SECRETARY OF LABOR,	:	
Complainant,	:	
v.	:	OSHRC Docket No. 98-1192
DANIS SHOOK JOINT VENTURE XXV,	:	
Respondent.	:	

DECISION

Before: ROGERS, Chairman; and EISENBREY, Commissioner.

BY THE COMMISSION:

Following an accident in which a pipefitter foreman was drowned when draining water pulled him into a drainpipe, the Occupational Safety and Health Administration inspected Danis Shook Joint Venture XXV's ("Danis Shook") worksite. As a result of the inspection, the Secretary of Labor cited Danis Shook for three violations of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act"), and proposed penalties totaling $12,600. Administrative Law Judge Ken S. Welsch vacated two items and affirmed one serious violation (item 2b). At issue on review are whether the judge erred in vacating item 2a of the citation alleging a serious violation of 29 C.F.R. § 1926.21(b)(2); whether Danis Shook had knowledge of the failure of its employees to use personal protective equipment (PPE) in violation of 29 C.F.R. § 1926.95(a) as alleged in item 2b; and whether the judge erred in rejecting Danis Shook's unpreventable supervisory misconduct defense to item 2b. For the reasons that follow, we affirm violations of both items 2a and 2b and assess a penalty of $6,300.

I. Background

On April 22, 1998, Danis Shook, a joint venture between Danis Industries and Shook National Corporation, was engaged in an expansion project at the Beavercreek Wastewater Treatment Plant in Green County, Ohio. The project included the construction of two identical concrete equalization basins ("Basin 1" and "Basin 2"), the purpose of which was to provide additional sewage storage capacity at the plant. Each basin was approximately 200 feet in diameter with a surrounding wall, which was approximately 20 feet high. The basin floor sloped one half an inch for each foot of the horizontal run toward a center drainpipe. The drainpipe was 42 inches in diameter and descended 6 feet below the basin floor to an adjoining ninety-degree elbow pipe, which extended horizontally to a pump station.

In late 1997, after the floors of the basins were constructed, carpenters fitted the drainpipes with plywood plugs in order to provide protection against falls. The plugs were later caulked to prevent rainwater from seeping through to adjoining facilities during construction. In early April 1998, after water from snow and rain had accumulated in both basins, Danis Shook's project superintendent, Michael Barrett ("Barrett"), ordered that holes be drilled through the plywood plugs to drain the basins. Under the direction of Dave Ritter ("Ritter"), Danis Shook's labor foreman, the laborer who did the drilling used waders, a life jacket, and a 100-foot lifeline, which was tied to a handrail.[1]

The pipefitter crew began to work along the dry perimeters of both basins during the first two weeks of April 1998. Their work involved cleaning wall castings, attaching bolts into the wall castings, and generally preparing the area for pipe installation. The water was draining as expected in Basin 2, but not in Basin 1. On April 22, 1998, the water in Basin 1 was approximately 34 inches deep at the center drainpipe area when the pipefitter foreman, James H. Wagner ("Wagner"), waded to the center and used a splintered board or metal

[1]The exact date on which the laborer drilled the holes is not clear in the record.

object to scrape or thump on or near the plywood plug. Wagner used no PPE. Within a brief period, the plug dislodged, and the rapid force of draining water pulled Wagner into the drainpipe where he drowned.

II. Did the judge err in vacating Item 2a alleging a serious violation of 29 C.F.R. § 1926.21(b)(2)?[2]

The Secretary alleged that Danis Shook violated 29 C.F.R. § 1926.21(b)(2) by failing to instruct employees who entered or worked in the equalization basins in the recognition and avoidance of hazards associated with engulfment or being drawn into the piping by the flow of water draining from the basins. In vacating the item, the judge found that while Wagner may not have understood or appreciated the hazards associated with working on or near the plywood plug, Danis Shook nevertheless satisfied its obligations under the standard by pointing out an engulfment hazard and the PPE that other employees had worn to avoid it. The judge relied on three conversations between Wagner and two other Danis Shook employees. The first conversation occurred in early April between Wagner and Danis Shook's mechanical engineer, Richard Tagliaferri ("Tagliaferri"). Wagner suggested to Tagliaferri that the pipefitters begin working in the equalization basins. Tagliaferri's response was that "there's still water in those tanks" and "if the plug [were] to be removed right away, it could cause someone to be swept into the hole." He also told Wagner that when laborers had previously drilled holes through the plywood plugs, they wore harnesses

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[2]**§ 1926.21 Safety training and education.**

. . . .

(b) *Employer responsibility*

. . . .

(2) The employer shall instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control or eliminate any hazards or other exposure to illness of injury.

and tied off.

The second conversation occurred on Monday, April 20, 1998, when Wagner returned to the worksite after a one week vacation. Tagliaferri stopped by Basin 2 to discuss piping details with the pipefitters, and Wagner mentioned that because he did not have the necessary materials to continue with his work in Basin 2, he was planning to move his crew to Basin 1, where materials for both basins were being stored. Tagliaferri responded that the basin still had water in it. He also told Wagner, "You need to talk to Mike Barrett before you go over there."

The final conversation occurred on the morning of April 22, 1998, shortly before the accident, when Wagner asked labor foreman Ritter where the waders and paddle bit were "because he had to wade out to do some more holes." Ritter told Wagner that the waders and paddle bit were located in the tool trailer along with the rope, harness, and life jacket that his crew member had used when drilling holes through the plywood plugs.

We find that these three conversations do not satisfy the requirements of 29 C.F.R. § 1926.21(b)(2). The standard requires that an employer instruct its employees in the recognition and avoidance of the hazards that are specific to the work site about which a reasonably prudent employer would have been aware. *CMC Electric, Inc.*, 18 BNA OSHC 1737, 1738, 1999 CCH OSHD ¶ 31,817, p. 46,743 (No. 96-0169, 1999), *aff'd in relevant part*, 221 F.3d 861 (6th Cir. 2000). *See also N & N Contractors, Inc.*, 18 BNA OSHC 2121, 2126, 2000 CCH OSHD ¶ 32,101, p. 48,243 (No. 96-0606, 2000), *aff'd*, No. 00-1734 (4th Cir. May 9, 2001, as amended July 16, 2001); *El Paso Crane & Rigging Co.*, 16 BNA OSHC 1419, 1424, 1993-95 CCH OSHC ¶ 30,231, p. 41, 620 (No. 90-1106, 1993) ("*El Paso*"); *Pressure Concrete Constr. Co.*, 15 BNA OSHC 2011, 2015, 1991-93 CCH OSHD ¶ 29,902, p. 40,810 (No. 90-2668, 1992) ("*Pressure Concrete*"). Danis Shook knew of the hazard. Joseph Reich, Danis Shook's safety coordinator, testified that the company routinely constructed open structures, like the equalization basins, in which plywood plugs were used to cover pipes during construction, and that the accumulation of water in such structures was

not unusual. Here, Barrett knew that water had been accumulating in the equalization basins for several months. He also knew in early April that pipefitters would be working in the basins, and in preparation for such work, he directed Bobby Sloan ("Sloan"), an exterior pipe installation labor foreman, to drill holes through the plugs.[3]

Despite its familiarity with the conditions in the equalization basins and its knowledge that Wagner's work in the basins was imminent, Danis Shook made no effort to instruct its employees in the specific hazards that work in those basins presented. Danis Shook had some written safety materials and conducted regular tool box talks, providing it with opportunities to present information to its employees concerning the recurring hazards of water-filled basins and plywood drain plugs in a "systematic" fashion. *R & R Builders*, 15 BNA OSHC 1383, 1390, 1991-93 CCH OSHD ¶ 29,531, p. 39,863 (No. 88-282, 1991) (affirming violation of § 1926.21(b)(2) where "occasional correction" of employees found insufficient to establish requisite "systematic training"). Danis Shook, however, did not include this required training as part of its formal training program to address these hazards and now argues that it satisfied its training obligation with respect to these hazards through chance conversations that failed to convey critical information. While the standard does not limit an employer in the method by which to impart the necessary instructions, it does require that the substance of the instructions be "specific enough to advise employees of the hazards associated with their work and the ways to avoid them." *El Paso*, 16 BNA OSHC at 1425 n.7, 1426, 1993-95 CCH OSHC at p. 41,621 n. 7. See also *O'Brien Concrete Pumping, Inc.*, 18 BNA OSHC 2059, 2061, 1999 CCH OSHD ¶ 32,026, p. 47,848 (No. 98-0471, 2000); *Pressure Concrete*, 15 BNA OSHC at 2016, 1991-93 CCH OSHD at p. 40,811.

The record establishes that Wagner's decision to prepare the basin by draining the

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[3]Although Barrett directed Sloan to drill holes through the plywood plugs, labor foreman Ritter and his crew ultimately performed the drilling. However, despite his direction to Sloan, Barrett did not determine how much water was in the basins nor did he instruct Sloan to wear a lifeline or harness.

water was consistent with his authority to direct his own work without prior clearance. It was, therefore, mere happenstance that Wagner had three brief conversations with other Danis Shook supervisory personnel in which they mentioned some safety considerations related to work in the basins. Moreover, while Tagliaferri and Ritter expressed some awareness of the hazard during these impromptu conversations, we cannot find that their discussions adequately conveyed to Wagner the danger that he might encounter when working on or near a plywood drainplug in a basin with accumulated water. *E.L. Davis Contracting Co.,* 16 BNA OSHC 2046, 2048, 1993-95 CCH OSHD ¶ 30,580, p. 42,339 (No. 92-35, 1994) (violation of 29 C.F.R. § 1926.21(b)(2) affirmed where employer's verbal instructions were insufficiently specific, complete and comprehensive). Nor can we find that they conveyed to him the vital necessity of using the appropriate personal protective equipment before venturing *anywhere* near the plywood plug. *See Pressure Concrete*, 15 BNA OSHC at 2017, 1991-93 CCH OSHC at p. 40,812 ("[t]he fact that the requisite instructions would have to be detailed enough to take into account various contingencies does not negate the requirement for the instructions").

Danis Shook would have us find the instructions adequate based on Mitchell's testimony that two weeks before the accident Wagner had told him that safety equipment was required when drilling holes through the plug or entering the water in the basins. However, the record shows that neither Wagner nor Mitchell understood the hazard. When asked at the hearing whether he could have reminded Wagner on the day of the accident to wear appropriate PPE before wading through the water to work on the plug, Mitchell stated: "I could have, but I never thought of it. It didn't seem to be unsafe to do it." Danis Shook's failure to provide sufficiently specific instructions about the nature and extent of the engulfment hazards and the measures to take against them here, and to make at least some effort to assure that employees understood the meager information it did provide, must explain why two experienced foremen failed to recognize that Wagner's conduct was hazardous. *See Pressure Concrete*, 15 BNA OSHC at 2017, 1991-93 CCH OSHD at p.

40,812 ("a reasonably prudent employer would attempt to give instructions that can be understood and remembered by its employees, and would make at least some effort to assure that the employees did, in fact, understand the instructions"). In this case, "actions speak louder than . . . words." *Id*.

We also find that the other training components upon which Danis Shook relies, including its new hire orientation program and weekly tool box talks, do not amount to compliance. Neither of these methods ever conveyed with any specificity instructions on the recognition and avoidance of engulfment hazards while working in an equalization basin with accumulated water. *See Pressure Concrete*, 15 BNA OSHC at 2016, 1991-93 CCH OSHD at p. 40,811 (instruction found inadequate where safety manuals and weekly meetings failed to address hazards specific to the worksite). In Danis Shook's new hire orientation program, employees reviewed its "Spotlight on Safety" booklet, which included a general rule requiring that "personal protective equipment must be used as needed," and another rule requiring that buoyant work vests be worn when employees were "working over or near water where depths create[d] a danger of drowning." However, these rules did not specify the need for PPE in any particular circumstances, such as working on or in proximity to the plywood plugs in the basins. *See L & M Lignos Enterprises*, 17 BNA OSHC 1066, 1067, 1993-95 CCH OSHD ¶ 30,675, pp. 42,569, 42,570 (No. 92-1746, 1995) (work rule requiring PPE not enough to satisfy standard without further explaining various worksite hazards where PPE would be necessary). The weekly toolbox talks covered some fall protection topics but never identified the engulfment hazards associated with working in the equalization basins.

We therefore find that Danis Shook failed to provide adequate instruction, and that the Secretary established a violation of 29 C.F.R. § 1926.21(b)(2).[4]

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[4]The other elements of the Secretary's *prima facie* case of the violation were established and are not at issue. *See Astra Pharmaceutical Prods.*, 9 BNA OSHC 2126, 2129, 1981 CCH OSHD ¶ 25,578, pp. 31,899-900 (No. 78-6247, 1981), *aff'd in pertinent part*, 681 F.2d 69

III. ITEM 2b

A. Did the judge err in finding that Respondent had knowledge of its employee's failure to use protective equipment in violation of 29 C.F.R. § 1926.95(a)?[5]

In item 2b of the citation, the Secretary alleged that Danis Shook violated 29 C.F.R. § 1926.95(a) by failing to require its employees to wear appropriate protective equipment "such as safety harnesses, lifelines and/or securing or retrieval devices to protect against engulfment hazards." The judge affirmed the violation. At issue on review is whether the judge erred in finding that Danis Shook had knowledge of the violation. Under Commission precedent, the Secretary makes out a *prima facie* case of knowledge by establishing that the employer either knew or, with the exercise of reasonable diligence, could have known of the presence of the hazardous condition. *Pride Oil Well Service*, 15 BNA OSHC 1809, 1814, 1991-93 CCH OSHD ¶ 29,807, p. 40,584 (No. 87-692, 1992) ("*Pride*"). The knowledge element is directed to the physical conditions that constitute a violation, and the Secretary need not show that an employer understood or acknowledged that the physical conditions were actually hazardous. *Phoenix Roofing, Inc.*, 17 BNA OSHC 1076, 1079-1080, 1993-95 CCH OSHD ¶ 30,699, p. 42,606 (No. 90-2148, 1995), *aff'd without published opinion*, 79 F.3d 1146 (5th Cir. 1996). Actual or constructive knowledge of an employer's foreman can

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(1st Cir. 1982) (Secretary must establish applicability of cited standard, noncompliance with the terms of the standard, employee exposure to the hazard, and employer knowledge of the hazard).

[5]**§ 1926.95 Criteria for personal protective equipment.**
(a) *Application*. Protective equipment, including personal protective equipment for eyes, face, head, and extremities, protective clothing, respiratory devices, and protective shields and barriers, shall be provided, used, and maintained in a sanitary and reliable condition wherever it is necessary by reason of hazards of processes or environment, chemical hazards, radiological hazards, or mechanical irritants encountered in a manner capable of causing injury or impairment in the function of any part of the body through absorption, inhalation or physical contact.

be imputed to the employer. *A. P. O'Horo*, 14 BNA OSHC 2004, 2007, 1991-93 CCH OSHD ¶ 29,223, p. 39,128 (No. 85-369, 1991); *Dun-Par Engineered Form Co.*, 12 BNA OSHC 1962, 1965-1966, 1986-87 CCH OSHD ¶ 27,651, p. 36,033 (No. 82-928, 1986); *Daniel Construction Co.*, 10 BNA OSHC 1549, 1552, 1982 CCH OSHD ¶ 26,027, p. 32,672 (No. 16265, 1982). Here, Wagner had actual knowledge of his own failure to wear PPE. As a foreman working in a supervisory capacity, his actual knowledge may be imputed to Danis Shook.

We also find that Danis Shook had constructive knowledge because the evidence shows that it could have known of the violative condition had it exercised reasonable diligence. *See Pride*, 15 BNA OSHC at 1814, 1991-93 CCH OSHD at p. 40,584. Reasonable diligence involves consideration of several factors, including the employer's obligation to have adequate work rules and training programs, to adequately supervise employees, to anticipate hazards, and to take measures to prevent the occurrence of violations. *Id.* As we indicated above in our discussion of item 2a, Danis Shook failed to provide adequate training in how to recognize and avoid the hazards associated with working on or in proximity to the plywood plugs in the basins. In addition, Danis Shook did not have a work rule that required the use of PPE in the circumstances that confronted Wagner. The Commission has defined a work rule as "an employer directive that requires or proscribes certain conduct and that is communicated to employees in such a manner that its mandatory nature is made explicit and its scope clearly understood." *J.K. Butler Builders, Inc.*, 5 BNA OSHC 1075, 1076, 1977-78 CCH OSHD ¶ 21,585, p. 25,902 (No. 12354, 1977) (employer's warning to employees to avoid unsafe areas was "too general to be an effective work rule"). Although Danis Shook's written safety materials contained a general rule requiring employees to wear PPE "as needed," it did not explicitly address the need for employees to wear PPE when working on or near the plywood plugs. Both Ritter and Reich testified that Danis Shook had no rule requiring employees to use a lifeline when working in water. Tagliaferri testified that he gave no directive to Wagner to wear PPE or stay out of Basin 1.

Instead, he told Wagner to talk with Barrett about his plan to work in Basin 1. However, Barrett stated that Wagner was "totally responsible" for installing piping and ensuring that the work was done safely, and that there was no rule prohibiting Wagner and the pipefitters from entering the basins.

With respect to the adequacy of employee monitoring, a *laissez-faire* attitude prevailed. Barrett, who was responsible for supervising Wagner, testified that he routinely relied on his craft foremen to evaluate the hazards that they encountered during the performance of their work and determine the ways in which to avoid them. His exclusive reliance on Wagner to recognize and avoid the hazards associated with working in the equalization basins was impermissible in view of Danis Shook's failure to adequately train its employees and adopt specific work rules to ensure that work was performed safely. *See Pride*, 15 BNA OSHC at 1815, 1991-93 CCH OSHD at p. 40,584 ("[a]n employer who has failed to address a hazard by implementing and enforcing an effective work rule cannot shift to its employees the responsibility for assuring safe working procedures").[6]

We therefore find that Danis Shook had constructive as well as actual knowledge of the violation.

[6]We also note that Danis Shook knew of Wagner's failure to wear required PPE while working on scaffolding in the equalization pump station just two or three weeks before his death.

B. Did the judge err in rejecting Respondent's affirmative defense of unpreventable supervisory misconduct to the violation of 29 C.F.R. § 1926.95(a) as alleged in item 2b?

Danis Shook contends that the PPE violation was the result of unpreventable supervisory misconduct. A claim of unpreventable supervisory misconduct is an affirmative defense for which the employer carries the burden of proof. *Hamilton Fixture*, 16 BNA OSHC 1073, 1077, 1993-95 CCH OSHD ¶ 30,034, p. 41,172-73 (No. 88-1720, 1993), *aff'd without published opinion*, 28 F.3d 1213 (6th Cir. 1994). To establish the defense, the employer is required to prove that "(1) it has established work rules designed to prevent the violation; (2) it has adequately communicated those rules to its employees; (3) it has taken steps to discover violations; and (4) it has effectively enforced the rules when violations have been discovered." *Gem Industrial, Inc.,* 17 BNA OSHC 1861, 1863, 1995-97 CCH OSHD ¶ 31,197, p. 43,688 (No. 93-1122, 1996), *aff'd without published opinion* 149 F.3d 1183 (6th Cir. 1998); *accord Brock v. L. E. Myers Co.*, 818 F.2d 1270, 1276-77 (6th Cir. 1987), *cert. denied*, 484 U.S. 989 (1987) ("*L. E. Myers*").[7]

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[7]Respondent incorrectly suggests in its Petition for Discretionary Review that the Sixth Circuit in *L. E. Myers* rejected Commission precedent requiring an employer to show an established and adequately communicated work rule in order to establish the affirmative defense of unpreventable employee misconduct. In *L. E. Myers*, 818 F.2d at 1277, the Sixth Circuit stated that "the Act itself places upon the employer the responsibility of taking all reasonable steps to eradicate preventable hazards, 'including imposing work rules, communicating the rules to employees, and providing training, supervision and disciplinary action designated to enforce the rules,'" and that "an employer may defend [a] citation on the ground that, due to the existence of a thorough and adequate safety program which is communicated and enforced as written, the conduct of its employees in violating that policy was idiosyncratic and unforeseeable." In subsequent cases, the court has continued to uphold Commission precedent requiring that such a showing must include established and adequately communicated work rules. *See National Engineering & Contracting Co. v. OSHRC*, 838 F.2d 815, 819 (6th Cir. 1987); *Precast Services, Inc.*, 17 BNA OSHC 1454, 1455, 1995-97 CCH OSHD ¶ 30,910, p. 43,035 (No. 93-2971, 1995), *aff'd without published opinion,* 106 F.3d 401 (6th Cir. 1997).

We find that the defense fails here for largely the same reasons upon which we base our finding of constructive knowledge of the violation at issue; Danis Shook failed to establish and adequately communicate a work rule that was designed to prevent the hazard. We therefore conclude that Danis Shook failed to establish that the violation was the result of unpreventable supervisory misconduct.

Accordingly, item 2b of the citation is affirmed.

IV. PENALTY

The Secretary proposed a combined penalty of $6,300 for the violations cited in items 2a and 2b. The proposed penalty included a 10 percent credit for history. Danis Shook does not dispute the penalty amount proposed by the Secretary, and we find based on consideration of the factors in section 17(j) of the Act, 29 U.S.C. § 666(j), that $6,300 is an appropriate penalty for items 2a and 2b.

V. ORDER

We affirm items 2a and 2b of the citation, and we assess a combined penalty of $6,300.

/s/
Thomasina V. Rogers
Chairman

/s/
Ross Eisenbrey
Commissioner

Dated: August 2, 2001

Secretary of Labor,
Complainant,
v.

Danis Shook Joint Venture XXV,
Respondent.

OSHRC Docket No. **98-1192**

APPEARANCES

Anthony M. Stevenson, Esq.
Office of the Solicitor
U. S. Department of Labor
Cleveland, Ohio
For Complainant

Gary W. Auman, Esq.
Dunlevey, Mahan & Furry
Dayton, Ohio
For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

Danis Shook Joint Venture XXV (Danis Shook) in April, 1998, was expanding the water treatment plant in Beavercreek, Ohio, when the pipefitters' foreman was engulfed into a 42-inch drainage pipe and drowned. After the Occupational Safety and Health Administration (OSHA) investigated the fatality, Danis Shook received a serious citation on June 22, 1998. Danis Shook timely contested the citation.

The citation, as amended,[8] alleges serious violations of § 5(a)(1) (item 1) of the Occupational Safety and Health Act (Act) for failing to provide a workplace free of recognized hazards by exposing employees who entered the accumulated water in the equalization basin to a potential engulfment hazard; 29 C.F.R. § 1926.21(b)(2) (item 2a) for failing to instruct employees in the recognition and avoidance of the hazards associated with entering a basin which contained accumulated water; and 29 C.F.R. § 1926.95(a) (item 2b) for failing to require employees entering the water in the equalization basin to wear appropriate personal protective equipment such as safety harnesses and lifelines. OSHA proposes a total penalty of $12,600.

[8] Danis Shook's statement that the court has not ruled on the amendment is not correct. The amendment was granted by the court by order dated February 19, 1999, and Danis Shook filed an amended answer dated February 25, 1999.

The hearing was held June 2 - 4, 1999, in Dayton, Ohio. Jurisdiction and coverage are stipulated (Tr. 4). Danis Shook argues that the evidence does not support the alleged violations and, if a violation is found, it was due to employee misconduct.

Each party filed post-hearing briefs and reply briefs. For the reasons stated, the alleged violation of § 1926.95(a) (item 2b) is affirmed and the remaining violations are vacated.

The Accident

In April, 1996, Danis Industries and Shook, Incorporated, formed a joint venture to perform the expansion work to the Beavercreek waste water treatment plant in Green County, Ohio. The project started in May, 1996, and employed in excess of 50 union employees. Danis generally handled the administrative work and Shook controlled the construction work. The project was completed, except for some landscaping, in June, 1999 (Tr. 35-36, 39, 287, 334, 338, 360).

As part of the expansion work, Danis Shook was to construct two identical equalization basins (EQ basin #1 and EQ basin #2). The EQ basins provide added capacity for the accumulation of sewage from storm surges. The accumulated sewage is mixed and aerated in the open basins before treatment by the plant (Exhs. C-1, R-2; Tr. 36, 335-337, 479, 496-498). The basins are above ground and are round, uncovered concrete basins with a diameter of approximately 203 feet and a concrete wall of approximately 20 feet. The floor of the basins slope, one-half inch for every foot, toward the center, where there is a 42-inch drain pipe (Tr. 10, 12, 37-38, 127, 282-283, 301-302, 343, 529). At the opening to the drain, there is a vertical drop of 6-feet to the pipe's elbow. The drain pipe then runs underground horizontally to the pump station (Tr. 316).

During construction of each basin floor, Danis Shook placed a ¾-inch plywood cover (plug) over the 42-inch opening to each drain (Tr. 13-14, 226). Wooden boards, 2-inch by 4-inches, were secured underneath the plywood plug (Tr. 302, 363-364, 525). The wooden plug was installed to prevent a fall hazard while employees were constructing the basin's floor (Tr. 14, 315, 341).

The construction of the two EQ basins was completed in the fall of 1997 (Tr. 341). The

plywood plugs remained over the drains and rain water started accumulating in the basins (Tr. 19, 344, 500-501). Danis Shook left the plugs in place and applied caulking to prevent the water from draining to the pump station, which was still under construction (Tr. 120, 366-367, 385).

After the pump station was completed in April, 1998, additional work needed to be done in the EQ basins, including placing brackets on the walls and across the concrete floor to support the aeration pipes (Exh. R-3; Tr. 36, 240-241, 494). In order to install the brackets, the accumulated water in the basins needed to be drained (Tr. 180-181, 307-308). The water was approximately 12 to 30 inches deep (Tr. 119-120, 346-347, 503).

To drain the water from the basins, a laborer wearing waders, a life vest, harness and a lifeline attached to a handrail entered the water and drilled three holes in each plywood plug (Tr. 112, 207). The holes were drilled approximately two weeks prior to the accident (Tr. 119, 231). There is no evidence that any other employee had been in the EQ basins since their construction (Tr. 227). After the holes were drilled, water began to drain, particularly from EQ basin #2. However, by April 22, 1998, water remained in both EQ basins.

The pipefitters who were responsible for installing the process piping in the basins had completed their work in the pump station and began working in EQ basin #2 (Tr. 240-241). The pipefitters' foreman was James H. Wagner, Sr., and the crew consisted of James E. Wagner (his son) and Wayne Mitchell (Tr. 144, 178-179, 268). Brackets and pipes had to be installed across the basin floor and on the wall (Tr. 494). However, before installing the brackets across the floor, the accumulated water needed to be removed (Tr. 484). The water in EQ basin #2 was still several inches deep (Tr. 172). Therefore, the pipefitters initially installed attachments and cleaned wall castings on the basin's interior wall. Unlike at the center of the basin, there was no water on the concrete floor within 30 feet of the wall. The installation of the wall attachments did not require going into the water (Tr. 270-271).

Although the work was not completed in EQ basin #2, on April 22, 1998, the pipefitters moved their work into EQ basin #1, where all the material was stored (Tr. 150, 172, 181). It was approximately 7:30 a.m.(Tr. 241-242). While Wayne Mitchell worked on cleaning the wall castings and James Wagner (son) assembled the tools, Foreman Wagner, wearing waders, walked into the accumulated water in EQ basin #1 (Tr. 241, 243-244). The water was in excess of 32

inches deep at the 42-inch drain (Tr. 145-146, 159-160). Foreman Wagner wanted to see why it was not draining (Tr. 242). He was observed removing a sheet of plastic from the area of the plywood plug (Tr. 244-245). After removing the plastic, Foreman Wagner was observed using a spud[9] bar or piece of rebar approximately 5 feet long to slide over the wooden plug (Tr. 173, 187-188, 191, 245, 571). Mitchell also testified that Foreman Wagner was thumping the spud bar on the plug "pretty hard" (Tr. 246, 248-249, 279-280). Suddenly, James Wagner (son), who was standing on top of the ladder outside the basin's wall, saw the plywood plug pop up in the water and his father (Foreman Wagner) sucked down into the drain (Tr. 161, 188). Foreman Wagner drowned (Tr. 23). The accident occurred at approximately 9:00 a.m. (Tr. 115).

At approximately 10:30 a.m., OSHA safety specialist (CO) Barbara Marcum initiated an investigation into the accident (Tr. 45, 56). She observed EQ basin #1 from the wall and interviewed employees, including supervisors of Danis Shook (Tr. 46, 72). As a result of the investigation, the serious citation was issued to Danis Shook.

Discussion

There is no dispute that Danis Shook's pipefitters' foreman was engulfed in the drain while removing a blockage from the plywood plug inside EQ basin #1. Wagner's responsibilities as foreman included directing the work of the pipefitters and their safety (Resp. Brief, p. 5; Tr. 175, 296, 299). Also, the parties agree that the dry floor in the basin near the wall was an area where the pipefitters could work without exposure to an engulfment hazard (Tr. 83, 85, 87, 528-529). Wayne Mitchell, who was working on the dry concrete floor area near the wall, was not an exposed employee. There is also no dispute that a safety harness and secured lifeline should have been worn by Foreman Wagner when he was working on the plywood plug (Tr. 54).

Danis Shook argues that it lacked knowledge of Wagner's work, and if he failed to wear personal protective equipment, it was due to unpreventable employee misconduct. Danis Shook notes that Foreman Wagner was told three times prior to the accident that a laborer had worn a harness and an attached lifeline when he drilled holes in the plug.

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[9] The spud bar weighed from approximately 15 pounds to 50 pounds (Tr. 249, 273, 365, 534).

Item 1 - Alleged Violation of § 5(a)(1)of the Act

The citation alleges that employees were exposed to a potential engulfment hazard while in the accumulated water inside EQ basin #1. The abatement portion of the citation provides for treating the EQ basins similar to confined spaces by requiring an assessment to identify the confined spaces and to develop and implement safe entry procedures, including a requirement for the use of appropriate protective equipment and/or rescue equipment to prevent the engulfment of employees. Section 5(a)(1) of the Act, referred to as the general duty clause, provides that each employer:

> [s]hall furnish to each of his employees employment and a place of employment which is free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.

The Secretary does not contend that the EQ basins were confined spaces. In the Secretary's post-hearing brief and reply brief, the Secretary describes the violation of the general duty clause as Foreman Wagner's failure to wear a safety harness and lifeline and his exposure to an engulfment hazard (Secretary's Brief, pp. 22-24; Secretary's Reply Brief, pp. 13-14).

If the Secretary cited § 5(a)(1) because there had been no hazard identification or assessment of the job site done in the basin, as stated in the citation, the alleged violation is vacated (Tr. 49). The Secretary offered no evidence supporting the allegation. Rick Tagliaferri, mechanical engineer, stated that he discussed the plug and the potential engulfment hazard with Michael Barrett, project superintendent, approximately six weeks prior to the accident (Tr. 493). Danis Shook did have a site-specific safety plan for the project and a written confined program (Exhs. C-4, C-5). The Secretary cites no deficiencies in the plan or program.

If the Secretary is alleging a § 5 (a)(1) violation because of an engulfment hazard which is abated by personal protective equipment, such as a safety harness and a secured lifeline, the Secretary has also cited 29 C.F.R. § 1926.95(a) (item 2a). The § 1926.95(a) allegation states that employees entering the basins did not wear appropriate protective equipment, such as safety harnesses, lifelines and/or securing or retrieval devices/systems, to protect against engulfment

hazards. Section 1926.95(a) requires the use of protective equipment, including personal protective equipment.

Under the circumstances of this case, the § 1926.95(a) allegation preempts § 5(a)(1). A citation under § 5(a)(1) of the Act is not appropriate where the particular hazard for which the employer has been cited is covered by a specific standard. *Ted Wilkerson, Inc*., 9 BNA OSHC 2012, 2015 (No 13390, 1981). A general standard is preempted by a specific standard if both address the same particular hazard. *Williams Enterp of Georgia, Inc.,* 832 F2d 567, 570 (11th Cir, 1987). If the same hazard is addressed, it must then be determined whether, as applied in the case, the specific standard preempts the application of the general standard. *McNally Construction & Tunneling Co*., 16 BNA OSHC 1879, 1880 (No 90-2337, 1994).

In this case, the Secretary cited both provisions for the same activity (working on the plywood plug), the same engulfment hazard (captured by the accumulated water in a 42-inch drain), and required the same abatement measures (safety harness and a secured lifeline). The allegations under § 5(a)(1) are duplicated by the allegations of § 1926.95(a).

The alleged violation of § 5(a)(1) is vacated.

Safety Standards

The Secretary has the burden of proving a violation.

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

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

Danis Shook does not dispute the application of §§ 1926.21(b)(2) and 1926.95(a) to its construction at the waste water treatment plant. There is no dispute that Wagner was exposed to an engulfment hazard when he attempted to remove a blockage from the plywood plug without appropriate protective equipment. With regard to the alleged violation of § 1926.95(a), Danis

Shook does not dispute that the failure to wear the harness and lifeline violated the terms of § 1926.95(a). The issue remaining as to alleged safety standard violations is whether terms of § 1926.21(b)(2) were violated and whether Danis Shook knew or should have known of the violation of § 1926.95(a). As to § 1926.95(a), Danis Shook asserts an affirmative defense of unpreventable employee misconduct.

Item 2a - Alleged Violation of § 1926.21(b)(2)

The citation, as amended, alleges that Danis Shook failed to instruct employees who entered or worked in the EQ basins in the recognition and avoidance of the hazards associated with engulfment by the flow of water draining through the pipe. Section 1926.21(b)(2) provides:

> The employer shall instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control or eliminate any hazards or other exposure to illness or injury.

Section 1926.21(b)(2) requires instruction to employees on (1) how to recognize and avoid unsafe conditions reasonably expected to be encountered on the job, and (2) the regulations applicable to those hazardous conditions. *Superior Custom Cabinet Co.,* 18 BNA OSHC 1019, 1020 (No. 94-200, 1997). Such instructions must address matters specific to the worksite about which a reasonably prudent employer would have instructed its employees. *Pressure Concrete Construction Co.*, 15 BNA OSHC 2011, 2016 (No. 90-2668, 1992).

The issue is whether Danis Shook failed to provide reasonable instruction regarding working on or near the plywood plug. *Crouse Combustion Systems, Inc.*, 13 BNA OSHC 1388, 1389 (No. 86-1244, 1987).

Foreman Wagner's death is not evidence that the instruction was inadequate. Section 1926.21(b)(2) contains no additional requirement that an employer effectuate required instructions. The failure to comply does not establish a violation of § 1926.21(b)(2). *Dravo Engineers and Constructors*, 11 BNA OSHC 2010, 2012 (No. 81-748, 1984). However, Foreman Wagner was a supervisor in charge of the safety of his employees. His failure to use safety equipment while working at the plywood plug indicates his lack of understanding or appreciation of the hazard. When a supervisory employee endangers himself, there is a strong inference of his incapacity to identify hazardous conditions. *Ed Taylor Construction Co.,* 15 BNA OSHC 1711, 1717, n. 8 (No. 88-2463, 1992).

In this case, the record establishes that Foreman Wagner received instruction sufficient to satisfy the standard. Danis Shook maintained a written safety program, a site specific safety plan and an employee safety guide, referred to as "Spotlight on Safety" (Exhs. C-3, C-4, C-5, R-4).

The written safety program identified the requirements of § 1926.21(b)(2) (Exh. C-3, p. 276; Tr. 62-63). The employees' safety guide, which was given to new employees, required that "personal protective equipment must be used as needed" (Exh. R-4, p. 281; Tr. 515-516). The guide also provided that "buoyant work vests shall be worn when working over or near water where depths create a danger of drowning, unless adequate fall protection is provided" (Exh. R-4, p. 282).

Danis Shook had weekly safety tool box talks (Tr. 248, 372, 520). The training included climbing scaffolds and ladders, roping tools, using safety equipment on scaffolding, and hazardous material on the job (Tr. 253). Also, among the topics, the weekly meetings discussed the use of safety harnesses and lanyards for fall protection (Tr. 361-362).

Although Danis Shook had an extensive safety program, there is no showing that the weekly safety meetings or written safety programs specifically addressed the use of personal protective equipment while working on a plywood plug under an accumulation of water (Tr. 253-254). Barrett testified that the safety meetings did not discuss working in water (Tr. 362).

The record, however, does show that Foreman Wagner received verbal instruction in the recognition and avoidance of the hazards associated with working on the plywood plug. Such instruction satisfies the requirements of § 1926.21(b)(2). An instruction may be formal, informal, verbal, or on the job. *Better Bilt Products, Inc.*, 15 BNA OSHC 1167, 1171 (No. 89-2028, 1991). Richard Tagliaferri, mechanical engineer, testified that approximately three weeks prior to the accident, Wagner's crew was finishing up in the aeration tanks. Foreman Wagner asked about working in the EQ basins. Tagliaferri informed Wagner that water was still in the basins and that the plug could not be removed because the water "could cause someone to be swept into the hole." He also told Wagner that a laborer, wearing a harness and tied off, "had drilled some holes in the top of the plywood to try and drain the tank" (Tr. 479-480).

During a second conversation, two days prior to the accident, while the pipefitters were in EQ basin #2, Tagliaferri testified that Foreman Wagner wanted to move the pipefitters to EQ basin #1 because it was where the material was stored. Tagliaferri told Wagner that there was still water in EQ basin #1 and that he had to talk to Michael Barrett, project superintendent. He again stated that the laborer had worn a harness and was tied off when he drilled holes in the plug

(Tr. 98, 481-482, 484, 488-489). David Ritter, labor foreman, testified that Foreman Wagner asked on the morning of April 22 where the paddle bit[10] and waders were located (Tr. 208). In addition to directing him to the storage trailer, Ritter told Wagner that his laborer had "used the ropes and harnesses, life jacket and waders" as safety equipment when drilling the holes (Tr. 209). When Ritter looked into the storage trailer after the accident, the harnesses and ropes were still in storage (Tr. 211).

"The issue as to this particular citation item . . . is whether the employer's program of safety instruction provided adequate guidance to the employees, not whether the accident could have been averted." Also, "to penalize this employer for this instruction when he has clearly identified the hazards to the employees and pointed out the ways they can be avoided would not only be unreasonable, but would also be discouraging and counterproductive to the cause of employee safety and health." *El Paso Crane and Rigging Co., Inc*., 16 BNA OSHC 1419, 1427 (No. 90-1106, 1993).

In Foreman Wagner's conversations with Tagliaferri and Ritter, he was advised of the appropriate personal protective equipment to use when working on the plug and the potential for an engulfment hazard. Wagner was told on at least three occasions of the laborer's use of a harness and lifeline. He was also informed of the potential engulfment hazard if the plug failed or was dislodged. This information was provided to Foreman Wagner in the form of an instruction. *Concrete Construction Co.,* 15 BNA OSHC at 1620 (the standard does not limit the employer in the method by which it may impart the necessary training but somehow substance must be imparted).

As a supervisor, Foreman Wagner was responsible for recognizing and avoiding hazards. Pointing out a hazard, and what others wore to abate the hazard, satisfies the employer's responsibility of providing instruction in the recognition and avoidance of hazards. An employer's instructions are adequate if they are "specific enough to advise employees of the hazards associated with their work and the ways to avoid them." *El Paso Crane & Rigging Co.,* 16 BNA OSHC 1419, 1425, n. 6 & 7 (No. 90-1106, 1993). The tragic consequences in this case

[10] The paddle bit had been used to drill the holes.

demonstrate that Wagner may not have fully understood the hazard of working around the plug. Wayne Mitchell, pipefitter, testified that Foreman Wagner told him that they were to use safety equipment when drilling holes in the plug (Tr. 254). As discussed subsequently, Danis Shook's compliance with the instruction requirements of § 1926.21(b)(2) does not necessarily mean that Danis Shook had a safety rule requiring personal protective equipment be used while working on the plug.

The testimony of James Wagner (son) and Wayne Mitchell on the lack of training is not given weight. Wagner (son) testified that he did not receive any safety-related instructions by Danis Shook about an engulfment hazard, while working on a plywood plug or the use of a harness and lanyard, except with ladders and scaffolding (Tr. 154-155, 174). Wayne Mitchell, pipefitter and a former pipefitter's foreman, could not identify any specific instructions he had received about the use of personal protective equipment when entering the water in the EQ basin (Tr. 253-254, 260, 266). He was unsure if the safety handbook had any rules requiring harnesses and lifelines (Exh. C-3; Tr. 263, 274). Mitchell did not consider it dangerous for Wagner to go into the water (Tr. 257). Neither Wagner nor Mitchell was shown to have worked or was expected to have worked on the plywood plug. They were not shown to have been exposed to an engulfment hazard. It was not demonstrated that Danis Shook was required to provide them instruction and hazard avoidance training on working on or near the plug. The work involving the plug and blockages was generally performed by laborers, not pipefitters. The Secretary did not argue or show that the instruction to laborers was inadequate. Prior to the accident, the laborer who drilled the holes in the plug wore a harness and lifeline.

A violation of § 1926.21(b)(2) is vacated.

Item 2b - Alleged Violation of § 1926.95(a)

The citation alleges that employees entering the basins did not wear appropriate protective equipment, such as safety harnesses, lifelines and/or securing or retrieval devices/systems to protect against engulfment hazards. Section 1926.95(a) provides:

> Protective equipment including personal protective equipment for eyes, face, head, and extremities, protective clothing, respiratory devices, and protective shields and barriers, shall be provided,

> used, and maintained in a sanitary and reliable condition wherever it is necessary by reason of hazards of processes or environment, chemical hazards, radiological hazards, or mechanical irritants encountered in a manner capable of causing injury or impairment in the function of any part of the body through absorption, inhalation or physical contact.

Danis Shook does not dispute that the cited standard applied, the terms of the standard were not complied with, and an employee was exposed to the conditions. Foreman Wagner was not wearing the appropriate personal protective equipment when he entered the water to clear a blockage from the plug. The parties agree that the appropriate personal protective equipment was a safety harness and a secured lifeline.

Danis Shook argues that it could not have known Foreman Wagner would work on the plywood plug without personal protective equipment (Tr. 210, 481-482, 488-489). Also, Danis Shook asserts that his failure to wear personal protective equipment was due to unpreventable employee misconduct.

Compliance with § 1926.95(a) requires that personal protective equipment be provided only when the employer has actual knowledge of a hazard requiring the use of personal protective equipment or a reasonable person familiar with the situation, including any facts unique to the particular industry, would recognize a hazard warranting the use of such equipment. *Armour Food Co.*, 14 BNA OSHC 1817, 1820 (No 86-247, 1990) (case involves § 1910.132(a), which is a similar provision as § 1926.95(a) applying to general industry).

The Secretary identified the hazard as engulfment. "Engulfment" is defined in the confined space standards at 29 C.F.R. § 1910.146(b) as:

> the surrounding and effective capture of a person by a liquid or finely divided (flyable) solid substance that can be aspirated to cause death by filling or plugging the respiratory system or that can exert enough force on the body to cause death by strangulation, constriction, or crushing.

The Secretary's definition of engulfment is adopted as part of Danis Shook's confined space program (Exh. C-4, p. 9). The definition is reasonable and applicable in this case. *Baumgartner, Simpson, Gumpertz & Heger, Inc.*, 15 BNA OSHC 1851, 1857-1858 (No. 89-1300, 1992), *aff'd on other grounds,* 3 F.3d 1 (1st Cir. 1993). The record shows that there was a

potential engulfment hazard if the plywood plug under accumulation of water for five months became dislodged or failed while an employee was working on or near the plug. CO Marcum described that there was the potential "for it [plug] to break or fail and suck someone through the pipe" (Tr. 50). The accident on April 22, 1998, demonstrates the nature of the hazard. Wagner was caught in the force of water suddenly draining when the plug failed or was dislodged.

A "recognized hazard" is a condition or practice over which the employer can reasonably be expected to exercise control because the potential danger is actually known to the particular employer or generally known in the industry. *Pepperidge Farm, Inc.*, 17 BNA OSHC 1993, 2003 (No. 89-265, 1997).

Danis Shook recognized that working on or possibly disturbing the plywood plug constituted a hazard (Resp. Brief, p. 23). The plug was under an accumulation of water for five months and was not inspected or tested by Danis Shook for strength and stability. The risk of working on or near the plug under these circumstances was plainly obvious to Danis Shook (Tr. 15-16, 384).

Rick Tagliaferri, project mechanical engineer, considered it a hazard for an employee to go near the center of the basin. He would require the employee to wear personal protective equipment and tie off, regardless if they would come in contact with the plug. Employees should tie off irrespective of their reasons for entering the water (Tr. 489, 508-509). Tagliaferri recognized that if something happened to the plug "it could cause someone to be swept into the hole" (Tr. 480).

Additionally, Joseph Reich, safety coordinator, considered it a drowning hazard for an employee to merely go into the water. He would require the employee to wear a buoyant vest and be secured (Tr. 530-531). Michael Barrett, project superintendent, also considered it an engulfment hazard if the plug failed or was dislodged (Tr. 22-23). Dave Ritter, labor foreman, who required the laborer to wear a harness and lifeline while drilling the holes, considered it a hazard because he did not know if the plywood plug had partially rotted during the five months underwater. He was also concerned about the weight of the water above the plug (Tr. 215-216, 226-227, 232).

Therefore, a violation of § 1926.95(a) is established if it is shown that Danis Shook knew of Wagner's failure to wear appropriate personal protective equipment.

Knowledge of the Violation

In order to establish an employer's knowledge of a violation, the Secretary must show that the employer knew or, with the exercise of reasonable diligence, could have known of a hazardous condition. *Dun-Par Engineered Form Co.*, 12 BNA OSHC 1962, 1965-1966 (No. 82-928, 1986). It need not be shown that the employer understood or acknowledged that the physical conditions were actually hazardous. *Phoenix Roofing Inc.,* 17 BNA OSHC 1076, 1079 (No. 90-2148, 1995).

However, when a supervisory employee has actual or constructive knowledge of the violative conditions, knowledge is imputed to the employer. "Because corporate employers can only obtain knowledge through their agents, the actions and knowledge of supervisory personnel are generally imputed to their employers and the Secretary can make a prima facie showing of knowledge by proving that a supervisory employee knew of or was responsible for the violation." *Todd Shipyards Corp.,* 11 BNA OSHC 2177, 2179 (No. 77-1598, 1984). If a supervisory employee is involved, the Secretary satisfies her burden of proving knowledge without showing an inadequate safety program. *Dover Elevator Co.*, 16 BNA OSHC 1281, 1286 (No. 91-862, 1993).

In this case, there is no dispute that James Wagner was a supervisor. He was the foreman of the pipefitters' crew. He supervised their work and was responsible for their safe work practices (Exh. C-3, pp. 262, 277; Tr. 299, 307). Therefore, Wagner's activity in clearing the blockage at the plug without appropriate personal protective equipment is imputed to Danis Shook, unless it establishes substantial grounds for not imputing that knowledge. *Ormet Corp.*, 14 BNA OSHC 2134, 2137 (No. 85-531, 1991).

Danis Shook argues that it was unforeseen for Wagner to enter the water and work on the plywood plug in EQ basin #1 without personal protective equipment. April 22, 1998, was the first day the pipefitters were in EQ basin #1. Danis Shook notes that the pipefitters were originally working in EQ basin #2, which was being readied for work (Tr. 304-305, 312). Also,

Danis Shook asserts that Foreman Wagner was engaged in work outside his job description. He was performing laborers' work at the time of the accident (Tr. 171, 300, 484). On the day of the accident, Michael Barrett, project superintendent, did not know that the pipefitters started working in EQ basin #1 and, specifically, that Foreman Wagner had entered the water to clear a blockage (Tr. 309, 374).

Despite Danis Shook's arguments, the record shows that Foreman Wagner's activity at the plug was foreseen. Barrett testified that Wagner could work in EQ basin #1 without authorization, if it was not determined a hazard by the foreman. It was within Wagner's discretion. Barrett testified that Foreman Wagner was not prohibited from entering the basin; and no one required him to use personal protective equipment, such as harnesses or lanyards, or to be tied off (Tr. 31-32, 313, 325, 328). Danis Shook had not posted signs at the basin restricting access or warning employees of a potential hazard (Tr. 33). Foreman Wagner was not required to report to Barrett regarding the work being performed (Tr. 326-327). Foreman Wagner did not file progress reports (Tr. 357). Also, Barrett knew that water still remained in both basins and the pipefitters needed to work in the basins (Tr. 348-350). Barrett had walked the job site every day looking for unsafe conditions (Tr. 352, 370).

Wagner (son) testified that the trades did not necessarily perform only their specific jobs (Tr. 171). Pipefitters were not prohibited from performing some laborer's work. Although a laborer in Ritter's crew drilled the holes in the plug, Barrett had instructed Bobby Sloan, a pipe foreman, to drill the holes (Tr. 228, 308, 328, 330). Wagner (son) also testified that Bobby Sloan knew that the pipefitters were in EQ basin #1 on April 22 because he had opened the drain valves (Tr. 153, 186-187, 191-192).

Rick Tagliaferri, mechanical engineer,[11] knew there was a possibility Foreman Wagner would go into the water (Tr. 492-493). Foreman Wagner had told him that he intended to work in EQ basin #1 (Tr. 480, 482, 491). Wagner (son) agreed that Tagliaferri knew his father planned

[11] Although he was not Foreman Wagner's direct supervisor, Tagliaferri was higher in management and could direct the work activities of the pipefitters. Tagliaferri was responsible for purchasing piping, equipment, and coordination of mechanical drawings (Tr. 289, 495). His responsibilities also included safety. He could order workers to make safety corrections and correct dangers.

to go into the other basin to see why the water was not draining (Tr. 153-154). Tagliaferri knew the water in EQ basin #1 was not draining (Tr. 502). He also knew that the pipefitters needed to work in the basins (Tr. 480, 499-500). Tagliaferri had told them to be careful in the basins because if something happened to the plug someone could be swept into the drain (Tr. 154, 480). He did not order nor require Foreman Wagner to use personal protective equipment when he was informed that Wagner was intending to work in the basin (Tr. 490-491, 507).

On the morning of the accident, Foreman Wagner asked Dave Ritter, laborer foreman, where the paddle bit was because he wanted to wade into the water to make more holes in the plug. Ritter knew that Wagner planned to go into the water (Tr. 208-209).

Wayne Mitchell, pipefitter, was inside the basin and observed Foreman Wagner working around the plug without personal protective equipment. He was told by Wagner that he wanted to see what was preventing the water from draining (Tr. 242-243). Mitchell did not consider what Foreman Wagner was doing as hazardous (Tr. 257). Wayne Mitchell had preceded Wagner as foreman of the pipefitters (Tr. 239, 259).

The Secretary having made a prima facie case showing of employer's knowledge through Danis Shook's supervisory employees, the burden shifts to Danis Shook to rebut the Secretary's case by establishing that it could not have prevented the violation.

Employee Misconduct Defense

Danis Shook denies the violation of § 1926.95(a) on the basis of unpreventable employee misconduct. To prove unpreventable employee misconduct, Danis Shook must show that (1) it has established work rules designed to prevent the violation, (2) it has adequately communicated these rules to its employees, (3) it has taken steps to discover violations, and (4) it has effectively enforced the rules when violations are discovered. *Nooter Construction Co.,* 16 BNA OSHC 1572, 1578 (No. 91-0237, 1994). The action of the employee must represent a departure from a work rule that the employer has uniformly and effectively communicated and enforced. *Frank Swidzinski Co.,* 9 BNA OSHC 1230, 1232 (No. 76-4627, 1981). As an affirmative defense, Danis Shook has the burden of proof.

Danis Shook argues that it had designed work rules which, if followed, could have eliminated the hazard. In addition to its safety rule regarding personal protective equipment "as needed," Foreman Wagner was advised three times of the laborer's use of personal protective equipment when working on the plug. Rick Tagliaferri, mechanical manager, told Wagner twice of the laborer's use of a harness and lifeline while drilling holes in the plug (Tr. 479-482, 488-489). On the day of the accident, Dave Ritter, labor foreman, also told Wagner that the laborer had used a harness and a lifeline (Tr. 208-209).

The record, however, fails to support a supervisory employee misconduct defense. There was no work rule which specifically prohibited employees from working on the plug or requiring the use of a harness and lifeline. The "Spotlight on Safety" guide which is given to each employee, including Wagner, provides that personal protective equipment must be worn "as needed" (Exh. R-4; Tr. 516-517). This rule is vague and broadly written. It does not identify the type of personal protective equipment, the circumstances triggering their use and who makes the decision.

A work rule is defined as an employer directive that requires or proscribes certain conduct and that is communicated to employees in such a manner that its mandatory nature is made explicit and its scope clearly understood. *J. K. Butler Builders, Inc.,* 5 BNA OSHC 1075, 1076 (No. 12354, 1977). Rules that give employees too much discretion in identifying unsafe conditions have been found too general to be effective. *Superior Custom Cabinet Co., Inc.,* 18 BNA OSHC 1019, 1021 (No. 94-200, 1997).

A safety rule that is discretionary is not mandatory. Danis Shook's personal protective rule is discretionary and was not made mandatory by Foreman Wagner's discussions with Ritter and Tagliaferri. The information Wagner received from Ritter and Tagliaferri, although accepted as instructional, was not shown to constitute a safety rule requiring compliance. Foreman Wagner was not directed to follow it. David Ritter, labor foreman, testified that it was his decision to have the laborer wear the harness. It was not required by Danis Shook. Ritter had the laborer wear the harness because of his concern that the plug might blow or give out, "you never know." When Ritter informed Wagner of the lifeline and harness, he was not directing or even recommending their use. He testified that there was no requirement or policy that required the

use of personal protective equipment when entering the basin (Tr. 209-210, 213-215, 218-219). Also, Tagliaferri's discussion with Wagner was not shown to be more than informational. Tagliaferri did not express the laborer's use of the lifeline and harness as a rule or directive. It was instructional and not a safety rule.

Michael Barrett, project superintendent, acknowledged that it was left to the foreman's discretion as to whether his crew used personal protection. When he directed the holes to be drilled, Barrett did not instruct or recommend that the laborer use a lifeline and harness (Tr. 32, 323, 328-329, 330-331, 347). He considered that it was within the foreman's discretion based on his own observation and experience.

Danis Shook's safety program relies on supervisors to identify the hazards and take corrective action. However, when relying on a supervisor's discretion, it must be shown that the supervisor had the necessary safety training and experience to make the safety-related decisions. Danis Shook offered no evidence as to Foreman Wagner's safety training and experience.

"When the alleged misconduct is that of a supervisory employee, the employer must also establish that it took all feasible steps to prevent the accident, including adequate instruction and supervision of its employee." If a supervisory employee is involved, "the proof of unpreventable employee misconduct is more rigorous and the defense is more difficult to establish since it is the supervisors' duty to protect the safety of employees under his supervision. . . . A supervisor's involvement in the misconduct is strong evidence that the employer's safety program was lax." *Archer Western Contractors, Ltd.*, 15 BNA OSHC 1013, 1017 (No. 87-1067, 1991).

Danis Shook was on notice that Wagner was not complying with the personal protective equipment rule. Within 30 days before the accident, Wagner and his crew had received a verbal warning for not wearing safety belts or harnesses while working on scaffolding in excess of 10 feet above the ground (Tr. 175, 182, 520-521, 554-555).

Also, working on plugs in water was apparently not a unique situation. Danis Shook had commonly used plywood plugs for similar purposes in the past without incident (Tr. 369, 525-526). There were also other locations on the project where employees had worked in water, such as a ditch or creek to tie-in piping (Tr. 362-363). If it is a routine activity, it is reasonable to

expect an employer to have established procedures for removing accumulated water, and if an employee is exposed, a more specific requirement for personal protective equipment.

As another element of the employee misconduct defense, Danis Shook must show that the safety rule is enforced. To prove that its disciplinary system is more than a paper program, an employer must show evidence of having actually administered the discipline outlined in its policy and procedures. Evidence of verbal reprimands alone suggests an ineffective disciplinary system. *Pace Construction Corp.*, 14 BNA OSHC 2216, 2218 (No. 86-758, 1991).

Danis Shook's safety program provides for progressive discipline, which consists of verbal and written warnings, suspensions and ultimately termination (Exh. C-3, p. 267). Barrett testified that he has never progressed to even a written reprimand. Other than the verbal warnings to Foreman Wagner and his crew, there is no showing that there was any other discipline (Tr. 371, 520-521, 523).

Serious Classification

Under § 17(k) of the Act, a serious violation exists if there is a substantial probability that death or serious physical harm could result from the violative condition and the employer did not and could not, with the exercise of reasonable diligence, know of the presence of the violation. In determining whether a violation is serious, the issue is not whether an accident is likely to occur; it is rather, whether the result would likely be death or serious harm if an accident should occur.

As discussed, knowledge of the violative condition is imputed to Danis Shook. Also, as evident by the accident, the failure to wear personal protective equipment was likely to result in death. The violation of § 1926.95(a) is serious.

Penalty Consideration

The Commission is the final arbiter of penalties in all contested cases. Under § 17(j) of the Act, in determining an appropriate penalty, the Commission is required to consider the size of the employer's business, history of previous violations, the employer's good faith, and the gravity of the violation. Gravity is the principal factor to be considered.

As a joint venture, Danis Shook is a large employer with more than 5,000 employees. There were 50 employees working at the water treatment plant. There was no history of previous OSHA violations. There is no showing that Danis Shook was uncooperative during the inspection (Tr. 16-17).

A penalty of $3,000 is reasonable for serious violation of § 1926.95(a). There was one employee exposed to an engulfment hazard without personal protective equipment. He died. The employee was a supervisor. He was exposed for less than two hours. Danis Shook failed to ensure that employees did not enter the accumulated water held by a plywood plug, and if an employee needed to enter, that he was strictly controlled and personal protective equipment was required.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

ORDER

Based upon the foregoing decision, it is ORDERED that serious Citation No. 1:

1. Item 1, alleging violation of § 5(a)(1), is vacated.
2. Item 2a, alleging violation of § 1926.21(b)(2), is vacated.

3. Item 2b, alleging violation of § 1926.95(a), is affirmed and a penalty in the amount of $3,000 is assessed.

/s/
KEN S. WELSCH
Judge

Date: November 12, 1999