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

SECRETARY OF LABOR, Complainant, v. UNITED ERIE, DIV. OF INTERSTATE CHEMICAL CO., INC., Respondent.	:	OSHRC DOCKET NO. 98-0297

APPEARANCES:

Theresa C. Timlin, Esquire
Office of the Solicitor
U.S. Department of Labor
Philadelphia, Pennsylvania
For the Complainant.

Richard R. Nelson, II, Esquire
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For the Respondent.

BEFORE: G. MARVIN BOBER
Administrative Law Judge

DECISION AND ORDER

Background and procedural history

This case arises under the Occupational Safety and Health Act of 1970, 29 U.S.C.§§ 651-678 (1970) ("the Act"), to review (1) citations issued by the Secretary of Labor pursuant to section 9(a) of the Act, and (2) proposed assessments of penalty issued pursuant to section 10(a) of the Act.

On July 14, 1997, Bruce Stephens, a production/kettle operator for United Erie (United), a division of Interstate Chemical Company, Inc. (Interstate), died of "environmental suffocation due to deficiency of atmospheric oxygen due to oxygen displacement." (GX-27; GX-37).[1] As a result of the fatality, the Occupational Safety and Health Administration (OSHA) conducted an inspection of the site, and on January 8, 1998, United was issued one willful, one serious, and one "other" citation. The proposed penalties in this case total $455,000. On January 30, 1998, United timely contested the citations, and an administrative trial was held in Erie, Pennsylvania September 8 - 11, 1998. Both parties filed post-trial briefs on December 23, 1998.

Jurisdiction

The parties agree that United is an employer engaged in interstate commerce within the meaning of section 3(5) of the Act, 29 U.S.C. § 652(5), and that the Occupational Safety and Health Review Commission ("the Commission") has jurisdiction over this case.

Stipulations

The parties stipulated to the following at the commencement of the trial. (Tr. 13-18).

1. The Review Commission has jurisdiction over these matters.

2. The proper identity of the Respondent is United Erie, division of Interstate Chemical Company.

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[1]Exhibits are identified as follows: GX (Government's Exhibit); RX (Respondent's Exhibit).

3. United Erie, division of Interstate Chemical Company, manufactures chemical binders and resins for the steel foundry industry in addition to manufacturing other chemicals.

4. Respondent, Interstate Chemical Company, is a corporation with its principal office and place of business at 2797 Freeland Road, Hermitage, Pennsylvania 16148.

5. United Erie, division of Interstate Chemical Company, has a work place at 438 Huron Street, Erie, Pennsylvania 16502.

6. Interstate Chemical Company employs one hundred sixty (160) employees in its business activities; thirteen (13) were employed at the subject work site at United Erie.

7. Respondent utilizes tools, equipment, machinery and materials, goods and supplies which originated in whole or in part from locations outside the Commonwealth of Pennsylvania.

8. The Respondent is an employer engaged in interstate commerce within the meaning of Section 3(5) of Occupational Safety and Health Act of 1970, 29 U.S.C. § 652 (5) ("the OSH Act").

9. The standard or regulation cited in each item of each citation applies to the condition described in each item of each citation.

10. Respondent failed to comply with the standard cited in Citation Number 1, Item 3, 29 C.F.R. § 1910.147(c)(4)(i).

11. Respondent failed to comply with the standard cited in Citation Number 2, Item 4(b) 29 C.F.R. § 1910.146(d)(5)(i).

12. Respondent failed to comply with the standard cited in Citation Number 2, Item 4(c) 29 C.F.R. § 1910.146(d)(5)(ii).

13. Respondent failed to comply with the standard cited in Citation Number 3, Item 1, 29 C.F.R. § 1910.36(b)(6).

14. Respondent failed to comply with the standard cited in Citation Number 3, Item 2, 29 C.F.R. § 1910.1200(f)(5)(i).

15. Citation Number 3, Items 1 and 2 were properly characterized as other than serious and the proposed penalty of zero for each violation is appropriate.

16. As part of their job duties, certain of United Erie's employees entered permit-required confined spaces, as that term is defined in 29 C.F.R. § 1910.146(b).

17. On July 10, 1997, Jeff Meisel entered tank C to clean it.

18. Respondent's United Erie division did not use test equipment to determine if any hazardous atmospheric conditions existed before Respondent's employee entered tank C on or about July 10, 1997.

19. Respondent's United Erie division did not provide testing and monitoring equipment to test for oxygen, combustible gases or vapors, or toxic gases or vapors when Mr. Meisel entered tank C on or about July 10, 1997.

20. In July 1997 the United Erie division did not prepare entry permits containing all of the information specified in 29 C.F.R. § 1910.146(f).

21. Joseph Puntureri, General Manager of United Erie, is the son of Albert Puntureri, President of Interstate Chemical Company.

22. On June 4, 1996, Interstate Chemical Company received OSHA Citations for willful and serious violations of 29 C.F.R. § 1910.146 *et seq*. arising out of an inspection at Interstate Chemical's Pueblo, Colorado facility.

23. The citations issued to Interstate Chemical's Pueblo, Colorado facility were settled and became a final order of the Occupational Safety and Health Review Commission on October 2, 1996.

24. As it had agreed in the stipulation of settlement with respect to the citations at its Pueblo facility, Respondent performed community and industry outreach including a presentation on confined space to the National Association of Chemical Distributors and the Metal Plating Association.

25. Mr. Bruce Stephens, an employee of United Erie was fatally overcome by an oxygen deficient atmosphere on July 14, 1997.

The Accident

Interstate, which owns seven facilities and leases another six facilities across the country, is a distributor of industrial chemicals; it purchases chemical products from manufacturers in large quantities, breaks them down into smaller lots, and disseminates them

to customers. United, a division of Interstate since 1993, manufactures chemical binders, resins and grease products. United also manufactures and blends products for private customers. Timothy Drohn, United's plant manager for about ten years, supervises plant operations and production employees. In July of 1997, the production employees were Bruce Stephens, a kettle operator assigned to the 4,000-gallon kettle, Joe Sammy Lucero, a kettle operator assigned to the 2,000-gallon kettle, Jeff Meisel, responsible for making products, transporting drums, and cleaning tanks, and Dave Fratz, the warehouseman. (Tr. 14; 71-77; 116-18; 133-34; 204-09; 278-86; 683-87).

On the morning of July 14, 1997, Stephens had finished processing a batch of dry-set MCR. Meisel's job was to load an Interstate truck with the MCR by hooking up hoses from the kettle to the truck, and the loading was done by sealing the top manhole of the 4,000-gallon kettle and using pressurized nitrogen to force the product into the tanker. When Meisel finished the loading around 3:30 p.m., he told Stephens, who was to clean the kettle for use the next day. Lucero was working that afternoon in the drumming station, which was 10 to 15 feet away from Stephens' kettle. Lucero saw Stephens get a ladder, which was used only to enter the kettles, and put it inside the kettle; he also saw that Stephens had on a half-mask respirator.[2] (Tr. 83-86; 103; 106-07; 134-35; 139-40; 234).

[2]Although there was evidence that Stephens may have entered the kettle to retrieve a gasket, the actual reason for his entry was never determined. (Tr. 250; 274; 629; 636-39).

Near the end of the day, Meisel was looking for a drill he wanted to use, and he asked Lucero if he had seen Stephens, who generally knew where the tools were. Lucero indicated that Stephens was in the kettle, and Meisel noted the top of the ladder protruding from the kettle. Around 4:30 p.m., Drohn came to Meisel's work area; they discussed Stephens' whereabouts, and Meisel told Drohn what Lucero had said. As Drohn started to return to the office, Meisel looked inside the kettle and called Stephens' name but got no response. Meisel then obtained a flashlight, and, looking in the kettle again, saw Stephens' body. Meisel ran to the west end of the plant to retrieve the facility's air pump, and he called the office and asked them to notify Joseph Puntureri and to call an ambulance. When Drohn entered the kettle to retrieve Stephens, he wore a full-face respirator that was supplied with air from the pump. He also carried in a half-mask respirator and a five-minute escape oxygen bottle as well as a harness attached to a rope; however, Drohn himself was not wearing a harness or attached to a rope. After being unable to detect a pulse, Drohn put the harness on Stephens and got him out of the kettle with the help of Meisel, Lucero and Puntureri. Upon removing Stephens, those present noted that the half-mask respirator was on the side of his head and not covering his face.[3] The paramedics then arrived, but they were unable to revive Stephens. The Erie County Coroner determined that his death was due to environmental suffocation. (Tr. 86-88; 140-46; 151; 236-38; 272-74; 388-90; 533-35; 630-31; GX-37).

[3]By this time, Anthony Stephens had arrived at the plant to pick up his father from work, and he helped to move his father's body from the top of the kettle. (Tr. 388-90).

The OSHA Inspection

Following the accident, Joseph Punturerі called OSHA and informed the agency of the fatality. Beverly Spare, the OSHA compliance officer (CO) assigned to the case, went to the site on July 15, 16, 24 and 30, 1997; Mark Harmon, another CO, accompanied her. As a result of her inspection, CO Spare determined that Stephens' entry was unauthorized because he did not follow the procedures that were in place at the facility, including the requirement to advise Drohn of the entry. CO Spare also determined that Stephens had made a prior unauthorized entry; on that occasion, Stephens had entered a kettle to retrieve a baseball cap. Stephens was reprimanded after the incident. (Tr. 318; 561-566; 590; 598).

Respondent's Expert Witness

United offered Joseph M. Cali, Ph.D., as an expert in occupational safety and safety management. Dr. Cali is the Allied Health Department Chair at Slippery Rock University; he is also a professor in that Department, and some of the courses he teaches address OSHA compliance. United retained Dr. Cali after the accident to examine and standardize its safety program. During his four to five visits to the facility, Dr. Cali held discussions with employees and management regarding operations at the plant, and these discussions included the confined space program United had in place prior to the accident. Dr. Cali also reviewed United's overall safety program and training records, its confined space program and video, and the depositions of various persons taken by OSHA during its inspection. (Tr. 723-47).

Dr. Cali testified that he had determined through his investigation that United's confined space program was a "fill-in-the-blank" document that was not filled in. He concluded, however, that "the employees did know that there were certain procedures in place," that "everyone would understand what steps needed to be taken," and that "[b]asically, everyone knew verbally what their roles were supposed to be." Dr. Cali also testified that there were various factors indicating that United "had a good faith belief that the conditions regarding confined space complied with the OSHA standards." These factors included his determination that United held safety meetings and showed the confined space video, that it had a confined space program, and that it had procedures in place that the employees understood. Dr. Cali nonetheless observed that United did not have any air monitoring equipment, that its rescue and retrieval systems and equipment were deficient, and that it did not have a written confined space entry permit form or written disciplinary procedures. (Tr. 749-57; 762-784).

The Secretary's Burden of Proof

In order to establish a violation of a specific standard, the Secretary must show by a preponderance of the evidence that: (a) the standard applies to the cited condition; (b) there was a failure to meet the terms of the standard; (c) the employees had access to the violative condition; and (d) the employer had actual or constructive knowledge of the conditions (*i.e.*, the employer either knew or could have known of the conditions with the exercise of

reasonable diligence). *Halmar Corp.*,18 BNA OSHC 1014, 1016 (No. 94-2043, 1997); *Atlantic Battery Co.*,16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

The Confined Space Standard

The permit-required confined spaces standard, found at 29 C.F.R. 1910.146, contains requirements for practices and procedures to protect employees from the hazards of entry into confined spaces. A confined space is defined as a space that is large enough and so configured that an employee can bodily enter and perform assigned work, has limited or restricted means of entry or exit, and is not designed for continuous employee occupancy. *See* 29 C.F.R. 1910.146(b). United was cited for failing to comply with various requirements of the confined space standard.

Serious Citation 1, Item 1 - Proposed Penalty: $1,050.00

> 29 CFR 1910.119(j)(5): The employer shall correct deficiencies in equipment that are outside acceptable limits (defined by the process safety information in paragraph (d) of this section) before further use or in a safe and timely manner when necessary means are taken to assure safe operation.

The Secretary asserts that United used "C" clamps in place of the original I-bolts to hold the hatch in place on various kettles at the facility; that the "standard requires that if there is a deficiency in a process vessel (*i.e.*, original equipment on the vessel that no longer works as it was designed), then the equipment must be replaced with equipment that is recommended by the manufacturer or otherwise verified as acceptable"; that "[t]he original I-bolts on the manhole cover for the 4,000-gallon pressurized kettle had been stripped and were no longer functional"; that "[f]or approximately one year, Respondent had been using

C-clamps to close the manhole cover"; that "[R]espondent had not certified or determined that the C-clamps would hold the hatch in place as well as the initial equipment"; and that "[R]espondent thus violated 29 C.F.R. § 1910.119(j)(5)." (Tr. 134; 481; GX-7).

United does not dispute the cited condition, but asserts, rather, that the "Complainant failed to prove that U-E violated this standard because she did not provide any evidence that the use of "C" clamps to seal the 4,000-gallon kettle placed the kettle outside acceptable limits." However, according to CO Spare, the cited standard, to correct deficiencies in equipment, requires replacement with "equipment [that] *** is acceptable to ensure the initial state of that equipment, or if there's broken parts to replace them with manufacturer's recommended equipment." She further testified that the use of "C" clamps in place of the original I-bolts could result in "fire hazards, explosion hazards, burns, chemical reactions" because "[t]here was no certification, or *** determination made that the C-clamps would hold the hatch in place as well as the initial equipment." (Tr. 478-91). The record establishes the alleged violation. This item is affirmed.[4]

Serious Citation 1, Item 2a - Proposed Penalty: $4,900.00

> 29 CFR 1910.146(h)(1): The employer shall ensure that all authorized entrants know the hazards that may be faced during entry, including information on the mode, signs or symptoms, and consequences of the exposure.

The Secretary asserts that while the employees at United had watched a videotape about confined space hazards, that training, in and of itself, was not sufficient to ensure that

[4]The assessment of penalties in this case is set out at the end of this decision.

employees who entered the kettles and other vessels at the facility had the knowledge and skills necessary to safely perform their job duties. The Secretary also asserts that employees were not given specific information about the potential hazards they faced, pointing out that while Timothy Drohn, the plant manager, and Jeff Meisel, one of the production workers, took a quiz about the contents of the video, none of the other employees took the quiz.

United asserts that the record does not support the conclusion that any of its employees was unaware of the dangers associated with confined space entry, noting that all four of the production employees were present during a safety meeting on November 8, 1996, when the confined space video was shown and the hazards of confined space entry were discussed at length. (Tr. 487; RX-36; RX-37). Meisel testified that the video addressed what confined spaces were and the hazards associated with entering such spaces, which included atmospheric conditions, exposure to product, and electrical hazards, such as starting up a motor. (Tr. 155-56). Sammy Lucero testified that he knew of the hazards of entering tanks and kettles, which included exposure to fumes and the possibility of the kettle automatically starting, and he indicated that this was why employees wore full-face respirators with supplied air when they entered confined spaces. (Tr. 94). United also notes the results of the quizzes given to Drohn and Meisel. (Tr. 420; GX-17; GX-24).

Despite United's assertion, it is clear Bruce Stephens entered the 4,000-gallon kettle on July 14, 1997, without prior authorization and with only a half-mask respirator on, and that his entry resulted in death by suffocation. In my view, his acts suggest that United did

not ensure that all authorized entrants knew of the hazards faced upon entry. United contends that Stephens' actions were unpreventable employee misconduct. To meet this affirmative defense, the employer must show that: (1) it established work rules designed to prevent the specific violation from occurring; (2) the work rules were adequately communicated to employees; (3) it took steps to discover violations of the rules; and (4) it effectively enforced the rules when violations were discovered. *Halmar Corp.*, 18 BNA OSHA 1014, 1017 (No. 94-2043, 1997); *Falcon Steel Co.*, 16 BNA OSHA 1179, 1193 (Nos. 89-2883 & 3444, 1993).

As Dr. Cali indicated in his testimony, *supra*, United did not have a site-specific confined space program; rather, it had a "fill-in-the-blank" program that was not filled in, and there were verbal rules that employees generally understood and followed. Specifically, before entering kettles or tanks, employees were to obtain Drohn's authorization and to also wear full-face respirators with air supplied by a line attached to an air pump. (Tr. 86; 91-94; 98-99; 156-62; 237; 249-50; 420; 564-65). However, Stephens did not follow these rules on July 14, 1997. (Tr. 249-50; 566;106-07; 630-31). Further, Stephens on a prior occasion entered a kettle without authorization to retrieve a baseball cap, and while he was verbally reprimanded for this incident, there was no written record of his reprimand and United did not have a written disciplinary procedure. (Tr. 227; 318-19; 565-66; 590-91; 627-29; 635). Finally, I note the evidence indicating that Meisel had entered vessels in violation of United's rules. (Tr. 117-18; 182-83). Based on the record, I find that United's work rules

were not adequately communicated or enforced and that the accident was not caused by unpreventable employee misconduct. United's defense accordingly fails, and this item is affirmed.

Serious Citation 1, Item 2b

> 29 CFR 1910.146(i)(1): The employer shall ensure that each attendant knows the hazards that could be faced during entry, including information on the mode, signs or symptoms, and consequences of the exposure.

The Secretary asserts that although United used a "buddy" system whereby employees were assigned as attendants for those who entered confined spaces, no steps were taken to ensure that attendants understood the hazards faced by the employees who entered confined spaces. The Secretary notes that this lack of understanding was evidenced by the behavior of Dave Fratz who, although assigned to attend Meisel when he entered Tank C on July 10, 1997, left the vicinity to do other work in the warehouse. (Tr. 133). The Secretary also notes that Timothy Drohn, the plant manager, demonstrated basic deficiencies in his knowledge of the duties of an attendant; in particular, Drohn told employees they could do other work, including work a significant distance away, while serving as attendants. (Tr. 129; 177-78).

United asserts it complied with the standard. However, the preamble to the cited standard requires "the attendant to know the hazards that may be faced during entry *** including the consequences of exposure." The preamble also requires the employer to "ensure that each attendant has knowledge regarding the hazards of permit-required confined space operations [to be] imparted to each attendant through 'training,

communication of effective work rules and administration.'" *See* 58 Fed Reg. 4462, 4517 (1993). Based on the record, such "training, communication of effective work rules and administration" by United was lacking. This item is therefore affirmed.

Serious Citation 1, Item 3 - Proposed Penalty: $1,050.00

> 29 CFR 1910.147(c)(4)(i): Procedures shall be developed, documented and utilized for the control of potentially hazardous energy when employees are engaged in the activities covered by this section.

The basis of this item was Stephens' entry into the 4,000-gallon kettle on July 14, 1997, without the controls providing the power to the mixing blades being locked out. The Secretary asserts that there was no lockout device to prevent someone from energizing the mixing blades and that United did not develop, document or utilize procedures for the control of potentially hazardous energy. In Stipulation 10, United admitted that (1) the standard applies and (2) "the conditions observed during the investigation failed to comply with the requirements of the standard." However, United does not admit to employee exposure or to knowledge of the condition. (Tr. 14; 18-21). United asserts that the evidence shows that it had instituted lockout/tagout procedures as early as May 5, 1990, and that its employees commonly locked out electrical service to equipment. United notes that it held several safety meetings on this subject, that it had the required procedures in place, notwithstanding the lack of a fully-documented written program, and that apart from the incident on July 14, 1997, there was no evidence that employees were exposed to a hazard

because of its failure to write down its procedures. (Tr. 117-18; 127; 304-05; RX-32; RX-33).

I find that the record establishes the alleged violation. United admits it did not have a "fully-documented written program," which, in my opinion, resulted in employees being inadequately informed about lockout procedures. Further, Stephens' entry into the kettle on July 14, 1997, shows employee exposure to potentially hazardous energy, and his actions that day were not unpreventable employee misconduct. *See* item 2a, *supra*. This item is affirmed

Willful Citation 2, Item 1a - Proposed Penalty: $56,000.00

> 29 CFR 1910.146(c)(l): The employer shall evaluate the workplace to determine if any spaces are permit-required confined spaces.

The Secretary asserts that United's "blanket statement" that all of its confined spaces were permit-required confined spaces does not constitute the evaluation required by the cited standard. United, however, asserts that it made the required evaluation. Specifically, Joseph Puntureri, the general manager, testified the facility had designated all of the vessels in the production area as permit-required confined spaces; he also said that "just to be conservative, we've always defined all of our spaces as needing a permit." (Tr. 310-11; 342; 345-46; 349).

In support of their respective positions, both parties cite to *Drexel Chem. Co.*, 17 BNA OSHC 1908 (No. 94-1460, 1997); the Secretary also cites to *Trinity Indus.*, 1997 WL 166156 OSHC (No. 95-455, 1997). In *Drexel*, the Commission found that a specific physical evaluation of the workplace to determine the existence of confined spaces was not required,

as long as the determination was made through existing records and knowledge of the spaces, and that documentation of the evaluation was not required if the employer explained how it was done. 17 BNA OSHC at 1910. In addition, in *Trinity*, the Judge stated as follows:

> The term "evaluate" is not defined by the standard. *** The standard requires that an evaluation be reasonable, not that it be made with perfect foresight. *** A rational initial evaluation is all that is required.

In my opinion, United's designation of all of the vessels in the production area as permit-required confined spaces constituted an evaluation within the meaning of the standard. Puntureri described how the evaluation was made, it was apparently based on his knowledge of the spaces at the facility, and, as I see it, it was "reasonable" and "rational" under the circumstances. United evaluated its production area with sufficient specificity to meet the requirements of the standard. This citation item is therefore vacated.

Willful Citation 2, Item 1b

> 29 CFR 1910.146(c)(2): If the workplace contains permit spaces, the employer shall inform exposed employees, by posting danger signs or by any other equally effective means, of the existence and location of and the danger posed by the permit spaces.

The record shows that United's employees entered kettles, tanks and other vessels for cleaning, maintenance and retrieval of items that did not belong in them and that, as a consequence, employees were exposed to the hazards presented by permit-required confined spaces. The record also shows that none of the confined spaces were marked with danger signs or other means to inform employees of the hazards posed by the spaces. The Secretary asserts that these factors establish a violation of the standard, particularly in light of Meisel's

testimony that employees had asked management which of the vessels were permit-required confined spaces and had never received an answer. (Tr. 127-128).

United asserts that the standard does not require the posting of danger signs; rather, all it requires is that the employer inform employees of the existence or location of confined spaces and of the dangers associated with entry into them by "equally effective means." United further asserts that it met this requirement, noting CO Spare's testimony that employees "knew the dangers of entering the confined spaces at the plant and that they had acquired this knowledge as a result of the videotape and other training that was provided."

United's argument that its employees knew of the dangers of entering the confined spaces at the plant through the videotape and training sessions it provided ignores the purpose of the cited standard. The standard expressly requires the posting of signs or other "equally effective means" that will inform employees of the existence and location of permit spaces as well as the hazards they pose. While signs are not mandatory, general training in the standard is insufficient, and "equally effective means" include methods such as restricting access to the spaces or using markers, symbols, or emblems to identify them. *See Drexel Chem. Co.*, 17 BNA OSHC at 1910-11. United's argument is also belied by Meisel's testimony set out above. This citation item is affirmed.[5]

Willful Citation 2, Item 2a - Proposed penalty: $56,000.00

[5]The characterization of this and the other willful items in this case, and the penalties assessed, is set out *infra*.

> 29 CFR 1910.146(c)(4): If the employer decides that its employees will enter permit spaces, the employer shall develop and implement a written permit space program that complies with this section. The written program shall be available for inspection by employees and their authorized representatives.

The Secretary asserts that United did not comply with the cited standard because it used a generic "fill-in-the-blank" program that was not filled in and was not site specific. United concedes its program was not site specific, but asserts that it met the standard because it used the program "as a reference guide to develop and implement means, procedures and practices for safe entry by the production employees into confined spaces." Regardless, I find that United did not comply with the standard. The subject standard requires the employer, *inter alia*, to: implement measures to prevent unauthorized entry; specify acceptable entry conditions, isolate and purge, inert, flush or ventilate the space; verify that conditions are acceptable for entry; designate persons having active roles in entry operations and provide them the required training; develop and implement rescue procedures and procedures for summoning rescue and emergency services; develop and implement a system for the preparation and use of entry permits. *See Drexel Chem. Co.*, 17 BNA OSHC at 1911-12. Based on my findings *supra*, as well as those *infra*, United's generic written program did not meet these requirements. This citation item is accordingly affirmed.

Willful Citation 2, Item 2b

> 29 CFR 1910.146(d)(3): Under the permit space program required by [29 CFR 1910.146(c)(4)], the employer shall: Develop and implement the means, procedures, and practices necessary for safe permit space entry operations, including, but not limited to, the following: (i) Specifying acceptable entry conditions; (ii) Isolating the permit space; (iii) Purging, inerting, flushing, or

> ventilating the permit space as necessary to eliminate or control atmospheric hazards; (iv) Providing pedestrian, vehicle, or other barriers as necessary to protect entrants from external hazards; and (v) Verifying that conditions in the permit space are acceptable for entry throughout the duration of an authorized entry.

The Secretary asserts that United did not comply with the standard because it had no atmospheric testing equipment and could not specify acceptable entry conditions or verify that conditions remained acceptable throughout the duration of an authorized entry.[6] The Secretary also asserts that United did not establish procedures for ensuring that hazards in permit spaces were controlled, that it did not purge, inert, flush, or ventilate its permit spaces before employees entered, and that it had no barriers set up to protect entrants from external hazards. (Tr. 129, 133, 174, 233). *See also Trinity Indus.*, 1997 WL 166156 OSHRC (No. 95-455, 1997). For these reasons, and those set out in item 2a, *supra*, this item is affirmed.

Willful Citation 2, Item 3 - Proposed Penalty: $56,000.00

> 29 CFR 1910.146(d)(l): Under the permit space program required by [29 CFR 1910.146(c)(4)], the employer shall: Implement the measures necessary to prevent unauthorized entry.

United admits that on a few occasions, "employees apparently entered confined spaces to retrieve items that had fallen into the vessels." United nonetheless asserts that the record does not establish a violation of the cited standard because the Secretary "failed to offer any credible evidence of how Respondent was supposed to prevent unauthorized entry

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[6]Acceptable entry conditions are those that must exist in a permit space to allow entry and to ensure that employees involved with a permit-required confined space entry can safely enter into and work within the space. *See* 29 C.F.R. 1910.146(b).

to kettles in violation of company procedure." However, the preamble to the confined space standard states that "employers [are required] to take whatever steps are necessary to prevent unauthorized employees into permit spaces."*See* 58 Fed. Reg. 4462, 4495 (1993). Moreover, United's assertion is nothing more than an attempt to shift the burden of proof. The evidence of record shows that employees made unauthorized entries into permit spaces, and United's contention that such acts were unpreventable employee misconduct was considered and rejected in item 2a of serious citation 1, *supra*. This citation item is affirmed.

Willful Citation 2, Item 4a - Proposed Penalty: $56,000.00

> 29 CFR 1910.146(d)(2): Under the permit space program required by [29 CFR 1910.146(c)(4)], the employer shall: Identify and evaluate the hazards of permit spaces before employees enter them.

The record shows United had no atmospheric testing equipment at the site and that employees, before entering a tank or kettle, would smell the contents. (Tr. 81, 117-118, 132). The Secretary asserts that this was an inadequate method of identifying and evaluating the hazards of a confined space before entry. United, however, asserts that it "did not violate [this regulation] because the record does not support a finding (i) that an evaluation of entry conditions was not made or (ii) that Mr. Meisel was exposed to any hazards resulting from a lack of monitoring equipment on July 10, 1997." I disagree. As set out in the preamble to the confined space standard, the employer must identify and evaluate permit spaces before entry, so that entry can be safely planned for and authorized. *See* 58 Fed. Reg. 4462, 4496

(1993). In my opinion, this requirement cannot be met without monitoring equipment, and, as United had no such equipment, it violated the standard. This citation item is affirmed.

Willful Citation 2, Item 4b

> 29 CFR 1910.146(d)(5)(i): Under the permit space program required by [29 CFR 1910.146(c)(4)], the employer shall: Evaluate permit space conditions as follows when entry operations are conducted: Test conditions in the permit space to determine if acceptable entry conditions exist before entry is authorized to begin ***

In Stipulation 11, United admitted that (1) the standard applies and (2) "the conditions observed during the investigation failed to comply with the requirements of the standard." United does not, however, stipulate to employee exposure or knowledge. (Tr. 18-21).

As noted above, 29 C.F.R. 1910.146(d)(2) requires an employer to identify and evaluate the hazards of permit spaces before entry, while 29 C.F.R. 1910.146(d)(5)(i), the subject standard, requires the employer to test conditions in the permit space to determine if acceptable entry conditions exist before entry. Based on my conclusion in item 4a, monitoring equipment is also required to comply with the terms of the subject standard. This item is therefore affirmed. *See also* 58 Fed. Reg. 4462, 4498-99 (1993).

Willful Citation 2, Item 4c

> 29 CFR 1910.146(d)(5)(ii): Under the permit space program required by [29 CFR 1910.146(c)(4)], the employer shall: Test or monitor the permit space as necessary to determine if acceptable entry conditions are being maintained during the course of entry operations.

In Stipulation 12, United admitted that (1) the standard applies and (2) "the conditions observed during the investigation failed to comply with the requirements of the standard." United does not stipulate to employee exposure or to knowledge. (Tr. 18-21). Regardless, for the same reasons set forth in the preceding discussions, this item is also affirmed.

Willful Citation 2, Item 5 - Proposed penalty: $56,000.00

> 29 CFR 1910.146(d)(4)(i): Under the permit space program required by [29 CFR 1910.146(c)(4)], the employer shall provide: Testing and monitoring equipment needed to comply with [29 CFR 1910.146(d)(5)].

The foregoing establishes that United did not have testing and monitoring equipment, as specifically required by the cited standard. This item is accordingly affirmed.

Willful Citation 2, Item 6a - Proposed Penalty: $56,000.00

> 29 CFR 1910.146(d)(4)(viii): Under the permit space program required by [29 CFR 1910.146(c)(4)], the employer shall provide: Rescue and emergency equipment needed to comply with [29 CFR 1910.146(d)(9)] ***

The preamble to the confined space standard requires the employer to "provide the equipment necessary for safe entry into and rescue from permit spaces at no cost to employees, to maintain that equipment properly, and to ensure its proper use by employees." *See* 58 Fed. Reg. 4462, 4497 (1993). The record shows that Drohn wore appropriate respiratory protection to enter the kettle on the day of the accident and that he took with him

a respirator, harness and rope to rescue Stephens; however, Drohn himself did not wear a harness and he was not attached to a rope. The record also shows that Stephens was removed from the kettle only with great difficulty, even with the harness and rope, and that United had no tripod or winch to facilitate employee rescues from vessels. (Tr. 86-88; 143-46; 227-28; 236-38; 256; 272-74; 302; 423; 436; 532-35). On the basis of the record, United did not have all of the necessary equipment for safe entry into and rescue from permit spaces. This citation item is therefore affirmed.

Willful Citation 2, Item 6b

> 29 CFR 1910.146(d)(9): Under the permit space program required by [29 CFR 1910.146(c)(4)], the employer shall: Develop and implement procedures for summoning rescue and emergency services, for rescuing entrants from permit spaces, for providing necessary emergency services to rescued employees, and for preventing unauthorized personnel from attempting a rescue.

The record shows that United did not develop and implement adequate procedures to carry out the requirements of the cited standard. (Tr. 125-26; 309; 537-39). This finding is supported by the company's rescue efforts on the day of the accident, which Meisel described as "pretty chaotic." (Tr. 86-88; 143-46; 236-38; 272-73). *See also* 58 Fed. Reg. 4462, 4501 (1993). In view of the record, United violated the cited standard. This item is affirmed.

Willful Citation 2, Item 7a - Proposed penalty: $56,000.00

> 29 CFR 1910.146(d)(6): Under the permit space program required by [29 CFR 1910.146(c)(4)], the employer shall: Provide at least one attendant

> outside the permit space into which entry is authorized for the duration of entry operations.

The discussion set out in item 2b of citation 1, *supra*, establishes that although United had a "buddy" system whereby employees were assigned as attendants for those who entered confined spaces, attendants were allowed to leave the areas of the vessels they were attending to perform work elsewhere. (Tr. 129; 133; 177-78). As stated in the preamble to the confined space standard, the employer is required to provide at least one attendant outside the permit space into which entry is authorized. An attendant can monitor more than one permit space, provided the attendant can keep an accurate count of and communicate with entrants, monitor activities inside and outside the spaces for hazards, and summon rescue services and keep unauthorized persons out of the spaces. One purpose of the standard is to protect authorized entrants from working in permit spaces that are not being adequately monitored. *See* 58 Fed. Reg. 4462, 4500-4501, 4518-20 (1993). In light of these requirements and the evidence of record, United did not comply with the cited standard. This item is affirmed.

Willful Citation 2, Item 7b

> 29 CFR 1910.146(i)(4): The employer shall ensure that each attendant: Remains outside the permit space during entry operations until relieved by another attendant.

Based on the foregoing discussion, United was also in violation of 29 C.F.R. 1910.146(i)(4). This citation item is accordingly affirmed.

Willful Citation 2, Item 8a - Proposed penalty: $56,000.00

> 29 CFR 1910.146(d)(10): Under the permit space program required by [29 CFR 1910.146(c)(4)], the employer shall: Develop and implement a system for the preparation, issuance, use, and cancellation of entry permits as required by this section.

The record shows United did not develop and implement a system for the preparation, issuance, use and cancellation of entry permits. (Tr. 225; 232; 306-07). This item is affirmed.

Willful Citation 2, Item 8b

> 29 CFR 1910.146(e)(l): Before entry is authorized, the employer shall document the completion of measures required by [29 CFR 1910.146(d)(3)] by preparing an entry permit.

In view of the disposition of item 8a, *supra*, United was also in violation of 29 C.F.R. 1910.146(e)(1). *See also* 58 Fed. Reg. 4462, 4496, 4504 (1993). This item is affirmed.

"Other" Citation 3, Items 1 and 2

In Stipulations 13 through 15, United agreed it had violated 29 C.F.R. 1910.36(b)(6) and 29 C.F.R. 1910.1200(f)(5)(i), the standards cited in items 1 and 2 of citation 3. United also agreed the violations were non-serious and that a penalty of zero was appropriate. (Tr. 20-21). Items 1 and 2 of citation 3 are affirmed, and no penalties are assessed for these items.

Whether the Violations in Citation 2 were Willful

A willful violation is one committed "with intentional, knowing or voluntary disregard for the requirements of the Act or with plain indifference to employee safety."

Williams Enter., Inc., 13 BNA OSHA 1249, 1246 (No. 85-355, 1987). As *Williams* goes on to state:

> 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. There must be evidence that an employer knew of an applicable standard or provision prohibiting the conduct or condition and consciously disregarded the standard. Without such evidence of familiarity with the standard's terms, there must be evidence of such reckless disregard for employee safety or the requirements of the law generally that one can infer that if the employer had known of the standard or provision, the employer would not have cared that the conduct or conditions violated it. It is therefore not enough for the Secretary simply to show carelessness or lack of diligence in discovering or eliminating a violation; nor is a willful charge justified if an employer has made a good faith effort to comply with a standard or eliminate a hazard, even though the employer's efforts are not entirely effective or complete.

13 BNA OSHC at 1256-57.

In support of the willful characterization, the Secretary notes OSHA cited Interstate's Pueblo, Colorado facility in 1996, that the citation alleged willful violations of the confined space standard, and that the citation was settled and became a final order of the Commission. The Secretary also notes that United has been a division of Interstate since 1993, that Joseph Puntureri, United's general manager, is the son of Albert Puntureri, Interstate's president, and that Joseph Puntureri knew of the citation issued to Interstate. Finally, the Secretary notes that Timothy Drohn had confined space training in 1988, that Drohn and Joseph Puntureri watched the confined space video along with the production employees in November of 1996, and that while Puntureri made notes at that time about what was needed to comply with the standard those measures were still not in effect on July 14, 1997. (Tr.

190-95; 210-11; 219; 224-25; 232-33; 248-49; 293; 296; 522; 647-51; 686). *See also* Stipulations 21-23.

Notwithstanding the foregoing, I conclude the violations were not willful. The record shows that United had a generic confined space program in place, that in November 1996 the confined space video was shown to the production employees and the hazards of confined space entry were discussed at length, and that United had verbal work rules the employees generally understood and followed; in particular, employees before entering vessels were to obtain Drohn's authorization and to don full-face respirators with air supplied by an air line attached to an air pump. United also had a procedure whereby a "buddy" was to attend to an entrant working in a vessel, and the facility had some rescue equipment and a procedure for summoning emergency services. The opinion of Dr. Cali, United's expert, was that the employees knew that there were certain procedures in place and that everyone knew basically what their roles were. Dr. Cali also opined that United had a good faith belief it met the confined space requirements, although it lacked air monitoring and some rescue equipment as well as a written disciplinary procedure and permit form. (Tr. 749-57; 762-784).

In finding that the violations were not willful, I am well aware of the tragic accident that claimed the life of Bruce Stephens. I am also well aware of the deficits in United's confined space procedures and of my determination, *supra*, that United was in violation of 14 of the 15 standards set out in citation 2. Regardless, on the basis of the record before me,

I am simply not persuaded that United's conduct in this matter rises to the level of intentional disregard of the Act or plain indifference to employee safety. In this respect, I note Drohn's testimony that United always assumed the "worst case scenario" and required the use of the full-face respirator and air pump for entry into vessels. (Tr. 249-50). I note also the testimony of Joseph Puntureri that the showing of the confined space video in November of 1996 was a direct result of the citation issued to Interstate. (Tr. 293-95). Finally, I note the testimony of Puntureri indicating that he and Drohn had discussed what the facility needed after the viewing of the video and that United had taken steps to fulfill the requirements of the confined space standard. (Tr. 293-311). While United's failure to purchase all the necessary equipment and to comply with all the standard's requirements by the time of the accident certainly shows a lack of diligence, it does not, in my opinion, demonstrate willful conduct.

Having found that the willful characterization is inappropriate, it is nonetheless clear that the violations set out in citation 2 that have been affirmed were serious in that there was a substantial probability that death or serious physical harm could have resulted. *See* section 17(k) of the Act, 29 U.S.C. §666(k). Items 1b through 8b of citation 2 are therefore affirmed as serious violations. *Super Excavators, Inc.*, 15 BNA OSHC 1313 (No. 89-2253, 1991).

Penalty Assessment

Once a contested case is before the Commission, the amount of the penalty proposed is just that -- a proposal. The Commission, as the final arbiter of penalties, makes the

determination of what constitutes an appropriate penalty. In so doing, the Commission must give due consideration to the four criteria under section 17(j) of the Act, 29 U.S.C. § 666(j). These penalty factors are the size of the employer's business, the gravity of the violation, the employer's good faith, and its prior history. The gravity of the offense is generally the principle element in the penalty assessment. *Nacirema Operating Co.*,1 BNA OSHC 1001 (No. 4, 1972); *Kus-Tum Builders, Inc.*, 10 BNA OSHC 1128 (No. 76-2644, 1981); *Trinity Indus., Inc.*, 15 BNA OSHC 1481 (No. 88-2691, 1992).

CO Spare used OSHA's Field Inspection Reference Manual (FIRM) to determine the proposed penalties. The FIRM requires consideration of the gravity of the violation, which includes the severity and probability of injury, as well as the size, good faith and history of the employer. With respect to the serious violations, CO Spare testified that she considered the gravity of each of the cited conditions to arrive at a base penalty, to which she applied reductions of 20 and 10 percent for size and history, respectively; the 20 percent reduction was based on Interstate's size, the 10 percent reduction was based on United's lack of history of prior violations, and no reduction for good faith was given. (Tr. 483-85; 491-92; 497-98). In light of the $4,900 penalty proposed for item 2 of serious citation 1, which, like the items in citation 2, alleged a violation of the confined space standard, it is clear that the CO applied a 30 percent reduction to a gravity-based penalty of $7,000.00, the maximum penalty that may be assessed for a serious violation.

United asserts that an additional 20 percent reduction for size should have been given, noting its small size and the fact that it is a separate entity from Interstate. United also asserts that the proposed penalties are improperly based on the fatality instead of the guidelines set out in the FIRM. I agree that a 40 percent reduction for size should have been used in this case, particularly since OSHA applied a 10 percent reduction based on United's history and not that of Interstate. However, I disagree that OSHA's decision to use the maximum gravity-based penalty of $7,000.00 was improper. In fact, in view of the number of violations of the confined space standard, I conclude that it is appropriate to assess a separate penalty for each violation of that standard. I further conclude that no credit for good faith is due.

Based on the foregoing, an additional reduction of 20 percent for size will be applied to the items that have been affirmed in citation 1, resulting in a penalty assessment of $750 each for items 1 and 3 and a penalty assessment of $3,500 each for items 2a and 2b. With respect to citation 2, a penalty of $3,500 each is assessed for items 1b through 8b.

ORDER

Based upon the foregoing decision, the disposition of the citation items, and the penalties assessed, is as follows:

Citation 1	**Standard**	**Disposition**	**Classification**	**Civil Penalty**
Item 1	1910.119(j)(5)	Affirmed	Serious	$ 750
Item 2a	1910.146(h)(1)	Affirmed	Serious	$3,500

Item 2b	1910.146(i)(1)	Affirmed	Serious	$3,500
Item 3	1910.147(c)(4)(i)	Affirmed	Serious	$ 750
Citation 2	**Standard**	**Disposition**	**Classification**	**Civil Penalty**
Item 1a	1910.146(c)(1)	Vacated		-0-
Item 1b	1910.146(c)(2)	Affirmed	Serious	$3,500
Item 2a	1910.146(c)(4)	Affirmed	Serious	$3,500
Item 2b	1910.146(d)(3)	Affirmed	Serious	$3,500
Item 3	1910.146(d)(1)	Affirmed	Serious	$3,500
Item 4a	1910.146(d)(2)	Affirmed	Serious	$3,500
Item 4b	1910.146(d)(5)(i)	Affirmed	Serious	$3,500
Item 4c	1910.146(d)(5)(ii)	Affirmed	Serious	$3,500
Item 5	1910.146(d)(4)(i)	Affirmed	Serious	$3,500
Item 6a	1910.146(d)(4)(viii)	Affirmed	Serious	$3,500
Item 6b	1910.146(d)(9)	Affirmed	Serious	$3,500
Item 7a	1910.146(d)(6)	Affirmed	Serious	$3,500
Item 7b	1910.146(i)(4)	Affirmed	Serious	$3,500
Item 8a	1910.146(d)(10)	Affirmed	Serious	$3,500
Item 8b	1910.146(e)(1)	Affirmed	Serious	$3,500
Citation 3	**Standard**	**Disposition**	**Classification**	**Civil Penalty**
Item 1	1910.36(b)(6)	Affirmed	Other	-0-

Item 2	1910.1200(f)(5)(i)	Affirmed	Other	-0-

Total Penalties Assessed: **$57,500**

G. MARVIN BOBER
ADMINISTRATIVE LAW JUDGE

Date:
Washington, D.C.