

SECRETARY OF LABOR,

Complainant,

v.

FLUOR DANIEL,

Respondent.

OSHRC Docket Nos. 96-1729 &  
96-1730 (consolidated)

***DECISION***

Before: ROGERS, Chairman; EISENBREY, Commissioner.

BY THE COMMISSION:

Fluor Daniel is a contract employer at a General Electric (“G.E.”) facility in Burkville, Alabama. On May 23, 1996, the Occupational Safety and Health Administration (“OSHA”) began inspections at the Burkville facility following a May 22, 1996 accident in which a number of employees, including eleven Fluor Daniel employees, were exposed to phosgene. As a result of Compliance Officer (“CO”) James Ralph’s health inspection, the Secretary of Labor (“the Secretary”) issued two citations, with three items, alleging that Fluor Daniel violated standards related to emergency action plans, employee training, and respiratory protection. As a result of CO Brian Smith’s safety inspection, the Secretary also issued one citation, with two items, alleging that Fluor Daniel violated standards by failing to implement or maintain adequate lockout/tagout procedures and hot work permits.

Administrative Law Judge Nancy J. Spies affirmed the two items alleging violations of the emergency action plan and respiratory protection standards, vacated the remaining

three items, and assessed a total penalty of \$32,500. For the reasons that follow, we affirm the willful respiratory protection item, assess a penalty of \$30,000, and vacate the remaining four items.

### **Background**

Fluor Daniel is an engineering and construction company with approximately 30,000 employees worldwide. Since 1985, Fluor Daniel has maintained employees at a G.E. manufacturing facility in Burkville, Alabama. Fluor Daniel was responsible for the initial construction of the Burkville facility between 1985 and 1987. Since that time its employees have been involved in various additions and modifications to the plant and have also provided on-site contract maintenance services. Fluor Daniel employees are not directly involved with G.E. production. In May 1996, Fluor Daniel had “a couple hundred” employees at the Burkville facility.

The Burkville facility consists of one waste handling plant and five manufacturing plants, including a resin plant and a phosgene plant.<sup>1</sup> The resin plant is a six-story, open-sided structure, approximately 100 feet wide and 400 feet long, which sits approximately fifty feet east of the phosgene plant. A street separates the two plants, but they are connected physically by a pipe rack, which holds phosgene-conveying pipes.

On May 22, 1996, a number of Fluor Daniel employees were working on the second floor mezzanine of the resin plant, removing a caustic line so that they could install a heat exchanger to the caustic scrubber system. While they were working, low levels of phosgene vented back through the caustic line. After the phosgene release was detected, the Fluor Daniel employees evacuated the resin plant.

Neither Fluor Daniel nor G.E. provided emergency escape respirators for Fluor Daniel employees in the resin plant, and none of the Fluor Daniel employees who evacuated the

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<sup>1</sup>The material safety data sheets for phosgene entered into evidence describe phosgene as a potentially fatal, poisonous, non-flammable gas that has an irritant effect on eyes, skin, respiratory tract, and lungs.

plant were wearing respirators. After evacuation, G.E.'s on-site physician examined eleven Fluor Daniel employees and referred them to a hospital in Montgomery, Alabama, where they were examined further and provided prophylactic treatment. Eight employees stayed overnight for observation and were released the next day.

## Discussion

### I. *Alleged Violations of 29 C.F.R. § 1926.64*

The Secretary cited Fluor Daniel for three violations of 29 C.F.R. § 1926.64, a standard that regulates the process safety management of highly hazardous chemicals. Citation 1, item 2 in Docket No. 96-1729, addressing the health-related charges, alleges that Fluor Daniel committed a serious violation of 29 C.F.R. § 1926.64(h)(3)(iii) because it did not ensure or document that its employees working in the resin plant demonstrated an understanding of the hazards of phosgene. Citation 1, item 1 in Docket No. 96-1730, addressing the safety-related charges, alleges that Fluor Daniel committed a serious violation of 29 C.F.R. § 1926.64(f)(4) by failing to develop and implement safe work practices to provide for the control of hazards during operations such as lockout/tagout. Citation 1, item 2 in Docket No. 96-1730 alleges that Fluor Daniel committed a serious violation of 29 C.F.R. § 1926.64(k)(2) by failing to maintain adequate hot work permits.

To establish a violation of an OSHA standard, the Secretary must show that (1) the standard applies, (2) the employer violated the terms of the standard, (3) its employees had access to the violative condition, and (4) the employer had actual or constructive knowledge of the violative condition. *E.g.*, *Gary Concrete Products, Inc.*, 15 BNA OSHC 1051, 1052, 1991-93 CCH OSHD ¶ 29,344, p. 39,449 (No. 86-1087, 1991). The Secretary has the burden of proving her case by a preponderance of the evidence. *E.g.*, *Astra Pharmaceuticals Prods.*, 9 BNA OSHC 2126, 2129, 1981 CCH OSHD ¶ 25,578, pp. 31,899-900 (No. 78-6247, 1981), *aff'd in pertinent part*, 681 F.2d 69 (1st Cir. 1982).

Regarding the first element of proof, section 1926.64 applies only to a process which involves “a chemical at or above the specified threshold quantities listed in Appendix A to

this section” or “a flammable liquid or gas . . . on site in one location, in a quantity of 10,000 pounds . . . or more.” 29 C.F.R. § 1926.64(a)(1)(i) & (ii). The Material Safety Data Sheets for phosgene introduced by both the Secretary and Fluor Daniel state that the gas is *not* flammable, and the Secretary does not contend otherwise on review. The question, therefore, is whether the Secretary showed that the process at issue involved a chemical at or above the specified threshold quantities (“TQ”) listed in Appendix A. The judge concluded that the Secretary “adduced no evidence” that Fluor Daniel or G.E. kept phosgene, or any other chemical listed in Appendix A, at or above the TQ. The TQ for phosgene is 100 pounds. Having reviewed the record, we agree with the judge that the Secretary has failed to make a prima facie showing that the process involved a chemical at or above the TQ, and she therefore has not established that the standard applies.

The Secretary relies on Smith’s statement that Fluor Daniel was engaged in a “covered process under the health and safety standards.” We disagree with the Secretary’s argument that Smith implicitly stated that the threshold quantity of phosgene was present simply because that is a predicate for the process to be “covered” under the standard. Neither Smith nor any other witness explicitly testified that there was at least 100 pounds of phosgene present at the Burkville facility, or cited any evidence that would support such a conclusion. CO Ralph testified that measurements taken after the May 22, 1996 release showed phosgene exposure levels between 0.3 and 0.5 parts per million, but the Secretary concedes that these measurements do not establish that phosgene was present at or above its threshold quantity. Nor has the Secretary introduced any documentary evidence stating the amount of phosgene present at the Burkville facility.

We also reject the Secretary’s argument that the amount of phosgene can be inferred from the physical characteristics of the facility. Although the Commission may draw reasonable inferences from the evidence, *Atlantic Battery Co.*, 16 BNA OSHC 2131, 2159, 1993-95 CCH OSHD ¶ 30,636, p. 42,475 (No. 90-1747, 1994), we do not think that the evidence in this case supports such an inference. The Secretary notes that G.E.’s resin plant

has several phosgene enclosures measuring approximately 14,000 cubic feet. However, the enclosures are not areas in which phosgene is stored. Rather, the enclosures are safety areas in which air is removed through “ventilation suction” and carried to scrubbers, which remove any phosgene that may be present. Therefore, it is not clear that the size of the phosgene enclosures indicates the amount of phosgene in the resin plant, or anywhere else in the Burkville facility. The Secretary also argues that “100 pounds of phosgene is clearly a small amount as it is less than that normally contained in a single cylinder of the compressed gas.”<sup>2</sup> She suggests that, on this basis, we may infer that the threshold quantity of phosgene was present at the Burkville facility. Even if 100 pounds is a “small amount” of phosgene, the Secretary has offered no proof that even this amount was present at the Burkville facility during the period covered by the citation. Accordingly, we conclude that the Secretary has not established, *prima facie*, that the standard applies.<sup>3</sup>

Because we find that the Secretary has not shown that section 1926.64 applied to the cited conditions, we vacate citation 1, item 2 in Docket No. 96-1729, and citation 1, items 1 and 2 in Docket No. 96-1730.

## *II. Alleged Violation of 29 C.F.R. § 1926.35*

Citation 1, item 1 in Docket No. 96-1729 alleges that Fluor Daniel committed a serious violation of 29 C.F.R. § 1926.35(b)(1)<sup>4</sup> because its emergency action plan does not

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<sup>2</sup>The Secretary cites 49 C.F.R. § 173.192(c)(1), a United States Department of Transportation regulation which limits the amount of phosgene in a cylinder to 150 pounds.

<sup>3</sup>In the absence of a *prima facie* showing of applicability, the Secretary’s arguments concerning the absence of “rebuttal” evidence are unavailing.

<sup>4</sup>Section 1926.35 provides, in pertinent part:

**§ 1926.35 Employee emergency action plans.**

....

(b) *Elements*. The following elements, at a minimum, shall be included in the plan:

address alternate evacuation routes. The judge found that Fluor Daniel is not required to address “alternate” evacuation routes in its emergency action plan, but she affirmed the citation based on her finding that Fluor Daniel’s emergency action plan failed to designate emergency escape route assignments.

As noted above, the first element that the Secretary must establish to prove a violation is that the cited standard applies. Section 1926.35 applies “to all emergency action plans required by a particular OSHA standard.” 29 C.F.R. § 1926.35(a). However, the standard does not, in itself, require an emergency action plan.<sup>5</sup> Although 29 C.F.R. § 1926.64(n) requires such an emergency action plan, we conclude, for reasons stated above, that the Secretary has failed to establish the applicability of that section. Moreover, in response to our supplemental briefing notice, the Secretary concedes:

There are no standards applicable to respondent’s operation at the cited workplace requiring it to have an emergency action plan, other than 29 C.F.R. § 1926.64. Thus, if the Commission finds that 29 C.F.R. § 1926.64 is inapplicable, 29 C.F.R. § 1926.35, specifying the criteria for emergency action plans required by another standard, is also inapplicable.

Because there was no “particular OSHA standard” which required that Fluor Daniel have an emergency action plan on or about May 22, 1996, we conclude that section 1926.35 did not apply to the company’s work at the Burkville facility. We therefore vacate citation 1, item 1 in Docket No. 96-1729.

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(1) Emergency escape procedures and emergency escape route assignments[.]

<sup>5</sup>In 1993, OSHA incorporated the general industry emergency action plan standard into the construction standards at 29 C.F.R. § 1926.35. 58 Fed. Reg. 35,076, 35,083 (1983). The preamble to the general industry emergency action plan standard provides that the standard “does not, by itself, require the employer to establish an emergency plan[;] [t]he section contains only the criteria to be followed in establishing emergency plans which are or which will be required by other specific OSHA standards.” 45 Fed. Reg. 60,656, 60,661 (1980).

### *III. Alleged Willful Violation of section 1926.103(a)(1)*

Citation 2, item 1 in Docket No. 96-1729 alleges that Fluor Daniel willfully violated 29 C.F.R. § 1926.103(a)(1) by failing to provide emergency respirators for employees working in the resin plant. The judge affirmed the violation and willful characterization. Fluor Daniel argues that the item should be vacated because it lacked fair notice of the standard's requirements due to the vagueness of the standard and because it was not cited during prior OSHA inspections. Fluor Daniel also argues, based on the same lack of prior citations, that the Secretary is estopped from citing it now under this standard. Finally, Fluor Daniel argues that the Secretary did not establish the violation.

For the following reasons, we agree with the judge's disposition.

#### *(A) Fair Notice*

At the time of the alleged violation, May 1996, 29 C.F.R. § 1926.103(a)(1) provided:<sup>6</sup>

In emergencies, or when controls required by subpart D of this part either fail or are inadequate to prevent harmful exposure to employees, appropriate respiratory protective devices shall be provided by the employer and shall be used.

Fluor Daniel argues that section 1926.103(a)(1) is a broadly worded standard, and that the reasonable employer test should be used to interpret it. We reject this argument. Phosgene was (and remains) a specifically regulated substance under Subpart D; more specifically, 29 C.F.R. § 1926.55 and its Appendix A provide clear notice that the respiratory protection standard applied to Fluor Daniel's facility. Moreover, the standard at section 1926.103(a)(1) plainly required the availability and use of respirators in emergencies or when engineering controls failed.

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<sup>6</sup>Section 1926.103 has since been amended to incorporate the general industry respiratory protection standard in 29 C.F.R. § 1910.134, as amended. 63 Fed. Reg. 1152, 1297 (1998).

In *Pride Oil Well Service*, 15 BNA OSHC 1809, 1813, 1991-93 CCH OSHD ¶ 29,807, p. 40,583 (No. 87-692, 1992), the Commission held that 29 C.F.R. § 1910.134(a)(2),<sup>7</sup> the general industry respiratory protection standard in effect at that time, was not vague and that, for this reason, the reasonable employer test was not needed to interpret and apply the standard. Although at the time of the alleged violation the language of section 1926.103(a)(1) was not exactly the same as that of section 1910.134(a)(2), it was similar to that of the latter standard, and arguably more precise. Therefore, based on *Pride Oil Well*, we conclude that section 1926.103(a)(1) is not unconstitutionally vague and that the reasonable employer test is not required to interpret and apply this standard.

Fluor Daniel also argues that it lacked fair notice of the requirements of section 1910.103 because OSHA inspectors failed to issue citations for deficiencies in its respiratory protection program during a 1991 OSHA compliance inspection and two subsequent Voluntary Protection Program (“VPP”) inspections at the Burkville facility. The record, however, does not establish that emergency respirators were addressed by any of those inspections. David Herrington, a member of Fluor Daniel’s corporate safety group, testified that the OSHA compliance inspection covered the resin plant, but he did not know this from first-hand experience because he was not working there at the time. Herrington did not indicate that emergency respirators were addressed at that inspection. As for the VPP inspections, Dennis Bowden, a Fluor Daniel manager at Burkville between 1985 and 1995, testified that he did not know whether emergency respirators were addressed then.

Even assuming that the respiratory protection program at the resin plant was discussed at those inspections, Fluor Daniel does not contend that OSHA personnel ever stated that respirators were unnecessary. It is well settled that OSHA’s failure to cite an employer during a previous inspection does not, in itself, constitute a lack of fair notice. *See, e.g., Peterson*

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<sup>7</sup>Section 1910.134(a)(2) provided in pertinent part that “[r]espirators shall be provided by the employer when such equipment is necessary to protect the health of the employee.”

*Brothers Steel Erection Co.*, 16 BNA OSHC 1196, 1201, 1993-95 CCH OSHD ¶ 30,052, pp. 41,300-01 (No. 90-2304, 1993), *aff'd on other grounds*, 26 F.3d 573 (5th Cir. 1994). We conclude, therefore, that Fluor Daniel had fair notice of the standard's requirements.

*(B) Estoppel Claim*

Fluor Daniel also argues that, based on the 1991 compliance inspection and the two VPP inspections, the Secretary is estopped from citing the company for a violation of section 1926.103(a)(1). In addition to the traditional elements of an estoppel claim, a party must show affirmative misconduct before estoppel can be applied against the government. *Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51 (1984). Here, Fluor Daniel produced no evidence of affirmative misconduct by OSHA personnel. There is no evidence that OSHA inspectors told Fluor Daniel that respirators were not needed in the resin plant. In fact, although Fluor Daniel claims that its safety and health programs "had been given specific approval on at least three prior occasions," it has not established that the company's respiratory protection program was evaluated during any of the three prior inspections.

Even a finding of affirmative misconduct would not, in itself, support an estoppel claim. Estoppel additionally requires a showing that the government's wrongful act will cause serious injustice, and the public's interest will not suffer undue damage if estoppel is imposed. *U.S. v. Ulysses-Salazar*, 28 F.3d 932, 937 (9th Cir. 1994), *cert. denied*, 514 U.S. 1020 (1995). Although Fluor Daniel claims that it will suffer severe injustice if estoppel is not applied, it does not cite any specific factors in support of this claim. Because Fluor Daniel has not shown that serious injustice would result if estoppel were not applied, nor any affirmative misconduct by the Secretary, we reject the company's estoppel arguments.

*(C) Violation of Section 1926.103(a)(1)*

Section 1926.103(a)(1) stated that respirators "shall be provided" in "emergencies," or when engineering controls "either fail or are inadequate to prevent harmful exposure to employees." Fluor Daniel concedes that it did not provide emergency respirators for

employees in the resin plant. It argues, however, that such respirators were unnecessary because of the engineering controls, evacuation plan, and other safety features at the Burkville facility. Fluor Daniel also argues that respirators were not required because “[t]he evacuation plan was the most expeditious remedy” in an emergency.

Fluor Daniel fails to address the unequivocal command of the standard that respirators “shall be provided” in emergencies. Fluor Daniel does not argue that the May 22, 1996 phosgene release was not an emergency, or that an emergency was not reasonably foreseeable. The fact that G.E. provided emergency respirators for its own employees should have alerted Fluor Daniel to the possibility of an emergency requiring the use of respirators. Fluor Daniel’s presence at the Burkville facility in 1991, when there was a chlorine release, also indicates that it could have foreseen an emergency involving a hazardous gas. Corporate safety group member Herrington acknowledged the possibility of an accident involving phosgene, testifying that “[p]ossibly, we could have anticipated a problem occurring” during the phosgene purging process. There are also reasons to believe that the engineering controls at the resin plant were not as effective as Fluor Daniel claims, as indicated by the May 22, 1996 phosgene exposure of eleven Fluor Daniel employees. Finally, Fluor Daniel’s argument that emergency respirators were not required because “[t]he evacuation plan was the most expeditious remedy” ignores the possibility that, in an emergency, not all employees would have been able to evacuate expeditiously. This argument is also irrelevant under the standard. Based on the above, we find that the standard applied, its terms were violated, employees had access to the hazard, and Fluor Daniel had knowledge of the cited conditions. We therefore conclude that the Secretary has established a violation of section 1926.103(a)(1).

*(D) Willfulness*

A violation is willful when it is committed with “intentional, knowing, or voluntary disregard for the requirements of the Act or with plain indifference to employee safety.” *Valdak Corp.*, 17 BNA OSHC 1135, 1136, 1993-95 CCH OSHD ¶ 30,759, p. 42,740 (No. 93-239, 1994), *aff’d* 73 F.3d 1466 (8th Cir. 1996). “A willful violation is differentiated by

a heightened awareness -- of the illegality of the conduct or conditions -- and by a state of mind -- conscious disregard or plain indifference.” *Williams Enterprises*, 13 BNA OSHC 1249, 1256-57, 1986-87 CCH OSHD ¶ 27,893, p. 36,589 (No. 85-355, 1987). A finding of willfulness is not justified where the employer had an objectively reasonable good faith belief that its workplace conformed to OSHA requirements, *Morrison-Knudsen Co./Yonkers Contracting Co.*, 16 BNA OSHC 1105, 1124, 1993-95 CCH OSHD ¶ 30,048, p. 41,281 (No. 88-572, 1993), or where the employer made a good faith effort to comply with the OSH Act’s requirements. *Tampa Shipyards, Inc.*, 15 BNA OSHC 1533, 1541, 1991-93 CCH OSHD ¶ 29,617, p. 40,104 (No. 86-360, 1992).

The judge found that Fluor Daniel willfully violated section 1926.103(a)(1) because it “substituted its own judgment for that of the Act.” We agree with the judge’s willful characterization. Fluor Daniel, through Herrington, a member of its corporate safety group,<sup>8</sup> had a heightened awareness of the hazard in not providing emergency respirators. Herrington testified as follows. From 1989 to 1990, when he was project safety manager for the Burkville facility, he was aware that G.E. provided emergency respirators for its own employees, but not for Fluor Daniel employees. Herrington expressed concern to Joe Jackson, G.E.’s plant manager, about a “double standard for employee safety, contractor employees versus plant personnel.”<sup>9</sup> Herrington requested emergency respirators for approximately 2,000 Fluor Daniel employees who were being brought in at that time.

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<sup>8</sup>The willful state of mind of a supervisor may be imputed to his or her employer. *E.g.*, *Access Equipment Systems*, 18 BNA OSHC 1718, 1727, 1999 CCH OSHD ¶ 31,821, p. 46,782 (No. 95-1449, 1999).

<sup>9</sup>Although at the hearing Fluor Daniel sought to establish that G.E. employees were provided emergency respirators only because they would have containment duties in the event of an emergency, on cross examination Fluor Daniel manager Bowden acknowledged that even G.E. employees without containment duties had access to emergency respirators. G.E.’s policy was thus known to Bowden, who held various management positions at the Burkville facility between 1985 and 1995.

Following extensive discussion between Herrington and Jackson, the decision was made not to provide Fluor Daniel employees with emergency respirators. Herrington testified, “The bottom line was that, in the event of an emergency, Fluor Daniel personnel were to immediately evacuate the area. . . [a]nd therefore, it was not justified or warranted to provide those rescuers for contractor personnel.”

We conclude that Fluor Daniel’s reliance on its evacuation policy was knowingly and obviously inadequate. We agree with Judge Spies, who found:

Evacuation is not a substitution for the use of respirators; employees using emergency respirators would receive additional protection *while* evacuating the hazardous area. This fact has heightened significance in the present case, where some employees were delayed during evacuation because of confusion regarding the location of their muster stations.

(Emphasis in original).<sup>10</sup>

Fluor Daniel argues in its initial brief on review that the concern Herrington expressed to Jackson about a “double standard” is distinguishable from an intentional disregard of an OSHA standard. Even if that were the case, Herrington’s testimony nonetheless shows plain indifference to employee safety. Fluor Daniel was not merely aware that its employees did not have access to respirators; Fluor Daniel deliberately focused its attention on the issue of whether to provide its employees with respirators. Despite this level of awareness regarding respirator access, Fluor Daniel chose to deprive its employees of this prescribed protection. Fluor Daniel’s deliberate decision not to take basic measures to help employees protect themselves shows plain indifference to employee safety and supports a finding that the violation was willful. *See Anderson Excavating and Wrecking Co.*, 17 BNA OSHC 1890, 1892, 1995-97 CCH OSHD ¶ 31,228, p. 43,789 (No. 92-3684, 1997), *aff’d*, 131 F.3d 1254 (8th Cir. 1997) (*per curiam*).

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<sup>10</sup>Moreover, the material safety data sheet for phosgene that Fluor Daniel introduced into evidence and claimed was used by its employees states that “[r]espirators must be available nearby . . . for emergencies.”

We also reject Fluor Daniel's asserted "good faith" defense to willfulness. Fluor Daniel's claim that emergency respirators were unnecessary based on its history does not address its obligation to provide respirators in emergencies or in the event that engineering controls failed or were inadequate. Moreover, Fluor Daniel could not have had an objectively reasonable good faith belief that its employees, who were working in close proximity to highly hazardous gases and at a facility where there had been a prior emergency involving the release of chlorine, might not face an emergency requiring the use of respirators. We also note that Fluor Daniel made no effort to seek a variance from the clear requirements of the standard. In these circumstances, we conclude that Fluor Daniel's violation of section 1926.103(a)(1) was willful.

*(E) Penalty*

In determining an appropriate penalty, we must consider the size of the employer, the gravity of the violation, the good faith of the employer, and the history of previous violations. Section 17(j) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 666(j). Fluor Daniel is a large corporation, with tens of thousands of employees, and approximately 200 employees at the cited facility. The engineering controls and other safety features at the Burkville facility may have reduced the probability that employees would be exposed to phosgene, but the gravity of the respiratory protection violation was high because, as the record established, phosgene exposure can cause serious injury or death. We accord no credit for good faith where Fluor Daniel had no reasonable basis to conclude that respirators were unnecessary and decided not to provide them for its employees. Fluor Daniel does not claim any credit for its compliance history. Although Compliance Officers Ralph and Smith generally testified that Fluor Daniel has a history of serious citations, there is no specific evidence in the record concerning the citations. Based on these factors, especially the high gravity, we assess, as the judge did, a penalty of \$30,000 for the willful violation of section 1926.103(a)(1).

**Order**

We vacate citation 1, items 1 and 2, in Docket No. 96-1729; and citation 1, items 1 and 2, in Docket No. 96-1730. We affirm citation 2, item 1, in Docket No. 96-1729, and assess a penalty of \$30,000 for this willful violation.

*/s/*  
Thomasina V. Rogers  
Chairman

*/s/*  
Ross Eisenbrey  
Commissioner

Date: September 21, 2001

Secretary of Labor,  
Complainant,

v.

OSHRC Docket Nos.

Fluor Daniel,  
Respondent.

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96-1729 & 96-1730  
(Consolidated)

Appearances:

Carla J. Gunnin, Esquire  
U. S. Department of Labor  
Office of the Solicitor  
Birmingham, Alabama  
For Complainant

David R. Wylie, Esquire  
Haynesworth, Baldwin, Johnson & Graves  
Greenville, South Carolina  
For Respondent

Before: Administrative Law Judge Nancy J. Spies

***DECISION AND ORDER***

Fluor Daniel contests citations issued to it by the Secretary on November 20, 1996. The Secretary issued the citations following inspections of one of Fluor Daniel's worksites by Occupational Safety and Health Administration (OSHA) compliance officers James J. Ralph and Brian R. Smith, beginning on May 23, 1996.

Ralph conducted the health inspection. The Secretary issued two citations as a result of his inspection, under Docket No. 96-1729. Citation No. 1, Item 1, alleges a serious violation of § 1926.35(b)(1) for failure to include emergency escape procedures and route assignments in its emergency action plan. Item 2 of Citation No. 1 alleges a serious violation of § 1926.64(h)(3)(iii) for failure to document employee training. Citation No. 2, item 1, alleges a willful violation of § 1926.103(a)(1) for failure to provide appropriate respiratory devices for its employees.

Smith conducted the safety inspection. The Secretary issued one citation as a result of Smith's inspection, under Docket No. 96-1730. Item 1 of Citation No. 1 alleges a serious violation of § 1926.64(f)(4) for failure to develop and implement safe work practices to provide for the control of hazards. Item 2 of Citation No. 1 alleges a serious violation of § 1926.64(k)(2) for failure to maintain adequate hot work permits.

Background

The worksite at issue is a manufacturing facility, owned and operated by General Electric (G.E.), in Burkville, Alabama. G.E.'s facility produces a number of products, including Lexan, a high-impact polycarbonate resin (Tr. 309). The facility sits on approximately 6,000 acres of land, and comprises five separate plants where various manufacturing processes take place (Tr. 284). The plant at issue is designated as plant 2, or the "resin plant." The resin plant is a six-story open-sided structure, measuring approximately 100 feet wide and 400 feet long. The second floor mezzanine is an open structure similar to a balcony (Tr. 285-286).

Fluor Daniel is a contract employer at G.E.'s Burkville facility. Fluor Daniel had several hundred employees at the facility, engaged in the demolition of old structures, modifications of existing structures, installation of new equipment, and the construction of various improvements to the building and property. None of these functions was directly related to the production of products for G.E. (Tr. 355, 374-377).

On May 22, 1996, several Fluor Daniel employees were working on the second floor mezzanine of the resin plant, installing a heat exchanger to the caustic scrubber system. The night before, G.E. operations personnel had begun a nitrogen-purging procedure for the process scrubber sump tank, located on the first floor. Fluor Daniel was unaware that the nitrogen-purging procedure was underway. Small amounts of nitrogen purge gas and phosgene vapors back-flowed and vented through the caustic line where the Fluor Daniel's employees were working (Tr. 26-27, 375-379).

When the phosgene leak was detected, the Fluor Daniel employees evacuated the resin plant. Eleven of the Fluor Daniel employees who were working in the immediate area of the leak were examined by the G.E. medical staff at G.E.'s on-site medical facility. The medical staff sent the 11 Fluor Daniel employees to a local hospital where they were examined and treated. Eight of the employees were kept overnight for observation and released the next day (Tr. 354).

OSHA assigned compliance officers Ralph and Smith to investigate the release of the phosgene gas. Ralph was also assigned to investigate an employee complaint relating to the resin plant (Tr. 12). Subsequently, the Secretary issued the citations that gave rise to the hearing and this decision.

**Docket No. 96-1729**

**Citation No. 1**

**Item 1: Alleged Serious Violation of § 1926.35(b)(1)**

The Secretary alleges a serious violation of § 1926.35(b)(1), which provides:

The following elements, at a minimum, shall be included in the plan:

- (1) Emergency escape procedures and emergency escape route assignments.

The citation alleges that Fluor Daniel's emergency action plan:

did not address alternate evacuation routes:

- (a) For employees that are required to evacuate the Phosgene/Resin Plant due to releases of toxic gas/chemical substances such as, but not limited to, phosgene.

At the outset, it is noted that the citation adds a requirement not found in the standard. The citation alleges that Fluor Daniel's emergency action plan failed to address "alternate" evacuation routes. Section 1926.35(b)(1) says nothing about alternate routes; the standard requires that the plan include emergency escape procedures and route assignments. The Secretary may not impose an additional requirement on the employer. If Fluor Daniel's action plan meets the terms of § 1926.35(b)(1), as worded, the company will prevail despite the absence of "alternate" evacuation routes in its plan.

The Secretary has the burden of proving the violation:

In order to establish a violation of an occupational safety or health hazard, the Secretary has the burden of proving: (a) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, (c) employee access to the violative conditions, and (d) the employer's actual or constructive knowledge of the violation (*i.e.*, the employer either knew or, with the exercise of reasonable diligence could have known, of the violative conditions).

*Atlantic Battery Co.*, 16 BNA OSHA 2131, 2138 (No. 90-1747, 1994).

The only element in dispute is (b): the employer's compliance or noncompliance with the standard's terms.

Compliance officer Ralph identified Exhibit C-1 as Fluor Daniel's emergency action plan, and stated that it was "not specific in terms of routes to be taken to muster stations. It talks about muster stations -- go to their assigned muster stations -- but it is not explicit" (Tr. 191). Muster stations are safe areas where employees report during an evacuation. Exhibit C-1 is a one-page document on Fluor Daniel's letterhead. It states in pertinent part (Exhibit C-1):

## EVACUATION PROCEDURE

In the event of any emergency alarm, G.E. Policy is to muster. We have a muster station located in each plant. All Fluor Daniel employees and subcontractors are instructed to go to their assigned muster station and there will be a G.E. Project Tech there to direct them on what procedure they are to do next . . . .

Ralph testified that “apparently in the resin phosgene plant, during the occurrence of the incident, there was some question as to whether or not all the employees of Fluor Daniel were aware of exactly where they should be going in order to muster” (Tr. 15). When pressed about the basis for this testimony, Ralph became vague (Tr. 33-40). Ralph appeared confused and uncertain regarding the primary employee interview on which he relied as the basis for recommending the issuance of a citation (Tr. 77-80). His testimony was, however, undisputed.

Fluor Daniel contends that Exhibit C-1 is merely a summary of its evacuation procedure. The company introduced Exhibit R-9, a document entitled “Fluor Daniel Site Specific Emergency and Evacuation Procedures, Project 2388, GE Burkville, AL.” David Herrington, one of Fluor Daniel’s safety managers, testified that Exhibit R-9 was a copy of the emergency action plan that Fluor Daniel followed at the time of the May 22 phosgene release (Tr. 320, 338).

Fluor Daniel’s emergency action plan provides (Exh. R-9, p. 2):

### Contractor Muster Stations

Each operation has identified a Contractor Muster Station. This is the location to which all contractor personnel are to report should the site alarm for toxic gas or fire be sounded. Fluor Daniel personnel are to wait here for further instructions from Fluor Daniel Safety Department.

## TOXIC GAS RELEASE

Should the Toxic Gas alarm sound, every Fluor Daniel employee on site is to:

1. Secure their work areas quickly by shutting down engines, welding machines, etc.
2. Check wind direction by observing the nearest windsock.
3. Proceed to their designated muster station by moving upwind or crosswind, depending on their location in

relation to the Brine Recovery or Resin/Phosgene Operations.

G.E.'s written orientation outline (Exh. R-10, p. 6-9) contains the same type of general information. Herrington testified that Fluor Daniel employees receive extensive orientation and training when they begin employment at the Burkville facility, which includes "evacuation routes, policies and procedures" (Tr. 340). Nowhere in the written orientation outline or in the written emergency action plan, however, does Fluor Daniel designate emergency escape route assignments. Section 1926.35(a) mandates that the emergency action plan "be in writing." The oral instruction provided by Fluor Daniel is insufficient to meet the requirements of the standard. The plan must be in writing to ensure consistency in the training provided to the employees. It must also have sufficient specificity to be meaningful. The Secretary presented evidence, slight but unrefuted, that Fluor Daniel's employees were confused about where their muster stations were located.

The Secretary has established a violation of § 1926.35(b)(1). The failure of Fluor Daniel to comply with the terms of the standard exposed its employees to the effects of hazardous chemicals, including phosgene. Overexposure to phosgene could lead to severe respiratory problems and death (Exh. C-5; Tr. 17). The violation was serious.

Item 2: Alleged Serious Violation of § 1926.64(h)(3)(iii)

The Secretary alleges a serious violation of § 1926.64(h)(3)(iii), which provides:

The contract employer shall document that each contract employee has received and understood the training required by this paragraph. The contract employer shall prepare a record which contains the identify of the contract employee, the date of the training, and the means used to verify that the employee understood the training.

Section 1926.64 covers "Process safety management of highly hazardous chemicals." Section 1926.64(a)(1)(i) provides that the standard applies to:

A process which involves a chemical at or above the specified threshold quantities listed in Appendix A to this section[.]

Appendix A to § 1926.64 lists the Threshold Quantity in Pounds (TQ) for phosgene (also called carbonyl chloride) to be 100 pounds.

Nowhere in the record does the Secretary advance any evidence or testimony regarding the amount of phosgene at the Burkville facility. The Secretary introduced a Material Safety Data Sheet

(MSDS) for phosgene, supplied by G.E. (Exh. C-5; Tr. 229-230). The MSDS is highlighted in some places where it refers to Reportable Quantities and TQs, and it contains two handwritten questions (Exh. C-5, p. 3): “1. How much Phosgene on site? 2. Storage location?” Neither of these anonymous questions is answered on the MSDS, in the other exhibits adduced by the Secretary, or by either of the two witnesses (Ralph and Smith) called by the Secretary.

The first element of the Secretary’s burden of proof is the applicability of the cited standard. By its own terms, § 1926.64 does not apply to a process using phosgene unless the process involves at least 100 pounds of phosgene. Absent evidence of the amount of phosgene at the Burkville site, the Secretary has failed to demonstrate the applicability of § 1926.64(h)(3)(iii) to Fluor Daniel’s worksite.

The only evidence submitted by the Secretary regarding measurements of phosgene referred to atmospheric tests that measured the airborne concentration of phosgene. Ralph testified that the phosgene leak resulted in an “estimated employee exposure level in the range of 0.3 to 0.5 parts per million [ppm] of phosgene” (Tr. 19). Ralph testified that exposure to phosgene in the amount of 2 to 5 ppm is considered hazardous to humans (Tr. 20). The Secretary provided no method for correlating the airborne concentration of phosgene (which was below the concentration considered hazardous) to the amount of phosgene located at the worksite.

The Secretary has failed to establish that § 1926.64(h)(3)(iii) applies to Fluor Daniel’s worksite. Item 2 is vacated.

## **Citation No. 2**

### **Item 1: Alleged Willful Violation of § 1926.103(a)(1)**

Section 1926.103(a)(1) provides:

In emergencies, or when controls required by subpart D of this part either fail or are inadequate to prevent harmful exposure to employees, appropriate respiratory protective devices shall be provided by the employer and shall be used.

The citation alleges that Fluor Daniel “did not provide emergency escape respirators for employees working in the Phosgene/Resin Plant.” It is undisputed that neither Fluor Daniel nor G.E. provided Fluor Daniel’s employees with emergency escape respirators (Tr. 52).

### **Equitable Estoppel**

Fluor Daniel raises the preliminary issue of equitable estoppel, claiming that it did not have fair notice that it was violating § 1926.103(a)(1). OSHA inspected the Burkville facility in 1991 in response to a complaint about respiratory protection compliance, and did not cite Fluor Daniel or G.E. for violations of the relevant standards (Tr. 270, 282). OSHA also conducted two “Voluntary Protection Program” (VPP) reviews of G.E.’s Burkville facility and did not advise the company to obtain respirators.<sup>11</sup>

Equitable estoppel is an affirmative defense. Both parties cite *Miami Indus., Inc.*, 15 BNA 1258 (No. 88-671, 1991) in support of their arguments. In *Miami Indus.*, the employer relied on statements made 10 years previously by an OSHA compliance officer who expressly approved a method of machine guarding devised by the employer. Based on the absence of citations for machine-guarding violations over a period of 10 years *and* the express approval of the OSHA compliance officer whom Miami consulted regarding its machine guard, the Review Commission found that Miami reasonably relied on the Secretary’s previous conduct so as to estop the Secretary from citing Miami for inadequate machine guarding.

*Miami Indus.* is distinguishable from the present case. The Secretary did not cite Fluor Daniel during its 1991 inspection (which involved chlorine respirators in a plant other than the one at issue) and did not comment negatively during the VPP reviews, but the Secretary made no positive statements nor gave express approval to Fluor Daniel’s lack of respirators in the resin plant. The Review Commission in *Miami Indus.* is emphatic that it “in no way retreat[s] from [its] position that simple failure to issue a citation alleging a violation of a particular standard does not *in itself* establish that OSHA considers the employer to be in compliance with that standard.” *Id* at 1264 (emphasis in original).

#### Violation of the Standard

As noted previously, there is no dispute that Fluor Daniel did not provide emergency escape respirators to its employees. G.E. had been providing all employees at its Burkville facility with chlorine respirators. In 1994, G.E. informed Fluor Daniel that it would no longer provide the

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<sup>11</sup> OSHA’s VPP (voluntary protection program) designates worksites which have “programs . . . for preventing or controlling occupational hazards. The systems not only ensure that OSHA’s standards are met, but go beyond the standards to provide the best feasible protection at that site” 53 Fed Reg. 26339, 26341 (1988). Even though VPP may be stringent, there is no implied acceptance by OSHA of each condition on VPP sites.

respirators (Exh. R-5; Tr. 267-269). Fluor Daniel considered providing its employees with respirators, but decided against it. Herrington explained Fluor Daniel's rationale (Tr. 322):

[T]he bottom line was that, in the event of an emergency, Fluor Daniel personnel were to immediately evacuate the area. And, therefore, it was not justified or warranted to provide those rescuers for contractor personnel. And G.E. indicated to us at that time that they would not do so.

Herrington attempted to justify Fluor Daniel's decision to ignore the requirements of § 1926.103(a)(1) (Tr. 322-323):

[I]n the 21-year history of the two facilities, Mount Vernon [Indiana] and Burkville, and the millions of employee hours worked, there has not been one incident that required the use of an air pack rescuer at both those facilities. The established systems and procedures put in place to protect both G.E. employees' safety and health and contractor personnel have worked, and musters and drills and assembly actions when they have occurred.

So, in the 21-year history of the two plants, there has not been one incident where an air pack rescuer was used in an emergency situation, even by G.E.; nor to my knowledge has there been one incident where a contractor employee, specifically a Fluor Daniel employee, who has worked at both sites, where there has been medical treatment required for an injury as a result of a chemical exposure.

So based on that information, the proof is in the results. The decision was made, you know, that the policy was appropriate.

There are a number of flaws with this rationalization. Herrington claims that there have been no instances where an employee has used an air pack rescuer in an emergency situation. The point of the citation is, however, that there were no respirators available to be used. Herrington also claims that there has never been an incident "where there has been medical treatment required for an injury as a result of a chemical exposure." Yet, the record establishes that in this case, 11 of Fluor Daniel's employees were treated at a hospital as a result of their exposure to phosgene vapors, and 8 of them were kept overnight in the hospital for observation.

The Secretary has established a violation of § 1926.103(a)(1). The standard applies to Fluor Daniel's worksite; Fluor Daniel did not provide the required respirators to its employees; its employees were exposed to hazardous chemical vapors; and Fluor Daniel knew of the violative conditions.

### Willfulness

The Secretary alleges that Fluor Daniel's violation of § 1926.103(a)(1) was willful.

A willful violation of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act"), is one committed with an "intentional, knowing or voluntary disregard for the requirements of the Act or with plain indifference to employee safety." *L. E. Myers*, 16 BNA OSHC 1037, 1046, 1993-95 CCH OSHD ¶ 30,016, p. 41,132 (No. 90-945, 1993) (quoting *Williams Enterp.*, 13 BNA OSHC 1249, 1256, 1986-87 CCH OSHD ¶ 27,893, p. 36,589 (No. 85-355, 1987)). "It is differentiated from other types of violations by a 'heightened awareness -- of the illegality of the conduct or conditions -- and by a state of mind -- conscious disregard or plain indifference.'" *General Motors Corp., Electro-Motive Div.*, 14 BNA OSHC 2064, 2068, 1991-93 CCH OSHD ¶ 29,240, p. 39,168 (No. 82-630, 1991) (consolidated). A violation is not willful if an employer had a good faith belief that the violative condition conformed to the requirements of the Act. The test of good faith is an objective one, that is, "whether the employer's belief concerning the factual matters in question was reasonable under all of the circumstances." *Morrison-Knudsen Co./Yonkers Contracting Co.*, 16 BNA OSHC 1105, 1124, 1993-95 CCH OSHD ¶ 30,048, p. 41,281 (No. 88-572, 1993).

*Pentecost Contracting Corp.*, 17 BNA OSHC 1953, 1955 (No. 92-3788, 1997).

The Secretary has established a willful violation of § 1926.103(a)(1). Herrington, a member of Fluor Daniel's corporate safety group, testified that Fluor Daniel considered providing respirators to its employees in compliance with the standard, but then decided against it because of its evacuation policy. Fluor Daniel substituted its own judgment for that of the Act. The Eleventh Circuit has considered "willfulness" in a similar context in *Trinity Indus. Inc.*, 16 F.3d 1149, 1154(11th Cir. 1994). Trinity implemented a hearing conservation program which intentionally did not comply with the standard because, in its opinion, its own program was superior. In finding the violation willful, the court held any alleged superiority irrelevant to the issue. The existence of the standard forecloses discretion on the part of an employer "to decline compliance and proceed with an alternative program." *Id.* Fluor Daniel's failure to provide respirators to its employees was not an oversight. Rather it came after a considered debate on the subject when G.E. determined it would no longer supply the contractor's employees with respirators. As Herrington stated, "The decision

was made, you know, that the policy was appropriate” (Tr. 323). Fluor Daniel did not seek a variance for the standard.

Fluor Daniel did not have a good faith belief that its implementation of an evacuation policy in lieu of providing respirators conformed to the requirements of § 1926.103(a)(1). Evacuation is not a substitution for the use of respirators; employees using emergency respirators would receive additional protection *while* evacuating the hazardous area. This fact has heightened significance in the present case, where some employees were delayed during evacuation because of confusion regarding the location of their muster stations. Fluor Daniel demonstrated a voluntary disregard for the requirements of the standard. The violation was willful.

**Docket No. 96-1730**

**Citation No. 1**

**Items 1 and 2: Alleged Serious Violations of § 1926.64(f)(4) and (k)(2)**

The Secretary alleges serious violations of § 1926.64(f)(4) and (k)(2), which provide:

(f)(4) The employer shall develop and implement safe work practices to provide for the control of hazards during operations such as lockout/tagout; confined space entry; opening process equipment or piping; and control over entrance into a facility by maintenance contractor, laboratory, or other support personnel. These safe work practices shall apply to employees and contractor employees.

...

(k)(2) The permit shall document that the fire prevention and protection requirements in 29 CFR 1926.352 have been implemented prior to beginning the hot work operations; it shall indicate the date(s) authorized for hot work; and identify the object on which hot work is to be performed. The permit shall be kept on file until completion of the hot work operations.

As noted under item 2 of Citation No. 1, Docket No. 96-1729, § 1926.64 applies only to processes which involve certain specified quantities of chemicals. The Secretary adduced no evidence that Fluor Daniel or G.E. kept phosgene, or any other chemical listed in Appendix A to § 1926.64, at or above the TQ. Accordingly, the Secretary has failed to establish that § 1926.64(f)(4) or (k)(2) apply to Fluor Daniel’s worksite. Items 1 and 2 are vacated.

**PENALTY DETERMINATION**

The Commission is the final arbiter of penalties in all contested cases. Under § 17(j) of the Act, in determining the appropriate penalty, the Commission is required to find and give “due consideration” to (1) the size of the employer’s business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the history of previous violations. The gravity of the violation is the principal factor to be considered.

Fluor Daniel is a large international corporation employing thousands of employees. It had more than 250 employees at the Burkville facility alone (Tr. 50). Fluor Daniel has a history of previous violations (Tr. 50). The Secretary presented no evidence of bad faith. Fluor Daniel had active safety and accident prevention programs (Exhs. R-7 through R-9).

The gravity of the violation of § 1926.35(b)(1) (item 1 of Citation No. 1, Docket No. 96-1729) is moderate to high. Fluor Daniel had an emergency action plan and trained its employees in evacuation procedures. However, when a chemical leak did occur, some of Fluor Daniel’s employees were confused about the correct evacuation route, which may have resulted in more exposure to the airborne concentrations of phosgene than was necessary. A penalty of \$2,500.00 is assessed.

No credit for good faith can be afforded for the willful violation of § 1926.103(a)(1) (item 1 of Citation No. 1, Docket No. 96-1729). *Caterpillar Inc.*, 17 BNA OSHC 1731, 1734 (No. 93-373, 1996). Failure to provide emergency respirators to its employees could result in overexposure to hazardous chemical vapors. While the exact number of Fluor Daniel’s employees who should have had access to respirators is unknown, 11 employees were involved in the May 22, 1996, incident. The probability of an accident occurring (a consideration for gravity) is not as high as the Secretary suggests in reaching her recommended penalty. The emergency warning system and the additional engineering controls in place in the Burkville plant lessened the chances that a chemical leak could occur and cause harm. When all circumstances surrounding the occurrence of the violation are weighed, the recommended penalty is determined to be excessive. A penalty of \$30,000 is appropriate for the willful violation and is assessed.

#### FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

#### ORDER

Based upon the foregoing decision, it is hereby ORDERED:

1. Item 1 of Citation No. 1, Docket No. 96-1729, is affirmed, and a penalty of \$2,500.00 is assessed.
2. Item 2 of Citation No. 1, Docket No. 96-1729, is vacated, and no penalty is assessed.
3. Item 1 of Citation No. 2, Docket No. 96-1729, is affirmed and a penalty of \$30,000.00 is assessed.
4. Item 1 of Citation No. 1, Docket No. 96-1730, is vacated and no penalty is assessed.
5. Item 2 of Citation No. 1, Docket No. 96-1730, is vacated and no penalty is assessed.

Date: March 13, 1998

/s/  
NANCY J. SPIES  
Judge