United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3419

Office of
Executive Secretary

Phone: (202) 606-5400
Fax: (202) 606-5050

SECRETARY OF LABOR,	
Complainant,	
v.	OSHRC Docket No. 94-0240
EAST TEXAS COATING, INC.,	
Respondent.	

ORDER APPROVING SETTLEMENT

This matter is before the Commission on a direction for review entered by Chairman Stuart E. Weisberg on November 17, 1997. The parties have now filed a stipulation and settlement agreement disposing of all issues on review. Accordingly, the stipulation and settlement agreement is approved.

FOR THE COMMISSION

Ray H. Darling, Jr.

Date: July 30, 1998

Ray H. Darling, Jr.
Executive Secretary

94-0240

NOTICE IS GIVEN TO THE FOLLOWING:

Daniel J. Mick
Orlando J. Pannocchia
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Ave., N.W.
Washington, D.C. 20210

Robert E. Rader, Jr.
Rader, Campbell, Fisher & Pyke
Stemmons Place, Suite 1080
2777 Stemmons Freeway
Dallas, TX 75207

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

ALEXIS HERMAN, SECRETARY OF LABOR, Complainant,	:	
v.	:	OSHRC Docket No. 94-0240
EAST TEXAS COATING, INC., Respondent.	:	

STIPULATION AND SETTLEMENT AGREEMENT

I

The parties have reached agreement on a full and complete settlement and disposition of the issues in this proceeding which are currently pending before the Commission.

It is hereby stipulated and agreed by and between the Complainant, Secretary of Labor, and the Respondent, East Texas Coating, Inc. ("ETC"), that:

1. Complainant hereby withdraws items 1 and 2 of Serious Citation 1, alleging violations of 29 C.F.R. §§1910.134(b)(8) and 1910.134(b)(11), and the notification of proposed penalties for those items. Respondent represents that it will retain the services of a Certified Industrial Hygienist ("CIH") to conduct an evaluation of the company's confined space entry program and emergency rescue procedures. ETC further represents that it will implement any protective measures and/or procedures recommended by the CIH including, but not limited to, conducting appropriate

employee monitoring of hazardous atmospheres during interior lining operations in hopper and tank cars, and sampling for potential silica dust exposure to employees in exterior blasting areas. ETC represents that it shall hire a Certified Industrial Hygienist within 60 days from the date of this Agreement.

2. Complainant hereby amends item 3 of Serious Citation 1 to characterize the alleged violation of §1910.134(e)(4) as other-than-serious with a proposed penalty of $125. Respondent hereby withdraws its notice of contest to said violation as amended.

3. Complainant hereby amends item 4(a) of Serious Citation 1 to characterize the alleged violation of §1910.134(f)(2)(iv) as other-than-serious with a proposed penalty of $125. Respondent hereby withdraws its notice of contest to said violation as amended. Respondent represents that it shall maintain records of its inspections of respirators kept for emergency use throughout its facility. Complainant hereby withdraws item 4(b) of Serious Citation 1, vacated by Judge Sommer in his September 19, 1997 decision.

4. Complainant hereby withdraws item 5 of Serious Citation 1, alleged violation of §1910.146(d)(4) (ii), and the notification of proposed penalty for that item. ETC represents that it will conduct periodic maintenance tests to ensure that its ventilation system used during confined space entries for

interior blasting and coating, is operating according to its design parameters. Respondent further represents that it will include written procedures for periodic inspections of its ventilation system in its confined space entry program.

5. Complainant hereby amends item 6 of Serous Citation 1 to characterize the alleged violation of §1910.146(d)(4)(iv) as other-than-serious with a proposed penalty of $170. Respondent hereby withdraws its notice of contest to said item. ETC represents that it will continue to provide, at no cost to employees, protective heavy duty coveralls to workers engaged in abrasive blasting operations.

6. Complainant hereby withdraws item 7 of Serious Citation 1, alleging a violation of §1910.146(d)(5)(ii), and the notification of proposed penalty for that item. Respondent represents that it will periodically conduct monitoring of the permit-required confined spaces inside its hopper and railcars during coating operations in order to verify that acceptable conditions are maintained throughout the course of entry. The frequency of such sampling shall be determined by the Certified Industrial Hygienist, in order for ETC to develop representative data of the range of exposures encountered by employees during these operations.

7. Complainant hereby amends the proposed penalty for item 8 of Serious Citation 1, alleging a violation of §1910.146(d)(7),

to $1,250. Respondent hereby withdraws its notice of contest to said violation as amended. Respondent represents that it will revise, within 60 days from the date of this Agreement, its confined space entry program to include procedures instructing attendants of multiple space entries on how to summon rescue assistance without distracting attention away from other entrants.

8. Complainant hereby withdraws item 9 of Serious Citation 1, alleging a violation of §1910.146(d)(9), and items 15(a) and 15(b) alleging violations of §§1910.146(k)(3)(i) and 1910.146(k)(3)(ii), and the notification of proposed penalties for those items. Respondent represents that it will establish and implement the following measures at its plant within 60 days from the date of this Agreement:

(1) Revise its confined space entry program to include clear procedures that instruct personnel how to summon rescue services in an expeditious manner.

(2) Provide all regional rescue services that will potentially respond in the event of an emergency rescue, with a diagram of the plant on an annual basis or as changes occur at the facility.

(3) Purchase and maintain readily accessible to rescue personnel a tripod that would mechanically assist in pulling an employee out from a confined space.

9. Complainant hereby amends the proposed penalty for items 10(c), 10(e), 10(f), and 10(g) of Serious Citation 1, alleging violations of §§1910.146(f)(7), 1910.146(f)(11), 1910.146(f)(12), and 1910.146(f)(13) respectively, to $1000. Respondent withdraws its notice of contest to said violations as amended. Complainant hereby withdraws items 10(a), 10(b), and 10(d) issued to ETC. Respondent represents that it shall ensure that all information required to be noted in its entry permits including, entrants and attendants' names, hazards of permit space, results of initial and periodic tests and when performed, emergency services to be summoned and means to summon, communication procedures to be used by entrants and attendants, and the safety equipment to be used in entries is recorded in each entry permit.

10. Complainant hereby withdraws items 11(a), 11(b), 13, 14(a) and 14(b) of Serious Citation 1, alleging violations of §§1910.146(h)(3), 1910.146(i)(5), 1910.146(j)(4), 1910.146(k)(2)(i) and 1910.146(k)(2)(ii) respectively, and the notification of proposed penalties for those items. Respondent represents that it has contacted the four regional emergency rescue providers that can potentially be dispatched to its plant, and verified that confined space rescue services are available from each of these outside responders. Respondent further represents that each of these four off-site emergency responders have visited

ETC's plant, were provided access to workplace confined spaces, and were informed of the hazards associated with the company's confined space operations. Respondent states that it will submit to the Dallas Area Office within 60 days from the date of this Agreement, a letter confirming an agreement between ETC and the identified four regional emergency rescue services. The letter shall set forth the company's reliance on these off-site rescue services in the event a confined space rescue is necessary and state the procedures to be used to ensure the most expeditious dispatch of one of these rescue services.

11. Complainant hereby amends that proposed penalty for item 12(a) of Serious Citation 1, alleging a violation of §1910.146(i)(4), to $1,500. Respondent hereby withdraws its notice of contest to said violation as amended. Complainant hereby withdraws items 12(b) and 12(c) of Serious Citation 1. Respondent represents that it will ensure, through supervisory observation, that its attendants remain outside of permit spaces during entry operations, and that attendants shall not be assigned auxiliary tasks which may distract from their primary duty to monitor the entrant.

12. Respondent hereby agrees to pay a penalty of $ 4,170 by submitting its check, made payable to U.S. Department of Labor, Occupational Safety and Health Administration (OSHA), to the OSHA

Dallas Area Office within 45 days from the date of this Agreement.

13. Each party agrees to bear its own fees and other expenses incurred by such party in connection with any stage of this proceeding.

14. None of the foregoing agreements, statements, stipulations, or actions taken by East Texas Coating, Inc., shall be deemed an admission by Respondent of the allegations contained in the citations or the complaint herein. The Agreement, statements, stipulations, and actions herein are made solely for the purpose of settling this matter economically and amicably and shall not be used for any other purpose, except for subsequent proceedings and matters brought by the Secretary of Labor directly under the provisions of the Occupational Safety and Health (OSH) Act of 1970.

15. Respondent states that there are no authorized representatives of affected employees.

16. The parties agree that this Stipulation and Settlement Agreement is effective upon execution.

17. Respondent certifies that a copy of this Stipulation and Settlement Agreement was posted at its Nash, Texas worksite in a conspicuous manner on the 8th day of July, 1998, pursuant to Commission Rules 7 and 100, and will remain posted for a period of ten (10) days.

Dated this 8th day of July, 1998.

Respectfully submitted,

MARVIN KRISLOV
Deputy Solicitor for
National Operations

JOSEPH M. WOODWARD
Associate Solicitor for
Occupational Safety and Health

DONALD G. SHALHOUB
Deputy Associate Solicitor for
Occupational Safety and Health

DANIEL J. MICK
Counsel for Regional
Trial Litigation

Robert E Rader

ROBERT E. RADER, JR., ESQ.
Rader, Campbell, Fisher &
Pyke
Stemmons Place, Suite 1080
2777 Stemmons Freeway
Dallas, TX 75202

ORLANDO J. PANNOCCHIA
Attorney for the
Secretary of Labor
200 Constitution Ave., NW
Room S-4004
Washington, DC 20210

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th STREET, N.W., SUITE 980
WASHINGTON, DC 20036-3419

Phone: (202) 606-5400
Fax: (202) 606-5050

Secretary of Labor,
Complainant,
v.
EAST TEXAS COATINGS,
Respondent.

Region 6
OSHRC Docket No. 94-0240
OSHA Inspection No. 103561171

Notice Of Docketing
Of Administrative Law Judge's Decision

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on 10/17/1997. The decision of the Judge will become a final order of the Commission on 11/17/1997 unless a Commission member directs review of the decision on or before that date.

Any party desiring review of the judge's decision by the Commission must file a petition for discretionary review. Any such petition should be received by the Executive Secretary on or before 11/6/1997 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91. All further pleadings or communications regarding this case shall be addressed to the Executive Secretary with a copy to the DOL Solicitor at the address below.

Executive Secretary
Occupational Safety and Health Review Commission
1120 20th St., N.W., Suite 980
Washington, D.C. 20036-3419

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

If Directed for Review by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. If you have questions, please call me at (202) 606-5400.

Ray H. Darling, Jr.

Ray H. Darling, Jr.
Executive Secretary

Date: October 17, 1997

This notice has been sent to:

For the Employer:
Robert E. Rader, Jr.
Rader, Campbell, Fisher & Pyke
Stemmons Place - Suite 1080
2777 Stemmons Freeway
Dallas, TX 75207

For the Secretary of Labor:
James E. White, Esq.
Regional Solicitor
Office of the Solicitor, U.S. DOL
525 Griffin Square Bldg., Suite 510
Griffin and Young Streets
Dallas, TX 75202

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3419

SECRETARY OF LABOR,	:	
	:	
Complainant,	:	
	:	
v.	:	OSHRC DOCKET NO. 94-0240
	:	
EAST TEXAS COATINGS, INC.,	:	
	:	
Respondent.	:	

APPEARANCES:

Ernest A. Burford, Esquire
Dallas, Texas
For the Complainant.

Robert E. Rader, Jr., Esquire
Dallas, Texas
For the Respondent.

Before: Chief Judge Irving Sommer

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to section 10 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* ("the Act"). The Occupational Safety and Health Administration ("OSHA") inspected the facility of Respondent East Texas Coatings ("ETC") August 10-12, 1993, after receiving an employee complaint about the facility. As a result of the inspection, ETC was issued a 15-item serious citation and a two-item "other" citation; 12 items allege violations of the confined space standard, while the remainder allege violations of various personal protective equipment standards. ETC contested the citations, and the hearing in this case was held May 31-June 2, 1995, and September 26-27, 1995.[1] Both parties have submitted post-hearing briefs.

[1]This case was heard by Administrative Law Judge Louis G. LaVecchia but was reassigned to the undersigned for decision after Judge LaVecchia's retirement in May 1996. The parties were notified, and neither had any opposition to the reassignment.

Background

ETC's facility, which had about 30 employees in August of 1993, is located in Nash, Texas and is in the business of removing the old lining and then applying new lining to the interiors of rail cars. A significant part of ETC's operations involve employees working inside railroad tank and hopper cars, both of which meet the definition of "confined space" set out in 29 C.F.R. 1910.146, OSHA's confined space standard.[2] The cars differ in that a tank car is one compartment and has one opening at the top, while a hopper car consists of two to four separate compartments, each of which has two top openings as well as one bottom opening. The cars also differ in that tank cars have some interior piping and bolts, while hopper cars do not, and the bottom portion of each hopper car compartment is sloped to facilitate unloading through its bottom opening. No tank cars were being worked on at the time of OSHA's visit to ETC, resulting in the inspection focusing on the hopper cars, and the following description of ETC's operations pertains to the hopper cars.

Upon arriving at ETC, the car compartments are checked visually through their top openings to ensure they are clean. They are also checked with a monitoring device to ensure they do not have a combustible, oxygen-deficient or toxic atmosphere, and this is done by dropping the device's sensor into one of the top openings. The bottom opening "gates" of the compartments are then removed, and an employee wearing a full-face supplied-air respirator blasts the compartment parts that can be blasted from the outside; this operation, called exterior blasting, takes place in the facility's yard. The car is next moved inside for interior blasting and lining, which are two separate areas of the facility. Interior blasting consists of an employee entering a compartment through a top opening, due to the dust-collection system that is placed over the bottom opening, and blasting the compartment with steel shot. Lining consists of an employee entering a compartment through its bottom opening and spraying the upper part of the compartment by standing on planking that is supported by tubing which has been placed around the interior sides; the planking and tubing are then removed, and the employee sprays the bottom part of the compartment while standing on the floor. Employees wear full-face supplied-air respirators for interior blasting and lining, and during both operations the

[2]The final rule for the standard was published in the Federal Register on January 14, 1993, and became effective on April 15, 1993. *See* 58 Fed Reg. 4462 (1993).

compartment is ventilated, which is accomplished by inserting ducting into one of the top openings; the ducting is connected to a ceiling-level fan that draws in the air from the compartment and vents it to the outside of the facility. A heating system is used to dry the lining, which is then inspected to make sure it has no defects. The car's bottom gates are replaced after work on the car is completed, and the car is then ready to leave the facility.

Two OSHA industrial hygienists ("IH's") conducted the inspection of ETC. IH Jeff Lewis had over four years experience with OSHA which included over 135 inspections, and he performed the hopper car lining operation sampling which was the basis of various of the citation items. IH Kathryn Delaney had over eight years experience with OSHA, which included five years as a senior IH and approximately 300 inspections; Delaney had also been a certified IH since 1992, was on the OSHA task force that had developed OSHA's policy with respect to the confined space standard, and, at the time of the hearing, had been the acting assistant area director for health in the Dallas OSHA office for five months. Also participating in the inspection were Gary Harrison, ETC's manager of services and the person responsible for safety matters at the facility, and Jerry Riddles, ETC's safety consultant since its inception in 1986. Riddles, who had his own consulting business and 23 years experience in industrial safety and health, had previously been the safety and environmental director at Trinity Industries ("Trinity"); he had also implemented Trinity's safety program in 83 plants, and ETC's operations were modeled after those he had put into effect in the rail car lining operations in Trinity's facilities. Riddles had approximately 15 years experience in confined space lining operations, had conducted 3,000 safety and health inspections of industrial facilities, and had participated in 150 to 200 OSHA inspections.

Serious Citation 1 - Item 1

Items 1(a) and 1(b) allege that ETC had not conducted appropriate surveillance of its interior lining and exterior blasting operations, respectively, in violation of 29 C.F.R. 1910.134(b)(8), which relates to respiratory protection and provides as follows:

> Appropriate surveillance of work area conditions and degree of employee exposure or stress shall be maintained.

With respect to item 1(a), the record shows that the interior lining operation consists of an employee wearing a full-face supplied-air respirator spraying the inside of a hopper car compartment

with lining material and that the compartment is ventilated during the operation. The record also shows that the lining contains xylene and other contaminants and that while ETC had performed monitoring outside of the hopper cars it had not monitored inside the compartments during the lining operation. (Tr. 56-59; 67; 71-72; 299-303). IH Delaney and Jerry Riddles both testified that the purpose of surveillance is to determine the levels of contaminants employees are exposed to and the type of respiratory protection needed to properly protect them. (Tr. 67; 223; 394-95). Delaney said that the standard required monitoring inside the compartments during lining to ensure the respirators used were adequate, particularly since contaminant levels during lining can vary greatly and the results of OSHA's sampling of ETC's operation showed xylene at levels immediately dangerous to life and health ("IDLH"), and that because ETC did no such monitoring it was in violation of the standard; however, she indicated that the standard could also be satisfied if adequate monitoring done under the same general conditions showed that the respirators used were adequate to protect employees from the levels of contaminants present during the operation. (Tr. 67-72; 223-35).

Riddles testified that ETC's lining operation was the same one he had implemented in Trinity facilities, that he had conducted numerous tests of lining operations inside hopper cars over a period of years in Trinity facilities, and that he knew the contaminant levels ETC lining employees would be exposed to and selected the respirators they used accordingly; he also testified that ETC utilized the same ventilation system, lining materials and respirators used in Trinity's lining operations, and that the ventilation system was designed to ventilate each compartment at a rate that would maintain an atmosphere with contaminant levels within OSHA requirements for the respirators used. Riddles said he had checked the air flow in compartments at Trinity facilities and at ETC, and that none of his readings had ever shown ventilation rates outside the established parameters; he also said OSHA and insurance company representatives had monitored Trinity's lining operation and that none of that testing or any of his had ever revealed xylene or other contaminants at levels which were hazardous in view of the respirators utilized. (Tr. 378-98; 407-10; 421; 429-35; 457-58; 471-75; 608-09).

In my opinion, the Secretary has established a violation of the standard. The standard as I read it requires the employer to monitor its own operation and not, as ETC urges, to rely solely on testing done at other facilities. Although ETC evidently interprets Delaney's testimony to condone reliance on monitoring at other facilities, the context of her testimony makes it clear that she was referring to

previous adequate testing of ETC's own lining operation under the same general conditions such that the company would actually know, rather than merely assuming, that the respirators used were sufficient to protect employees. (Tr. 223-35). That ETC was required to do its own monitoring is supported by Delaney's testimony that contaminant levels can vary significantly during lining. (Tr. 228-29; 235). This conclusion is also supported by my findings in item 2, *infra*. Specifically, OSHA's sampling of ETC's lining operation revealed xylene at IDLH levels, and Delaney testified that in such circumstances the appropriate protection was either a self-contained breathing apparatus ("SCBA") or a supplied-air respirator with a five-minute escape-pack respirator attached to it; moreover, Riddles' own post-inspection testing of the lining operation showed significant variations in xylene and other contaminant levels when, based on his testimony, the results should have been substantially similar. This subitem is affirmed as a serious violation.

With respect to item 1(b), the record shows that exterior blasting takes place in ETC's yard and that it consists of an employee wearing a supplied-air respirator and other protective equipment blasting the compartments from the outside with a mixture of silica sand, water and rust inhibitor. The record also shows ETC had not monitored the operation, and that OSHA was unable to conduct its own sampling as no exterior blasting was taking place. (Tr. 49-50; 67-68; 111; 235-36; 301-02; 347; 432-34; 599-600). Delaney testified this subitem was issued due to ETC's failure to test for silica dust during the blasting, which, based on her experience, could result in overexposure to the blaster and others who might be in the area. She said bystanders could be overexposed in as few as 15 minutes and that relatively short-term exposure could cause silicosis; she also said overexposure could occur even with a wet-blast system, and that while she had no information this had happened at ETC the company was still required to conduct its own testing. (Tr. 67-68; 72; 236-38; 277-78). Riddles testified that the blaster was protected by the respirator and that there was no need to test for other employee exposure. He said ETC's system did not generate dust as it used a nozzle with ports that wet the sand with water as it came out. He also said that the system was the same one he had implemented at Trinity facilities, that he had done testing at those facilities, and that none of his tests had ever revealed a problem with silica dust. (Tr. 432-34; 599-600). Based on the record, ETC was in violation of the standard. First, as found above, the standard requires the employer to monitor its own operation rather than relying on testing at other facilities. Second, that the blaster wore a

respirator indicates that the system did in fact generate silica dust to which others in the area could be exposed. Third, Delaney expressly testified that there were employees passing through the area when she was there, and that if ETC's system actually removed the possibility of free silica it would be the first such system she had ever heard of. (Tr. 236-37). This subitem is affirmed as a serious violation, and the single proposed penalty of $2,500.00 for items 1(a) and 1(b) is assessed.

Serious Citation 1 - Item 2

Item 2(a) alleges that employees applying lining in hopper car compartments did not use respirators approved for IDLH atmospheres, in violation 29 C.F.R. 1910.134(b)(11), which states as follows:

> Respirators shall be selected from among those jointly approved by [MSHA] and [NIOSH] under the provisions of 30 CFR part 11.

The record shows that lining employees use full-face supplied-air respirators which are approved for atmospheres with contaminants below IDLH levels. The record also shows that due to the lining operation sampling conducted by IH Lewis, which revealed the presence of xylene at IDLH levels, IH Delaney determined that ETC's respiratory protection was inadequate and that the appropriate protection would be either a SCBA or a supplied-air respirator with a five-minute escape-pack respirator attached to it. (Tr. 68-80; 114; 118; 225-35; 303-04; 347; C-1-2). ETC's contention is that the OSHA sampling was invalid. The evidence in this regard follows.

Lewis testified he put two separate organic vapor monitors on two different lining employees to determine their exposure to contaminants; each monitor comes in a sealed can with a plastic top, and also enclosed in the can is a "closure cap" with two "ports" which is used after the monitoring.[3] Lewis removed the monitors after the employees finished their lining work. He then removed the retainer ring and protective membrane from each monitor, replaced the membrane with the closure cap and plugged the ports, and put each monitor back into its can. He also replaced each can's plastic top, sealed all the cans and placed them in his equipment bag, and, when the inspection was over, sent the cans to the OSHA lab in Salt Lake City for analysis; C-2, the analysis results, show that the two

[3]The monitors, shown in C-13, the manufacturer's instructional booklet, work by absorbing contaminants into their charcoal centers, and analysis is performed by unplugging the closure cap's center port and injecting a solvent into it and then withdrawing a sample and analyzing it.

sampling periods were 64 and 57 minutes and that the respective xylene levels were 1,441.77 and 933.6115 parts per million ("ppm"). (Tr. 291-98; 332-39; 677-81).

Jerry Riddles testified the sampling was done properly until the end, when Lewis put the retainer rings and membranes into the cans in which the monitors were shipped, touched the charcoal insides of the monitors, and closed out the monitors without wiping his hands off first. Riddles said the monitors were covered with lining over-spray and that these actions "spiked" the samples, noting that the closure caps do not create a perfect seal and that C-13 instructs users to store the monitors in areas free of organics. He further noted that having the equipment bag in the OSHA van on a 100-degree day in August would have caused the caps to expand such that the monitors had additional exposure to the lining over-spray and that this process could have occurred several times before the samples were sent to the OSHA lab. After learning of the analysis results, Riddles told OSHA they were incorrect; he then conducted his own sampling of the operation. (Tr. 398-410).

Riddles' sampling was done on September 8 and October 14, 1993, as ETC on those dates was lining cars identical to the one OSHA had tested, and other than the temperature, the conditions were the same. The September 8 sampling consisted of putting both a sampling pump and a monitor like the one shown in C-13 on two lining employees.[4] Riddles closed out the first monitor by wiping off all the over-spray on it and cleaning his hands; he then removed and disposed of the retainer ring and membrane and capped and sealed the monitor in its can. He closed out the second monitor by removing and disposing of its retainer ring and membrane, and while he did not wipe the monitor clean he made sure his hands were clean before capping it; after putting the second monitor in its can he then took a third monitor, removed and disposed of its retainer ring and membrane, and, after capping it, put it in the same can in which he had placed the second monitor and sealed the can. Riddles took the samplings to an accredited lab he had used for years, and all of the results showed xylene well below IDLH levels; however, the results from the second monitor had the highest xylene level, and the third monitor, which had had no exposure to the lining process, showed a xylene level of 110.56 ppm and Riddles opined this was due to the monitor being in the can with the second monitor. His next sampling consisted of placing monitors on two employees and closing out the

[4]Riddles said most of his prior lining operations testing had been done with sampling pumps and that he wanted to compare the sampling pump results with the monitor results. (Tr. 413-14).

monitors in the same way he had closed out the first monitor on September 8; the samples went to the same lab, and the results again showed xylene well below IDLH levels.[5] Riddles said he had conducted many tests of the same operation in Trinity facilities and had never gotten results of xylene at IDLH levels; he also said the typical xylene range was between 400 and 600 ppm, and that the respirators ETC provided were adequate for the lining operation. (Tr. 410-31; 596-99).

Based on the record, the Secretary has demonstrated the alleged violation. First, Lewis specifically testified that he had not put the rings and membranes in the cans, and Delaney, a certified IH, assisted Lewis with the sampling; in addition, while Gary Harrison, ETC's manager of services, agreed with Riddles, the testimony of Harrison and Riddles in this regard is simply not persuasive in view of the record as a whole. (Tr. 337; 643-45; 678-79). Second, Lewis testified that he could not have touched the charcoal filters in the monitors, as Riddles said he had, because the filters are recessed and have a spoked plastic "guard" over them, and the testimony of Lewis is supported by C-13, which on page 6 depicts the spoked guard. (Tr. 680-83). Third, besides the fact that Riddles' testing was done after the inspection, the results of his testing do not support his testimony. The sampling pump testing results on R-2, for example, show xylene levels of 354.97 and 99.62 ppm, respectively, for the two employees who were monitored, which are not only very disparate results but also contradict Riddles' testimony that xylene levels during lining are generally between 400 and 600 ppm. Moreover, Riddles said most of his prior testing had been done with sampling pumps, and the sampling pump results for both employees on R-2 show with one exception much lower levels of all of the listed contaminants than the monitor results, which calls into question Riddles' conclusions about contaminant levels during lining operations. Finally, despite Riddles' testimony that the monitors in his October testing were cleaned off in the same way in which the first monitor in his September testing was cleaned off, the xylene levels in R-3, 585 and 523 ppm, are very close to the xylene level of 584.39 ppm shown in R-2 for the second monitor, which, according to Riddles, was not wiped clean. Item 2(a) is affirmed as a serious violation.

Items 2(b) and 2(c) allege further violations of 29 C.F.R. 1910.134(b)(11); specifically, item 2(b) alleges that on August 11, 1993, a lining employee was using an unapproved respirator assembly,

---

[5]R-2 and R-3 are the lab results of the September and October testing, respectively.

and item 2(c) alleges that on September 7, 1993, lining employees were not using a certain type of escape respirator with their supplied-air respirators. As ETC points out, the Secretary presented no evidence in support of these specific subitems, and they are accordingly vacated. However, despite the vacation of these two subitems and the fact that a single penalty of $2,500.00 has been proposed for all three of these subitems, it is my conclusion, due to the high gravity of the violation, that a penalty of $2,500.00 is appropriate. The proposed penalty is therefore assessed.

Serious Citation 1 - Item 3

Item 3 alleges that ETC failed to adequately monitor its respiratory protection program, in that employees were seen using their respirators incorrectly, in violation of 29 C.F.R. 1910.134(e)(4). That standard provides, in pertinent part, as follows:

> Frequent random inspections shall be conducted by a qualified individual to assure that respirators are properly selected, used, cleaned, and maintained.

This item was based on IH Delaney and IH Lewis seeing an attendant in the inside blasting area who was wearing his respirator with the bottom strap unfastened, another attendant in the lining area who lifted his respirator to shout into the bottom opening of a hopper car compartment, and two employees, one in the yard and one in the inside blasting area, who were wearing their respirator straps over their hard hats. Delaney and Lewis testified the standard was violated, even though there was no evidence of overexposure to contaminants in any of the instances, as the respirators were worn improperly and neither Jerry Riddles nor Gary Harrison said anything to the employees; Delaney explained that the way the respirators were worn negated their protection and that ETC had a duty to advise employees of any improper usage so that they would wear them correctly when they were required; she also explained that wearing respirator straps over hard hats can deform the straps. (Tr. 84-90; 238-42; 304-07; 322; 339-43). Riddles testified there was no exposure as to the attendant with the unfastened strap as the blasting had not started and when it did his strap was fastened, and that the other attendant was not exposed because the lining process was finished and the ventilation system was drawing fresh air into the opening. Riddles said that having respirator straps over hard hats was improper and that while he did not recall seeing a worker in the yard wearing his respirator in this manner he did see the other worker and told Harrison to go after him and admonish him, which

Harrison did; Riddles also said that the worker in the yard was not required to wear a respirator, and that none of the instances created an exposure problem. (Tr. 436-37; 441-49; 606).

In view of the foregoing, ETC was in violation of the standard. Riddles agreed that wearing respirator straps over hard hats was improper, and the testimony of Delaney and Lewis that Riddles and Harrison saw the workers and said nothing to them is credited over Riddles' contrary testimony. (Tr. 84-85; 90; 305-07). Riddles' testimony with respect to the lining attendant, which indicated that lifting the respirator in those circumstances was not improper, is likewise not credited; it is apparent from the record that lining had just taken place inside the compartment, and Lewis specifically testified that the attendant had his head in the opening and that he was required to have on a respirator. (Tr. 340-42). As to the blasting attendant with the unfastened strap, Lewis testified that blasting was ongoing at the time, but Delaney and Riddles testified it was not, leading me to find this instance did not violate the standard. (Tr. 87; 339-40; 441-46). However, the other instances were clearly violations, and that there were three separate incidents renders Riddles' testimony about employee training in ETC's respirator program unpersuasive. (Tr. 435-39; 601-05). This item is affirmed as a serious violation, and the proposed penalty of $1,750.00 is assessed.

Serious Citation 1 - Item 4

Item 4(a) alleges that ETC did not keep records of inspections of respirators maintained for emergency use, as required by 29 C.F.R. 1910.134(f)(2)(iv), which states as follows:

> A record shall be kept of inspection dates and findings for respirators maintained for emergency use.

The record shows, and ETC does not dispute, that no records of inspections were kept for an emergency respirator located in the lining area. (Tr. 91-92; 650; 670-72). Gary Harrison testified he inspected the respirator twice a week by taking it out of the case where it was kept and checking its components; he also testified he looked at the respirator daily to make sure the gauges read as they should and that nothing had been tampered with. (Tr. 648-51). IH Delaney testified that keeping written records in these circumstances was less important, and that ETC's respiratory protection program did discuss the need to inspect respirators. (Tr. 92; 242). In addition, Harrison stated that he had been keeping the required records since the OSHA inspection. (Tr. 671-72). In my view, an "other" violation has been established. This subitem is affirmed as such, and no penalty is assessed.

Item 4(b) alleges that the same emergency respirator was not quickly accessible and that it was not stored in a suitable compartment, as required by 29 C.F.R. 1910.134(f)(5)(i), which provides, in relevant part, as follows:

> [R]espirators shall be stored to protect against dust, sunlight, heat, extreme cold, excessive moisture, or damaging chemicals. Respirators placed at stations and work areas for emergency use should be quickly accessible at all times and should be stored in compartments built for the purpose. The compartments should be clearly marked.

The basis of this item was the locked glass-fronted case in which ETC stored the respirator and compressed air, as shown in photos R-5 and C-6. Delaney testified that the only key to the case was kept in a locked box in Harrison's office, that getting the key in an emergency could take too long, and that breaking the glass on the case could result in glass fines or dust getting on the inside of the respirator mask and subject the employee using it to face cuts or dust inhalation; she also testified that alternatives would be to leave the case unlocked or to have more keys available. (Tr. 93-96). Jerry Riddles testified that ETC had built the case for the respirator and that it was kept locked up so that it would be there in an emergency and so that no one could tamper with or remove it. He also testified that the employees knew they were to break the glass in an emergency, that the glass on the case was safety glass, and that the respirator itself was kept in a ziplock bag to protect it from the glass breakage as well as shop dust and other materials.[6] Riddles noted that the ziplock bag containing the respirator was clearly depicted in R-5, as was the instruction on the case's front to break the glass in case of an emergency. (Tr. 449-52; 607-08). In my opinion, the evidence of record does not demonstrate a violation of the standard. This item is therefore vacated.

Serious Citation 1 - Item 5

This item alleges a violation of 29 C.F.R. 1910.146(d)(4)(ii), which requires the employer to "maintain ... properly" "[v]entilation equipment needed to obtain acceptable entry conditions." As noted above, the record shows that the ventilation system used for interior blasting and lining consists of ducting being inserted into one of the hopper car compartment top openings; the ducting is connected to a ceiling-level fan that draws in the air from the compartment and vents it to the outside of the facility. IH's Delaney and Lewis determined that the ventilation system was not maintained

[6]Harrison also testified that the respirator was kept in a ziplock bag. (Tr. 649-50).

properly due to the OSHA sampling results showing xylene at IDLH levels during the lining operation and the statements of Jerry Riddles and Gary Harrison that no checks or evaluations of the system had been done; Delaney also concluded the standard was violated based on Riddles telling her the system was designed to exchange the air every 15 seconds and her own velometer readings of the system which revealed that the air was actually being exchanged every 1.2 to 1.5 minutes, depending on the compartment size. (Tr. 97-105; 242-53; 261; 278-79; 307-10; 343-47).

Jerry Riddles testified the ventilation system was the same one he had devised for the lining operation at Trinity facilities, that it worked by drawing in air through the compartment's bottom opening, and that it provided ventilation at a rate that would not adversely affect the lining and would also maintain an atmosphere with contaminant levels within OSHA requirements for the respirators used. He said the air flow rate ranged from 2000 to 2300 cubic feet per minute and that a higher rate would cause much of the lining being sprayed to be sucked up into the ducting as well as premature drying of the lining; he also said the air flow rate would result in a complete air exchange in 40 to 80 seconds, depending on the compartment's size, and that Delaney misunderstood his statement about a 15-second air exchange rate, which related only to the center of the compartment where the face of the ducting would be. Riddles stated that ETC had a preventive maintenance program for the system that consisted of checking all of its components; he further stated that he himself had checked the air flow in hopper car compartments during his visits to ETC and that all of his readings had been within the specified range. (Tr. 378-89; 411; 427; 431-42; 452-58; 608-13; 638-43).

In light of the record, I conclude ETC was in violation of the standard. First, both Delaney and Lewis testified that Riddles and Harrison told them during the inspection that no checks or evaluations of the system had been performed, and their testimony is credited over the contrary testimony of Riddles. (Tr. 99; 102-05; 249; 308). Moreover, Riddles' testimony that the ventilation system maintained an atmosphere with contaminant levels that were within OSHA requirements for the respirators used is contradicted by the evidence set out in item 2, *supra*, which established that the OSHA sampling of the lining operation revealed xylene at IDLH levels and that the respiratory protection ETC provided its lining employees was consequently inadequate. This item is affirmed as a serious violation, and the Secretary's proposed penalty of $2,500.00 is assessed.

Serious Citation 1 - Item 6

Item 6 alleges that employees performing abrasive blasting were not provided the proper protective equipment as required by 29 C.F.R. 1910.146(d)(4)(iv), or, in the alternative, 29 C.F.R. 1910.94(a)(5)(v). 1910.146(d)(4)(iv) requires that employees working in permit-required confined spaces be provided "at no cost" "[p]ersonal protective equipment insofar as feasible engineering and work practice controls do not adequately protect employees," while 1910.94(a)(5)(v) requires that "[abrasive blasting] [o]perators shall be equipped with heavy canvas or leather gloves and aprons or equivalent protection to protect them from the impact of abrasives."

The basis of this item was IH Delaney's testimony that she saw two employees enter the top openings of hopper car compartments to perform blasting wearing respirators, canvas shrouds and gloves but no torso protection other than flannel shirts over T-shirts and jeans; she heard blasting commence after the employees entered the compartments and after it stopped the same two employees exited the compartments, and there was no other blasting going on at the time. When Delaney asked what equipment was provided, Jerry Riddles and Gary Harrison told her respirators, canvas shrouds and gloves were provided and that employees who wanted to could purchase coveralls through payroll deductions. (Tr. 105-11; 253-57). Riddles and Harrison testified blasters wore heavy-duty coveralls, which provided more protection than aprons, as well as the other required equipment, and that while ETC did not provide the coveralls at no cost until after the inspection it required blasters to wear them; they also testified they saw no blasters entering compartments without coveralls and that although Delaney brought this matter up and they asked her to point out the employees she never did. Riddles and Harrison discussed R-6-11, photos taken by OSHA and by Riddles in the blasting area, and noted that besides R-11, which showed an attendant wearing a flannel shirt, all of the employees in the photos had on gray coveralls. (Tr. 458-71; 651-54).

Based on the record, the Secretary has shown the alleged violation. The testimony of Riddles and Harrison is not credited in light of that of Delaney, and in this regard, I note that she specifically testified that they never told her that blasting employees were required to wear the coveralls. (Tr. 257). This item is affirmed as a serious violation of 1910.146(d)(4)(iv), which, in my view, is the standard more applicable to this situation. ETC disputes the applicability of the standard, contending that hopper car compartments are not permit-required spaces during interior blasting. However,

Delaney testified the compartments were permit spaces during blasting due to the dust generated by the operation as well as the hazard of skin abrasions; in this respect, she noted that abrasive blasting can abrade or penetrate the skin with the same force with which it strips the lining from rail car interiors. (Tr. 107-08; 244-46; 267). Delaney's testimony is supported by the above language of 1910.94(a)(5)(v) and by the definition of "permit-required confined space" set out at 1910.146(b), which includes confined spaces containing any recognized serious safety or health hazard. ETC was in violation of the standard, and the proposed penalty of $1,750.00 is assessed.

Serious Citation 1 - Item 7

Item 7 alleges a violation 29 C.F.R. 1910.146(d)(5)(ii), which requires the employer to:

> Test or monitor the permit space as necessary to determine if acceptable entry conditions are being maintained during the course of entry operations.

The basis of this item was ETC's failure to conduct any testing or monitoring inside the hopper car compartments during the lining operation to determine if acceptable entry conditions were being maintained. IH Delaney testified that contaminant levels can increase dramatically during lining operations in confined spaces, and that without any testing or monitoring the employer cannot know whether the safeguards in use, such as respiratory protection and ventilation systems, are adequate; she further testified that continuous testing or monitoring is not required, and that other options would be to frequently interrupt the lining process for sampling, or, if this was infeasible, to perform sampling on a routine basis in order to have a body of information that would give the range of exposure to be expected during the operation. (Tr. 111-18; 257-59). ETC contends, as it did in item 1, *supra*, that it was not in violation of the standard because of the numerous tests that Jerry Riddles had conducted of the same lining operation at Trinity facilities showing that contaminant levels were within OSHA requirements for the respirators utilized. However, this contention is rejected for the same reasons set forth in item 1, particularly in light of the OSHA sampling revealing xylene at IDLH levels during the lining operation. This item is affirmed as a serious violation, and the proposed penalty of $2,500.00 is assessed.

Serious Citation 1 - Item 8

This item alleges a violation of 29 C.F.R. 1910.146(d)(7) in that ETC's confined space program did not include "the means and procedures to enable the attendant to respond to an

emergency affecting one or more of the permit spaces being monitored without distraction from the attendant's [other] responsibilities." The record shows that ETC's practice was to have one attendant monitor two hopper car entrants working in adjacent compartments. The record also shows there were persons with radios in the facility, and that in case of an emergency involving an entrant, the attendant was to summon a person with a radio who would call for help. (Tr. 120-21; 124; 259-60; 483-85). IH Delaney testified that during her observation of the blasting and lining operations there were times when there was no one with a radio in the area, that had there been an emergency the attendant would not have been able to respond to it without being distracted from the other entrant, and that ETC's confined space program did not address this situation. (Tr. 119-26). Jerry Riddles testified that an employee passing out or falling off the planking used in the lining operation would fall against the sloped sides of the bottom of the compartment and then slide out through the bottom opening and onto the shop floor, which was about 2 feet below. He said there had been instances where this had occurred in Trinity facilities due to employees having physical ailments, like a heart attack, that the employees had always slid out the bottom, and that there was no danger of an employee getting hung up and having to be rescued from inside a compartment; he also said that in case of an emergency involving one entrant, who would slide out onto the floor, the attendant was to shout for help and have the other entrant vacate his compartment and that all other attendants were to evacuate their entrants in case the shop air going to the respirators was the problem.[7] Riddles noted the attendant could attend to the injured employee, or go for help in the unlikely event that no one with a radio was nearby, as there would no longer be any entrants. (Tr. 475-87; 517; 617-19). Gary Harrison also testified about these procedures, and Riddles stated they were covered in ETC's confined space program and that employees were trained in them. (Tr. 486-89; 655; R-15-16).

In view of the record, ETC violated the cited standard. First, it is clear from Delaney's testimony that this item includes interior blasting, and Riddles himself testified that during this operation a dust collection system was put over the compartment's bottom opening. (Tr. 120; 442). Second, it is apparent that the dust collection system would prevent an employee from sliding out the bottom of the compartment, and ETC presented nothing to show how it would rescue an interior

[7]According to Riddles, the risk of the shop air being bad was "almost nil" because it was monitored with equipment that would detect any impurities. (Tr. 632-33).

blasting entrant in an emergency.[8] Finally, while Delaney agreed an employee could slide out the bottom of a compartment if there was nothing to obstruct him, she opined the scaffolding used to perform lining in the compartments, as well as the lining and respirator equipment lines the employees took in with them, could impede their sliding out; in addition, Riddles' testimony about the employees' ability to slide out despite the planking is simply not convincing in light of R-13-14. (Tr. 262; 279-81; 479-83; 617-18). R-13 shows the scaffolding tubing and planking on the shop floor outside of a compartment, while R-14 is an overhead view of an employee with his upper body in the relatively small bottom opening of a compartment. These photos and the rest of the record persuade me the planking and equipment used in the compartments would impede employees from sliding out, and that in an emergency attendants would be unable to comply with the standard. This item is affirmed as a serious violation, and the proposed penalty of $2,500.00 is assessed.

Serious Citation 1 - Item 9

Item 9 alleges that ETC's procedures for summoning rescue and emergency services were deficient in violation of 29 C.F.R. 1910.146(d)(9), which requires the employer to:

> Develop and implement procedures for summoning rescue and emergency services, for rescuing entrants from permit spaces, for providing necessary emergency services to rescued employees, and for preventing unauthorized personnel from attempting a rescue.

The record shows that ETC's procedure was for the attendant to summon a person with a radio; that individual would radio the office; the office would call 911 in Texarkana, and the 911 operator in Texarkana would dispatch an emergency service provider to ETC. IH Delaney testified that pursuant to her investigation, which included discussions with the company representatives and a review of ETC's confined space program, the 911 operator in Texarkana would call the Nash, Texas City Hall, which would in turn call the Wake Village City Hall, and that the ultimate responder would be the Wake Village Volunteer Fire Department; she identified C-7 as a diagram of ETC's procedure that she and Lewis had prepared based on what they learned. Delaney said the procedure was inadequate because Wake Village was 5 to 10 miles away, that it would take the Wake Village service at least ten minutes to arrive, and that a fatality in a confined space could occur in under six

[8]ETC's contention that the compartments were not permit spaces during interior blasting was rejected in item 6, *supra*.

minutes if it involved a hazardous atmosphere; she also said the procedure would take even longer if a tripod was needed to pull someone out of a rail car as that equipment was at the Texarkana Water Department and would also have to be taken to the site.[9] (Tr. 127-34; 262-67).

Jerry Riddles and Gary Harrison testified that there were actually four services, located in Texarkana, Nash, Wake Village and Liberty, that could respond to an emergency, and that 911 in Texarkana was called as it knew which of the services was available and could get there the fastest; they also testified that emergency services had been summoned before and after the inspection, that it had taken them from four to eight minutes to arrive, and that once 911 was called an employee was stationed at ETC's entryway to direct the service to the emergency. (Tr. 490-93; 655-56; 673-74). However, Delaney's testimony, which was based on what Riddles and Harrison told her at the time of the inspection and a review of ETC's confined space program, was that the Wake Village service would be the ultimate responder to an emergency at ETC, and it is clear from their testimony that Delaney and Lewis also spoke with emergency response representatives in Texarkana and with the Wake Village Volunteer Fire Department; the testimony of Delaney in this regard is therefore credited over that of Riddles and Harrison. (Tr. 130-32; 178-84; 317). Moreover, it is clear from item 8 that there was not always a person with a radio in the interior lining and blasting areas, which could significantly delay ETC's call to 911. Finally, it is clear from the evidence, including that set out in items 8 and 15, that ETC did not have a tripod or other equipment to pull employees from rail car interiors and that it had no adequate means of rescuing employees from confined spaces itself. This item is affirmed as a serious violation, and the proposed penalty of $2,500.00 is assessed.

Serious Citation 1 - Item 10

Items 10(a)-(g) allege that ETC's confined space entry permit forms did not contain all of the information required by 29 C.F.R. §§ 1910.146(f)(4)-(5), (f)(7) and (f)(10)-(13); those sections require the identification of the authorized entrants, the personnel serving as attendants, the hazards of the space to be entered, the results of testing performed and the testers, the rescue and emergency services that can be summoned, the communication procedures used by entrants and attendants, and

[9]Delaney said the ventilation system used would not completely clean the air even when the lining stopped as the lining would continue to give off contaminants; also, if the entrant fell, his respirator could be displaced and he would then be breathing the contaminated air. (Tr. 265; 281).

any personal protective or other equipment to be provided during entry. IH Delaney testified the standards were violated because C-9, copies of completed permit forms for ETC's entry activities in August of 1993, did not contain all the required information, which presented the hazard of not having the equipment and/or conditions necessary to ensure the safety and health of entrants; she also testified that copies of the forms contained in C-9 were not provided until the on-site inspection was over and that the forms were dated from August 25-30, 1993. (Tr. 136-49). Jerry Riddles testified that he had devised the permit forms in view of the standard's requirements and ETC's operations, that a packet of the forms, like R-17, was attached to each car upon arrival and stayed with the car throughout its stay in the facility, and that a form was used at each stage of the car's processing; specifically, the cars were tested before each entry and the results were recorded on the forms, the procedures and equipment required for the operation were indicated on the forms, the entrants and the person responsible for the operation signed the forms, and the responsible person also dated the forms. Riddles further testified that the forms had been revised several times over the course of the year prior to the standard's effective date, that by August of 1993 the form had been revised approximately eight times, and that ETC had mistakenly disposed of all prior versions of the form. (Tr. 518-48; 619-28). In light of the record, the Secretary has shown the alleged violations. My own review of C-9 persuades me to conclude, as Delaney testified, that ETC's permit forms did not have all the required information; for example, they do not show the hazards of the permit space, the identity of the tester of the space, or the time of the testing. Further, while it is clear that OSHA was allowed to review some of ETC's forms at the facility at the time of the inspection, the only copies of forms that were actually provided to OSHA were dated after the inspection. (Tr. 146; 619-20). Items 10(a)-(g) are affirmed as serious violations, and the proposed penalty of $2,500.00 is assessed.

Serious Citation 1 - Item 11

Items 11(a) and 11(b) allege violations of 29 C.F.R. §§ 1910.146(h)(3) and 1910.146(i)(5), respectively, which require communication as necessary between entrants and attendants such that attendants can monitor entrant status and alert entrants of the need to evacuate the space as required by paragraph (i)(6) of the standard. Jerry Riddles and Gary Harrison testified that the method ETC used was a system of raps or knocks on the compartment walls in which both attendants and operators were trained; they also testified that the equipment used for interior blasting and lining

would not work without the operator depressing the trigger, that both operations generated noise, and that attendants were alerted if the noise of the operation ceased.[10] It was Riddles' opinion that the system was adequate and in compliance with the standard. (Tr. 545-46; 549-53; 656-60).

With respect to the blasting area, IH's Delaney and Lewis testified the operation generated a great deal of noise, and that while they heard some rapping on the walls it was infrequent and they could not tell which compartment it came from; Lewis said the blasting was so loud that he, Delaney and the company representatives had to go to the other side of the building to talk. Lewis and Delaney also testified that the blasting attendant was working on the floor 10 to 20 feet from the compartments, and that the only way he could have observed an entrant would have been from the top of the compartment. Delaney opined that the communication was inadequate, indicating it had to do with entrants' work needs rather than safety, and that means such as two-way radios or consistent and frequent visual contact should have been used. (Tr. 151-52; 157-60; 318-21).

As to the interior lining area, Delaney testified that entrants rapped on the walls once or twice but that the instances were related to their work needs. She further testified that although she was told that any ceasing of the operation would alert the attendant, the operation stopped frequently, sometimes for two or three minutes, and there was no action on the part of the attendant. Delaney said there was some visual contact between the attendant and the entrants, such as when an entrant was standing on the floor to line the bottom part of the compartment, but that it was inconsistent; she also said that the attendant left the immediate area to obtain materials and that when he did he was gone for a minute or more and was at times more than 30 feet away from his main work area. Delaney's opinion was that the communication between the attendant and entrants should have been every 1-1.5 minutes, because of the potential for IDLH conditions inside the compartments during lining, and that whatever method ETC chose, whether it was signals, direct visual observation or two-way radios, needed to be consistent and frequent. (Tr. 151-69; 267-69).

Based on the record, ETC violated the cited standards. First, Riddles and Harrison testified that entrants and attendants used hearing protection in the inside blasting area, and despite Harrison's

---

[10]According to Harrison, an attendant rapping once alerted the entrant to stand by for instructions, an entrant rapping once required the attendant to establish eye contact with the entrant, and an attendant rapping repeatedly required the entrant to vacate the space. (Tr. 657).

indicating that such protection would not affect the workers' ability to hear the rapping on the walls, I conclude, as did the IH's, that ETC's communication system was inadequate for the blasting operation. (628-31; 657-58). Second, while Riddles testified he did not recall the instances in the lining area Delaney described and Harrison testified attendants worked no more than ten feet from the compartments, their testimony is not credited in light of that of Delaney and Lewis. (Tr. 551-53; 659-60). It is concluded that ETC's communication system was also inadequate for the lining operation, particularly in view of the IDLH conditions present at the time of the inspection. These subitems are affirmed as serious violations, and the total proposed penalty of $2,500.00 is assessed.

Serious Citation 1 - Item 12

Item 12(a) alleges that an attendant entered a confined space at the same time that entrants were in confined spaces, in violation of 29 C.F.R. 1910.146(i)(4), which requires the attendant to "[remain] outside the permit space ... until relieved by another attendant." Items 12(b) and 12(c) allege that attendants were performing tasks which diverted their attention from entrants, in violation of 29 C.F.R. §§ 1910.146(i)(6)(iv) and (i)(10), respectively; 1910.146(i)(6)(iv) requires attendants to evacuate spaces "[i]f the attendant cannot effectively and safely perform all [required] duties," while 1910.146(i)(10) prohibits the performing of "duties that might interfere with the attendant's primary duty to monitor and protect the authorized entrants."

The basis of item 12(a) was IH Delaney's testimony that she saw an attendant in the lining area make an entry into a compartment at the same time that two entrants were performing lining in adjacent compartments; the attendant took setup materials over to the next compartment to be lined, ducked down and entered the compartment from the bottom and put the materials in, and then left the compartment. Delaney said that Jerry Riddles and Gary Harrison were with her at the time, that they did not admonish the employee, and that they told her his name was Terry Nabors. (Tr. 161-62; 169-73; 260). The bases of items 12(b) and 12(c) include this incident in addition to the instances set out in item 11, *supra*, involving the attendant in the interior blasting area who was working up to 20 feet from the compartments and the attendant in the lining area who went over 30 feet away to get materials, who, it is clear from the record, was Nabors. (Tr. 157; 160-62; 169-77). Riddles denied that the item12(a) incident had occurred and offered a different explanation of what had happened; however, his testimony is not credited in light of that of Delaney. (Tr. 554-55; 570-73). Moreover,

Riddles' testimony that he saw no attendants leave their areas during the inspection, and the testimony of Harrison that attendants worked no more than 10 feet away from the compartments, was considered and rejected in item 11. (Tr. 553; 659-60). The Secretary has established the alleged violations, all three subitems are affirmed, and the total proposed penalty of $2,500.00 is assessed.

Serious Citation 1 - Item 13

This item alleges a violation of 29 C.F.R. 1910.146(j)(4), which requires the employer to:

> [Verify] that rescue services are available and that the means for summoning them are operable.

IH Delaney testified that employers relying on outside emergency services must verify the availability of those services before confined space entries, and that Jerry Riddles and Gary Harrison told her no such verification was being done at ETC; she further testified that the standard required ETC to contact the emergency service at the beginning of the day and that if the service could not guarantee its availability for the entire day ETC was obligated to call it before every entry. Delaney said that verification meant ensuring not only that the service would be available but also that it would have the needed equipment, manpower and expertise, pointing out that OSHA had had to provide the City of Dallas Fire Department with confined space training and that despite its training and equipment that service would not always be immediately available for a confined space emergency; Delaney also said that she had no direct knowledge that the Wake Village Volunteer Fire Department, the service that would respond to emergencies at ETC, had had any confined space training and that she had investigated the matter and had been unable to confirm that ETC had communicated with the service or provided it with any information. (Tr. 178-86; 269-73).

Based on the record, ETC was in violation of the standard. Although Riddles and Harrison testified that there were four emergency service providers in the area, that ETC had advised them all that it would be making confined space entries and would be calling upon them for emergency assistance if necessary, and that the services had all been invited to its facility, their testimony is not credited in light of that Delaney and my findings set out in item 9, *supra*. (Tr. 491-92; 559-61; 632; 655-56; 674). Harrison also testified that calling before every entry was impractical due to the numerous entries that could occur on any one day, and Riddles' opinion was that OSHA's interpretation was unreasonable, particularly since calling a service would not prevent it from going

out on another call. (Tr. 560-61; 633-34; 662-63). Regardless, it is my conclusion that ETC was required to comply with the standard as Delaney indicated or, alternatively, as Delaney also indicated, to have had an adequate in-house rescue service of its own.[11] (Tr. 180). This item is therefore affirmed as a serious violation, and the proposed penalty of $2,500.00 is assessed.

Serious Citation 1 - Item 14

Items 14(a) and 14(b) allege violations of 29 C.F.R. §§ 1910.146(k)(2)(i) and (k)(2)(ii), respectively; those standards require the employer to "[i]nform the rescue service of the hazards [it] may confront when called on to perform rescue" and to "[p]rovide the rescue service with access to all permit spaces ... so that the rescue service can develop appropriate rescue plans and practice rescue operations." The basis of these items was ETC's failure to communicate with or provide any information to the Wake Village Volunteer Fire Department, the service that would respond to emergencies at ETC. (Tr. 183-88; 274; 283-84). The foregoing item establishes such failure, which in turn establishes the violations alleged in this item. Items 14(a) and 14(b) are accordingly affirmed as serious violations, and the proposed penalty of $2,500.00 is assessed.

Serious Citation 1 - Item 15

Items 15(a) and 15(b) allege violations of 29 C.F.R. §§ 1910.146(k)(3)(i) and (k)(3)(ii). These standard provide, respectively, as follows:

> Each authorized entrant shall use a chest or full body harness, with a retrieval line attached....Wristlets may be used in lieu of the chest or full body harness if the employer can demonstrate that the use of a chest or full body harness is infeasible or creates a greater hazard and that the use of wristlets is the safest and most effective alternative.
>
> The other end of the retrieval line shall be attached to a mechanical device or fixed point outside the permit space in such a manner that rescue can begin as soon as the rescuer becomes aware that rescue is necessary. A mechanical device shall be available to retrieve personnel from vertical type permit spaces more than 5 feet deep.

The basis of these items was the failure of entrants to wear harnesses with retrieval lines and the fact that ETC had no tripod or other lifting device to pull entrants from rail cars when necessary. Although the focus of the inspection in this case was on the hopper cars, as noted at the beginning of this decision, it is clear from the record that this item relates to entry operations in both hopper and

[11]Item 15, *infra*, establishes that ETC had no such rescue service.

tank cars. It is also clear, and ETC does not dispute, that it did not have a tripod or other lifting device and that its entrants did not wear harnesses with retrieval lines. With respect to the hopper cars, ETC contends it would never be necessary to rescue an entrant from a compartment because he would fall against the sloped sides and then slide out the bottom opening and onto the shop floor. This contention was considered and rejected in item 8, *supra*, and as ETC has presented no additional evidence in this regard, items 15(a) and 15(b) are affirmed as to the hopper cars.

As to the tank cars, Riddles testified that they have only one top opening and that there is one attendant to each entrant; the entrant enters the car with his lining equipment, a "drop light" and a supplied-air respirator as well as a five-minute escape pack respirator, and the attendant holds the air line and the lining and drop light lines so that they will not interfere with the lining. If the entrant goes down, the attendant immediately summons help, all other entrants are evacuated, and the entrant's air line is disconnected from the shop air and connected to bottled air, on the chance that the shop air is the problem; an authorized employee trained in CPR and first aid then dons the emergency respirator and enters the tank with the wristlets, which are kept in the same case that contains the emergency respirator, and tends to the entrant. Riddles said the tank car is continuously ventilated, that the downed entrant would no longer be spraying the lining, and that by the time the authorized employee would get to the entrant the atmosphere would be cleared such that respirators would probably not even be needed; he also said 911 is called as the authorized employee could do only so much, and since the likely cause of the emergency would be a heart attack or some other physical ailment ETC preferred to have paramedics at the site. (Tr. 493-97; 515-18; 632-33).

Riddles further testified that wearing a harness or wristlets attached to a retrieval line into a tank car was infeasible and more dangerous for entrants. He noted the equipment and lines that entrants take with them into the tanks, and the filler pipes and bolts inside the tanks; a non-entry rescue could cause the entrant to become entangled with the filler lines, the entrant could be injured if he were dragged over the bolts, and the drop light could be broken and generate a spark and create a fire. He also noted that most tank car openings are 20 inches wide, although they can range from 18 to 36 inches, and said that unless someone entered the car to remove some of the entrant's equipment, such as the escape pack, and to guide him out, the entrant would get hung up in the opening. Riddles stated that ETC's procedure was safer and faster than a non-entry rescue using a

retrieval line and tripod, pointing out that a tripod, before it could be used to pull out an entrant, would first have to be gotten up on the top of the tank car and set up. (Tr. 496-505; 515-17).

IH Delaney's testimony with respect to this item was that there were alternative means which could be used to effectuate a rescue, but that the preferred method was for the entrant to wear a harness with a retrieval line connected to a tripod or other lifting device so that rescue could take place without anyone else having to enter the car and be subject to the hazardous atmosphere. (Tr. 188-203). I conclude that ETC's procedure was not a viable alternative. First, despite Riddles' testifying the tank cars were ventilated continuously, he did not explain how this could be done with a single opening with equipment lines going through it and an attendant watching the entrant, and, in case of an emergency, an authorized employee entering the opening; that the tank cars were not ventilated is supported by the fact that entrants wore five-minute escape packs in addition to their supplied-air respirators, which, as noted in item 2, *supra*, is the appropriate protection for IDLH atmospheres, and I find that the authorized employee, upon entering the tank, would be subject to the same hazard confronting the entrant. Second, even assuming *arguendo* the tanks were somehow ventilated, Delaney testified that ceasing the lining in a ventilated hopper car compartment, which has two top openings and a bottom opening, would not completely clear the air as the lining would continue giving off contaminants, and, if the entrant fell, his respirator could be displaced and he would then be breathing the contaminated air. (Tr. 265; 281). Third, I am simply not persuaded that a harness or wristlets could not be used to make a non-entry rescue, especially since the attendant holds on to the equipment lines and since a 20-inch-wide opening would have a circumference of almost 63 inches. Finally, it is apparent that a tripod or other device could be set up and ready for use in case of an emergency, as the standard states, and Delaney testified that it is much more difficult to pull someone out of a confined space without a lifting device. (Tr. 200-01). Items 15(a) and 15(b) are affirmed as serious violations, and the proposed penalty of $2,500.00 is assessed.

"Other" Citation 2 - Item 1

This item alleges that the leather gloves employees wore when using the liquid rust inhibitor utilized in the exterior blasting operation provided insufficient protection, in violation of 29 C.F.R. 1910.132(c), which states as follows:

> All personal protective equipment shall be of safe design and construction for the work to be performed.

IH Delaney testified that the leather gloves the employees wore could become saturated with the rust inhibitor, an amine compound, and result in prolonged skin contact with the inhibitor. She further testified such contact could cause skin irritation or burns and that the appropriate protection, as set out in C-10, the rust inhibitor's material safety data sheet, would be to wear rubber or neoprene gloves under the leather gloves; however, she agreed she was told during the inspection that the inhibitor was greatly diluted when used and said that if exposure was limited to the diluted inhibitor additional gloves would be unnecessary. (Tr. 203-11). Jerry Riddles testified that the undiluted rust inhibitor was 25 percent water and 75 percent amine but that it was diluted to one part amine to 1,000 parts water at ETC; he said the only exposure to the undiluted inhibitor was when workers put it in containers to add water to it and that there had been no skin problems from using the inhibitor. (Tr. 562-64). On the basis of the record, the standard was not violated. This item is vacated.

"Other" Citation 2 - Item 2

This item alleges that ETC did not keep its canceled entry permits from April 15, 1993, the effective date of the confined space standard, through the end of June 1993, in violation of 29 C.F.R. 1910.146(e)(6), which provides in relevant part as follows:

> The employer shall retain each canceled entry permit for at least 1 year to facilitate the review of the permit-required confined space program required by paragraph (d)(14) of this section.

The record plainly shows, and ETC does not dispute, that it did not maintain its canceled entry permit forms for the cited period. (Tr. 211-12; 564-65; 619-23). This item is therefore affirmed as an "other" violation. However, while the citation itself proposes a penalty of $500.00 for this item, IH Delaney testified that no penalty was proposed for this item. (Tr. 212-13). In view of Delaney's testimony and the "other" classification of this item, no penalty is assessed.

Conclusions of Law

1. Respondent East Texas Coatings, Inc., is engaged in a business affecting commerce and has employees within the meaning of section 3(5) of the Act. The Commission has jurisdiction of the parties and of the subject matter of the proceeding.

2. Respondent was in serious violation of 29 C.F.R. §§ 1910.134(b)(8), (b)(11) and (e)(4); 1910.146(d)(4)(ii), (d)(4)(iv), (d)(5)(ii), (d)(7) and (d)(9); 1910.146(f)(4), (f)(5), (f)(7), (f)(10), (f)(11), (f)(12) and (f)(13); 1910.146(h)(3); 1910.146(i)(4), (i)(5), (i)(6)(iv) and (i)(10); 1910.146(j)(4); and 1910.146(k)(2)(i), (k)(2)(ii), (k)(3)(i) and (k)(3)(ii).

3. Respondent was in "other" violation of 29 C.F.R. §§ 1910.134(f)(2)(iv) and 1910.146(e)(6).

4. Respondent was not in violation of 29 C.F.R. §§ 1910.94(a)(5)(v), 1910.132(c) and 1910.134(f)(5)(i).

Order

On the basis of the foregoing Findings of Fact and Conclusions of Law, it is ordered that:

1. All items of citation 1 are affirmed as serious violations, other than item 4(a), which is affirmed as an "other" violation with no penalty, and item 4(b), which is vacated. The proposed penalties for all of the affirmed serious violations are assessed as set out in the decision.

2. Item 1 of citation 2 is vacated.

3. Item 2 of citation 2 is affirmed as an "other" violation, and no penalty is assessed.

Irving Sommer
Chief Judge

Date: