SECRETARY OF LABOR, Complainant, v. MONTGOMERY KONE, INC., and PARSONS BRINCKERHOFF CONSTRUCTION SERVICES, INC., Respondents.	OSHRC Docket Nos. 97-1133 & 97-1135

DECISION

Before: ROGERS, Chairman; and VISSCHER, Commissioner.

BY THE COMMISSION:

When the United States Postal Service decided to renovate and refurbish the Thirtieth Street Post Office in Philadelphia, it entered into contracts with a number of contractors to perform various construction activities. One contractor was Parsons Brinckerhoff Construction Services, Inc., which was hired as construction manager. Another was Montgomery KONE, Inc. ("Montgomery KONE"), an elevator company based in Illinois, which entered into a contract to modernize the elevators in the Post Office complex. Montgomery KONE was refurbishing a hydraulic freight elevator at the Post Office's truck terminal annex when an explosion occurred in the elevator pit, injuring two of its employees. A compliance officer of the Occupational Safety and Health Administration ("OSHA") investigated the accident, and the Secretary of Labor issued citations to Montgomery KONE and to Parsons Brinckerhoff Construction Services, Inc. Both companies contested the

citations, and the two cases were consolidated for a hearing before an administrative law judge of this Commission. The judge's decision has been directed for review pursuant to 29 U.S.C. § 661(j), section 12(j) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act").[1]

Docket No. 97-1133

Background

Two of the elevators that were to be modernized under the contract were hydraulic freight elevators in the truck terminal annex. They were located side by side and shared a common elevator shaft and elevator pit, separated only by metal beams. Montgomery KONE had already completed work on one of the elevators, which was back in service, and had taken out the second elevator car, which was known as elevator number one.

The subbasement of the truck terminal annex, in which the elevator pit for these elevators was located, was about fifteen feet below ground level. The floor of the elevator pit in which the employees were working was approximately five feet below the floor of the subbasement and measured approximately 12 feet by 18 feet. It was entered and exited by means of a ladder. According to the record, there were up to four ladders in the pit at one time: (1) a permanent metal ladder affixed to the wall, (2) a wooden "A-frame" ladder, (3)

[1]The judge's decision addressed the citations issued to both employers. When the direction for review was entered, however, the issue that was directed for review involved only Montgomery KONE. No issue involving Parsons Brinckerhoff Construction Services, Inc., Docket No. 97-1135, was specified or briefed. We therefore now sever the two cases pursuant to Rule 10 of the Commission's Rules of Procedure, 29 C.F.R. § 2200.10, and vacate the direction for review in Parsons Brinckerhoff Construction Services, Inc., Docket No. 97-1135. Because the Commission has not reviewed the administrative law judge's decision as to any issues presented by that case, the decision as to Docket No. 97-1135 is accorded the precedential value of an unreviewed judge's decision and does not constitute precedent binding on the Commission. *Leone Constr. Co.*, 3 BNA OSHC 1979, 1975-76 CCH OSHD ¶ 20,387 (No. 4090, 1976).

a six-foot fiberglass ladder, and (4) an orange extension ladder which was leaning against one wall of the elevator shaft. Access to the permanent metal ladder was blocked by cylinders, and the wooden ladder was damaged in the explosion.[2] From the testimony and exhibits, it appears that, to get out of the elevator pit, Montgomery KONE's employees had to climb the extension ladder and step off it to the side onto the subbasement floor.

Hydraulic elevators are raised and lowered by a piston, or "jack," that operates on hydraulic fluid. The jack in this case is housed in a vertical shaft that extends approximately 70 feet below the floor of the elevator pit. At the time in question, Montgomery KONE had already removed the old jack from its shaft. After a drilling company had rebored the shaft, enlarging it to a thirty-inch diameter, and had installed a metal liner, Montgomery KONE began the installation of a PVC liner. The purpose of the liner was to keep moisture from the jack and prevent corrosion, which could lead to elevator failure. The liner would also contain any hydraulic fluid that might leak from the jack and contaminate the soil.

The PVC liner extended to the bottom of the seventy-foot shaft. The liner came in sections that had to be connected together using a primer and a cement. First, a cap was attached to one end of the first section and allowed to cure, then the first and second sections were glued together and allowed to cure. Eventually, all four sections were connected, so the liner was two feet in diameter, seventy feet long, and had one closed end, which would go into the bottom of the hole. When the entire PVC liner was glued and cured, it was lowered into the hole to be stored while the next step, assembling the steel jack cylinder, was performed.

During the week after the PVC liner was assembled, the sections of the steel jack cylinder were assembled and a welding contractor welded the joints to seal them in order to

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[2]It appears that the fiberglass ladder was not in the elevator pit at the time of the explosion.

keep out water and keep in hydraulic fluid. Early the following week, Montgomery KONE's employees wrapped a rubberized material around the welded joints of the jack cylinder and used a torch to "shrink-wrap" them. Once the jack cylinder had been completely assembled, welded, and wrapped, it was lowered into the PVC liner, and the two cylinders were joined together at the top with a victaulic coupling. When one of the two employees in the pit lit a welding torch to weld a bolt to the assembly, the explosion occurred.

We find from this record that a welding arc ignited heavier-than-air vapors from the primer and PVC cement that had accumulated in the elevator pit proper after they were displaced from the shaft. The ingredients of the primer and cement used to connect the sections of the PVC liner included tetrahydrofuran and methyl ethyl ketone, both of which are flammable. Vapors from these substances are approximately 2½ times as heavy as air. It appears that the heavier-than-air vapors settled into the bottom of the PVC liner even though the Montgomery KONE employees who worked in the elevator pit had made efforts to remove them, including using an exhaust fan to suck out the air in the elevator pit and blowing compressed air into the PVC cylinder to "purge" it. Unfortunately, because of the weight of the flammable vapors, these efforts were inadequate, and, when the jack cylinder was lowered into the PVC liner, it partially displaced these vapors from the PVC liner into the elevator pit. The employee holding the welding torch was standing several feet from the liner. When he lit the welding torch, the flame ignited the vapors in the elevator pit and carried the reaction to the vapors that remained in the PVC liner.

The resulting explosion shattered the PVC liner and strewed pieces of PVC "shrapnel" around the pit. One employee was struck by several pieces and suffered wounds to his legs. When OSHA investigated the explosion, it issued Montgomery KONE three citations alleging various violations of OSHA standards. The only issue before us is item 1 of citation 1, which alleged a serious violation of the construction safety standard at 29 C.F.R. § 1926.21(b)(6)(i), which provides:

§ 1926.21 Safety training and education

* * *

(b) *Employer responsibility.*

* * *

(6)(i) All employees required to enter into confined or enclosed spaces shall be instructed as to the nature of the hazards involved, the necessary precautions to be taken, and in the use of protective and emergency equipment required. The employer shall comply with any specific regulations that apply to work in dangerous or potentially dangerous areas.

Section 1926.21(b)(6) contains a second provision which is relevant here:

(ii) For purposes of paragraph (b)(6)(i) of this section, *confined or enclosed space* means any space having a limited means of egress, which is subject to the accumulation of toxic or flammable contaminants or has an oxygen deficient atmosphere. Confined or enclosed spaces include, but are not limited to, storage tanks, process vessels, bins, boilers, ventilation or exhaust ducts, sewers, underground utility vaults, tunnels, pipelines, and open top spaces more than 4 feet in depth such as pits, tubs, vaults, and vessels.

After a hearing at which the parties presented numerous witnesses, including experts, the administrative law judge vacated this item because he found that the elevator pit was not a confined space within the meaning of the standard. Although the judge found that the elevator pit was shown to be subject to the accumulation of flammable contaminants, he concluded that it was not a confined space because it did not have a limited means of egress. He based his conclusion on a finding that, after the explosion, the employees were able to find and climb the ladder out of the five-foot-deep pit in the dark with "no difficulty" even though one of them was injured.

Discussion

The only dispute before us is over the first element of the Secretary's burden of proof, whether the standard applies.[3] Under the language of the standard, a confined space is "any space having a limited means of egress, which is subject to the accumulation of toxic or flammable contaminants or has an oxygen deficient atmosphere." We find that the Secretary has shown that both of those conditions were present.

A. "subject to the accumulation of toxic or flammable contaminants"

The judge found that the elevator pit here was subject to the accumulation of flammable vapors. We agree with the judge's finding. The record clearly shows that the elevator pit became subject to the accumulation of heavier-than-air flammable vapors once Montgomery KONE introduced the PVC primer and cement into the pit.

Montgomery KONE argues essentially that it could not have known that the standard applies because it could not have known that chemical vapors might be present even after its efforts to purge them from the shaft. Where, as here, however, an employer is responsible for introducing chemicals into its workplace, it also has a duty to learn about the characteristics of those chemicals and to determine any dangerous conditions to which the employees may be exposed as a result. *Texas A.C.A. Inc.*, 17 BNA OSHC 1048, 1050, 1993-

[3]If we find that the elevator pit was a confined space, the other elements of the Secretary's *prima facie* case are established. *See Armstrong Steel Erect., Inc.*, 17 BNA OSHC 1385, 1386, 1995-97 CCH OSHD ¶ 30,909, p. 43,030 (No. 92-262, 1995) (Secretary's burden of proving violation includes applicability of standard, noncompliance, employee exposure, and employer knowledge). The record shows that the terms of the standard were not met because Montgomery KONE did not provide either of the employees in the elevator pit any confined space training. In fact, their immediate supervisor testified that the company did not provide confined space training because it did not work in any confined spaces. It is also clear that untrained employees were exposed to the cited condition, because they were in the elevator pit; and the company knew that they had not been given confined space training.

95 CCH OSHD ¶ 30,652, p. 42,526 (No. 91-3467, 1995); *Pressure Concrete Constr. Co.*, 15 BNA OSHC 2011, 2016, 1991-93 CCH OSHD ¶ 29,902, p. 40,811 (No. 90-2668, 1992). The record indicates that the use of PVC liners was a relatively recent development in the elevator industry and that the installation of the PVC liner is normally performed by the drilling company rather than the elevator company. One of Montgomery KONE's employees testified that he had never installed a PVC liner before. Even if Montgomery KONE as a corporate entity did not have the knowledge that was necessary to perform the task safely, it had a duty before it undertook a new activity to investigate the safety of the procedures it would be using, to learn about the potential hazards the activity may pose to its employees, and to train those employees how to protect themselves from those hazards. The material safety data sheets for both the PVC primer and the PVC cement indicate that the vapor density is 2.49 times that of air. That information should have informed Montgomery KONE's employees that they were dealing with vapors that would not all be blown out of the seventy-foot-deep PVC liner with the compressed air they were using. It was the employer's duty to educate its employees to assure that they understood and appreciated the significance of the possible hazard.

Montgomery KONE argues that that elevator pits like this one are not generally considered confined spaces, and two safety officers from the Postal Service, which owned the building, testified that the Postal Service does not consider the elevator pit to be a confined space and that it never informed Montgomery KONE that it was a confined space. The company also presented evidence that air sampling was performed in the elevator pit before the explosion and after it, and that no abnormalities were detected. We offer no opinion, however, as to whether the elevator pit had a contaminated atmosphere or was

subject to the development of a contaminated atmosphere at other times.[4] In the elevator pit here, the presence of the flammable vapors in the PVC cylinder demonstrates that the elevator pit was subject to the accumulation of flammable contaminants.

B. "having a limited means of egress"

The other element of the standard's definition of a confined space is that it had limited means of egress. The administrative law judge found that egress was not limited because the two employees in the elevator pit when the explosion occurred "had no difficulty using the ladder to exit the pit after the explosion occurred despite the injuries [one of the employees] suffered and the fact that [the] lights went out." Relying on his finding that the employees "were not hindered by the ladder" in getting out of the elevator pit, the judge gave greater weight to the expert testimony of Montgomery KONE's witnesses than to that of the Secretary's expert witnesses. The judge also referred to a provision in OSHA's excavation standard, 29 C.F.R. § 1926.651(c)(2), which indicates that stairways, ramps, and ladders are considered safe means of egress from trenches. Relying on this provision, he concluded that the ladders in the elevator pit provided the employees a safe means of egress.

We disagree with the judge's conclusion that egress from the elevator pit was not limited. Webster's *New Collegiate Dictionary* (1979) defines the word "limited" merely as "restricted." The judge's reliance on the excavation standard was misplaced. The fact that ladders are a "safe" means of egress from a trench for purposes of compliance with the excavation standard does not mean that they are not a "limited" means of egress for purposes of defining a confined space.

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[4]The Secretary has presented speculative testimony that methane could have been present in the elevator pit and has argued that this possibility makes the pit subject to the accumulation of flammable contaminants. We give little weight to this argument because the record establishes that methane is lighter than air and would rise up the elevator shaft and escape through vents in the roof rather than accumulate in the pit.

The limited nature of the egress from the elevator pit is borne out by the photographic evidence, including a videotape made by the compliance officer. These exhibits show that the way out of the elevator pit was an orange extension ladder that was leaning against one wall of the elevator shaft and extended several feet beyond the edge of the pit. To get out, it was necessary to climb the ladder and step to the side a foot or two onto the floor of the subbasement. When the explosion occurred and the lights went out, the two employees had to feel their way around in the dark until they found each other, then found the ladder and helped each other get out of the pit. On this record, we find that the conditions encountered in the elevator pit constituted a limited means of egress. The employees may have been able to climb out of the elevator pit without further problems, but the fact that they had to assist one another supports our conclusion that their means of egress was limited.

Having found that the Secretary has established both that the elevator pit had limited means of egress and that it was subject to the accumulation of flammable contaminants, we conclude that it was a confined space within the meaning of section 1926.21(b)(6)(ii) and that the training requirements of section 1926.21(b)(6)(i) applied.[5] Although the employees

[5]Chairman Rogers notes that the Secretary has argued that the elevator pit was *per se* a confined space under the definition in section 1926.21(b)(6)(ii), because it was a pit that was more than four feet deep. She agrees that the elevator pit was a confined space for the reasons set out above. She would also find, however, that the standard is ambiguous but that the interpretation of the standard put forth by the Secretary is reasonable, that it "sensibly conforms to the purpose and wording" of the standard and is therefore entitled to deference. *Martin v. OSHRC (CF&I Steel)*, 499 U.S. 144, 151 (1991)(quoting *Northern Indiana Pub. Serv. Co. v. Porter County Chapter of Isaac Walton League of America, Inc.*, 423 U.S. 12, 15 (1975)); *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Section 1926.21(b)(6)(ii) is ambiguous because it is unclear whether the areas listed in the second sentence of the definition are intended to be examples of locations that might fit the qualifications in the first sentence or whether the intent of the second sentence was to designate all such locations as confined spaces. Chairman Rogers finds the Secretary's interpretation here reasonable because it recognizes that the spaces enumerated in the second sentence are potentially hazardous and that employees must be trained to deal with these

who connected the sections of the PVC liner did read the directions on the labels of the chemicals they were using and did use personal protective equipment to protect themselves while they were using the chemicals, neither the employees in the pit when the explosion occurred nor the supervisor in charge of them had been given sufficient information to appreciate the insidious nature of the vapors these chemicals produced. Because adequate training about the hazards presented by the chemicals that had been used in the pit was not given to the employees who were required to enter the pit, and based on the testimony of the company that it did not provide confined space training, a violation has been proved.

Characterization and penalty

The citation alleged that the violation was serious. A violation is serious under section 17(k) of the Act, 29 U.S.C. § 666(k), "if there is a substantial probability that death or serious physical harm could result." *Miniature Nut & Screw Corp.*, 17 BNA OSHC 1557, 1558, 1995-97 CCH OSHD ¶ 30,986, p. 43,176 (No. 93-2535, 1996). Here, the standard required that employees be trained about the hazards they might encounter in a confined space. The hazards at which the standard is aimed include oxygen deficient atmosphere, toxic atmosphere, and flammable or explosive atmosphere. In another case involving this same standard, we found that, if an accident had occurred as a result of the employer's failure to instruct its employees, the consequences could well be serious physical harm. *Baker Tank Co.*, 17 BNA OSHC 1177, 1180, 1993-95 CCH OSHD ¶ 30,734, p. 42,684 (No. 90-1786, 1995). Here, both of Montgomery KONE's employees experienced temporary

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hazards. Accordingly, she would defer to the Secretary's interpretation and also find that the elevator pit was a confined space because it was an open top pit more than four feet deep, placing it within the locations specifically designated by the standard.

Commissioner Visscher does not consider the Secretary's *per se* interpretation reasonable because it eliminates the two conditions in the first sentence of the definition, which are the factors that make a confined space potentially hazardous.

hearing loss, and the employee whose legs were wounded by the flying pieces of PVC missed about a month of work. Although the injuries actually suffered may not have been as serious as they could have been, there clearly was a substantial probability that serious injury could result from the explosive atmosphere in the elevator pit. We therefore find that this violation was serious.

The Secretary proposed a penalty of $3,500 for this item. Because he vacated the item, the judge did not determine what amount of penalty would be appropriate. On review, the parties have not argued the amount of the penalty although the briefing notice apprised them that the amount of the penalty would be in issue. In the absence of an argument by either of the parties that the amount proposed by the Secretary was not appropriate, we assess a penalty in the amount proposed, $3,500.

Conclusion

For the reasons above, we find that Montgomery KONE committed a serious violation of the standard at 29 C.F.R. § 1926.21(b)(6)(I) by failing to train its employees about the hazards they could be expected to encounter in the elevator pit. We assess a penalty of $3,500 for that violation.

/s/
Thomasina V. Rogers
Chairman

/s/
Gary Visscher
Commissioner

Dated: December 9, 1999

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR
Complainant

v.

Docket Nrs. 97-1135
97-1133

PARSONS BRINCKERHOFF
CONSTRUCTION SERVICES, INC.,
and
MONTGOMERY KONE, INC.,
Respondents

Appearances
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Before JOHN H FRYE, Judge

DECISION AND ORDER

During 1997, the U.S. Postal Service was performing renovations to its 1.3 million square foot terminal annex at its 30th Street facility in Philadelphia. It had retained Parsons Brinckerhoff

Construction Services[6] to perform contract administration and coordination of the many contractors who were performing this work, and it had entered into a contract with Montgomery KONE to rebuild and repair elevators, including hydraulic freight elevator number one (elevator one).

An hydraulic elevator utilizes hydraulic fluid to actuate a piston attached to the bottom of the car. The vertical movement of the piston raises and lowers the car to the various floors served by the elevator. In order to accommodate this piston, a shaft of more than 72 feet in depth had been drilled in the pit[7] for elevator one and lined with steel. In turn, the steel was lined with PVC plastic pipe. The PVC plastic pipe came in several sections, and it was necessary to glue these together with PVC primary cement, a highly flammable substance. Montgomery KONE employees then installed the hydraulic mechanism inside the PVC pipe. The hydraulic mechanism and PVC pipe was joined together by a fitting at the top.

On the afternoon of April 22, 1997, Lou Scarpitti and Dan Walsh, employees of Montgomery KONE, were continuing with the installation of the hydraulic mechanism in elevator one's pit. Walsh started to weld a bolt on the plate that is part of the head of the hydraulic mechanism. Seconds after Walsh struck his arc, an explosion occurred, shattering the PVC pipe and injuring Walsh. Walsh was out of work for a month. The Philadelphia Fire Department responded immediately and alerted OSHA's Philadelphia Area Office. OSHA arrived on the scene the following morning.

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[6] Parsons Brinckerhoff Construction Services, Inc. is a corporation with its principal place of business in Herndon, Virginia. Stipulated. Tr. 19-21. Parsons concedes that it is an employer engaged in business affecting commerce within the meaning of §3(5) of the Act (29 USC §652(5)). Stipulated. Tr. 19-21.

[7] The pit is a space about twelve by eighteen feet, and was four feet, ten inches deep. Tr. 28, 69, 342-43. GX 14. It adjoins a second pit of the same dimensions. The two pits are separated by steel expando beams and chicken wire. Tr. 28, 73, 787. On April 22, 1997, the two pits were also separated by the platform for elevator one, which was leaning upright between the two pits. Tr. 28, 69, 173, 345, 793.

The Secretary issued citations to both Parsons Brinckerhoff and Montgomery KONE. The principal issue among the parties concerns whether the elevator one's pit was a confined or enclosed space as defined in 29 CFR ' 1926.21(b)(6)(ii). If so, ' 1926.21(b)(6)(i) required that employees be trained in the nature of the hazards, the precautions that they should take, and the use of proper protective and emergency equipment prior to entry. Both Montgomery KONE and Parsons Brinckerhoff were cited for a serious violation of ' 1926.21(b)(6)(i). In addition to challenging the application of the confined space standard, Parsons Brinckerhoff argues that it provided only construction management services, had no exposed employees, and was not responsible for employee safety.

Montgomery KONE also received a citation alleging serious violations of ' 1926.352(c) (welding in the presence of flammable compounds), and ' 1926.352(i) (welding on a container of a flammable substance without evacuating it); a citation alleging a serious repeat violation of ' 1926.1200(h)(1) (training on hazardous chemicals present at the work site); and a citation alleging other-than-serious violations of ' 1926.102(a)(1) (eye and face protection) and ' 1926.350(a)(10) (storage of oxygen cylinders).[8] Parsons Brinckerhoff also received citations for alleged serious violations of ' 1926.501(b)(1) (fall protection) and ' 1926.1053(b)(1) (improper use of a ladder).

Following the filing of complaints and answers, these two cases were consolidated and tried together in Philadelphia April 13 through 17 and 28. The Commission's jurisdiction is admitted.

To establish a violation of a specific standard,

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[8] Montgomery KONE also received citations alleging violations of ' 1926.501(b)(3) (fall protection), ' 1926.152(b)(1) (improper storage of flammable or combustible liquids), ' 1926.501(b)(1) (fall protection), ' 1926.403(d)(1) (improperly secured electrical equipment), and '1926.1053(b)(1) (improper use of a ladder). At trial, the Secretary dropped her allegations of violations of the first two sections and Montgomery KONE withdrew its notice of contest to the last three. In its brief, Montgomery KONE withdrew its notice of contest to the allegation of a violation of ' 1926.350(a)(10). Accordingly, the citations alleging violations of ' 1926.501(b)(3) and ' 1926.152(b)(1) are dismissed. The citations alleging violations of ' 1926.501(b)(1), ' 1926.403(d)(1), '1926.1053(b)(1), and ' 1926.350(a)(10) are affirmed.

> ... the Secretary must prove by a preponderance of the evidence that: the standard applies to the cited condition; the employer failed to meet the terms of the standard; its employees had access to the violative condition; and the employer either knew or could have known of the condition with the exercise of reasonable diligence.

Pride Oil Well Service, 15 OSHC 1809, 1811 (Rev. Com. 1992). The Secretary satisfies her burden of proof if the record, when considered as a whole, contains a preponderance of evidence in support of her allegations. *Ultimate Distribution Systems, Inc.*, 10 OSHC 1568, 1570 (Rev. Com. 1982).

THE ALLEGED VIOLATIONS

I MONTGOMERY KONE, INC.

Serious Citation 1, Item 1: Alleged Violation of 29 C.F.R. § 1926.21(b)(6)(i)

The definition of a "confined or enclosed space" is set forth in 29 C.F.R. § 1926.21(b)(6)(ii):

> ... "confined or enclosed space" means any space having a limited means of egress, which is subject to the accumulation of toxic or flammable contaminants or has an oxygen deficient atmosphere. Confined or enclosed spaces include, but are not limited to, storage tanks, process vessels, bins, boilers, ventilation or exhaust ducts, sewers, underground utility vaults, tunnels, pipelines, and open top spaces more than 4 feet in depth such as pits, tubs, vaults, and vessels.

The Secretary maintains that the pit for elevator one meets the definition of a confined or enclosed space on two separate bases. First, the Secretary argues that it is an open-top space greater than four feet deep, and second, that it has a limited means of egress and is subject to the accumulation of toxic or flammable contaminants.

There is no question that the pit was an open-top space more than four feet deep. The Secretary points to *Ed Taylor Construction Co. v. OSHRC*, 938 F.2d 1265, 1272, 15 OSHC 1238, 1242 (11th Cir. 1991), for the proposition that confined spaces include these spaces regardless of whether industry so regards them. In reaching its conclusion, the court noted that the regulation

clearly warns that such spaces are subject to the accumulation of toxic or flammable contaminants and that it is irrelevant whether anyone in industry may have believed otherwise. For this reason, the Secretary regards as irrelevant Montgomery KONE's testimony to the effect that the elevator industry does not recognize elevator pits as confined spaces, that the USPS did not recognize the elevator pit as a confined space, and that the pit was not subject to the accumulation of toxic or flammable contaminants.[9]

The Secretary also argues that she established that elevator one's pit was subject to the accumulation of flammable gases. Montgomery KONE argues just as vigorously that it was not. Montgomery KONE's position is dependent upon viewing the explosion that occurred as having taken place outside of elevator one's pit. Its brief states:

> The Court is then left with the fact that the PVC liner exploded. That fact does not and cannot convert the elevator pit into a confined space under the construction industry standard. The liner was in a hole which according to GX 15 extended about 72 feet below the floor of the elevator pit. The hole constitutes a separate and distinct space from the elevator pit. [footnote omitted] The sole purpose of the jack hole or shaft, as the Secretary calls it, is to house the jack assembly for the elevator.
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> As the evidence of record and particularly the testimony of Officer Borbidge makes plain, the appropriate analogy is the cylinder could have exploded anyplace. It was analogous to a pipe bomb which could exist without regard to the jack hole; it could for example have exploded out on the street. There simply is no relationship to the pit.

Montgomery KONE's brief, p.27.

The statement that there is no relationship between the explosion and the elevator pit blinks at reality. While it is more probable than not that a flammable gas accumulated and exploded in the PVC liner and not in the elevator pit, the fact remains that the effects of the explosion were felt in the pit. The injured worker was in the pit. The explosion was violent enough to extinguish all the

[9] The decision in *Ed Taylor Construction* was rendered by the Eleventh Circuit and it is not binding in this case.

lighting in the pit, and to damage articles of equipment present there. To hold that this pit does not fall within the definition set out in ’ 1926.21(b)(6)(ii) because a flammable gas enough to accumulated and exploded in a cylinder placed in a hole in the pit’s floor, rather than in the pit itself, elevates technical distinctions to an unwarranted level of importance. While it may well extinguish all the be true that the same explosion might have occurred were the PVC liner located in a hole drilled in front of the Post Office in the middle of Market Street, placing the PVC liner in a hole in elevator one’s pit made the pit "subject to the accumulation of ... flammable contaminants."

The definition of a confined space requires, first, that it have "a limited means of egress" and, second, that it "be subject to the accumulation of toxic or flammable contaminants." The above discussion makes clear that elevator one’s pit meets the second requirement. However, the first requirement presents a more difficult inquiry.

Starting from the obvious, it is evident that the means of egress is to permit workers to escape the hazard of toxic or flammable contaminants, or, if they are unable to do so, to permit access by rescue personnel. If the means of egress is limited, ' 1926.21(b)(6)(i) requires that the employees who enter the confined space "are to be instructed as to the nature of the hazards involved, the necessary precautions to be taken, and in the use of protective and emergency equipment ...." If the means of egress is not limited, no such instruction is required.

The Secretary's experts testified that, because the only way out of elevator one’s pit was a ladder, it had a limited means of egress. Dr. Brown and Mr. Krug both took the position that any time a worker must use his or her hands to exit from a space, egress is limited. Mr. Krug relied on ANSI standard Z117.1 (1995), stating that ANSI based its position on the needs of rescue personnel.[10] Dr. Brown also relied on "the ANSI document," but seemed to be most concerned

[10] Tr. 592-93.

about situations in which a worker was required to crawl on hands and knees to exit a space.[11] Under their rational, a stairway or a ramp would not be limited because it would not require the use of one's hands. Both experts testified that egress by means of a ladder was limited because it presented an impediment which would not be present if an employee or rescue person could simply walk out of the space. Given that the obvious purpose of the ladder is to permit escape from a hazard, this testimony strongly implies that egress by means of a ladder is either unsafe or inadequate.

Montgomery KONE points out that the pit was only 4 feet 10 inches in depth and that both elevator mechanics had no difficulty using a ladder to exit the pit after the explosion occurred, despite the injuries Mr. Walsh suffered and the fact that lights went out. Both Mr. Dowson and Mr. Gage, Montgomery KONE's experts, relied on this fact in reaching the conclusion that the means of egress from elevator one's pit was not limited.[12] There was no evidence that rescue personnel would have any difficulty making a rescue.

Given that Messrs. Scarpitti and Walsh were not hindered by the ladder when they exiting the pit, I find the testimony of Montgomery KONE's experts to be more persuasive than that of the Secretary's experts. Moreover, Montgomery KONE's experts' conclusion is consistent with the treatment of ladders in the standard applicable to trenches. Trenches are subject to the accumulation of toxic or flammable contaminants in addition to the hazard of cave-in, and the standard requires a safe means of egress. Section 1926.651(c)(2) considers stairways, ramps, and ladders all to be "safe means of egress" from trenches. I conclude that elevator one's pit was not a confined space within the meaning of ' 1926.21(b)(6)(ii). Accordingly, Citation 1, item 1, is vacated.

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[11] Tr. 709-10.

[12] Tr. 918-19, 1033-34.

Serious Citation 1, Item 2a: Alleged Violation of 29 C.F.R. § 1926.352(c)

Section 1926.352(c) provides that:

> No welding, cutting, or heating shall be done where the application of flammable paints, or the presence of other flammable compounds, or heavy dust concentrations creates a hazard.

The Secretary maintains that there can be no doubt that this regulation applies to the cited condition, and that Montgomery KONE violated it. The Secretary points out that on April 22, 1997, Montgomery KONE employees Dan Walsh and Lou Scarpitti began tack welding inside the pit for elevator one where flammable materials such as PVC glues and primer thinner were stored[13] approximately seven feet away.[14]

Montgomery KONE argues that the cited standard cited is a performance standard, and the burden is on the Secretary to demonstrate that the glue cans posed a hazard when welding was performed. Montgomery KONE points out that the cans were present for a period of about 12 days before Mr. Walsh performed tack welding. During that time, Mr. Scarpitti used a welding torch to apply shrink wrap to the joints of the jack, sending sparks and other hot material cascading about the area. Moreover, nothing happened the prior week when the outside welder was welding the joints of the cylinder. It seems obvious to Montgomery KONE that, if the PVC glues and primer thinner were a hazard, then something would have happened.

Montgomery KONE maintains that Mr. Walsh specifically took steps to comply with the requirements of this standard before he began welding. He testified as follows:

Q: Before you began welding, did you take any precautions?
A: Just normal. There was water always present so we felt we needed to clear the area of flammables like paper and things like that. I put on my shield, welding gloves

[13] Tr. 42, 71, 173, 338, 796. GX 9, GX 22 at counter 408.

[14] Tr. 54.

and said to Lou stay clear, I am going to weld. That's the precautions that I took. Tr. 89.

Montgomery KONE correctly maintains that the Secretary simply failed to prove her case. Citation 1, item 2a, is vacated.

Serious Citation 1, Item 2b: Alleged Violation of 29 C.F.R. § 1926.352(i)

> Section 1926.352(i) provides that:
> Drums, containers, or hollow structures which have contained toxic or flammable substances shall, before welding, cutting or heating is undertaken on them, either be filled with water or thoroughly cleaned of such substances and ventilated and tested.

The nature of the cylinder where Dan Walsh and Lou Scarpitti were welding and the events that transpired after the arc was struck are not in dispute. It is evident that the cylinder contained flammable substances, i.e., gasses generated by the glue and primers used in joining the sections of PVC pipe together. The Secretary maintains that Montgomery KONE did not fill the cylinder with water or clean it, ventilate it, and test it before beginning to weld.

Montgomery KONE argues, first, that the standard applies to drums, containers or hollow structures on which welding, heating or cutting is undertaken. It points out that the PVC pipe is a plastic material, and that no welding was done on it. The welding operation at the time of the explosion was to attach jack bolts to a plate on the head of the hydraulic mechanism. See R-14. Mr. Walsh said he was welding 10 inches from the jack head, and his testimony is confirmed by the exhibits. Tr. 101, R-14. Therefore, according to Montgomery KONE, the welding was not being performed on a drum, container or hollow structure, and the standard does not apply.

Second, Montgomery KONE argues that it complied with the standard. Its safety rule states: "[b]efore welding or burning over polyvinylchloride (PVC) casing, take steps to purge the PVC casing of flammable vapors." See C-2 at p. 48, Tr. 163. Montgomery KONE maintains that Mr. Scarpitti did precisely that; when he smelled fumes from the glue, he introduced compressed air into

the PVC casing, purging it for about 30 minutes. The smell disappeared. Montgomery KONE argues that the procedures employed are consistent with those accepted in the industry, citing the testimony of Messrs. Dowson and Gage. Tr. 926-27, 929, 936, 1026-27, 1029.

The problem with Montgomery KONE's second argument is that the ventilation employed by Mr. Scarpitti was inadequate. He inserted the air hose only about fifteen feet into a 70-foot cylinder. Tr. 816. The gasses that he needed to evacuate are two and one-half times heavier than air, so he could not have disturbed the gasses lying far below the end of the hose. Tr. 704-05. Thus the procedure employed by Mr. Scarpitti did not thoroughly clean the PVC pipe of these gases and ventilate it.

However, Montgomery KONE's first argument is meritorious. A perusal of ' 1926.352 indicates that subsection (i) was intended to apply to structures on which welding was to be performed, not to structures in the vicinity of the locus of the welding. Subsections (a) and (b) provide that structures on which welding is to be performed are to be removed to a safe place, or, if that is not possible, all movable fire hazards in the vicinity are to be removed to a safe place. If neither the object to be welded nor the fire hazards in its vicinity can be removed, steps are to be taken to isolate the heat, sparks, and slag from the fire hazards.

In this case, the Secretary's testimony indicates that the explosion took place within the PVC pipe in the space between the inner wall of the PVC and the hydraulic mechanism that had been lowered into it. Tr. 258-61, 574-75. No welding was performed on the PVC pipe. Rather, the welding was undertaken on lengths of 'all-thread' screwed into a plate that is part of the head of the hydraulic mechanism in order to fashion jacking bolts to be used to level the plate and insure that the piston that raises and lowers the elevator was properly aligned. Tr. 834-36, 837-38, 840-47; R-13, R-14. While the facts indicate that Montgomery KONE may have violated §1926.352(b) by

failing to isolate heat, sparks, and/or slag from the atmosphere inside the PVC pipe, it did not violate subsection (i) by failing to purge a container on which it performed welding. Citation 1, item 2b, is vacated.

Serious Citation 2, Item 1: Alleged Violation of 29 C.F.R. § 1910.1200(h)(1)

Section 1910.1200(h)(1) provides that

> (h) *Employee information and training*. (1) Employers shall provide employees with effective information and training on hazardous chemicals in their work area at the time of their initial assignment, and whenever a new physical or health hazard the employees have not previously been trained about is introduced into their work area. Information and training may be designed to cover categories of hazards (e.g., flammability, carcinogenicity) or specific chemicals. Chemical-specific information must always be available through labels and material safety data sheets.

The Secretary asserts that employees Dan Walsh, Lou Scarpitti and Leo Thomas all testified that they did not receive hazard communication training from Montgomery KONE. Tr. 47, 66, 141. Montgomery KONE sharply disputes this assertion, pointing out that on direct examination by the Secretary, Mr. Thomas testified that Montgomery KONE gave him the MSDS sheets and explained to him how to look through them. Tr. 141. Mr. Thomas testified that the subject of how they would go about assembling the PVC liner was discussed with George Hrin before the work was done, and that "everybody on the job was instructed that it was a highly flammable process." Tr. 141-42. Mr. Thomas also testified that he was instructed by George Hrin to ventilate the PVC pipe before the welding took place. He indicated that tool box talks were given every week (Tr. 143), and identified at least three dates prior to the accident when he discussed chemical safety with his crew during these talks, including the talk about welding over PVC liners and the company's hazard communication program. Tr. 161-163. The tool box talk about welding over PVC liners was given March 5, 1997. Tr. 163. Mr. Scarpitti corroborated Mr. Thomas' testimony concerning the instructions he received prior to assembling the PVC liner. Tr. 808-811.

Montgomery KONE has refuted the Secretary's factual allegations. Citation 2, item 1, is vacated.

Citation 2, Item 1: Alleged Violation of 29 C.F.R. § 1926.102(a)(1)

Section 1926.102(a)(1) states:

> (a) General. (1) Employees shall be provided with eye and face protection when machines or operations present potential eye or face injury from physical, chemical, or radiation agents.

The Secretary points out that, on April 22, 1997, Lou Scarpitti was not wearing eye protection during the welding operation. Dan Walsh was using Scarpitti's personal welding shield because the only other available shield had broken straps. At the time, Scarpitti acted as the fire watch. Tr. 50, 87, 89, 108, 421-422, 440, 441. This welding presented the potential for flash burns to the eyes. Tr. 440. Montgomery KONE counters that Mr. Scarpitti testified that he was not watching the welding operation but rather to avoid the arc, he faced the wall of the pit, where he could see the reflection of the welding arc on the wall of the pit. Montgomery KONE believes that as a result, Mr. Scarpitti did not run any risk of flash burns to the eyes.

Mr. D'Imperio testified that the fire watch must keep an eye on the welding operation to ascertain whether any fires are started by it. Consequently, a person serving as fire watch must have eye protection. While it may be that Mr. Scarpitti could see the reflection of the arc on the pit wall, there is no testimony that he could serve as an effective fire watch without looking at the welding operation itself.

Leo Thomas had obtained a hot work permit for the week of April 21, 1997, so he knew that employees would be performing welding or other hot work in this area. Thomas also did daily inspections of the pit. There is no question that Montgomery KONE knew that welding was taking

place in the pit. Montgomery KONE violated 29 C.F.R. § 1926.102(a). The Secretary characterized this violation as other-than-serious and proposed a penalty of $ 00. This is affirmed.

II PARSONS BRINCKERHOFF CONSTRUCTION SERVICES, INC.

Under its contract with the Postal Service, Parsons Brinckerhoff administered twenty construction contracts and seven or eight contracts with architect or engineering firms. Each of these companies contracted directly with the USPS, and none, including Montgomery KONE, had a contractual relationship with Parsons Brinckerhoff. Tr. 1079. Parsons had two engineers, an architect, a secretary and a project manager on the work site. Tr. 1076-1077.

Parsons provided coordination and communication between the contractors and the USPS, coordinated work scheduling among the contractors, and monitored the progress of the work by each contractor, including Montgomery KONE. Tr. 1061-1062, 1082. Parsons ensured that each contractor's work met contract specifications, that quality control was maintained, and that costs were verified. Tr. 1082. Parsons referred to the appropriate building codes and the responsible architect firm to resolve disputes with contractors regarding the acceptance of their work. Tr. 1083.

Parsons represented the USPS and acted as its "eyes and ears" at the work site (Tr. 1061), performing daily inspections to monitor the progress of the contractors to assure that their work was in accordance with contract specifications. Because it was not possible for Parsons to inspect all aspects of the ongoing work on a daily basis, these inspections were designed to monitor the most active construction areas. These inspections were often conducted after the contractor had finished work for the day so as not to interfere with the progress of construction. Tr. 1087-1088. Parsons also participated in inspections upon the contractor's completion of work, in "punch list" inspections, and in elevator safety inspections with the responsible architect firm and elevator inspector. Tr. 1086-1087.

The Secretary maintains that Parsons had sufficient control over safety at the work site to have corrected the alleged violations for which it was cited. Parsons was aware of the assembly of the PVC liner and jack assembly in elevator one's pit. Tr. 445. The Secretary also urges that, by reason of its daily inspections, Parsons should have been aware of the work performed by Montgomery KONE in the hoistway for elevator No. 13. There, she found two alleged violations - one relating to fall protection and the other to the use of a ladder - for which she cited Parsons. She does not contend that Parsons had actual knowledge of these alleged violations. Tr. 453-55.

Parsons maintains that the construction standards do not apply to the work it performed on this job. It urges that the analysis required by *CH2M Hill Central, Inc.*, 17 OSHC 1961 (Rev. Com. 1997) and *Foit-Albert Associates,* 17 OSHC 1975 (Rev. Com. 1997) dictates this conclusion. It maintains that it is not a construction manager in the sense of *Bechtel Power Corp.,* 4 BNA 1005 (Rev. Com.. 1976), *aff'd per curiam*, 548 F.2d 248 (8th Cir. 1977), where the company, in addition to the construction management work, employed two full-time safety representatives who policed the work site and reported hazardous conditions to the trade contractors and coordinated the safety programs. Bechtel had the authority to issue letters to contractors directing hazard abatement action, and even had authority to issue stop-work orders, if deemed necessary. In contrast, Parsons' sole responsibility was to "[r]eview and monitor the construction contractor's safety plan and security program." PBCS Exh. 1, Amendment 3, Article 12.2(e).

It is clear that the construction standards apply to Parsons. Its activities and responsibilities fall within the scope of "overall supervisory authority" outlined in *Bechtel, supra. See also Bertrand Goldberg Associates,* 4 OSHC 1587, (Rev. Com. 1976); *Cauldwell-Wingate Corp.,* 6 OSHC 1619 (Rev. Com. 1978); and *Kulka Construction Management Corp.,* 15 OSHC 1870 (Rev. Com. 1992). Like the respondents in those cases, Parsons had broad administrative and coordination responsibilities at the work site. Had the Secretary cited Parsons for exposing its own employees to hazards created by Montgomery KONE, rather than for exposing Montgomery KONE's employees

to hazards created by Montgomery KONE, the issues presented would be straightforward. In all of the above cases, the Secretary had cited the employer for exposing its own employees to hazards created by another contractor, and the Commission's analysis focused on the degree of control that the employer had over the hazardous condition.

Here, the Secretary has cited Parsons for exposing Montgomery KONE's employees[15] to a hazard which Montgomery KONE created. Were Parsons a general contractor the Secretary would almost certainly be correct. A general contractor is properly chargeable with responsibility for the actions of its subcontractors.[16] Because Parsons is not a general contractor, the Secretary has sought to establish that it exercised broad authority similar to that possessed by CH2M Hill. She has done so by introducing evidence designed to establish that Parsons had extensive authority over safety at the work site.

The Secretary points out that Parsons was responsible for reviewing and monitoring the safety plans of the contractors for the Postal Service. Tr. 1063. Parsons accomplished this in monthly meetings when, under Postal Service rules establishing a format for the meetings, the contractors' implementation of their safety plans was discussed. Tr. 1063, 1109-1110. Parsons prepared the minutes of each safety meeting, and these were sent to the Postal Service. Tr. 1124. GX 41, 42, 43, P-RX 3. In addition, the Secretary notes that Parsons' employees were instructed to point out safety problems they observed to the supervisor of the responsible contractor (Tr. 1066, 1084) and to attempt to correct any situation that posed an immediate threat to life. Tr. 1085.

The Secretary finds the strongest evidence of Parsons' authority regarding safety enforcement on the work site in Parsons' project manager's statement to CSHOs D'Imperio and Cassady that they interpreted as stating that Parsons had the authority to remove contractors'

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[15] Tr. 453-56.

[16] *See Blount International Ltd.*, 15 OSHC 1897, 1899 (Rev. Com. 1992).

employees at the work site for safety violations. Mr. D'Imperio testified as follows concerning his conversation with Dan Jones, Parsons' project manager:

> Q I'd like [you] to relate what Dan Jones told you?
>
> A We were talking about relationship -- I was asking him about the relationships with Parsons Brinckerhoff, the post office and Montgomery Kone. He explained that relationship to me. We got into who enforces safety at the site and what his -- what Parsons Brinckerhoff's relationship, or what their duties were with that and Mr. Jones had told me that they do inspections of the work site daily for quality control along with -- they have safety issues that they will also address those also.
>
> I said is that where it would end? For instance, if you saw something and you brought it to the supervisor on your contractors and he really didn't pay attention to you or blew you off, I think I actually said that, you know, what could you do from that point.
>
> And, Dan Jones had said that he would go to the post office and tell them that he was going to have them removed from the site.
>
> Q He would go to the post office. Just go through that again?
>
> A That he would go to the post office and tell them that he was going to have them removed from the site.
>
> Q He's going to tell them; who is them?
>
> A The safety department, I assume it was, for the post office.
>
> Q So, Dan Jones, if there was something that Parsons Brinckerhoff observed, that they took exception to, Dan Jones said he would go to the post office and tell the safety department what?
>
> A That he was going to have them removed from the site.
>
> Q That he was going to have them -- did he say how he was going to do that?
>
> A No.

Tr. 519-20.

Mr. D'Imperio also testified that Parsons had two Montgomery KONE employees disciplined for safety infractions. The first instance apparently concerned a hard hat violation, but Mr. D'Imperio's memory of what he had learned of this instance was so hazy as to make this

testimony unreliable. Tr. 521-23, 526-29. Montgomery KONE Foreman Leo Thomas testified that one of his employees, Mr. Barnes, was disciplined following a request from Parsons. Mr. Thomas indicated that the discipline was imposed by Montgomery KONE after receiving information on a safety violation from Parsons. Tr. 150-51. This incident occurred in June, 1997, after the inspection. Tr. 1092. Consequently, its materiality is questionable.

In this case, the record is sketchy in regard to the nature of Parsons' responsibilities. It seems safe to assume that, insofar as Parsons acted as the "eyes and ears" (Tr. 1061) of the Postal Service in coordinating the work of the construction contractors, its role parallels that of CH2M Hill. However, Parsons' role with respect to safety differs markedly from CH2M Hill's. The latter, in

> [a]cting under the differing site conditions and contract modification mechanisms, ... implemented a contract specification directed specifically toward, and with the intent of eliminating, a substantial safety hazard at the site, the occurrence of methane gas. CH2M initiated a safety meeting with [a contractor] and gave explicit safety instruction to the trade contractors, who in turn understood that CH2M was providing guidance and direction.

17 OSHC at 1972. In contrast, the strongest statement that the Secretary can find in the record to describe Parsons' responsibility is that Parsons "would go to the post office and tell them that he was going to have them removed from the site."

The process which Parsons followed in these matters was outlined by its Project Manager in connection with the discipline imposed on Mr. Barnes for the infraction, about which Mr. D'Imperio testified, that occurred after the inspection.

> Q Okay. Why don't you relate what happened.
>
> A Jim Morgan was up doing a construction progress inspection in the elevator 13 machine room. Jim observed Mr. Barnes performing what Jim felt was an unsafe act specifically standing a little too close to an open edge without fall protection. Jim came back down to my office and reported to me.
>
> He and I both immediately went next door to the plant manager of Maintenance Operations Bill Dobbins. Bill is our primary day to day point of contact with the post office in terms of the ongoing construction projects. We reported to Bill what was

observed. Bill directed that Tom Barnes be removed from the job site. He did not want an employee performing in an unsafe manner.

Mr. Morgan and I went up and informed Leo Thomas, the senior Montgomery representative on site at the time, of Mr. Dobbins' decision. We then went back to our offices and called Rich Hyland the project manager for Montgomery and the next day had discussions with Bill Lippman and set up a meeting. I believe the incident took place late in the day Thursday right before people were getting ready to go home.

We had discussions over the phone on Friday with Mr. Lippman and I believe Mr. Hyland. I know we attempted to call Rich. I don't recall if we were successful in reaching him or not but we set up a meeting for first thing Monday morning with Mr. Lippman and the Postal Service, Parsons Brinckerhoff and Montgomery employees all met Monday morning at I believe 9:00 a.m., reviewed the situation, reviewed the incident. Initially Mr. Dobbins had indicated that Mr. Barnes was to be removed from the job site by Montgomery permanently.

And during the meeting he indicated that after hearing Montgomery's plans for performing additional safety training with respect to the issues that we observed, he indicated that it would be appropriate to allow Mr. Barnes back on site on Wednesday with a three day suspension.

Tr. 1092-93. The Secretary did not challenge this account of the event on cross, although she did introduce Government Exhibit 43, which appears to be the minutes of the meeting in which Mr. Barnes' situation was discussed. The minutes indicate that Parsons' Project Manager suggested the three-day suspension, and do not reflect any comment by Mr. Dobbins, who was in attendance.

Viewing this evidence in the light most favorable to the Secretary dictates the conclusion that Parsons had the authority to point out safety violations and recommend disciplinary action. There is no evidence that Parsons had authority similar to that of CH2M Hill to adopt specific procedures to minimize hazards or to pass on the safety acceptability of equipment. CH2M Hill had exercised such authority when it "gave explicit safety instruction to the trade contractors" and passed on the acceptability of equipment. Although the evidence leaves open the possibility that Parsons may have had the authority to require disciplinary action against employees of trade contractors whom it found to have violated safety standards, that authority is far short of the authority to give "explicit safety instruction to the trade contractors." Enforcing discipline against violators of OSHA standards may place Parsons in the role of a 'safety cop,' but it does not give it

the authority to dictate what procedures should be implemented and what equipment employed in order to comply with them. It more nearly parallels Foit-Albert's authority to point out deviations from specifications having safety implications.

The second issue presented by the Secretary's case is that of notice. It appears that Parsons was aware of the assembly of the PVC liner and jack assembly in elevator one's pit. Tr. 445, 1115-16. It was also on notice of the training that the Montgomery KONE employees had received. Tr. 1103, 1111-12, 1117. The evidence with regard to its control of safety issues may well be sufficient to conclude that Parsons could have abated the alleged violation of ' 1926.21(b)(6)(i). However, because I have determined that elevator one's pit was not a confined space within the meaning of that standard, there is no need to decide that issue.

Parsons lacked actual notice of the conditions in elevator 13 that the Secretary alleges were violations. Were Parsons a general contractor or a construction manager with authority over safety similar to that exercised by CH2M Hill, there would appear to be little reason not to charge it with constructive knowledge of those violations. In those circumstances, it is reasonable to assume that an employer with overall authority for implementing safe work practices on a site is aware of the practices that are actually in use. But Parsons' authority falls short of that mark, so that it is necessary to examine its inspection practices to determine whether they reasonably should have been expected to have revealed the conditions that the Secretary has cited.

Parsons' inspections of the freight elevator work were performed by James P. Morgan, who was also assigned responsibility for a rest room renovation and a passenger elevator project.[17] Daniel L. Jones, Parsons' project manager and Mr. Morgan's supervisor, testified that these inspections are intended to determine how much of a particular project a contractor has finished and

[17] Tr. 772.

whether the work conforms with specifications. They are conducted when the Parsons engineer is not otherwise engaged in administrative matters. They do not cover all aspects of the work on any given day, but concentrate on the most active areas. Most often, they occur after the contractor has finished work for the day so as not to disrupt the construction process.[18] Mr. Morgan testified that in June, 1996, he had concentrated his inspections on the rest room renovation. Subsequently, he devoted more inspection effort to the freight elevator project. Shortly before the accident, the freight elevators were given less of his attention and he gave emphasis to a passenger elevator renovation project.[19]

Under these circumstances, I conclude that it would not be reasonable to impute knowledge of the alleged violations at elevator 13 to Parsons. The inspections routinely conducted by Parsons, while they appear to satisfy the demands of Parsons' contract, were designed to examine work as it neared completion. The conditions in elevator 13 that the Secretary alleges were violations involved a ladder that did not extend the required three feet above its upper landing, and the employee's failure to use fall protection while working atop the car. These inspection procedures were not systematic and thorough enough to be relied on to bring these sorts of isolated, temporary conditions to Parsons' attention. Citation 1, item 2, and Citation 2, item 1, are vacated. Because I have concluded that elevator one's pit was not a confined space within the meaning of ' 1926.21(b)(6)(ii), Citation 1, item 1, is also vacated.

[18] Tr. 1087-88.

[19] Tr. 772.

CONCLUSIONS OF LAW

Respondent Parsons Brinckerhoff Construction Services, Inc., was subject to the standards applicable to construction set forth in 29 C.F.R. Part 1926 in connection with the renovation of the U.S. Postal Service 30th Street facility in Philadelphia.

Respondent Montgomery KONE, Inc., and Respondent Parsons Brinckerhoff Construction Services, Inc., were not in violation of the standard set forth at 29 C.F.R. ' 1926.21(b)(6)(i).

Respondent Parsons Brinckerhoff Construction Services, Inc., was not in violation of the standard set forth at 29 C.F.R. ' 1926.501(b)(1).

Respondent Parsons Brinckerhoff Construction Services, Inc., was not in violation of the standard set forth at 29 C.F.R. ' 1926.1053(b)(1).

Respondent Montgomery KONE, Inc., was not in violation of the standard set forth at 29 C.F.R. ' 1926.352(c).

Respondent Montgomery KONE, Inc., was not in violation of the standard set forth at 29 C.F.R. ' 1926.352(i).

Respondent Montgomery KONE, Inc., was not in violation of the standard set forth at 29 C.F.R. ' 1926.1200(h)(1).

Respondent Montgomery KONE, Inc., was in other-than-serious violation of the standard set forth at 29 C.F.R. ' 1926.102(a)(1). A penalty of $00 is appropriate.

Respondent Montgomery KONE, Inc., was in other-than-serious violation of the standard set forth at 29 C.F.R. ' 1926.350(a)(10). A penalty of $00 is appropriate.

Respondent Montgomery KONE, Inc., was not in violation of the standard set forth at 29 C.F.R. ' 1926.501(b)(3).

Respondent Montgomery KONE, Inc., was not in violation of the standard set forth at 29 C.F.R. ' 1926.152(b)(1).

Respondent Montgomery KONE, Inc., was in serious violation of the standard set forth at 29 C.F.R. ' 1926.501(b)(1). A penalty of $2000 is appropriate.

Respondent Montgomery KONE, Inc., was in other-than-serious violation of the standard set forth at 29 C.F.R. ' 1926.403(d)(1). A penalty of $00 is appropriate.

Respondent Montgomery KONE, Inc., was in other-than-serious violation of the standard set forth at 29 C.F.R. ' 1926.1053(b)(1). A penalty of $00 is appropriate.

ORDER

Citation 1, item 3a, issued to Montgomery KONE, Inc., is affirmed as a serious violation of the Act. Citation 3, items 1, 3, 4, and 5 issued to Montgomery KONE, Inc., are affirmed as other-than-serious violations of the Act. All other citations issued to Montgomery KONE, Inc., and Parsons Brinckerhoff Construction Services, Inc., are vacated. A civil penalty of $2000 is assessed against Montgomery KONE, Inc.

JOHN H FRYE

Judge, OSHRC

Dated: OCT 9 1998

Washington, D.C.