UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1825 K STREET NW
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WASHINGTON, DC 20006-1246

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SECRETARY OF LABOR,	:	
Complainant,	:	
v.	:	Docket No. 91-0952
CLEAN HARBORS OF KINGSTON, INC.,	:	
Respondent.	:	

ORDER

This matter is before the Commission on a Direction for Review entered by Commissioner Donald G. Wiseman on February 24, 1992. The parties have now filed a Settlement agreement.

Having reviewed the record, and based upon the representations appearing in the Settlement Agreement, we conclude that this case raises no matters warranting further review by the Commission. The terms of the Settlement Agreement do not appear to be contrary to the Occupational Safety and Health Act and are in compliance with the Commission's Rules of Procedure.

Accordingly, we incorporate the terms of the Settlement Agreement into this order, and we set aside the Administrative Law Judge's Decision and Order to the extent that it is inconsistent with the Settlement Agreement. This is the final order of the Commission in this case. See 29 U.S.C. §§ 659(c), 660(a), and (b).

Edwin G. Foulke, Jr.
Chairman

Donald G. Wiseman
Commissioner

Dated January 14, 1993

Velma Montoya
Commissioner

Docket No. 91-0952

NOTICE OF ORDER

The attached Order by the Occupational Safety and Health Review Commission was issued and served on the following on January 14, 1993.

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

Albert H. Ross, Esq.
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Office of the Solicitor, U.S. DOL
llth Floor
One Congress Street
Boston, MA 02114

W. Anthony Stevens, Jr., Esq.
Clean Harbors, Inc.
1200 Crown Colony Drive
Quincy, MA 02269

Richard Gordon
Administrative Law Judge
Occupational Safety and Health
Review Commission
Room 420
McCormack Post Office and Courthouse
Boston, MA 02109-4501

FOR THE COMMISSION

Ray H. Darling, Jr.

Ray H. Darling, Jr.
Executive Secretary

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

LYNN MARTIN, SECRETARY OF LABOR, Complainant, v. CLEAN HARBORS OF KINGSTON, INC., Respondent.	OSHRC DOCKET NO. 91-0952

SETTLEMENT AGREEMENT

Complainant and respondent hereby stipulate and agree that:

(1) On March 8, 1991, the Secretary issued a citation for alleged violations of the Occupational Safety and Health Act of 1970, 29 U.S.C. s 651 et seq., (hereafter referred to as the "Act") and issued a notification of proposed penalty in the amount of $480.

(2) Respondent, an employer within the meaning of section (3)(5) of the Act, duly filed with a representative of the Secretary of Labor a Notice of Intent to Contest the Citation. This Notice was duly transmitted to the Review Commission and it is agreed that jurisdiction over this proceeding is conferred upon said Commission by section 10(C) of the Act.

(3) A hearing was held in Boston, MA on September 17, 1991 before Administrative Law Judge Richard W. Gordon.

(4) Subsequently, Judge Gordon issued an Opinion and Order which Affirmed Serious Citation 1, Item 1, alleging a violation of Section 5(a)(1) of the Act, and assessing a penalty of $480.

(5) On January 28, Respondent duly filed with the Commission a Petition for Discretionary Review, and on February 24, 1992, the Commission issued a Direction for Review.

(6) On October 6, 1992, the Commission issued a briefing notice to the Parties.

(7) The Complainant and Respondent have agreed to resolve this

matter without the necessity of further pleadings as follows:

The Citation is amended from Serious to Section 17

The Citation is hereby amended to read as follows:

1. Section 5(a)(1) of the Occupational Safety and Health Act of 1970: Employees were exposed to the hazard of delayed rescue while working in a confined space.

(a) Follen Street Pump Room, December 12 and 13, 1990, employees entered this confined space to skim #2 diesel fuel, Biosolve and water and pump this mixture into a tank truck.

Effective rescue from the pump room would be delayed due to:

1. Ineffective voice communication through half-face respirators by employees in the pump room.

Among other methods, the feasible and acceptable method to correct this hazard is to:

1. Provide and use an alarm-activated and explosion-proof type of communication system.

The Penalty remains $480.

(8) In view of the aforesaid, Respondent hereby withdraws its Notice of Contest and Petition for Discretionary Review and the parties agree that the Citation and Proposed Penalty, as amended by this Agreement, become a final order pursuant to Section 10(a) of the Act.

(9) Respondent stipulates that the violations alleged have been abated and that the penalty will be paid within 30 days from the date of this Agreement. Respondent agrees to comply with the Act in all respects in the future.

(10) The Respondent agrees to undertake the following abatement activity at all of its workplaces:

<u>Communication</u>

Prior to any entry into a confined space, the workplace shall be evaluated to determine an adequate system of communication between entrants and standby personnel. This must be assured by the foreman. An adequate system of communication may be in the form of visual contact, verbal communication, either unassisted or electronically assisted, or sound (i.e., periodic taps on a vessel.) Whenever standby personnel cannot see the entrant, an adequate system of communication

means that they can hear and understand each other's voices or signals.

(11) Respondent further certifies that the original Notice of Contest and a copy of this Agreement have been posted and that all pleadings and documents in this matter have been served in accordance with Commission Rules 7 and 100.

(12) Each party hereby agrees to bear its own fees and expenses incurred by such party in connection with any stage of this proceeding.

(13) Respondent hereby certifies that a copy of this Settlement Agreement was posted at its workplace on December 31, 1992.

(14) Respondent's consent to the citation becoming a Final Order pursuant to this Settlement Agreement shall not constitute an admission by Respondent of violation of the Act in any proceeding other than one brought directly under the provisions of the Occupational Safety and Health Act of 1970, including but not limited to any citations issued or penalties proposed by the Secretary under the provisions of sections 10(A) and 10(B) of the Act.

Dated, this 30th day of December, 1992.

Clean Harbors of Kingston, Inc.

By: W. Anthony Stevens, Jr.
W. Anthony Stevens, Jr.
Attorney for Clean Harbors
of Kingston, Inc.

Marshall J. Breger
Solicitor of Labor

Joseph M. Woodward
Associate Solicitor for
Occupational Safety and Health

Daniel J. Mick
Counsel for Regional
Trial Litigation

Mark J. Lerner
Mark J. Lerner
Attorney
U.S. Department of Labor

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SECRETARY OF LABOR
Complainant,
v.
CLEAN HARBORS
Respondent.

OSHRC DOCKET
NO. 91-0952

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 January 23, 1992. The decision of the Judge will become a final order of the Commission on February 24, 1992 unless a Commission member directs review of the decision on or before that date. ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW. Any such petition should be received by the Executive Secretary on or before February 12, 1992 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

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

Executive Secretary
Occupational Safety and Health
Review Commission
1825 K St. N.W., Room 401
Washington, D.C. 20006-1246

Petitioning parties shall also mail a copy to:

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

If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 634-7950.

FOR THE COMMISSION

Ray H. Darling, Jr. /skw

Date: January 23, 1992

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 91-0952

NOTICE IS GIVEN TO THE FOLLOWING:

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Administrative Law Judge
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UNITED STATES OF AMERICA
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UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. CLEAN HARBORS OF KINGSTON, INC. Respondent.	OSHRC DOCKET NO. 91-0952

Appearances:

Robert A. Yetman, Esq.
Office of the Solicitor
U.S. Department of Labor
For Complainant

Jonathan R. Black, Esq.
Clean Harbors Environmental
Services Companies
Quincy, Massachusetts
For Respondent

Before: Administrative Law Judge Richard W. Gordon

DECISION AND ORDER

This is a proceeding brought under § 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651, et seq., ("Act") to review citations issued by Secretary pursuant to § 9(a) and a proposed assessment of penalty thereon issued pursuant to § 10(a) of the Act.

On March 8, 1991, the Secretary issued a citation to Respondent following an inspection of Respondent's work site at Back Bay Station, Boston, Massachusetts, during the period

December 13 to 14, 1990. The citation charged Respondent with a serious violation of the general duty clause of the Act, 29 U.S.C. § 654(a)(1), Section 5(a)(1), for which the Secretary proposed a penalty of $480.00.

By filing a timely notice of contest, Respondent brought this proceeding before the Occupational Safety and Health Review Commission (Commission). A hearing was held in Boston, Massachusetts on September 17, 1991. The parties have submitted their briefs and this matter is now ready for decision.

ALLEGED VIOLATION

Serious citation 1, item 1, as amended, states:

Section 5(a)(1) of the Occupational Safety and Health Act of 1970: The employer did not furnish employment and a place of employment which was free from recognized hazards that were causing or likely to cause death or serious physical harm to employees in that employees were exposed to the hazard of working within a confined space without an adequate rescue procedure and an effective communication system.

(a) Follen Street pump room, December 12 and 13, 1990, employees entered this confined space to skim #2 diesel fuel, Biosolve and water and pump this mixture into a tank truck.

Effective rescue from the pump room would be delayed due to:

1. Employees not wearing safety belts with D rings, or harnesses.

2. Ineffective voice communication through half mask respirators, by employees in the pump room.

Among other methods, one feasible and acceptable method to correct this hazard is to:

1. Ensure employees who enter confined spaces wear safety belts or harnesses at all times and

2. Provide and use an alarm-activated explosion proof type of communication system.

Section 5(a)(1) reads in pertinent part:

(a) Each employer -- (1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.

SUMMARY AND EVALUATION OF THE EVIDENCE

Respondent is engaged in the business of hazardous waste removal, emergency response, remediation, maintenance and operation aspects dealing with hazardous materials. (Tr. 29). The firm is a medium size company in the industry and employs approximately 1,100 employees. (Tr. 6). Respondent stipulated that it is engaged in a business affecting interstate commerce. (Tr. 6). Accordingly, I find that Respondent is an employer within the meaning of Section 3(5) of the Act.

The work site was an underground pump room located near the Massachusetts Bay Transportation Authority (MBTA) Back Bay Station in Boston ("Follen Street pump room"). The pump room is a confined space consisting of three chambers accessed through bulkhead type doors at the street level and descending three levels below the sidewalk level with the floor of the lowest chamber being forty feet below the sidewalk. (Ex. C-1, Tr. 27-30).

Respondent was hired for a variety of tasks following a major accident involving a December 12, 1990, collision of an AMTRAK train and a MBTA commuter train in the Back Bay underground train station. (Tr. 16). Respondent performed its work on December 12 and 13, 1990, by using vacuum trucks and vacuum hoses to pump off diesel fuel. Respondent also used absorbent pads that absorbed oil and not water. (Tr. 83).

On December 13, 1991, Carol Shum, an OSHA Compliance Officer inspected the work site. (Tr. 15-16). Ms. Shum contacted Respondent's foreman, Mr. Robert Paul, and conducted an opening conference. Both Ms. Shum and Mr. Paul then proceeded to the

"pump room" where Respondent's employees were removing "runoff". (Tr. 17). Ms. Shum observed Mr. Michael Carvolho, an employee of Respondent, exiting the pump room at the sidewalk level. He was wearing a half mask respirator. (Ex. C-3, Tr. 23). Mr. Carvolho was required to frequently enter and leave the pump room to remove saturated pads and place new pads in the chamber. He was the only person in the confined space. A standby man, Mr. Phillon, remained at street level. Ms. Shum observed that Mr. Carvolho was not wearing a safety belt nor was he equipped with a non-explosive communications system such as a walkie talkie. (Tr. 24-25).

It is well established that four requirements must be met in order to establish a violation of the general duty clause. First, the Secretary must establish a hazard at the work site; second, the hazard must be recognized either by the employer or be a recognized hazard within the employer's industry. The hazard must also constitute a serious violation within the meaning of the Act; that is, that the hazard may result in serious injury or death. Lastly, the Secretary must establish that the abatement of the hazard is feasible. *See National Realty and Construction Company v. OSHRC* (1973-74 OSHD ¶17,018).

As the Secretary correctly states, the issue in this case is whether the procedures followed by Respondent were sufficient to provide protection to employees in the confined space while engaged in a hazardous activity. The Secretary takes the position that Mr. Carvolho should have been wearing a safety belt to facilitate a rescue in the event that he became incapacitated and required to be removed from the confined space. The Secretary also asserts that in view of the distance from the bottom of the confined space and the standby man at street level as well as the configuration of the space which necessitated that

the employee be out of visual contact with the person at street level, a walkie talkie system should have been used to facilitate communication between the employee and his rescuer.

I find, and Respondent agrees, that entering confined spaces is hazardous. Ms. Shum has testified that this activity is hazardous because of possible oxygen deficiency or the presence of explosive gases or other gases such as methane, carbon monoxide, natural gas and unknown gases. (Tr. 95, 126). Another reason is that an employee could suffer a physical injury, heart attack or the like while working at the lowest level of a confined space. (Tr. 40). Appropriate testing should always be conducted to determine the presence of toxic gases. (Tr. 182-183). In fact, Respondent tested the confined space for oxygen deficiency and explosive gases prior to employee entry and at periodic times while Mr. Carvolho was at the bottom of the confined space.

Respondent argues that the atmosphere in the pump room was monitored by Clean Harbors personnel throughout the two day work assignment. Mr. Paul, Clean Harbors foreman, and Mr. Spielvogel, Clean Harbors manager of occupational safety and health, testified that oxygen levels in the pump room were acceptable throughout the two day period. Oxygen and LEL readings were recorded in writing every 30 minutes during the job. (Ex. R-3). Mr. Paul testified that he entered the pump room and observed the configuration of the work space. He opined that the pump room contained no noticeable vents or other avenues for toxic fumes to enter into the work space. No other hazard increasing activities, such as cleaning or welding, were being performed by Clean Harbors personnel at the pump room. Moreover, the oxygen and combustible gas meters that were used by Clean Harbors to monitor the work site atmosphere would automatically sound an

alarm in the event that the atmospheric condition in the work area changed. No such warnings occurred. The record supports a conclusion that Respondent took appropriate steps, given the facts of this case, to address the potential hazard of oxygen deficiency and the presence of combustible gases. Respondent monitored the atmosphere in the pump room and utilized personnel trained in confined space entry procedures. Respondent's air monitoring showed the atmosphere in the work place to be safe. The Secretary's assertion that the atmospheric monitoring was insufficient is not supported by substantial evidence.

The other recognized hazard that was controlled by the work practices of respondent was the need to provide for the removal of an injured employee in the work space. The Secretary asserts that Respondent's training manual requires that employees entering confined spaces must wear a safety belt and therefore Respondent recognizes the hazardous nature of working in confined spaces. While I agree with the Secretary on this point, I don't believe that a violation of one's own safety rules, in and of itself, constitutes a violation of the Act. Ms. Shum testified that the failure to wear a safety belt could delay a rescue procedure. While this statement is true in a general sense, the failure to wear a safety belt in the case at bar would not delay a rescue. The evidence shows that since there was no risk posed to employees by atmospheric conditions at the pump room, there was no need to provide for rapid removal of employees from the work space.

Mr. Spielvogel testified that respondent had developed a rescue plan that focused on physical injuries to employees in the work space. In the event of a physical injury, Respondent would summon emergency medical assistance to evaluate and treat the employee in the work space before devising a method to remove the employee. Respondent

asserts that in these circumstances "effective rescue" would not require rapid removal from the work space. Mr. Spielvogel, who had personally observed the pump room, also testified that the use of a harness and lifeline in this work space, given the physical configuration of the ladders and platforms, was inappropriate because the type of injury which would be anticipated would require a Stokes basket or other type of stretcher arrangement for effective removal. Ms. Shum allowed on cross-examination that an injured employee could become "tangled" in the ladder and platform during extrication with a harness. Also, Mr. Spielvogel testified that it would have been inappropriate to use safety belts in this instance as they are designed for use where horizontal pulls are required. Accordingly, I find that the failure of Respondent to use safety belts or harnesses at the pump room in no way diminished the opportunity for effective rescue of an injured employee given the consistent atmospheric conditions in the work space and the absence of engulfment hazards.

Lastly, the Secretary states the need for a voice assisted communication system between an employee in a confined space and a standby man outside of the space is an industry recognized prudent safety procedure to protect employees in confined spaces particularly, as in this case, where the employee is often out of sight of the standby man. The need for a two way communication system in this case is explained in excerpts from the National Institute for Occupational Safety and Health (NIOSH). (Ex. C-5 at p. 29). Respondent acknowledges the NIOSH criteria document as a recognized authority in its industry. (Tr. 57, Ex. R-2). The Secretary argues that the need for a voice assisted communication system in this case is compelled by the fact that Mr. Carvolho was required to wear a half face respirator at all times. (Tr. 23, 24). While an in court demonstration

of voice communication through a half face respirator revealed that some communication could be heard through the respirator, the quality of the voice communication was poor. The evidence presented by the Secretary is persuasive that, in view of the distance from the bottom of the confined space and the standby man at street level as well as the configuration of the pump room which necessitated that the employee be out of visual contact with the person at street level, a walkie talkie system should have been utilized to facilitate communication between employer and his rescuer. Also, the Secretary established the feasibility of abating the violation with the use of walkie talkies. Respondent owns an unknown number of walkie talkies which it considers to be safety equipment and which could have been used in the pump room.

After a careful review of the credible evidence now of record, I find that the Secretary has met her burden of proof in establishing that a violation of Section 5(a)(1) of the Act existed at Respondent's work place.

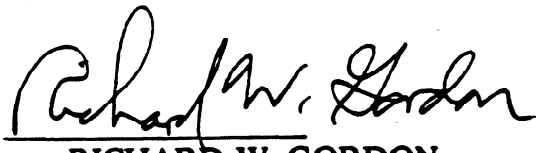
Section 17(j) of the Act requires the Commission to find and give "due consideration" to the size of the employer's business, the gravity of the violation, the good faith of the employer, and the history of previous violations in determining the assessment of an appropriate penalty. Upon consideration of these factors, I have determined that a penalty of $480.00 is appropriate. I will not decrease the proposed penalty merely because one of the possible bases of affirmance is unsupported by substantial evidence.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Findings of fact and conclusions of law relevant and necessary to a determination of the contested issues have been made above. Fed. R. Civ. P. 52(a). All proposed findings of fact and conclusions of law inconsistent with this decision are hereby denied.

ORDER

1. Serious citation 1, item 1 alleging a violation of Section 5(a)(1) of the Act is AFFIRMED and a penalty of $480.00 is ASSESSED.



RICHARD W. GORDON
Judge, OSHRC

Dated: _____
Boston, Massachusetts