UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR, Complainant, v. PRIDE PETROLEUM SERVICES, Respondent.	Docket No. 92-3382

ORDER GRANTING MOTION FOR DEFAULT JUDGMENT

Commission Rule 93(b), 29 C.F.R. 2200.93(b), requires that a party which has filed a petition for discretionary review file a brief within 40 days after the date of the briefing notice. Pride Petroleum Services (Pride) did not file its brief within this period, and the Secretary moved for a default judgment. The Secretary's motion is granted.

On August 31, 1994, the Commission issued a briefing notice. Commission Rule 93(a), 29 C.F.R. § 2200.93(a), provides that instead of filing a brief a party may file:

> a letter setting forth its arguments, a letter stating that it will rely on its petition for discretionary review or previous brief, or a letter stating that it wishes the case decided without its brief.

The briefing notice issued to Pride also states:

> A party who does not intend to file a brief must notify the Commission in writing setting forth the reason therefor within the applicable time for filing briefs, and shall serve a copy on all other parties.

In spite of the rule and the language in the briefing notice, Pride did not reply. On October 19, 1994, the Secretary moved for default judgment. Pride again did not reply.

On October 25, 1994, the Commission issued an order to show cause to Pride requesting an explanation within twenty days of the date of the order. Pride's attorney responded by letter dated November 23, 1994, requesting that Pride's petition for discretionary review be considered as its brief, and stated:

> I did not understand the Briefing Notice to require us to notify the Commission if we were not going to file a brief if we intended to rely on our motion (sic) as our brief. . . . If the briefing notice had required us to notify the Commission that we did intend on relying on our Motion (sic) as our brief, we have certainly done so.[1]

He also admitted that Pride did not timely respond to the order to show cause.

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[1] Pride's attorney also represents Well Solutions, Inc., Rig 30 (WSI) in Docket No. 91-340 in which he was also informed of the Commission's rules. WSI failed to respond to a briefing notice and the Secretary filed a motion for default judgment on September 27, 1994, which was during the period when Pride's brief was due. The Secretary's attorney stated in his motion:

> On September 14, 1994, the undersigned contacted [WSI's] counsel, to inquire as to respondent's intentions regarding the filing of a brief. The undersigned was orally informed that respondent did not intend to file a brief. Pursuant to Commission Rule 93, the undersigned advised that respondent should inform the Commission of its intentions.

In spite of this admonition, WSI did not respond although it did respond to a subsequent Commission order.

Pride's inaction does not comply with Commission Rule 93(b). Accordingly, the direction for review is vacated due to Pride's failure to respond to the briefing notice. Commission Rule 93(d), 29 C.F.R. § 2200.93(d); *D. A. & S. Oil Well Servicing, Inc.*, 1986-87 CCH OSHD ¶ 27,795 (No. 85-604, 1987). *See also A. B. Chance Co.*, 13 BNA OSHC 1172, 1173 n.1, 1986-87 CCH OSHD ¶ 27,863, p. 36,492 n.1 (No. 84-519 1987). The judge's decision is affirmed as a final order.

Stuart E. Weisberg
Stuart E. Weisberg
Chairman

Edwin G. Foulke, Jr.
Commissioner

Dated December 14, 1994

Velma Montoya
Velma Montoya
Commissioner

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SECRETARY OF LABOR, Complainant, v. PRIDE PETROLEUM SERVICES, Respondent.	:	Docket No. 92-3382

NOTICE OF COMMISSION ORDER

The attached order by the Occupational Safety and Health Review Commission was issued on December 14, 1994. **ANY PERSON ADVERSELY AFFECTED OR AGGRIEVED WHO WISHES TO OBTAIN REVIEW OF THIS ORDER MUST FILE A NOTICE OF APPEAL WITH THE APPROPRIATE FEDERAL COURT OF APPEALS WITHIN 60 DAYS OF THE DATE OF THIS DECISION.** See Section 11 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 660.

FOR THE COMMISSION

Ray H. Darling, Jr.

December 14, 1994
Date

Ray H. Darling, Jr.
Executive Secretary

Docket No. 92-3382

NOTICE IS GIVEN TO THE FOLLOWING:

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Richard DeBenedetto
Administrative Law Judge
Occupational Safety and Health
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Room 420
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SECRETARY OF LABOR
Complainant,
v.
PRIDE PETROLEUM SERVICES
Respondent.

OSHRC DOCKET
NO. 92-3382

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 December 2, 1993. The decision of the Judge will become a final order of the Commission on January 3, 1994 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 December 22, 1993 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

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

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

Petitioning parties shall also mail a copy to:

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

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

FOR THE COMMISSION

Ray H. Darling, Jr.

Date: December 2, 1993

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 92-3382

NOTICE IS GIVEN TO THE FOLLOWING:

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UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR,	
Complainant,	
v.	OSHRC Docket No. 92-3382
PRIDE PETROLEUM SERVICES,	
Respondent.	

Appearances:

Michael H. Olvera, Esq.
Office of the Solicitor
U.S. Department of Labor
For Complainant

George R. Carlton, Jr., Esq.
Goodwin & Carlton
Dallas, Texas
For Respondent

Before Administrative Law Judge Richard DeBenedetto:

DECISION AND ORDER

On October 15, 1992, Pride Petroleum Services ("Pride"), an oil well servicing company, was issued a serious citation alleging the violation of two standards relating to the use of respiratory protective equipment. Item 1a of the citation alleges that Pride's failure to provide respirators for its workers at a Post, Texas, well site violated 29 C.F.R. § 1910.134(b)(2) which requires that respirators be selected on the basis of the hazards to which a worker is exposed. Item 1b alleges that Pride's additional failure to monitor the level of hydrogen sulfide ("H_2S") in and around this well site violated § 1910.134(b)(8) which requires an employer to conduct appropriate surveillance of both work area conditions and the degree of employee exposure. A total penalty of $4500 is proposed for these grouped violations.

The citation stems from an inspection conducted by OSHA industrial hygienist Jack M. Haning on July 29, 1992, in connection with a complaint arising under § 11(c) of the Occupational Safety and Health Act ("Act"), 29 U.S.C. § 660(c) (Tr. 6, 9). After meeting with two representatives from Pride and interviewing three Pride employees, Haning was

taken to a well site located in an area known as the "PLK 32" lease approximately ten miles south of Pride's field office in Post, Texas (Tr. 11-13, 15-17, 48-49, 118-19; Exhibits C-1 & C-2). The owner of the well, Brothers Production Company, Inc. ("Brothers"), had hired Pride to replace a defective rod inside the well and, later, had asked Pride to lay down some additional rods and tubing (Tr. 15, 18, 36-37, 86, 94-98, 114-15; Exhibit C-5). The work was performed by a crew of four employees over a three-day period from July 27 to July 29, 1992 (Tr. 86-88, 113-14, 118-20; Exhibit C-5).

According to Haning, the well had the potential to release H_2S, a gas which is sometimes encountered during oil production and can be extremely toxic if released in high levels (Tr. 17-22, 34-35, 37-40). Although Pride did have an adequate written respiratory protective program in place and had respirators available at its field office in Post, respirators were not provided at the well site (Tr. 22-23, 43, 47-48, 73-75, 105). In addition, electronic devices which monitor the level of H_2S within their immediate area were apparently not utilized by Pride on this project (Tr. 21-23, 41, 51-56, 64-65, 104-05).

At the hearing, the Secretary moved to amend Item 1a of the citation so as to allege a violation of § 1910.134(a)(2) in the alternative; a ruling on the amendment was reserved until the issuance of a decision in this matter (Tr. 41-47). A review of the complete record, however, indicates that a ruling on this motion is not necessary because the Secretary has failed to satisfy his burden of proving a violation under *either* standard.

Section 1910.134(b)(2), the originally cited standard, sets forth one of the many requirements that must be satisfied by employers before their respiratory protective program can be considered minimally acceptable: "Respirators shall be selected on the basis of hazards to which the worker is exposed." Typically, an employer cited under this standard has provided some type of respirator to its employees, but has selected one that is inappropriate in terms of the type of hazard involved. *See e.g. Seaboard Foundry, Inc.*, 11 BNA OSHC 1398, 1983-84 CCH OSHD ¶ 26,522 (No. 77-3964, 1983) (alleged violation of § 1910.134(b)(2) affirmed where employees were provided with type of respirator incapable of protecting them from exposure to silica dust). Here, however, it has already been established that no respirators of any kind were made available to the Pride employees working at the well site. Although there is nothing in the record to indicate exactly what

type of respirator Pride kept at its field office in Post, Haning conceded that these respirators, while not provided at the well site, were "proper" ones (Tr. 47-48, 75). The Secretary, therefore, has failed to demonstrate that this standard is truly applicable to the conditions cited and that Pride actually violated its terms.[1]

Section 1910.134(a)(2), the standard the Secretary seeks to allege in alternative to § 1910.134(b)(2), essentially consists of three requirements:

> Respirators shall be provided by the employer when such equipment is necessary to protect the health of the employee. The employer shall provide the respirators which are applicable and suitable for the purpose intended. The employer shall be responsible for the establishment and maintenance of a respiratory protective program which shall include the requirements outlined in paragraph (b) of this section.

Of the three, the first requirement appears to be the most applicable here in terms of the conditions described in Item 1a of the citation ("...there were not any [self contained breathing apparatus] available at the site for exposure to unknown concentrations of H_2S."). Thus, in order to establish a violation of this standard, the Secretary would have to prove that respirators were "necessary" to protect the health of Pride's employees at the Brothers well site. *See Pride Oil Well Service*, 15 BNA OSHC 1809, 1812, 1992 CCH OSHD ¶ 29,807 (No. 87-692, 1992) ("*Pride Oil*").

In previous cases dealing with this issue, the amount of evidence presented by the Secretary to demonstrate the potential for exposure to toxic levels of H_2S has been significant. For instance, the results of tests performed by the inspecting officer, the servicing company, and/or the well operator to determine the level of H_2S in and around a particular site have been submitted to document the presence of gas in the area. *Brock v. City Oil Well Service Co.*, 795 F.2d 507, 508 n.2 (5th Cir. 1986); *Power Fuels Inc.*, 14 BNA OSHC 2209, 2211-12, 1991 CCH OSHD ¶ 29,304 (No. 85-166, 1991) ("*Power Fuels*"); *Snyder Well Servicing, Inc.*, 10 BNA OSHC 1371, 1374, 1982 CCH OSHD ¶ 25,943 (No. 77-1334, 1982) ("*Snyder*"). Prior history, in terms of past citations or previous experience with a cited

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[1]The Secretary acknowledged in his post-hearing brief that of the two standards he claims were violated under this item, § 1910.134(a)(2) is the more applicable. Secretary's Post-Hearing Brief at 3.

well, has also been cited where relevant to establishing the well's potential for releasing H_2S. *Power Fuels* at 2212; *Snyder* at 1374. Even strong testimony from an experienced compliance officer or industrial hygienist has played an important role in the Secretary's ability to prove that respirators were "necessary" under certain conditions. *See Pride Oil* at 1812; *Snyder Well* at 1374.

None of these factors, though, are present here. Haning's oil well inspection experience, for instance, is limited to ten to fifteen inspections out of a total 1,000 he has performed for OSHA; only six of these cases involved H_2S (Tr. 7-8, 50-51, 60, 62-63). Except for a brief stint in high school when he was employed with an oil servicing company, Haning also lacks any significant experience working in the oil industry and has gained his knowledge of oil well production and H_2S exposure solely from the few OSHA training classes he has attended on these subjects (Tr. 6-9, 34-35, 61-62). *Cf., e.g., Snyder* at 1374 (compliance officer had 33 years of experience in oil and gas production, had helped to develop safety standards for drilling operations, and had worked in oil fields).

Furthermore, the evidence generated by the actual inspection was considerably lacking. The primary basis for Haning's conclusion that there was a potential for exposure to H_2S at the Brothers well was the unremarkable fact that a "Caution: Poison Gas" sign had been posted at the site (Tr. 17-18, 20; Exhibit C-1). Clearly, H_2S is not the only potentially toxic gas that may be released at a well site and Haning admitted that he had no idea who posted the sign or why (Tr. 38, 64). Haning also failed to perform any tests or take any readings at the time of his inspection to determine whether H_2S, in any amount, existed in the area around the well (Tr. 28, 64-65, 82). In fact, he never even got out of his truck to walk around the well site or examine the well (Tr. 64).

Although Haning did testify that the well was located in a geographical area he understood to be "sour", i.e. known to produce H_2S, his assertion reveals nothing about this particular well's capacity for producing and releasing H_2S (Tr. 32-33, 83). Moreover, Haning's testimony was based primarily on a map of Texas which purports to depict the areas of major sour gas production in the state and appears in a document which Haning did not have available to him until after the citation was issued (Tr. 32-33, 65-66, 68-69; Exhibit C-3). In addition, the map, which itself is not very clear, is part of a regulation

known as "Rule 36" that was promulgated by the Texas Railroad Commission to protect the general public, not industry, from H_2S exposure and as such, it has little to offer to the resolution of this dispute (Tr. 23-25, 66; Exhibit C-3).[2] Without the map, Haning's knowledge of the area's potential for H_2S production was based solely upon his limited oil well inspection experience noted *supra* (Tr. 33).

Not even the testimony of three Pride employees who worked on the Brothers well could salvage the Secretary's already weak case. Only one of the employees testified that he smelled H_2S at the well and Haning's testimony that one's sense of smell cannot serve as a true indication of the presence of H_2S raises serious questions about the reliability of this lone observation (Tr. 21, 104, 115-16, 122-23).[3] Moreover, Kenneth Price's identification of the well as "sour" was directly contradicted by his testimony that he had never known the well to produce H_2S on the numerous occasions over the past five years when he had performed work on it (Tr. 72-73, 105-06, 109). In sum, there is simply insufficient evidence to prove that H_2S gas actually or even potentially existed at the Brothers well. Because the record as a whole does not substantiate the Secretary's allegation of potential exposure, it cannot support a finding that respirators were truly "necessary" under these conditions. Item 1a, therefore, must be vacated, regardless of which of the two standards the Secretary alleges was violated.

Although far too speculative to establish that respirators were necessary, the evidence submitted by the Secretary *is* sufficient enough to prove that Pride, in accordance with § 1910.134(b)(8), should have performed an appropriate test to determine whether a hazardous substance was present at this worksite and if so, in what level. Haning himself recognized that the failure to utilize respirators while performing well servicing work does

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[2] Likewise, the form filled out by Brothers in order to comply with Rule 36 and which, according to the Secretary, demonstrates the potential for H_2S exposure at the cited well, cannot be attributed any significant weight here (Tr. 25-31, 77-79; Exhibit C-4). The level of H_2S documented there evidently refers to the lease as a whole and not to the specific well in question (Tr. 26-31, 77-79, 80-83). Finally, the fact that some of the figures on the form were altered further limits the usefulness of this document to the Secretary's case (Tr. 27-28, 80-81; Exhibit C-4).

[3] It is worth noting that Haning failed to indicate whether he himself smelled H_2S when he conducted his inspection of the well site.

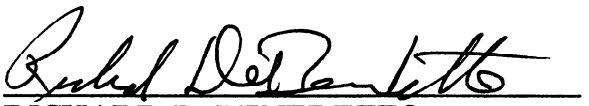
not always constitute a violation since their use depends on whether atmospheric testing has been done and what the results of such testing has revealed about the level of the substance in the area; he even identified the levels of H_2S at which he would agree that the use of respirators would not be necessary (Tr. 75-78). Haning also implied at one point that the citation as a whole was issued mainly because Pride had done nothing to determine the level of H_2S in the vicinity of the well (Tr. 21-22).

Clearly, the "Caution" sign alone should have alerted Pride to the fact that the presence of some type of toxic gas, not necessarily H_2S, was possible and as part of its effort to maintain an adequate respiratory protective program, Pride should have conducted preliminary tests to learn definitively whether respirators were indeed necessary. Pride's failure to comply with this requirement for a minimally acceptable respiratory protective program in the face of evidence, however speculative, that a hazard might exist, violates the mandate of § 1910.134(b)(8).

As its defense, Pride apparently elected to rely upon its counsel's cross-examination of the Secretary's witnesses since it did not present any witnesses or evidence of its own at the hearing and also, did not submit a post-hearing brief. An affirmative defense of employee misconduct was alleged by Pride in its answer, but no evidence supporting this allegation was ever introduced at the hearing. Accordingly, Item 1b is affirmed. Because the failure to comply with this standard could have ultimately resulted in exposing employees to a highly toxic substance which could cause serious physical injury or even death, the violation was properly characterized as serious. Upon consideration of the criteria set forth in § 17(j) of the Act, a penalty of $2,000 is appropriate.

Based upon the foregoing findings and conclusions, it is

ORDERED that item 1a of the citation is vacated, item 1b is affirmed, and a penalty of $2,000 is assessed.



RICHARD DeBENEDETTO
Judge, OSHRC

Dated: November 26, 1993
Boston, Massachusetts