Cited Standard

Section 1910.146(a) provides that the PRCS standard "contains requirements for practices and procedures to protect employees in general industry from the hazards of entry into permit-required confined spaces." As a threshold issue, Dana contends the PRCS standard does not apply to the cited conditions, and thus all of the remaining items must be vacated.

In § 1910.146(b), the following definitions of "confined space" and "permit-required confined space" are found:

> *Confined space* means a space that:
>
> (1) Is large enough and so configured that an employee can bodily enter and perform assigned work; and
>
> (2) Has limited or restricted means for entry or exit (for example, tanks, vessels, silos, storage bins, hoppers, vaults, and pits are spaces that may have limited means of entry); and
>
> (3) Is not designed for continuous employee occupancy.
>
> . . .
>
> *Permit-required confined space* (permit space) means a confined space that has one or more of the following characteristics:
>
> (1) Contains or has a potential to contain a hazardous atmosphere;
>
> (2) Contains a material that has the potential for engulfing the entrant;
>
> (3) Has an internal configuration such that an entrant could be trapped or asphyxiated by inwardly converging walls or by a floor which slopes downward and tapers to a smaller cross-section; or
>
> (4) Contains any other recognized serious safety or health hazard.

Dana argues that dirty tanks are not considered confined spaces because company policy prohibits employees from entering dirty tanks. The company argues that clean tanks are not considered permit-required confined spaces because tanks that have been washed no longer

contain a potential for a hazardous atmosphere. Dana further contends that, even if clean tanks are considered permit confined spaces, the company has met the requirements for reclassifying the tanks under § 1910.146(c)(7), as well as the requirements for alternate entry under § 1910.146(c)(5).

Item 13 of Citation No. 1 and Items 2 and 3 of Citation No. 2 deal specifically with Supervisor #1's entry into the dirty tank on January 28, 2009. The remaining items apply more generally to Dana's tank entry procedure. There is no dispute that Supervisor #1 entered a dirty tank, but Dana contends it was an isolated incident that does not reflect the company's usual working conditions. It must first be determined if Dana allowed its employees routinely to enter dirty tanks.

Dirty Tanks

Dana asserts it has a long-standing rule prohibiting its employees from entering dirty tanks. Exhibit R-3 is purportedly a copy of a memo from [redacted] to "ALL TANK WASH EMPLOYEES," dated November 8, 1997. The memo (with its odd second sentence) states:

> UNDER NO CIRCUMSTANCES ARE YOU TO ENTER AN UNCLEANED TANK EVEN IF THE MONITOR INDICATES IT IS SAFE.
>
> THIS IS THE FIRST SAFETY MEETING UNDER MY DIRECTION AS FACILITY MANAGER AT SUMMIT, ILLINOIS AND THIS IS THE POLICY FROM NOW ON AT SUMMIT.

(Exh. R-3).

The Commission has determined that whether or not an employee is required to enter a space has no bearing on its classification as a confined space. In *Cagle's Inc.,* 22 BNA OSHC 1185, 1186 (No. 98-0485, 2008), the Review Commission held that a "space with restricted egress and unintended for employee entry under specified circumstances constituted a confined space where, under those circumstances, an employee nonetheless entered the space."

Here, regardless of whether or not Dana prohibited employees from entering dirty tanks, Supervisor #1 did, in fact, enter one. Dana concedes Supervisor #1 entered a dirty tank on January 28, 2009. Therefore, under *Cagle's*, the tank Supervisor #1 entered was a confined space[3].

[3] In order to meet the definition of a permit-required confined space, the confined space must have one or more of the hazardous characteristics listed in § 1910.146(b). In the present case, the Secretary contends the tanks contain or
Continued on next page

This entry, Dana contends, was perpetrated by an employee committing an unprecedented act of unpreventable employee misconduct. Dana presented a parade of employee witnesses ([redacted], Clarence Bean, Employee #1, Employee #2, Employee #3, Employee #4, Employee #5, and Employee #6) who stated unequivocally they had never entered a dirty tank in all their years with Dana, and that they had never seen other employees enter dirty tanks. Supervisor #1 admitted he entered a dirty tank on January 28, 2009, but claimed that was the only time he had done so. The Secretary countered with two former Dana employees, Ex-Tank Washer and Ex-Supervisor #2, who stated that employees routinely entered dirty tanks under the direction of Dana's supervisors.

Ex-Tank Washer

Ex-Tank Washer did not testify at the hearing. He was working the same shift as Supervisor #1 the day Supervisor #1 entered the dirty tank. Bachus did not speak with Ex-Tank Washer during her initial inspection of Dana's facility. After the Secretary issued the instant citations on July 24, 2009, Ex-Tank Washer called OSHA and asked to speak to Bachus (Tr. 1716). [redacted] had fired Ex-Tank Washer, and Ex-Tank Washer called Bachus to inform her of ongoing hazardous working conditions at the Summit facility. Bachus typed up a statement using information she learned from Ex-Tank Washer during the telephone call. Bachus left blanks in the statement when she was unsure of the facts. Later, Ex-Tank Washer came to Bachus's OSHA office, where he filled in the blanks left in the statement, and then signed the statement (Tr. 1719).

Ex-Tank Washer worked for Dana from October 2007 until August 14, 2009. On August 14, [redacted] asked Ex-Tank Washer to take a drug test because, [redacted] stated, "[A]s I walked past [Ex-Tank Washer] in the tank wash, I detected a very strong odor of marijuana" (Tr. 1895). Ex-Tank Washer declined to go to the clinic Dana uses for drug tests, and [redacted] fired him. What happened next is disputed.

[redacted] testified:

> [Ex-Tank Washer] was very, very angry by this time, and he was shouting obscenities, making accusations. He was in a very high state of anger, his demeanor was very frightening, his eyes were fire engine red, his veins were

---

have the potential to contain a hazardous atmosphere. While Dana denies that its clean tanks contain hazardous atmospheres, it does not dispute that the dirty tanks contain or have the potential to contain hazardous atmospheres.

> bulging out on his neck, and he was spitting and screaming and cursing. And, he said, "If I lose my F'ing job over this, I'm going to F- you up, I'm going to F- [Supervisor #1] up, I'm going to F- the company up.

(Tr. 1898).

> Well, the shouting and hollering continued, and I continued to edge him toward the door. I had to get him out of the building, and finally did get him out the door, and two other employees came at that time and seen there was a commotion going on, and they escorted him to his vehicle at which time he left the premises.

(Tr. 1900-1901).

[redacted] testified he himself did not get angry, he did not use obscenities, and he did not push Ex-Tank Washer (Tr. 1916). [redacted] went to his office and called the Summit Police Department to report Ex-Tank Washer's conduct. The officer he spoke with informed [redacted] that Ex-Tank Washer had already stopped by the police station (located one block from Dana's facility) and had filed an assault complaint against [redacted]. A few minutes later, a police officer arrived at Dana's facility and took [redacted] statement (Tr. 1901).

> The reporting officer (R/O) filed an "Offense/Incident Report," which states:
>
> R/O spoke with victim who related that when he was getting off work at 0730 hours, his boss (offender) asked him to take a drug test. When victim asked why, offender for no reason became angry. Offender then grabbed victim by the throat choking him, then pushed him outside the door. Victim openly admitted that he smokes marijuana but he doesn't do it at work. Victim also stated that other company employees smoke marijuana on the job which is why he questioned offender.
>
> R/O was contacted by offender who related that he asked victim to take a drug test because he felt that victim was under the influence of drugs. It is company policy if someone refuses, he is automatically terminated. Victim became immediately upset, becoming belligerent towards offender. Victim started making threats towards offender and witnesses as well as his immediate supervisor [Supervisor #1] who was not present and had nothing to do with this occurrence. Victim was asked to leave which he refused. At this time offender pushed victim out of the office area through a doorway towards the outside. Offender states that he pushed victim in the chest and never choked him.
>
> Offender was advised by R/O that when victim refused to leave, he should have called Police. Victim advised on the procedure of signing complaints.

(Exh. R-38).

When confronted with his own statement to the police that he "pushed victim in the chest," [redacted] initially said he did not push him. Upon further questioning, [redacted] allowed he may have "urged or guided" Ex-Tank Washer by gently placing his hand on his arm, a gesture he

reenacted with counsel for Dana (Tr. 1918). [redacted] could not explain why he informed the police officer, immediately after the incident, that he had pushed Ex-Tank Washer in the chest. [redacted] testified he was not arrested and was not charged with assault (Tr. 1903).

Shortly after this altercation, Ex-Tank Washer contacted Bachus. On September 24, 2009, Ex-Tank Washer met with Bachus and signed the statement she had prepared, based on her telephone conversation with him[4:]

> I, [Ex-Tank Washer], worked at Dana Container from approximately *October 5th 2007* until August 14, 2009.
>
> On the most recent event, [Supervisor #1] directed met to enter the dirty tank wagon on *the week before 1-28-09.* I was to enter the tank wagon to perform the following task: *dig out old product.*
>
> I, [Ex-Tank Washer], was instructed to enter tank wagons, which had not been cleaned of the residual product on numerous occasions by [Supervisor #1], my supervisor.
>
> I, [Ex-Tank Washer], witnessed my supervisor, [Supervisor #1], enter dirty tank wagons on numerous occasions (approximately) *3-4 times a week* without following the necessary safety precautions including, but not limited to, the completion of an entry permit, performance of air monitoring and a lack of use of retrieval device(s) for rescue if needed.
>
> [Supervisor #1] was my direct supervisor and [redacted] was the Plant Manager and supervised myself and [Supervisor #1].
>
> On January 28, 2009, I entered a dirty tank wagon with [Supervisor #1].
>
> On January 28, 2009, I was directed to enter the dirty tank wagon by [Supervisor#1], *after it airs out.*
>
> Employee #1 witnessed [*Supervisor #1*] instructing me to enter the tank wagon without completion of a permit and air monitoring on January 28, 2009.
>
> On January 28, 2009, [Supervisor #1], instructed me to enter the dirty tank wagon to perform the assigned duties of *digging out product.*
>
> I, [Ex-Tank Washer], was removed from this tank wagon by [Employee #5 and Employee #3] because I was unable to remove myself from the tank wagon. Mr. *[redacted]* witnessed me being rescued from the tank wagon.
>
> I believe that I could not remove myself from the tank wagon because I was adversely affected from the chemicals present in the tank wagon I had entered.

[4] The italicized portions of the statement reproduced here indicate Ex-Tank Washer's handwritten additions to the statement Bachus had previously typed.

I was told by *[redacted]* and *the Attorney* to tell any OSHA representative the following about the incident that occurred on January 28, 2009:

> *I do not go inside tanks. Keep replies to yes or no. Do not volunteer any information.*

In order to keep my position of Tank Washer at Dana Container, I was required by [Supervisor #1] to enter tank wagons without completing any safety precautions.

The supervision at the facility did not follow OSHA regulations when entering tank wagons because: *Ignorant to the facts*

I complained to [Supervisor #1] on numerous occasions that I was concerned about my safety when entering the dirty tank wagons without following safety procedures.

Employee #7 – Employee #2 heard me voice safety concerns about entering tank wagons on different occasions.

I voiced my concerns for my health and safety to [redacted] on numerous occasions including the following: *8-14-09.*

When I voiced my concerns about not performing air monitoring or completion of permits prior to entering the tank wagons, [redacted] responded by: *Shut my freaking mouth or go home. [redacted] told me to do what [Supervisor #1] says and if it's not right he will re[c]tify it.*

When I voiced my safety concerns about not performing air monitoring and/or permits prior to entering dirty tank wagons to [Supervisor #1, Supervisor #1] instructed the following to me: *Go in the tank and hurry up out.*

[redacted] was aware that [Supervisor #1] did not complete permits prior to entering dirty tank wagons. I know he was aware of this practice because: *Never had any work permits.*

I know [redacted] was aware that employees entered dirty tank wagons because: *Anytime you write ["]hand labor["] he, [redacted], knew that we went inside tanks.*

[redacted] witnessed employees enter dirty tank wagons without following the necessary safety precautions such as, wearing safety harnesses attached to retrieval devices, performing air monitoring and completion of permits.

[Supervisor #1] never required that I complete a permit prior to entry into a tank wagon *1* time. The most recent time he required me to complete a permit was *8-14-09.*

I witnessed [Employee #5] enter wagons approximately *2* times *a week.*

I, [Ex-Tank Washer], was threatened with my job if I did not act what I believed to be unsafe, as [Supervisor #1] instructed me.

The unsafe behavior I was required to perform at Dana Container included entering dirty tank wagons without performing air monitoring, without the use of rescue equipment and without completion of permit entry.

> [redacted] involvement with entering permit spaces included the following[:] *Showing us how to fill out phony paperwork.*
>
> [redacted] was in the facility at least *5* times per day and often viewed employees entering tank wagons, both clean and dirty.
>
> [redacted] was involved with day to day operations which involved which tank wagons would be entered. [redacted] often instructed employees to enter tank wagons.
>
> Employees were allowed to enter dirty tank wagons without the completion of any permits or air monitoring by redacted].
>
> On average, during the night shift, employee(s) entered tank wagons approximately *1—2* time per night and *3—4* times per week.
>
> I told [redacted] on various occasions that I was concerned about my safety when entering tank wagons without following any safety procedures.
>
> The last time I voiced my safety concerns to [redacted], I was fired on August 14, 2009.

(Exh. C-40).

Ex-Tank Washer filed an 11(c) action with OSHA, alleging [redacted] fired him after "voicing safety concerns" (Exh. C-41). The OSHA investigator for the 11(c) action was David Ward. After gathering information and interviewing witnesses, Ward recommended dismissal of the 11(c) complaint (Exh. R-42).

The Secretary subpoenaed Ex-Tank Washer to appear as a witness at the hearing. Ex-Tank Washer failed to appear at the hearing, and could not be located subsequently.

Counsel for Dana chose to pursue a slash and burn strategy in order to discredit Ex-Tank Washer. No stone was left unthrown as a litany of Ex-Tank Washer's supposed character flaws were recited for the record. [redacted] made a number of unsubstantiated charges against Ex-Tank Washer. [redacted] stated Ex-Tank Washer had a record of numerous felony convictions for offenses including stealing copper wire, possession of drugs, armed robbery, aggravated robbery, aggravated battery of a police officer, vehicular invasion, and possession of burglary tools (Tr. 1929-1930). Other than [redacted] testimony, Dana adduced no evidence of these convictions. Dana also adduced no evidence explaining why the company was not troubled by Ex-Tank Washer's purported criminal record during the almost two years he worked for Dana. It was only after Ex-Tank Washer went to OSHA that Dana developed concern about Ex-Tank Washer's purported moral failings. In fact, when asked how he knew Ex-Tank Washer had a

reputation for violence, [redacted] replied, "I know that because I held his job for him two different times, 30 days each time, for violent crimes against females" (Tr. 1915).

Dana enlisted employee Employee #6 to pile on the trashing of Ex-Tank Washer's name. Employee #6 testified he lived in the same building as Ex-Tank Washer. Employee #6 accused Ex-Tank Washer of tapping into his cable lines for free TV service, ripping his screen doors, and jimmying his locks. People came to Employee #6's door at all hours looking for Ex-Tank Washer. Plus, "[Ex-Tank Washer's] traffic was always blocking me from getting out of my parking space. There were just so many things with this guy. I mean, my mail was opened" (Tr. 1939). When asked how he knew Ex-Tank Washer was the person responsible for the instances of cable tapping, screen ripping, lock jimmying, and mail opening, Employee #6 responded, "Well, he was the only one home in the building in the daytime. Everyone else in that building was working the day shift" (Tr. 1939). Employee #6 also stated Ex-Tank Washer borrowed money from him and failed to pay it back. Employee #6 was aware Ex-Tank Washer on occasion bought "juice" (brand name "Possible Flush") to "clean his system up. When it's time to take a drug test, that would substitute to clean his system out" (Tr. 1941-1942).

Ex-Supervisor #2

[redacted] hired Ex-Supervisor #2 as the second shift (3:00 p.m. to 11:30 p.m.) supervisor at the Summit facility in March 2009 (approximately two months after Supervisor #1 entered the dirty tank at issue) (Tr. 712). Ex-Supervisor #2 left Dana on August 16, 2010 (approximately one year after [redacted] fired Ex-Tank Washer). At the hearing, Ex-Supervisor #2 testified he observed employees enter dirty tanks "pretty much daily" (Tr. 731). He did not allow employees he supervised to enter dirty tanks, but he saw employees from the shift before his and the shift after enter the dirty tanks (Tr. 835-841). Ex-Supervisor #2 said [redacted] was aware employees were entering the dirty tanks: "He directed [Employee #2] to dig out a trailer that contained tar" (Tr. 736).

Ex-Supervisor #2 experienced ongoing problems with tardiness and absenteeism due to his daughter's serious illness. In August 2010, Ex-Supervisor #2 was in the process of negotiating with an auto dealership for the purchase of a new car. On August 15, 2010, Ex-Supervisor #2 called into Dana to inform the company he would be late. Ex-Supervisor #2 testified regarding the ensuing events:

> [W]hat happened was I ended up receiving three days [of suspension] to go get a car to make sure I had transportation for my daughter because the transmission had

> blown up. I called [Dana] and let them know that I was going to be about two hours late. At 5:00 when I walked out of the dealership, my phone was ringing, and it was [Employee #1] saying, "[redacted] says why don't you take three days off."
>
> So, I went in the next day to speak to [redacted] about it and he got irate. Well, what happened was, I went in and tried to talk to him about it. He said, "You must think I'm F-ing stupid."
>
> I said, "Sometimes I think you let guys around here blow smoke up your butt."
>
> With that, he got irate and jumped up and started swinging at me and pushing me, and shoving me all the way down the hallway and telling me to get the f___ out of here—excuse my language—get the f___ out of here and, you know, pushing me and shoving me, and the only thing I could think to say to him to get him to stop was, "[redacted], if you hit me, I'll sue you. That is assault. Stop."
>
> And, he shoved me out the door, and I twisted my ankle a little bit, but, you know, as I was back-pedaling, I'm trying to grab my belongings out of the facility, and he just kept on pushing and pushing. And that was the last day I was employed there.
>
> . . .
>
> I wasn't terminated. I just decided to resign.

(Tr. 715-716).

In [redacted] version of the events, [redacted] did not get angry, did not use obscenities, and did not physically touch Ex-Supervisor #2. Otherwise, [redacted] agrees that Ex-Supervisor #2 quit following notification that he had received a three-day suspension for attendance issues (Tr. 1160-1162). [redacted] stated that Ex-Supervisor #2 called him at his home the following Sunday night and apologized for his behavior, and asked for his job back. [redacted] testified he told Ex-Supervisor #2, "There is no common ground for you and I to talk about this any further" (Tr. 1164). Approximately two weeks later, [redacted] learned that "an unnamed disgruntled former employee had gone to OSHA" (Tr. 1164). This accords with Ex-Supervisor #2's testimony that he called [redacted] and asked to return to Dana, and [redacted] told him his "bridge was burned" and refused to take him back (Tr. 863). Ex-Supervisor #2 stated he contacted OSHA approximately two weeks later (Tr. 868).

Ex-Supervisor #2's testimony was riddled with contradictions. He rarely stuck to his original answer to any given question. Ex-Supervisor #2 continuously elaborated, or refined, or backtracked from his initial responses to questions. He appeared to be attempting the difficult task of making damaging statements about his ex-employer while simultaneously currying favor

with [redacted]. (According to [redacted], Ex-Supervisor #2 told him he considered [redacted] a "father figure" (Tr. 1163)).

As just one example, Ex-Supervisor #2 was questioned about a tank wash he performed in front of Dana's expert witness, Randy McGough, so McGough could observe Dana's entry procedure. The questioning regarding this innocuous incident, which had no bearing on Ex-Supervisor #2's accusations of unsafe work practices against Dana, became an opportunity for Ex-Supervisor #2 to obfuscate the facts:

> Q. There's a gentleman in the back of the room. Do you see him in the very back, back?
>
> Ex-Supervisor #2: Yes, sir.
>
> Q. Do you know who he is?
>
> Ex-Supervisor #2: I have no idea, sir.
>
> Q. Do you recall seeing him out at the Summit Terminal before? He's an expert engineer, named Randy McGough?
>
> Ex-Supervisor #2: No, I don't recall seeing him, sir.
>
> Q. Do you recall performing a tank wash while he was there so he could observe an entry?
>
> Ex-Supervisor #2: No, sir, I do not. He asked me what my procedure was. I didn't perform one because he was leaving.
>
> Q. That wasn't my question, but a second ago you said you don't recall him. Now you do?
>
> Ex-Supervisor #2: Now that you're mentioning about performing a tank wash, I do.
>
> Q. Now you remember him?
>
> . . .
>
> Ex-Supervisor #2: I didn't perform a tank wash for the gentleman. He had asked me what my procedure was to clean a tank or I forget if there was a product that he might have even given me as a question to like, how would you clean such and such, and I told him, you know, we're just going to enter, and he had to leave I think or he was on his way out as I was getting to work.
>
> Q. Did you finish your answer?
>
> Ex-Supervisor #2: Yes.
>
> Q. So, now you remember all that?
>
> Ex-Supervisor #2: Yes.
>
> Q. But, two minutes ago, you looked at him and said you didn't recognize him; you'd never seen him before?

> Ex-Supervisor #2: I don't recognize him but if that's the gentleman you say was out there, I remember having a conversation with –he could have put on ten pounds sir. You're talking over a year. You know, he could have put on twenty pounds. I don't recall his face, sir.
>
> Q. Do you recall performing a tank entry while Mr. McGough was present at the Dana Summit Terminal?
>
> Ex-Supervisor #2: I don't remember it being Mr. McGough, sir. I believe it was Shane. We did a demonstration as a group. We volunteered to do a demonstration for Shane because they needed to show that we knew how to do it, and I told [redacted] we had been practicing and we had been training.

(Tr. 909-911).

In fact, Ex-Supervisor #2 performed the tank entry at McGough's request, and McGough took two photographs of Ex-Supervisor #2 as he did so (Exh. R-35; Tr. 1484-1485). Ex-Supervisor #2's testimony regarding this tank entry is not pivotal in terms of evidence (the fact Ex-Supervisor #2 performed the tank entry demonstration is not controversial and was not disputed by anyone but Ex-Supervisor #2), but it is illustrative of Ex-Supervisor #2's tendency to gild his responses. His testimony as a whole alternated between evasive and overly-detailed.

Ex-Supervisor #2's reliability as a witness was further undermined the second day of his testimony. Ex-Supervisor #2 first testified on October 27, 2010. At the end of the day, Marcel DeBruge, one of the two attorneys representing Dana, was cross-examining Ex-Supervisor #2. The next morning, on October 28, 2010, DeBruge resumed his cross-examination. He started by asking Ex-Supervisor #2 about a text message Ex-Supervisor #2 had sent from his cell phone to DeBruge's cell phone the day before. The text read, "20 an hour, a hand shake from [redacted]. If I tell the truth up there, it will hurt him" (Tr. 829).

Ex-Supervisor #2 testified regarding the circumstances that resulted in his text to DeBruge:

> Yesterday, when I arrived, Mr. DeBruge chased me down the hallway, and we had quite a lengthy conversation at the elevator about how Dana needs me, "We're all friends. That's what friends are for. I understand your daughter is sick. What does she have?"
>
> I explained to him my daughter has neurofibromatosis. He said, "Oh yes, one of my colleagues at the office has that, his wife has that, and she's constantly getting tumors removed from her head," which he advised me that, no bridge is burned with coming back to work for Dana. [redacted] and you are good guys, you're all good people."

(Tr. 936).

> [Y]esterday, I think for lunch,[DeBruge] has been asking me to go to lunch with them every day to talk, and I just said, "No, no, no," and then I started thinking, well, if my bridge isn't burned, I can go back to work and provide for my family, and also in a way to kind of make sure those guys aren't going to get hurt. I think I could do more there than I could here.
>
> But, it was him saying that my bridge wasn't burned, so I'm looking to see exactly where they would go in order to do what they need to cover this situation up.

(Tr. 938).

> It was presented to me as one hand washes the other.
>
> . . .
>
> My understanding was that basically he wanted me to not show up. That's what it was. I forgot exactly what he said.
>
> . . .
>
> To the best of what I remember was [DeBruge] had told me one hand washes the other and he said, "You don't even need to show up." You know, before I had started testifying, he said, "You don't even need to show up."
>
> . . .
>
> And, I asked him, I said, "Well, I'm under subpoena. Wouldn't I be arrested?"
>
> And, he says, "In my twenty years of practicing law, I've never heard that; anyone being arrested for that. . . . I was leaving at that point and he said, "Well think about it," and I said, "Okay."
>
> . . .
>
> We were bouncing back and forth. Initially, it was I could have my job back, and then I was obviously hoping for more.
>
> . . .
>
> [What I was trying to convey in the text was] that I get $ 20 an hour and a hand shake from [redacted], you know, like no hard feelings in order to go back to work and not testify here today.
>
> . . .
>
> [If Dana had agreed to the text], [m]y wife would have come up with a case of postpartum depression. She had just had a child two weeks ago, so I would have had an emergency and go home.

(Tr. 941-943).

Credibility Determination Regarding the Statement of Ex-Tank Washer and the Testimony of Ex-Supervisor #2

The Secretary contends Dana's employees routinely enter dirty tanks. This contention is based primarily on Ex-Tank Washer's statement and Ex-Supervisor #2's testimony. Dana has raised questions regarding their trustworthiness as witnesses. The undersigned must determine whether these ex-employees of Dana's are credible.

With respect to Ex-Tank Washer, only his signed statement made at OSHA's office is in evidence. Ex-Tank Washer failed to appear in response to a subpoena, and Dana was unable to cross-examine him. This alone would cast doubt on the reliability of his statement. The statement is further undermined when read in conjunction with the police report that was filed when Ex-Tank Washer lodged an assault charge against [redacted].

In his statement made to OSHA more than a month after he was fired, Ex-Tank Washer stated, "I voiced my concerns for my health and safety to Mr. [redacted] on numerous occasions, including the following: *8-14-08*. . . .The last time I voiced my safety concerns to [redacted], I was fired on August 14, 2009" (Exh. C-40).

In his statement to the police, made within minutes of his firing, Ex-Tank Washer made no mention of his safety concerns. Instead, Ex-Tank Washer informed the police he was fired for failing to take a drug test. [redacted] corroborated that Ex-Tank Washer's refusal to take a drug test was the grounds for Ex-Tank Washer's termination. It would appear that Ex-Tank Washer's statement to OSHA that he was fired for raising safety concerns was a *post hoc* rationale designed to ennoble Ex-Tank Washer and damage Dana.

Based on Ex-Tank Washer's evasion of the subpoena and the contradiction between his statement to OSHA and his statement to the Summit Police Department, the undersigned finds Ex-Tank Washer's statement to be unreliable. No weight will be given to Exhibit C-40.

Ex-Supervisor #2's testimony as a whole lacked credibility. Ex-Supervisor #2 found it difficult not to amend or tweak his answers as the questioning progressed. He appeared to be embellishing his responses, repeatedly adding details or rephrasing his answers.

It is, however, the introduction of the text message to DeBruge that puts Ex-Supervisor #2's testimony beyond the pale. The text is evidence Ex-Supervisor #2 was willing to lie and to evade a subpoena as he negotiated to be rehired. Ex-Supervisor #2 essentially admitted on the record he could be bought. In doing so, Ex-Supervisor #2 demonstrated he was unreliable and untrustworthy. His testimony will not be considered when analyzing the alleged violations.

Without Ex-Tank Washer's statement to OSHA and Ex-Supervisor #2's testimony, the only evidence the Secretary has that a Dana employee entered a dirty tank is Supervisor #1's entry on January 28, 2009. The other eight Dana employees stated they themselves had never entered a dirty tank, and they had never seen any other employees do so. Much of this testimony appeared

coached, but the Secretary was not able to elicit contrary evidence. Based upon the record, it is determined that Dana's employees did not routinely enter dirty tanks.

Permit-Required Confined Spaces

OSHA requires employers to have a permit-required confined space program when its workplace has a confined space that has or has a potential to have a hazardous atmosphere. Section 1910.146(b) provides:

> *Hazardous atmosphere* means an atmosphere that may expose employees to the risk of death, incapacitation, impairment of ability to self-rescue (that is, escape unaided from a permit space), injury, or acute illness from one or more of the following causes:
>
> (1) Flammable gas, vapor, or mist in excess of 10 percent of its lower flammable limit (LEL);
>
> (2) Airborne combustible dust at a concentration that meets or exceeds its LEL;
>
> (3) Atmospheric oxygen concentrations below 19.5 percent or above 23.5 percent;
>
> (4) Atmospheric concentration of any substance for which a dose or a permissible exposure limit is published in Subpart G, *Occupational Health and Environmental Control,* or in Subpart Z, *Toxic and Hazardous Substances,* of this part and which could result in employee exposure in excess of its dose or permissible exposure limit;
>
> (5) Any other atmospheric condition that is immediately dangerous to life or health.

Dana contends that because its employees enter only washed tanks at its Summit facility, the tanks do not have or have a potential to have a hazardous atmosphere. Therefore, Dana contends, the PRCS standard does not apply.

Dana is incorrect on this point. The question of whether washed tanks are PRCSs was addressed by the Commission in *Suttles Truck Leasing, Inc.,* 20 BNA OSHC 1953 (Nos. 97-0545 & 97-0546, 2004). In that case, the employer operated tank washing facilities in Creola, Alabama, and Columbus, Ohio. The employer (represented by the same attorneys who represent Dana in the instant case) argued that the PRCS standard did not apply to post-wash tanks because they were not PRCSs. The Commission disagreed, holding "that the tanks—both pre-wash and post-wash—were PRCSs." *Id. at* 1960.

Dana's contention is rejected. The company's washed tanks are PRCSs, and subject to the PRCS standard.

Reclassification of PRCSs

Dana contends it met the requirements for reclassification under § 1910.146(c)(7), which provides:

> A space classified by the employer as a permit-requested confined space may be reclassified as a non-permit confined space under the following procedures:
>
> (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.
>
> . . .
>
> NOTE: Control of atmospheric hazards through forced air ventilation does not constitute elimination of the hazards. Paragraph (c)(5) covers permit space entry where the employer can demonstrate that forced air ventilation alone will control all hazards in the space.
>
> (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 certification shall be made available to each employee entering the space or to that employee's authorized representative.

Dana hired Randy McGough, who prepared a report entitled "Tank Trailer Washing and Confined Space Entry Evaluation Report" (Exh. R-36). McGough is a professional engineer with extensive experience in the industrial tank wash industry. He is trained in the chemistry and physics relating to the evaluation of external and internal environments (Exh. R-31; Tr. 1438-1442). He was qualified at the hearing as an expert in chemistry, physics, and engineering relating to the evaluation of industrial tanks (Tr. 1445, 1463-1464). McGough conducted testing on one tank at Dana's Summit facility in July 2009, and observed Dana's wash and tank entry procedures there (Tr. 1443). McGough had previously observed, tested, and evaluated other tank wash facilities he said were operated by Dana in other locations. McGough found the Summit facility's procedures were equivalent to the other facilities he had visited. Based upon his visit to Dana's Summit facility, McGough concluded the following in his report:

> [T]he tank trailer testing protocols and results for the other Dana facilities are applicable and appropriate for use at the Summit terminal. Based on a review of previous atmospheric testing results at the other Dana facilities and the pre-tank entry results at the Summit terminal, the tank trailer washing procedures are found to be adequate to remove any potential atmospheric or dermal hazards inside the tank trailers. Since the tank trailers are empty during all entries, they contain no material that would have the potential to engulf an entrant. Additionally, the tank trailers do not have inwardly converging walls or a floor that slopes downward to a smaller cross-section that could trap or cause asphyxiation.

(Exh. C-36, p. 6-1).

Based on McGough's report, Dana contends it has satisfied the requirement of § 1910.146(c)(7)(i), by establishing the permit space poses no actual or potential atmospheric hazards. The testing, however, of the other "Dana" facilities upon which McGough relies were not actually Dana facilities at the time of the testing. McGough is referring to tests done at facilities in Demopolis and Creola, Alabama, and Columbus, Ohio, in 1996 and 1997, when the tank wash facilities were owned by Suttles.

At the time of the hearing, John Clarence Bean worked in Dana's facility in Demopolis, Alabama. He explained the relationship between Suttles and Dana:

> In 1998 with Suttles, the family owned a trucking company, leasing company, tank wash services and driver leasing. The family decided at that time they wanted to sell the company. Two of his sons were full grown and wanted to move out and do something else with their lives. He put it out that he wanted to sell the company, and within probably six months, we were approached by Mr. Ron Dana.
>
> We went through the process of going through the company and finding out what we actually owned and getting titles together and counting some of the equipment and counting some of the buildings, and we sold out to Mr. Ron Dana. . . . I was asked to move with the new company.

(Tr. 1379-1380).

Craig Schroll is a self-employed consultant who testified for the Secretary. He is a board certified safety professional, who helped develop the PRCS standard. He is on the adjunct faculty for the OSHA Training Institute (Exh. C-52; Tr. 1748, 1751-1752). He was qualified as an expert on hazard assessments and permit-required confined spaces (Tr. 1766-1767).

Schroll disagreed with McGough's opinion that tanks are no longer PRCSs after they go through the mechanical wash process (Tr. 1768). He believes McGough overstates the facts when he says all contaminants are removed in the wash process (Tr. 1769).

> The way it's written in the reports, there is a lot of potential in the process as described for there to be variability based on the particular tank washer, and their interpretation. It's more of a description than a procedure outlined in the reports, and they identify that maybe you can clean with solvent, maybe not.
>
> There is not any real clear identification about which leads to which wash. Just with water, there is cold water washing, there's warm washing, there's solvent washes, there's caustic washes. There's really not a lot of detail provided in terms of which thing is used of what process for previous material.

(Tr. 1770-1771).

The testing to which McGough refers in his report is the testing that was at issue in *Suttles,* where the Commission found that the evaluation done at Suttles's Columbus, Ohio, facility "confirmed that any toxic atmosphere in the tanks was purged during the cleaning process. . . . Suttles was warranted in dispensing with the testing for *toxic* atmospheres so long as the tanks were washed, dried and ventilated in accordance with the operating procedures developed in consultation with Dr. Ball" *Id.* at 1966 (emphasis in the original). Dana is attempting to piggy-back onto this testing conducted twelve years prior to the instant inspection, for a different company. As Schroll noted, the Suttles testing represents "a limited sampling from long ago" (Tr. 1775).

Dana attempts to conflate the two companies, treating them as interchangeable with regard to previous evaluations and interactions with OSHA. Dana argues the Secretary is equitably estopped from pursuing this case on the grounds the Commission found the Columbus, Ohio, testing could be applied to the wash tank procedures in Creola, Alabama, in the *Suttles* decision. Dana contends it is entitled to use the twelve-year old Suttles data to avoid compliance with the PRCS standard at its Summit facility.

The record shows, however, that there is no continuity between the former Suttles facilities in Ohio and Alabama and the current Dana facility in Summit, Illinois. The conditions of the Summit facility and the old Suttles facilities are not the same. McGough admitted that the tanks tested in 1996 and 1997 were washed with water, rather than with solvents sometimes used at the Summit facility. The Summit facility uses one large spinner to clean a tank, while the other facilities use three smaller spinners. Dana washes baffled tanks, which contain interior divisions as a road safety feature. The baffles create barriers for ventilation air flow. The testing done in 1996 and 1997 did not include baffled tanks (Tr. 1521, 1551, 1776-1778). Plant manager [redacted] was questioned about his relationship with Suttles:

> Q. [W]hen you first started at [Dana] back in 1997, it had no relationship with Suttles Truck Leasing, isn't that right?
>
> [redacted]: To the best of my knowledge.
>
> . . .
>
> Q. Okay, now, prior to Ms. Bachus's inspection, had you ever communicated with anybody at Suttles Truck Leasing regarding their cleaning procedures?
>
> [redacted]: I don't believe I had.
>
> . . .
>
> Q. You've never talked to anybody at Suttles Truck Leasing to find out if they're cleaning the exact same things that you are, is that right?

[redacted]: I did not speak to anybody about that, that's right.

Q. So, prior to Ms. Bachus doing her inspection, you didn't have any knowledge as to whether or not Suttles Truck Leasing was cleaning the same types of chemicals that you clean at Dana Container, isn't that right?
[redacted]: I believe that's right.

Q. Now, prior to Ms. Bachus's inspection, did you have any relationships with any of the other Dana Container facility managers?

[redacted]: Not a business or job relationship. I spoke with a few of them.

Q. Did you ever speak to them about cleaning procedures?

[redacted]: No.

. . .

Q. Since Ms. Bachus's inspection, have you talked to any of the other facility managers at Dana across the country about their cleaning procedures?

[redacted]: I haven't talked directly to any of the other managers pertaining to cleaning methods, no.

(Tr. 1306-1309).

In order to meet the reclassification requirements, Dana must also document the certification process in accordance with § 1910.146(c)(7)(iii). [redacted] attempted at the hearing to equate Dana's entry permits with the reclassification certificate, and in so doing revealed the company's claim of reclassification was a litigation strategy, and not a procedure of which he, as plant manager, was aware:

Q. So, you believe that you have met (iii) through the permits you've produced in this case, is that right?

[redacted]: I believe the (iii), yes.

. . .

Q. Have you ever given any training to your employees regarding certification of the reclassified space?

[redacted]: There has been some. I didn't personally give the training, but our employees have had some training pertaining to that, yes.

Q. Okay, was that before or after Ms. Bachus's inspection?

[redacted]: I believe that was after.

Q. So, before Ms. Bachus's inspection, did you ever teach your employees about how to properly certify that a space has been reclassified?

[redacted]: Our employees were doing all of this. They weren't trained to call it reclassified. We've always been doing all of these things.

Q. Okay, you just decided to call it reclassified later, right?

[redacted]: I didn't decide that.

Q. You didn't decide that. Somebody else at Dana did, right?

[redacted]: No.

(Tr. 1230-1231).

The undersigned agrees with Schroll that the 1996 and 1997 testing is too remote in time to apply to Dana's Summit facility. Dana has failed to establish the tanks had no actual or potential atmospheric hazards. The only evaluation done at Dana's facility was performed on one tank in July 2009, after the incident that gave rise to this inspection occurred. Dana cannot predicate reclassification on data recorded a dozen years previously in a different location under different circumstances for a different company. Furthermore, Dana adduced no documentary evidence of reclassification certification, as required by § 1910.146(c)(7) (Tr. 1417). Dana has failed to prove reclassification.

Alternate Entry

Dana contends it has met the requirements for alternate entry under § 1910.146(c)(5), which provides:

> An employer may use the alternate procedures specified in paragraph (c)(5)(ii) of this section for entering a permit space under the conditions set forth in paragraph (c)(5)(i) of this section.
>
> (i) An employer whose employees enter a permit space need not comply with paragraphs (d) through (f) and (h) through (k) of this section, provided that:
>
> (A) The employer can demonstrate that the only hazard posed by the permit space is an actual or potential hazardous atmosphere;
>
> (B) The employer can demonstrate that continuous forced air ventilation alone is sufficient to maintain that permit space safe for entry;
>
> (C) The employer develops monitoring and inspection data that supports the demonstrations required by paragraphs (c)(5)(i)(A) and (c)(5)(i)(B) of this section;
>
> (D) If an initial entry of the permit space is necessary to obtain the data required by paragraph (c)(5)(i)(C) of this section, the entry is performed in compliance with paragraphs (d) through (k) of this section;
>
> (E) The determinations and supporting data required by paragraphs (c)(5)(i)(A), (c)(5)(i)(B), and (c)(5)(i)(C) of this section are documented by the employer and are made available to each employee who enters the permit space under the terms of paragraph (c)(5) of this section or to that employee's authorized representative; and

(F) Entry into the permit space under the terms of paragraph (c)(5)(i) of this section is performed in accordance with the requirements of paragraph (c)(5)(ii) of this section.

Dana adduced undisputed testimony that it used continuous forced air ventilation during tank entries. The Secretary argues that an employer cannot simultaneously claim that it uses reclassification and alternate entry for permit spaces—the two are mutually exclusive. For reclassification, the employer must establish the permit space "poses no actual or potential atmospheric hazards." Alternate entry requires the employer to establish "that the only hazard posed by the permit space is an actual or potential hazardous atmosphere." Obviously the employer cannot demonstrate a space poses no actual or potential atmospheric hazards, while at the same time demonstrating that it poses only an actual or potential hazardous atmosphere. Here, however, the undersigned has concluded that Dana failed to establish its washed tanks pose no actual or potential atmospheric hazards under § 1910.146(c)(7). Dana is permitted to pursue an alternative legal theory.

The Secretary does not dispute Dana's claim that it used continuous forced air ventilation. She questions the extent of the company's documentation in general terms. Schroll testified that to implement alternate entry, "the standard requires that you evaluate your ventilation. You would have to figure the size and configuration of the confined space that you are attempting to ventilate. You would have to evaluate where you're introducing ventilation flows, how much you're flowing over what period of time" (Tr. 1781). He did not state Dana's documentation was inadequate. The standard does not require data with the specificity required by Schroll. It requires the employer to develop "monitoring and inspection data that supports the demonstrations required" to show "that continuous forced air ventilation alone is sufficient to maintain that permit space safe for entry."

McGough's report details the ventilation process for washed tanks. Washed tanks are ventilated regardless of whether an employee is required to enter the tank after the washing process. Under "Tank Trailer Washing Procedure," McGough lists eight steps for cleaning a tank. After the final rinse (Step 5), the procedure states:

> Step 6: Steam lines are placed into the tank trailer along with 2-4" air hoses. The introduction of steam and blown air into the tank trailer serves to sanitize and dry the interior surface. The steam is typically applied for 10 minutes after which the steam lines are removed. Blown air is continually applied for an additional 15 minutes after the steam lines are removed.

> Step 7: On rare occasions, a tank trailer must be entered for inspection or to remove any small amounts of inert material that was not removed during the washing process. If a tank trailer is required to be entered, the facility personnel follow the **Tank Trailer Entry Procedure** as defined in Section 4 of this report. After tank trailer entry and exit, the tank trailer is rinsed with water for an additional 2 minutes.

(Exh. R-36).

The Tank Trailer Entry Procedure requires employees to fill out a tank entry permit, which includes monitoring for oxygen, lower explosive limit, and toxic levels of hydrogen sulfide and carbon monoxide. Required levels for entry are 20.9% for oxygen, 0% for lower explosive limit, and 0.00 ppm for toxicity. Step 10 provides:

> Tank entry person performs interior surface inspection or performs removal of any inert material remaining in tank trailer. During the entire time an individual is inside the tank trailer, verbal communication is maintained with the standby personnel and air is also continually blown inside the tank trailer via the 2-4" air hoses.

(Exh. R-36).

[redacted] testified Dana runs forced air ventilation the entire duration of a confined entry (Tr. 1048). Bean explained the air is not ventilated from inside the facility:

> Q. Okay, then, let's talk about continuous air—how does the air get into the tank?
>
> Bean: Well, you attach a hose that's attached to a blower to the trailer, and it blows air into it.
>
> Q. And, where is the air coming from?
>
> Bean: It's outside air.
>
> Q. Okay, and that outside air is coming from air in the facility, isn't it?
>
> Bean: Outside air, outside the building. It's pulling it through and going into the tank trailer.
>
> Q. So, you're pulling it from outside the building?
>
> Bean: It's fresh air.

(Tr. 1544-1545).

Dana has established it uses continuous forced air ventilation during entry. The only hazard posed by the tanks is an actual or potential hazardous atmosphere.[5] Dana's tank entry

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[5] Section 1910.146(b) lists other hazardous characteristics of a permit-required confined space as:

> (1) contains or has a potential to contain a hazardous atmosphere;

Continued on next page

permits document the monitoring and data requirements of § 1910.146(c)(5)(i)(C) and (E). It is determined that Dana has established it uses the alternate entry procedures of the PRCS standard.

Accordingly, Dana need not comply with paragraphs (d) through (f) and (h) through (k) of the PRCS standard for entries made into clean tanks. The undersigned does not find Dana met the requirements for alternate entry with respect to Supervisor #1's entry into a dirty tank on January 28, 2009. Supervisor #1 did not perform air monitoring before entering the tank, and did not ventilate the tank while he was in it.[6] Alleged violations that occurred when Supervisor #1 entered the dirty tank will be analyzed under the conventional requirements of the PRCS.

For purposes of analysis, the remaining items will be considered in three groups. In the first group are items alleging noncompliance with subsections found in paragraphs (d) through (f) and (h) through (k), issued for periods when Dana was implementing alternate entry. The second group consists of items issued for periods when Dana was implementing alternate entry, but the cited subsections are not found in paragraphs (d) through (f) and (h) through (k). The third group includes those items alleging violations resulting from Supervisor #1's entry into the dirty tank on January 28, 2009, when Dana's alternate entry procedure was not being implemented.

Group 1: Alleged Violations of PRCS Subsections Found in Paragraphs (d) Through (f) and (h) Through (k), During Alternate Entry

Item 10 of Citation No. 1: Alleged Serious Violation of § 1910.146(d)(4)(i)

Item 10 of Citation No. 1 alleges:

> On or about January 28, 2009, employees were required to enter permit required confined spaces. Testing and monitoring equipment needed to evaluate permit

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(2) Contains a material that has the potential for engulfing entrant;

(3) Has an internal configuration such that an entrant could be trapped or asphyxiated by inwardly converging walls or by a floor which slopes downward and tapers to a smaller cross-section; or

(4) Contains any other recognized serious safety or health hazard.

A hazardous atmosphere is the only permit-required confined space hazard at issue in this proceeding.

[6] In its brief, Dana states Supervisor #1 "went to the top of the tank, *inserted a blower and began blowing the tank*, put on a negative pressure respirator and harness, and without hooking off (Tr. 1599) or testing the atmosphere (Tr. 607-608) or completing a permit (Tr. 607-608) as he was trained, entered the tank (Tr. 1595-1596)." (Dana's brief, p. 13; emphasis added). Nowhere in any of the cited transcript pages does Supervisor #1 testify that he put a blower in the tank. Paramedic Maylath testified there was one air hose draped over the top of the tank (not two air hoses as required by Dana's own procedure) when he arrived at Dana's facility, but there is no evidence Supervisor #1 placed it there. It is likely Supervisor #1's fellow employees placed it there when Supervisor #1 was discovered unconscious in the tank.

spaces, such as, but not limited to, a hazardous gas monitor, was not maintained in working condition and/or properly calibrated.

Section 1910.146(d)(4)(i) provides:

(d) Under the permit space program required by paragraph (c)(4) of this section, the employer shall:

. . .

(4) Provide the following equipment (specified in paragraphs (d)(4)(i) through(d)(4)(ix) of this section) at no cost to employees, maintain that equipment properly, and ensure that employees use that equipment properly:

(i) Testing and monitoring equipment needed to comply with paragraph (d)(5) of this section[.]

Dana requires its employees to use a 4-gas meter to test the atmosphere of its tanks. Bachus asked to view the meter during her inspection. When she turned on the meter, she was "unable to obtain an oxygen level reading of the normal atmosphere" (Exh. C-53 through C-59; Tr. 214-215). [redacted] acknowledged the meter gave a faulty reading (Tr. 1143).

Supervisor #1 did not use the meter to test the atmosphere of the dirty tank he entered on January 28, 2009 (Tr. 207-208). Thus, this item is analyzed under § 1910.146(c)(5)(i), which provides that an employer "need not comply with paragraph[ ] (d)"of the PRCS. Therefore, Dana was not required to comply with § 1910.146(d)(4)(i). Item 10 is vacated.[7]

Items 11a and 11b of Citation No. 1:
Alleged Serious Violation of §§ 1910.146(d)(13) and (14)

Items 11a and 11b of Citation No. 1 allege:

On or about January 28, 2009, the employer reviewed entry operations which included permits that documented entry into permit spaces. The employer failed to revise the program to correct deficiencies documented on the permits including, but not limited to, lack of entrant and attendant names and/or signatures.

. . .

On or about January 28, 2009, the employer reviewed canceled permits which documented entry into permit required confined spaces. The employer failed to revise the permit space program when permits documented that employee(s) who had entered the spaces, failed to follow the requirements of a permit required confined space.

[7] Item 10 would be vacated even if Dana were required to comply with the cited standard. [redacted] testified that a person using the meter could not tell if it was functioning properly until the meter was turned on. If an employee did turn on the meter and discover it was not working, [redacted] would post a sign forbidding employees to enter tanks until the meter was repaired (Exh. R-5; Tr. 1046-1047). There is no evidence Dana knew the meter was faulty until Bachus turned it on during her inspection.

Sections 1910.146(d)(13) and (14) provide:

> (d) Under the permit space program required by paragraph (c)(4) of this section, the employer shall:
>
> . . .
>
> (13) Review entry operations when the employer has reason to believe that the measures taken under the permit space program may not protect employees and revise the program to correct deficiencies found to exist before subsequent entries are authorized[.]
>
> (14) Review the permit space program, using the canceled permits retained under paragraph (e)(6) of this section within 1 year after each entry and revise the program as necessary, to ensure that employees participating in entry operations are protected from permit space hazards.

The Secretary contends Dana violated the cited standards because [redacted] "failed to review entry operations and correct deficiencies in his program after being given shoddy permits from his own supervisors for over a year" (Secretary's brief, p. 79). Deficiencies include permits failing to list an attendant during entry, permits omitting subsequent air monitoring data, permits showing a failure to review MSDSs prior to entry, permits exceeding the time limit listed, and permits with no time of entry (Exh. C-38).

Items 11a and 11b allege violations of paragraph (d) of the PRCS standard. Under Dana's alternate entry procedure, Dana was not required to comply with §§ 1910.146(d)(13) and (14). Items 11a and 11b are vacated.

Item 1b of Citation No. 2: Alleged Willful Violation of § 1910.146(d)(3)(i)

Item 1b of Citation No. 2 alleges:

> On or about January 28, 2009, employees were required to enter permit required confined spaces. The employer failed to specify acceptable entry conditions necessary for safe permit space entry operations.

Section 1910.146(d)(3)(i) provides:

> [The employer shall]:
>
> (3) Develop and implement the means, procedures, and practices necessary for safe permit space entry operations including, but not limited to, the following:
>
> (i) Specifying acceptable entry conditions.

The Secretary contends Dana's confined space program does not mention how a space is to be evaluated to determine the existence of potential hazards. The program does not specify acceptable entry conditions (Exh. C-20).

Item 1b alleges a violation of paragraph (d) of the PRCS standard. Under Dana's alternate entry procedure, Dana was not required to comply with § 1910.146(d)(3)(i). Item 1b is vacated.

Group 2: Alleged Violations of PRCS Subsections Not Found in Paragraphs (d) Through (f) and (h) Through (k), During Alternate Entry

Item 12 of Citation No. 1: Alleged Serious Violation of § 1910.146(g)(3)

Item 12 of Citation No. 1 alleges:

> On or about January 28, 2009, employees were required to enter permit required confined spaces. The employer failed to ensure the employees were proficient and that all employees understood, and had the knowledge and skills to perform safe entry operations.

Section 1910.146(g)(3) provides:

> The training shall establish employee proficiency in the duties required by this section and shall introduce new or revised procedures, as necessary, for compliance with this section.

Employers using alternate entry are required to comply with paragraph (g) of the PRCS standard. Section 1910.146(g)(3) applies to Dana's workplace.

The Secretary's evidence in support of Item 12 is slight. She bases this allegation on statements employees made to Bachus during the course of her investigation. When Supervisor #1 came to OSHA's office for a deposition, he was unable to correctly answer certain questions, including what "LEL" stood for, and stated that tank entry was appropriate at levels of "20 and above" for LEL and toxicity (Dana's rule is that LEL and toxicity must be 0.000) (Tr. 1618-1619). Bachus also testified that Employee #5 and Employee #8 did not seem to understand the requirements of the PRCS standard with regard to entry and toxicity (Tr. 359).

At the hearing, Supervisor #1 testified he had worked the night shift at Dana immediately prior to going to OSHA's office for his deposition. He stated he informed Bachus that he was "tired and sleepy" during his deposition (Tr. 1634). Bachus questioned Employee #5 and Employee #8 in English; both are Spanish speaking. She could not recall if a translator assisted with her questioning (Tr. 533).

Bachus's testimony on this issue was tentative (this is true of her testimony as a whole). She qualified most of her answers, spoke in general terms, and could not recall crucial details (Tr. 356-363, 533-534).

Supervisor #1 was able to answer questions competently at the hearing. Employee #5, who testified with the aid of an interpreter, did not demonstrate a lack of proficiency in his required duties. The employees' improved performance may be due to coaching prior to their appearances. The undersigned cannot, however, dismiss the possibility the conditions under

which Bachus questioned the witnesses contributed to her perception they were not proficient. It is determined the Secretary has failed to establish a violation of § 1910.146(g)(3). Item 12 is dismissed.

Item 1a of Citation No. 2: Alleged Willful Violation of § 1910.146(c)(4)

Item 1a of Citation No. 2 alleges:

> On or about January 28, 2009, the employer failed to develop or implement a written permit space entry program which complied with 29 CFR 1910.146. The employer's written permit deficiencies included but were not limited to, complete purging, flushing or ventilating procedures, testing and monitoring equipment available for adequate evaluation of permit space conditions, and inadequate procedures for rescuing and summoning for rescue and emergency services.

Section 1910.146(c)(4) provides:

> If the employer decides that its employees will enter permit spaces, the employer shall develop and implement a written permit space program that complies with this section. The written program shall be available for inspection by employees and their authorized representatives.

Employers using alternate entry are required to comply with paragraph (c) of the PRCS standard. Section 1910.146(c)(4) applies to Dana's workplace.

[redacted] provided Bachus with Dana's written PRCS program. [redacted] stated that he does not hand out copies of the PRCS program to employees, but it is available for them to look at (Exh. C-20; Tr. 397, 1275-1276).

Bachus found a number of deficiencies in the written program (Tr. 365-398). Perhaps the most egregious deficiency is paragraph 16 of the program, which provides:

> If the test indicates that the atmospheric conditions are hazardous, the confined space shall be purged as required in 14 above. Atmospheric conditions shall be termed hazardous if test shows any of the following:
>
> (a) The presence of oxygen below or above the breathing air range (**16.5** to 21.9 % by volume.)
>
> (b) Any atmosphere with less than 19.5 % oxygen should not be entered without an approved self-contained breathing apparatus (SCBA).
>
> (c) The presence of a flammable vapor.

(Exh. C-20, p. 637) (emphasis added).

Section 1910.146(b) defines an oxygen deficient atmosphere as "an atmosphere containing less than 19.5 percent oxygen by volume." Dana's program lists the breathing range for oxygen as being three full percentage points below the actual acceptable range. [redacted] acknowledged

the program was incorrect, and that someone who entered a tank with 16.5% oxygen could become incapacitated (Tr. 986-987). [redacted] excused the inaccuracy by saying Dana trained its employees that 19.5 % oxygen is the correct figure (Tr. 983-984).

[redacted] testified he believed the PRCS program was acceptable because OSHA had inspected Dana's Summit facility in 2001 and had not cited the company under § 1910.146(c)(4) (Tr. 1331-1332). He admitted the compliance officer for the 2001 inspection never told him Dana's program was "okay" (Tr. 1332-1333). "[I]t is well-established by both the Commission and the courts that OSHA's failure to cite an employer during a past inspection does not, standing alone, constitute a lack of fair notice." *Fluor Daniel v. OSHRC,* 295 F.3d 1232, 1233 (11th Cir. 2002).

The Secretary has established Dana was in noncompliance with the cited standard. Every Dana employee who entered a PRCS had access to the violative condition; if an employee relied on the PRCS program (which employees should be able to do), he could have died or sustained serious injuries from the oxygen-deficient atmosphere. [redacted] was aware of the error in the written program, and had considered deleting it, but failed to change it.

The Secretary has established a violation of § 1910.146(c)(4).

Willful Classification of Item 1a of Citation No. 2

The Secretary classifies this violation as willful.

> A willful violation is one "committed with intentional, knowing or voluntary disregard for the requirements of the Act, or with plain indifference to employee safety." *Falcon Steel Co.,* 16 BNA OSHC 1179, 1181, 1993-95 CCH OSHA ¶30,059, p. 41, 330 (No. 89-2883, 1993)(consolidated); *A.P. O'Horo Co.,* 14 BNA OSHC 2004, 2012, 1991-93 C.H. OSHA ¶ 29,223, p. 39,133 (No. 85-0369, 1991). A showing of evil or malicious intent is not necessary to establish willfulness. *Anderson Excavating and Wrecking Co.,* 17 BNA OSHC 1890, 1891, n.3, 1995-97 C.H. OSHA ¶ 31,228, p. 43,788, n.3 (No. 92-3684, 1997), *aff'd* 131 F.3d 1254 (8th Cir. 1997). A willful violation is differentiated from a nonwillful violation by an employer's heightened awareness of the illegality of the conduct or conditions and by a state of mind, *i.e.,* conscious disregard or plain indifference for the safety and health of employees. *General Motors Corp., Electro-Motive Div.,* 14 BNA OSHC 2064, 2068, 1991-93 C.H. OSHA ¶ 29,240, p. 39,168 (No. 82-630, 1991)(consolidated).

A.E. Staley Manufacturing Co., 19 BNA OSHC 1199, 1202 (Nos. 91-0637 & 91-0638, 2000).

The Secretary contends Dana's violation of § 1910.146(c)(4) is willful based on [redacted] acknowledgment that he knew of the PRCS program's deficiencies, yet did not change it.

Furthermore, the Secretary cited Dana for violating the same standard in 2006, following an inspection at Dana's facility in Paulsboro, New Jersey (Exh. C-6).

It is determined the Secretary has not established willfulness with regard to this item. The 2006 citation occurred at a different facility under different management. In addition, the Paulsboro facility had *no* written PRCS program. Although Dana's PRCS program at issue here was deficient, employees were not left to rely solely on the program with no other guidance. During training they were informed of the correct percentage of oxygen for acceptable entry. [redacted] issued a memo in 2008 clarifying the acceptable oxygen percentage for entry (Exh. R-9). Item 1a of Citation No. 2 is affirmed as serious.

Group 3: Alleged Violations Resulting from Supervisor #1's Tank Entry on January 28, 2009

Item 13 of Citation No. 1: Alleged Serious Violation of § 1910.146(k)(3)

Item 13 of Citation No. 1 alleges:

> On or about January 28, 2009, an employee entered a permit required confined space and was not attached to a non-entry rescue system. The employee had not worn a full body harness with a retrieval line attached to a mechanical device for use in assistance of a non entry-rescue.

Section 1910.146(k)(3) provides:

> To facilitate non-entry rescue, retrieval systems or methods shall be used whenever an authorized entrant enters a permit space, unless the retrieval equipment would increase the overall risk of entry or would not contribute to the rescue of the entrant.

This item is based on Supervisor #1's entry into the dirty tank on January 28, 2009. Section 1910.126(k)(3) applies to Supervisor #1's entry.

The Secretary alleges Supervisor #1 entered the tank without wearing a harness. Supervisor #1 claims he was wearing a harness, but both assistant fire chief Gallaga and paramedic state that he was not. It is undisputed he was not attached to a retrieval line.

Maylath entered the tank to help retrieve Supervisor #1. Maylath turned Supervisor #1 over, administered a sternum rub to him and wrapped webbing around Supervisor #1's body so he could be lifted from above. When asked if Supervisor #1 was wearing any retrieval device, Maylath responded, "Retrieval? No, it would be a harness. That's why I used my webbing" (Tr. 109).

In his report, Maylath wrote, "a hoisting mechanism was above the tanker, when crew attempted to move the mechanism above the hatch, it would not reach. While in the process of

moving the mechanism over, a harness was handed to crew by a worker. Crew again looked at the unconscious man who had no harness on" (Exh. 7a).

Maylath's demeanor on the witness stand was professional and straightforward. He gave detailed, consistent testimony. His testimony is in accordance with the report he wrote following Supervisor #1's retrieval. Maylath was a credible witness and his testimony that Supervisor #1 was not wearing a harness is accepted.

The Secretary has established Dana failed to comply with the terms of the standard. Supervisor #1 was not wearing a harness, and the hoisting mechanism above the tank would not reach the hatch. Even if Dana could establish Supervisor #1 was wearing his harness and the hoisting mechanism did reach the hatch, a violation would still be established. It is undisputed that Supervisor #1 was not attached to the hoisting mechanism (Tr. 1599). Dana's argument that it complied with the cited standard because the hoisting device was, in fact, 50 feet long and "could reach anyone in the bay" (Dana's brief, p. 82) is nonsensical. The standard unambiguously requires that retrieval systems *be used* (not just available) whenever an employee enters a permit space, in order "[t]o facilitate non-entry rescue." If the hoisting device is not actually attached to the employee's harness, non-entry rescue is not possible. Rather, the rescuer must also enter the permit space (as Maylath did here), and physically attach the employee's harness to the hoisting device.

The Secretary has established Supervisor #1's exposure to the hazardous atmosphere in the tank. At the hospital, Supervisor #1 was diagnosed with toxic exposure to toluene (Exh. C-16). Had Supervisor #1 been attached to the hoisting device in compliance with § 1910.146(k)(3), his fellow employees could have retrieved him from the tank as soon as he was discovered. Instead, Supervisor #1 continued to lay unconscious in the tank while rescue personnel responded to the emergency call.

Supervisor #1 had actual knowledge that he was entering the dirty tank while not wearing a harness or being attached to the hoisting device. At the time of the entry, Supervisor #1 was a supervisor for Dana. As such, his knowledge is imputed to Dana. *Dover Elevator Co.,* 16 BNA OSHC 1281, 1286 (No. 91-862, 1993) ("[W]hen a supervisory employer has actual or constructive knowledge of the violative conditions, that knowledge is imputed to the employer, and the Secretary satisfies [her] burden of proof without having to demonstrate any inadequacy or defect in the employer's safety program.")

The Secretary has established Dana committed a violation of § 1910.146(k)(3). Under § 17(k) of the Act, a violation is serious "if there is a substantial probability that death or serious physical harm could result from" the violative condition. Here, Dana's employees were unable to retrieve Supervisor #1 from the tank, and had to summon emergency personnel. Paramedics were required to enter the dirty tank, exposing themselves to the hazardous atmosphere. Supervisor #1 was hospitalized. The violation is properly classified as serious.

Item 2 of Citation No. 2: Alleged Willful Violation of § 1910.146(d)(5)(i)

Item 2 of Citation No. 2 alleges:

> On or about January 28, 2009, an employee entered a permit required confined space. The employee entered without testing the conditions inside the permit space to ensure the space was safe for entry.

Section 1910.146(d)(5)(i) provides:

> [The employer shall] [t]est conditions in the permit space to determine if acceptable entry conditions exist before entry is authorized to begin, except that, if isolation of the space is infeasible because the space is large or is part of a continuous system (such as a sewer), pre-entry testing shall be performed to the extent feasible before entry is authorized, and, if entry is authorized, entry conditions shall be continuously monitored in the areas where authorized entrants are working[.]

This item is based on Supervisor #1's entry into the dirty tank on January 28, 2009. Section 1910.126(k)(3) applies to Supervisor #1's entry. It is undisputed Supervisor #1 did not test the atmosphere of the dirty tank before he entered it. Supervisor #1 was exposed to the hazardous atmosphere in the tank. As supervisor, Supervisor #1's knowledge that he failed to test the atmosphere of the tank is imputed to Dana. The Secretary has established a violation of § 1910.146(d)(5)(i).

Item 3 of Citation No. 2: Alleged Willful Violation of § 1910.146(e)(1)

Item 3 of Citation No. 2 alleges:

> On or about January 28, 2009, a supervisor entered a permit required confined space. The supervisor failed to complete a permit which would have documented the measures taken to ensure safe permit space entry operations.

Section 1910.146(e)(1) provides:

> Before entry is authorized, the employer shall document the completion of measures required by paragraph (d)(3) of this section by preparing an entry permit.

This item is based on Supervisor #1's entry into the dirty tank on January 28, 2009. Section 1910.126(k)(3) applies to Supervisor #1's entry. It is undisputed Supervisor #1 did not complete a permit documenting the measures he took to ensure safe permit space entry operations.

Supervisor #1 was exposed to the hazardous atmosphere in the tank. As supervisor, Supervisor #1's knowledge that he failed to complete the permit is imputed to Dana. The Secretary has established a violation of § 1910.146(e)(1).

Employee Misconduct Defense

Dana contends that when Supervisor #1 entered the dirty tank on January 28, 2009, he was engaged in unpreventable employee misconduct for which Dana is not liable.

> To establish the unpreventable employee misconduct defense, an employer must show that it established a work rule to prevent the violation; adequately communicated the rule to its employees, including supervisors; took reasonable steps to discover violations of the rule; and effectively enforced the rule.

Schuler-Haas Electric Corp., 21 BNA OSHC 1489, 1494 (No. 03-0322, 2006).

In addition, the employer has the burden of showing "that the violative conduct of the employee was idiosyncratic and unforeseeable." *L. E. Myers Co.,* 16 BNA OSHC 1037, 1040 (No. 90-945, 1993). Where, as here, the purported employee misconduct includes the actions of a supervisory employee, the employer faces a higher standard of proof. "[W]here a supervisory employee is involved, the proof of unpreventable employee misconduct is more rigorous and the defense is more difficult to establish since it is the supervisor's duty to protect the safety of employees under his supervision . . . . A supervisor's involvement in the misconduct is strong evidence that the employer's safety program was lax." *Archer-Western Contractors Ltd.*, 15 BNA OSHC 1013, 1016-1017 (No. 87-1067, 1991).

Dana established it had work rules designed to prevent the violations committed by Supervisor #1 when he entered the dirty tank. Dana uses a confined spaces training program developed by J. J. Keller. The program includes rules requiring employees to wear harnesses and retrieval lines when entering a PRCS, to test the conditions before entering a PRCS, and to complete an entry permit before entering a PRCS (Exh. R-8, pp. 10, 14-15, 21). These rules were communicated to Dana's employees, including Supervisor #1, through training (Exh. R-7).

Dana has failed to establish, however, that it took reasonable steps to discover violations of its rules. One of the best tools Dana had for discovering violations was the tank entry permits the company required its employees to complete before entering the washed tanks. The permits are each one page in length, and require minimal information to be supplied or checked off. Of the twenty-eight permits Dana produced to the Secretary, every one contained an error or omission (Exh. C-38). Eleven of the defective twenty-eight permits were filled out by Supervisor #1.

None of the permits indicates that subsequent air monitoring was conducted. Permits indicated that work was being done for as long as three hours without subsequent air monitoring. Some permits noted "permit is only good for 20 minutes," yet employees exceeded twenty minutes on seventeen of the permits. Supervisor #1 failed to review MSDSs prior to tank entry. His permits failed to identify an attendant. Some permits listed Supervisor #1 as attendant, but did not list a cleaner (Exh. C-38).

Review of the tank entry permits by [redacted] would have alerted him that Dana's employees, including supervisor Supervisor #1, were failing to complete the permits properly, and were violating Dana's safety rules. Dana also failed to enforce its rules. [redacted] not only admitted he failed to enforce Dana's safety program, he sought to excuse it:

> Well, for myself personally, the reason why there is so little discipline—and I apologize if I'm out of line—but we have seen a classic example over the last two days of *why I run a lax discipline*, documented discipline, because it opens the door for every employee who gets angry to pick up the phone and call OSHA.

(Tr. 1055, emphasis added).

One of Dana's supervisors violated OSHA's PRCS standard, as well as Dana's own safety program. The plant manager admitted he was lax with his discipline for safety violations. Under these circumstances, Dana cannot establish that Supervisor #1's conduct was either idiosyncratic or unforeseeable. To the contrary, it was predictable that an employee would bypass the safety rules when obviously deficient tank entry permits were continually accepted without repercussions. Dana has failed to establish its defense of employee misconduct.

Willful Classification of Items 2 and 3 of Citation No. 2

The Secretary classifies Dana's violations of §§ 1910.146(d)(5)(i) (testing of PRCS conditions) and (e)(1) (preparing entry permit) as willful. "The hallmark of a willful violation is the employer's state of mind at the time of the violation–an 'intentional, knowing, or voluntary disregard for the requirements of the Act or . . . plain indifference to employee safety." *Kaspar Wire Works, Inc.,* 18 BNA OSHC 2178, 2181 (No. 90-2775, 2000), *aff'd* 268 F.3d 1123 (D.C. Cir. 2001). Supervisor #1 testified that he knew he was wrong in entering the dirty tank without testing it or completing a tank entry permit, but stated that it was at the end of his shift and he just wanted to finish it quickly, so he disregarded the safety rules in which he was trained: "I was tired, it was cold, and I wanted to try to finish the trailer and I made a mistake" (Tr. 1597).

It is determined that Supervisor #1's violations of the cited standards are willful. Supervisor #1's entry into the dirty tank was the result of a deliberate decision he made, and it put his life at risk.[8] He admitted knowing it was wrong to enter the dirty tank, and he compounded the wrongdoing by failing to test the tank or fill out the required permit. Supervisor #1 then neglected to wear a harness, thus ensuring his predictable rescue was made much more difficult for emergency personnel. All of these violations were committed with premeditation by Supervisor #1.

"The employer is responsible for the willful nature of its supervisors' actions to the same extent that the employer is responsible for their knowledge of violative conditions." *Tampa Shipyards, Inc.,* 15 BNA OSHC 1533, 1539 (Nos. 86-360, 86-469; 1992). Supervisor #1, as a supervisor for Dana, knowingly disregarded the requirements of §§1910.146(d)(5)(i) and (e)(1). He sacrificed safety for expedience. Supervisor #1's actions present a clear-cut case of willfulness, which is imputed to Dana.

Items 2 and 3 of Citation No. 2 are affirmed as willful.

Incidental Issues

Dana raises various incidental issues, which fall generally under the umbrella of what Dana refers to as "government misconduct." The conspiracies and intrigue conjured up by Dana's attorneys include Bachus's "improper agenda," her purported manipulation of evidence, and her supposed coercion of witnesses. Dana's post-hearing brief is brimming with indignant footnotes, fulminating against everything from the compliance officer's laughter during the hearing to the Secretary's counsel inadvertently omitting a page from an exhibit. No incident is too small for Dana's counsel to pounce on and claim as evidence of misconduct or nefarious motives. None of these assertions has any basis in reality and Dana's contention is summarily dismissed.

Dana also asks the undersigned to reconsider her ruling that Schroll could testify as a rebuttal expert for the Secretary, and her admission into evidence of Ex-Tank Washer's statement. The undersigned declines to do so.

[8] It is also likely he was complicit in putting a subordinate employee's life at risk, since he told medical personnel at the hospital that he was inside the tank with another employee, who was helping him clean it out (Exh. C-16).

Penalty Determination

The Commission is the final arbiter of penalties in all contested cases. "In assessing penalties, section 17(j) of the OSH Act, 29 U. S. C. § 666(j), requires the Commission to give due consideration to the gravity of the violation and the employer's size, history of violation, and good faith." *Burkes Mechanical Inc.,* 21 BNA OSHC 2136, 2142 (No. 04-0475, 2007). "Gravity is a principal factor in a penalty determination and is based on the number of employees exposed, duration of exposure, likelihood of injury, and precautions taken against injury." *Siemens Energy and Automation, Inc.,* 20 BNA OSHC 2196, 2201 (No. 00-1052, 2005).

Dana employed fourteen employees at its Summit, Illinois, facility. The company has several other facilities throughout the United States, but its total number of employees was not adduced at the hearing. In 2006, OSHA cited Dana for violations at its Paulsboro, New Jersey, facility (Exh. C-6).

Dana is given no credit for good faith. The record indicates Dana attempted to manipulate OSHA's inspection from the time Bachus entered its facility. [redacted] handed Bachus a bogus statement, purportedly taken from Supervisor #1 somewhere between the time he was hoisted unconscious out of the dirty tank and when he was taken away by ambulance to a hospital.

Item 13 of Citation No. 1-§ 1910.146(k)(3): The gravity of this violation is high. Supervisor #1 was not wearing a harness and was not attached to a retrieval device. This violation prolonged his exposure to the hazardous atmosphere, and caused rescue personnel to be exposed as well. A penalty of $7,000.00 is assessed.

Item 1a of Citation No. 2--§ 1910.146(c)(4): The gravity of this violation is moderately high. Dana had a written PRCS, but it was deficient. It stated that 16.5 % was the lower acceptable range for oxygen. This deficiency was mitigated somewhat by Dana's training and memo issued by [redacted] correcting the percentage of oxygen. A penalty of $3,500.00 is assessed.

Item 2 of Citation No. 2--§ 1910.146(d)(5)(i): The gravity of this violation is high. Supervisor #1 entered the dirty tank without testing the atmospheric conditions. This violation exposed him to a hazardous atmosphere. A penalty of $70,000.00 is assessed.

Item 3 of Citation No. 2--§ 1910.146(e)(1): The gravity of this violation is high. The completion of the tank entry permit is designed to ensure employees take the proper precautions before entering the tank. A penalty of $70,000.00 is assessed.

Findings of Fact and Conclusions of Law

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

ORDER

Based upon the foregoing decision, it is ORDERED that:

1. Item 10 of Citation No. 1, alleging a serious violation of § 1910.146(d)(4)(i), is vacated, and no penalty is assessed;

2. Item 11a of Citation No. 1, alleging a serious violation of § 1910.146(d)(13), is vacated, and no penalty is assessed;

3. Item 11b of Citation No. 1, alleging a serious violation of § 1910.146(d)(14), is vacated, and no penalty is assessed;

4. Item 12 of Citation No. 1, alleging a serious violation of § 1910.146(g)(3), is vacated, and no penalty is assessed;

5. Item 13 of Citation No. 1, alleging a serious violation of § 1910.146(k)(3), is affirmed, and a penalty of $7,000.00 is assessed;

6. Item 1a of Citation No. 2, alleging a willful violation of § 1910.146(c)(4), is affirmed as serious, and a penalty of $3,500.00 is assessed;

7. Item 1b of Citation No. 2, alleging a willful violation of § 1910.146(d)(3)(i), is vacated, and no penalty is assessed;

8. Item 2 of Citation No. 2, alleging a willful violation of § 1910.146(d)(5)(i), is affirmed as willful, and a penalty of $70,000.00 is assessed; and

9. Item 3 of Citation No. 2, alleging a willful violation of § 1910.146(e)(1), is affirmed as willful, and a penalty of $70,000.00 is assessed.

/s/ Sharon D. Calhoun
SHARON D. CALHOUN
Judge

Dated: February 17, 2012
Atlanta, Georgia