

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.

OFFSHORE SHIPBUILDING, INC.,

Respondent.

OSHRC Docket No. 97-257

DECISION

Before: ROGERS, Chairman; VISSCHER and WEISBERG, Commissioners.

BY THE COMMISSION:

This case arises out of a citation and a notification of failure to abate violations issued by the Secretary of Labor (“the Secretary”) to Offshore Shipbuilding, Inc. (“Offshore”). During the times in question, Offshore operated a shipyard in Palatka, Florida.

In June 1995, the Secretary of Labor issued a citation alleging that Offshore had violated a number of occupational safety and health standards issued under 29 U.S.C. § 654(a)(2), section 5(a)(2) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (“the Act”). That citation was resolved by a settlement agreement between Offshore and the Secretary in which Offshore agreed to abate the cited violations. During late August and early October 1996, a compliance officer (“the CO”) of the Occupational Safety and Health Administration of the Department of Labor (“OSHA”) conducted a follow-up inspection to determine whether the violations had been abated. As a result of

that inspection, OSHA issued Offshore one citation as well as one notification of failure to abate violations under section 10(b) of the Act, 29 U.S.C. § 659(b).

The citation alleged a repeated violation of the maritime confined space training standard. The notification of failure to abate (“FTA notice”) alleged that Offshore had failed to correct two violations cited in the 1995 citation. Offshore contested the citation and the FTA notice, and a hearing was held before Administrative Law Judge Ken Welsch. The judge affirmed all three items, and Offshore petitioned for review of the judge’s decision. The decision was directed for review pursuant to section 12(j) of the Act, 29 U.S.C. § 661(j).

FAILURE TO TRAIN

In the first item on review, the Secretary alleged that Offshore had committed a repeated violation of the maritime confined space standard at 29 C.F.R. § 1915.12(d)(2) by failing to give an employee confined space entry training before he entered a confined space.¹

¹Section 1915.12(d)(2) provides:

§ 1915.12 Precautions and the order of testing before entering confined and enclosed spaces and other dangerous atmospheres.

. . . .

(d) *Training of employees entering confined and enclosed spaces or other dangerous atmospheres.*

. . . .

(2) The employer shall ensure that each employee who enters a confined space, enclosed space, or other areas with dangerous atmospheres is trained to:

- (i) Recognize the characteristics of the confined space;
- (ii) Anticipate and be aware of the hazards that may be faced during entry;
- (iii) Recognize the adverse health effects that may be caused by the exposure to a hazard;
- (iv) Understand the physical signs and reactions related to exposures to such hazards;

(continued...)

Facts

The OSHA compliance officer began her follow-up inspection in late August of 1996 but did not complete it until October because several Offshore employees were on vacation and were not available to be interviewed. During both visits, Offshore was performing extensive repairs on a ferry called the *Captain Rusty*. The job included cutting out and replacing badly rusted steel plates. In August, Offshore had removed the deck plates, so the below-decks area was open. When the CO returned in October, Offshore was replacing the deck plates over a ballast tank. The ballast tank was approximately 12 feet by 13 feet by 19 feet. It had three openings: two 18-to-22-inch diameter holes in the deck for access, and a hole approximately 10 feet by 18 inches running horizontally approximately 4 feet above the floor of the tank.

The compliance officer learned from Offshore's paint foreman that a new employee had been in the ballast tank welding the overhead deck plates. When she interviewed the welder, he told her that he had been hired by Offshore the previous day and had not been given any training by the company before he began working in the ballast tank. When the welder began the job, the ballast tank was open, but he had closed himself in as the work progressed. The CO considered the ballast tank to be a confined space "because it is not intended for employees to work in on a regular basis. It's small, it has limited access, it can create or aggravate a serious situation" such as chemical exposure, explosive atmosphere, fumes, or lack of oxygen. She therefore concluded that Offshore had violated section 1915.12(d)(2).

¹(...continued)

- (v) Know what personal protective equipment is needed for safe entry into and exit from the space;
- (vi) Use personal protective equipment; and
- (vii) Where necessary, be aware of the presence and proper use of barriers that may be needed to protect an entrant from hazards.

Before anyone had entered the ballast tank, Offshore had performed atmospheric testing in the tank, testing for oxygen, toxicity, and volatility. The company had also set up a ventilation system that could blow 3900-4000 cubic feet of air into the ballast tank per minute. The employee in the ballast tank was performing mig welding using argon, which is heavier than air, as the inert gas that is sprayed to clean the metal to be welded. Although the CO did not know what gases were being used for the welding and had no evidence that a hazardous environment existed in the ballast tank, she testified that she was certain that a hazardous atmosphere could occur in the tank despite Offshore's precautions.

Offshore presented two former OSHA officials as expert witnesses, as well as its part-time safety director, a member of the local fire department. Each of them testified that the ballast tank was an enclosed space within the meaning of the standard, not a confined space.

The judge found that the ballast tank was an enclosed space within the meaning of the standard. He found that Offshore had committed a repeated violation. On review, Offshore asserts that the standard cited by the Secretary does not apply to the activities being performed because that standard is preempted by a more specifically applicable standard. The company also argues that, even if there is no preemption, the judge erred in finding a violation because there was no proof that there was a dangerous atmosphere in the ballast tank, and that, even if the standard does presume the existence of a hazard, that presumption is rebuttable, and the evidence here has rebutted it. For the reasons below, we reject these arguments and affirm the judge.

Discussion

In order to prove that an employer violated an OSHA standard, the Secretary must prove that (1) the standard applies to the working conditions cited; (2) the terms of the standard were not met; (3) employees had access to the violative conditions; and (4) the employer either knew of the violative conditions or could have known with the exercise of reasonable diligence.

Armstrong Steel Erect., Inc., 17 BNA OSHC 1385, 1386, 1995-97 CCH OSHD ¶ 30,909, p. 43,028 (No. 92-262, 1995) (citations omitted). Here, the record establishes that the second, third, and fourth elements have been established. The welder in the ballast tank had

not been trained, so the requirements of the standard had not been met. Because he was in the tank, he was exposed to the conditions the standard was intended to protect against. We also find that Offshore had knowledge of the violative condition. The standard imposes an affirmative duty to train employees before they enter a confined or enclosed space; Offshore knew where the welder was working and its supervisors acknowledged that it had not provided him with any training before he entered the tank.

We also conclude that the standard applies to the cited conditions. By its terms, the standard applies to confined and enclosed spaces, and to other locations having dangerous atmospheres. The Secretary proceeded on the theory that the ballast tank was a confined space, but we agree with the judge that the evidence establishes that the ballast tank was an enclosed space under the definitions in 29 C.F.R. § 1915.4. Section 1915.4(p) defines the term “confined space” as “a compartment of small size and limited access, such as a double bottom tank, cofferdam, or other space which by its small size and confined nature can readily create or aggravate a hazardous exposure.” Under section 1915.4(q), “the term *enclosed space* means any space, other than a confined space, which is enclosed by bulkheads and overhead. It includes cargo holds, **tanks**, quarters, and machinery and boiler spaces.”(Boldface added). On the record here, we find that the ballast tank in question more closely fits the definition of an “enclosed space.”

Offshore asserts that, because the employee was performing welding, the requirements of section 1915.12 are preempted by the maritime standard that governs welding in a confined space, section 1915.51(c),² and it therefore cannot be found in

²That standard provides:

§ 1915.51 Ventilation and protection in welding, cutting and heating.

(a) The provisions of this section shall apply to all ship repairing, shipbuilding, and shipbreaking operations; except

(continued...)

violation of section 1915.12(d)(2). Offshore’s argument relies on 29 C.F.R. § 1910.5(c)(1), which states in pertinent part, “If a particular standard is specifically applicable to a condition, practice, means, method, operation, or process, it shall prevail over any different general standard which might otherwise be applicable to the same condition, practice, means, method, operation, or process. . . .” We find, however, that section 1915.51(c) is not more specifically applicable to the cited conditions than 1915.12(d), the section cited by the Secretary. First, section 1915.51(c) governs welding and heating in confined spaces, while we have found that the ballast tank was an enclosed space rather than a confined space. Second, it governs the activity of welding, while section 1915.12(d) applies to the *entry* into confined or enclosed spaces and requires that the employee be trained *before*

²(...continued)

that paragraph (e) of this section shall apply only to ship repairing and shipbuilding. Paragraph (g) of this section shall apply only to ship repairing.

(b) *Mechanical ventilation requirements.*

. . . .

(c) *Welding, cutting and heating in confined spaces.* (1) Except as provided in paragraphs (c)(3) and (d)(2) of this section either general ventilation meeting the requirements of paragraph (b) of this section shall be provided whenever welding, cutting or heating is performed in a confined space.

(2) The means of access shall be provided to a confined space and ventilation ducts to this space shall be arranged in accordance with § 1915.76(b)(1) and (2).

(3) When sufficient ventilation cannot be obtained without blocking the means of access, employees in the confined space shall be protected by air line respirators in accordance with the requirements of § 1915.152(a), and an employee on the outside of such a confined space shall be assigned to maintain communication with those working within it and to aid them in an emergency.

being allowed to enter a confined space or an enclosed space, or any other space that has a dangerous atmosphere. Offshore's failure to provide that training is the cited condition.

We also find that section 1915.12 does not require the Secretary to prove that the atmosphere in the ballast tank presented a hazard. Section 1915.11(b) provides: "*Dangerous atmosphere* means an atmosphere that **may** expose employees to the risk of death, incapacitation, impairment of ability to self-rescue (i.e., escape unaided from a confined or enclosed space), injury, or acute illness." (Boldface added). The standard "treats all confined and enclosed spaces and other dangerous atmospheres that could present an atmospheric hazard as having this potential, and requires protective measures before entry takes place." 59 Fed.Reg. 37,816, 37,827 (1994). *See also* 59 Fed.Reg. at 37,825. We therefore reject Offshore's argument that the Secretary must prove that there was a dangerous atmosphere in the ballast tank.

In reaching this conclusion, we recognize that Offshore presented testimony from two former OSHA officials that the requirements of the standard did not come into play until there was a dangerous atmosphere and that, because of Offshore's precautions, there was no dangerous atmosphere. However, these witnesses had not been involved in the drafting or promulgation of the standard but merely gave their own interpretations of what the standard meant. The testimony of an expert witness is not necessarily controlling, even if it is unrebutted. *ConAgra Flour Milling Co.*, 16 BNA OSHC 1137, 1141, 1993-95 CCH OSHD ¶ 30,045, p. 41,234 (No. 88-1250, 1993) (citing *United States Steel Corp. v. OSHRC*, 537 F.2d 780 (3d Cir. 1976)), *rev'd in part on unrelated grounds*, 25 F.3d 653 (8th Cir. 1994). As noted above, this standard does not require the Secretary to prove that there was a dangerous atmosphere.

The judge rejected the argument that the Secretary must prove that there was a dangerous atmosphere, stating that confined and enclosed spaces are presumed to have dangerous atmospheres. Offshore asserts that it has rebutted the presumption. The standard does not, however, presume the existence of a dangerous atmosphere. The definition of a

dangerous atmosphere states that it “may expose employees to” risk. The emphasis is on the potential for a hazardous condition to occur, not on the existence of a hazardous condition. We conclude that, under the definition of “dangerous atmosphere,” the Secretary need establish only that there is the potential for a hazardous condition to occur in a location in order to invoke the training requirements of the standard.³ The testimony of the compliance officer has established that here. Consequently, we affirm the judge’s finding that Offshore violated section 1915.12(d)(2).⁴

³Because we reject Offshore’s underlying premise that there is a presumption, we need not reach the derivative argument that it has rebutted the presumption because of the evidence about the ventilation. We would note, however, that the ventilation that Offshore provided was required by 29 C.F.R. § 1915.51(c)(1) where welding was being performed.

⁴Commissioner Weisberg notes that the position advanced by Commissioner Visscher in his dissent, namely that the ballast tank did not become an enclosed space until after the employee had completed the process of “enclosing himself in,” was neither raised nor argued by the company. Moreover, the company’s expert witnesses testified that it was an enclosed space. They apparently did not qualify their testimony or add the caveat *when completed*. The standard at issue, section 1915.12(d)(2), requires that employees receive training in hazard recognition, use of protective equipment, and in self-rescue techniques before entering a confined space, enclosed space, or other areas with dangerous atmospheres. As the Commission noted above, the emphasis of this standard is on the potential for a hazardous condition to occur, not on the existence of a hazardous condition. Commissioner Weisberg believes that in circumstances where an employee’s work assignment in the ballast tank is to enclose himself in by welding deck plates, it is reasonable to interpret the standard to require the employer to provide the requisite training to the employee *before he enters the space*. To hold otherwise would create the anomaly of precluding any entry into an enclosed space that would trigger the training requirement because the work location would not become enclosed until after the employee was already in it for the express purpose of enclosing it. Thus, following Commissioner Visscher’s reasoning, had the employee in the instant case completed the assigned task of welding all the deck plates and transformed it into an enclosed space, the employee would be inside the enclosed space, could exit from the enclosed space, but would have never entered the enclosed space. This is the shipbuilding equivalent of “The Englishman Who Went Up a Hill, but Came Down a Mountain.”

Characterization and penalty

In order to establish a repeated violation:

[T]he Secretary has the burden of establishing that the violations were substantially similar. Where the citations involve the same standard, the Secretary makes a *prima facie* showing of “substantial similarity” by showing that the prior and present violations are for failure to comply with the same standard. The burden then shifts to the employer to rebut that showing.

GEM Industrial Inc., 17 BNA 1861, 1866, 1996 CCH OSHD ¶ 31,196, p. 43,689 (No. 93-1122, 1996) (citations omitted). Here, the record establishes that Offshore had previously been cited for a violation of the same standard and that the citation had become a final order, and Offshore has not rebutted this *prima facie* showing. The Secretary has therefore established that the violation was repeated.

Section 17(j) of the Act, 29 U.S.C. § 666(j), provides that the Commission shall assess an appropriate penalty for each violation, giving due consideration to the size of the employer, the gravity of the violation, the good faith of the employer, and the employer’s history of previous violations. The Secretary proposed a penalty of \$7,500 for this violation, and the judge assessed a penalty in that amount. Because neither party has argued that the penalty assessed by the judge was not appropriate, we see no reason to disturb the penalty assessment recommended by the judge.

FAILURE TO ABATE -- NO RESCUE TEAM

The first item contained in the FTA notice alleged that Offshore had failed to abate a previously-cited violation of the standard at 29 C.F.R. § 1915.12(e)⁵ because it had neither

⁵29 C.F.R. § 1915.12(e) provides:

§ 1915.12 Precautions and the order of testing before entering confined and enclosed spaces and other dangerous atmospheres.

....

(e) *Rescue teams.* The employer shall either establish a

(continued...)

organized a rescue team of its own nor arranged for an outside team to perform confined space rescues at the shipyard. Offshore argues (1) that it did not need to have a rescue team because it was not performing any work in confined spaces, (2) that it did have a rescue team, and (3) that it had arranged for an outside rescue team. For the reasons below, we reject each of these arguments and find that Offshore had failed to abate the previously-cited violations.

Facts

Item 6 of the original citation, which had become a final order under the settlement agreement, alleged a violation of section 1915.12(e) for failure to have established a shipyard rescue team or to have arranged for an outside rescue team. During the follow-up

⁵(...continued)

shipyard rescue team or arrange for an outside rescue team which will respond promptly to a request for rescue service.

(1) Shipyard rescue teams shall meet the following criteria:

(i) Each employee assigned to the shipyard team shall be provided with and trained to use the personal protective equipment he or she will need, including respirators and any rescue equipment necessary for making rescues from confined and enclosed spaces and other dangerous atmospheres.

(ii) Each employee assigned to the shipyard rescue team shall be trained to perform his or her rescue functions including confined and enclosed and other dangerous atmosphere entry.

(iii) Shipyard rescue teams shall practice their skills at least once every 12 months. Practice drills shall include the use of mannequins and rescue equipment during simulated rescue operations involving physical facilities that approximate closely those facilities from which rescue may be needed.

Note to paragraph (e)(1)(iii): If the team performs an actual rescue during the 12 month period, an additional practice drill for that type of rescue is not required.

(iv) At least one person on each rescue team shall maintain current certification in basic first aid which includes maintenance of an airway, control of bleeding, maintenance of circulation and cardiopulmonary resuscitation (CPR) skills.

inspection, the CO determined that Offshore did not have a properly-equipped rescue team and had not made arrangements for an outside rescue team to perform that function. She based that conclusion on conversations with several Offshore employees, including its superintendent, a foreman, and the professional firefighter Offshore had hired to act as its part-time safety director. The foreman told her that he had frequently asked the company's general manager to establish and equip a rescue team, but that the general manager had told him that Offshore did not need a team of their own and could contract that function out. According to the foreman, the outside contract was never implemented. The superintendent told the CO that he had asked the general manager for equipment for a company rescue team but the requests were denied outright or were ignored.

The compliance officer testified that Offshore was required to have a rescue team because the company's work logs showed that employees had entered confined spaces in the months before her October inspection. She indicated that, although the only function of a rescue team is to perform rescues from confined spaces, it must be properly trained and equipped to perform that function. According to the CO, that means the team must be trained and equipped for any confined space hazard it may reasonably be expected to encounter.

Offshore's part-time safety director, Fowler, testified that, when he had been hired in May, the company did not have a rescue team, but that, by October 1, he had established one and there was a full complement of rescue equipment on the site. Fowler said that each member had been issued personal protective equipment, including a full body harness, a helmet, and gloves, which were stowed onsite in an equipment bag. At the time of the inspection, the bags were stowed in a steel shed near the gangway to the *Captain Rusty*. According to Fowler, the members of the team had been given all the requisite training, but, because Offshore was not performing any painting, Fowler did not believe it was necessary for the team to have respirators.

The chief of the Palatka Fire Department testified that his department is located about 7-8 minutes from the shipyard and that it would respond to an emergency there because, although Offshore is outside the city of Palatka in the county, the area is covered by a mutual aid agreement. His department had received a request from Offshore for a proposal to furnish a rescue team to Offshore, but his reply to Offshore's request indicated that, in order to provide an outside rescue team, his department would have to obtain additional equipment and to perform additional training. City policy required that the requesting organization help defray the additional costs that would be incurred. The chief listed those costs in his response to Offshore. The cost of the additional equipment would be \$25,091, and Offshore was asked to enter into a seven-year contract at a rate of \$2,000 a year. The chief indicated that Offshore had never entered into any agreement with the Fire Department.

Discussion

The judge found that Offshore had not abated this violation. On review, Offshore makes four arguments, two of which are based on the assertion that it was not performing any work in confined spaces during the period between the time the earlier citation became a final order and the date of the reinspection on October 2. Relying on this premise, Offshore asserts that it had abated the violation, because its employees were not exposed to the hazardous condition that formed the basis of the citation. Thus, Offshore contends, it cannot be penalized for a failure to abate. It also argues that, since no confined space work was being performed, no rescue team was needed.

We find that the underlying premise on which these claims are based is not supported by the record. The company asserts that it was not performing any confined space work, not that its employees did not enter confined spaces. Indeed, the company's work logs indicated that employees had entered confined spaces during the period in question. Employee exposure to a violative condition is established if the record indicates that it is reasonably predictable that, during assigned work activities, personal comfort activities, or normal ingress-egress to and from their work stations, an employee may come into the zone of

danger, either through operational necessity or otherwise, including through inadvertance. *Fabricated Metal Prod., Inc.*, 18 BNA OSHC 1072, 1073-74, 1998 CCH OSHD ¶ 31,463, p. 44,506 (No. 93-1853, 1997). Since an employee who enters a confined space could be overcome by noxious gases that had accumulated there, it is not necessary that the employees perform work there in order for the requirements of the standard to apply. We recognize that work such as painting or welding may increase the likelihood that a hazardous condition will occur, but the standard is not limited to the rescue of employees who were performing work when they became unable to rescue themselves. It applies as well to an employee who may enter a previously-closed area and is overcome by the atmosphere that has developed there. Accordingly, we find that Offshore had not abated the violation by keeping its employees from entering any confined spaces, and that, because employees had entered confined spaces, a rescue team was required.

We also reject Offshore's third argument, its claim that it had established a rescue team. We find that, although a team may have been created and its training begun, Offshore's team was not equipped to perform confined space rescues because its members did not have respirators. The feature that distinguishes rescue from confined spaces from other first aid and rescue situations is that confined spaces may contain a hazardous atmosphere. The confined space standard is primarily concerned with the rescue of an employee or employees overcome by the atmosphere in the confined space. Section 1915.12(e)(1)(i) specifically requires that employees be provided with and trained in the use of respirators.⁶ That requirement was -- by Fowler's admission -- not satisfied. Without

⁶That section provides:

§ 1915.12 Precautions and the order of testing before entering confined and enclosed spaces and other dangerous atmospheres.

.....

(continued...)

respirators, the rescue team could not be expected to perform a rescue without endangering its members. Consequently, we reject Offshore's argument that it had established a shipyard rescue team that met the criteria set out in section 1915.12(e)(1)(i).

Offshore's final argument on this item is that it had arranged for an outside rescue team because the city fire department was required by the mutual aid agreement to respond to a call for assistance at the shipyard. The judge rejected this argument by stating that the standard requires more than simply dialing "911." We agree with the judge's conclusion but would add that the record here clearly establishes that the fire department's reply to Offshore's inquiry stated that the department did not have the proper equipment to allow it to enter into an agreement and that it would need additional training if it were to undertake to perform the role of outside confined space rescue team for the shipyard. In light of the fire department's assertion that it was not adequately trained or equipped to perform such a function, we cannot accept Offshore's claim that it had made adequate arrangements for an outside rescue team.

Consequently, we affirm the judge's finding that Offshore had failed to abate the previously-cited violation of 29 C.F.R. § 1915.12(e).

Penalty

The administrative law judge assessed a penalty of \$14,000 for this failure to abate. Offshore has not challenged the amount assessed by the judge, although the Secretary has noted that the Commission has the discretion to assess the larger penalty originally proposed

⁶(...continued)

(e) *Rescue teams.* . . .

(1) Shipyard rescue teams shall meet the following criteria:

(i) Each employee assigned to the shipyard team shall be provided with and trained to use the personal protective equipment he or she will need, including respirators and any rescue equipment necessary for making rescues from confined and enclosed spaces and other dangerous atmospheres.

by the Secretary. Having considered the statutory penalty factors set out in section 17(j) of the Act, we conclude that the penalty recommended by the judge is appropriate. Accordingly, we affirm his assessment of a penalty in the amount of \$14,000.

FAILURE TO ABATE -- NO EXPOSURE CONTROL PLAN

The second failure-to-abate item alleged that Offshore failed to abate a previously-cited violation of 29 C.F.R. § 1915.1030(c)(1)(i) because, when the CO arrived to reinspect, Offshore did not have a written exposure control plan for employees who might be exposed to bloodborne pathogens.⁷ The judge affirmed this notification and assessed a penalty of

⁷The entry at 29 C.F.R. § 1915.1030 contains a note that the provisions of that standard are identical to those of 29 C.F.R. § 1910.1030, which provides in pertinent part:

§ 1910.1030 Bloodborne pathogens.

....

(b) *Definitions.* For purposes of this section, the following shall apply:

....

Occupational Exposure means reasonably anticipated skin, eye, mucous membrane, or parenteral contact with blood or other potentially infectious materials that may result from the performance of an employee’s duties.

....

(c) *Exposure control*—(1) *Exposure Control Plan.* (i) Each employer having an employee(s) with occupational exposure as defined by paragraph (b) of this section shall establish a written Exposure Control Plan designed to eliminate or minimize employee exposure.

(ii) The Exposure Control Plan shall contain at least the following elements:

- (A) The exposure determination required by paragraph(c)(2),
- (B) The schedule and method of implementation for paragraphs
- (d) Methods of Compliance, (e) HIV and HBV Research Laboratories and Production Facilities, (f) Hepatitis B Vaccination and Post-Exposure Evaluation and Follow-up, (g) Communication of Hazards to Employees, and (h) Recordkeeping, of this standard, and

(continued...)

\$75,000. Although we affirm the judge's finding that Offshore had failed to abate the previously-cited violation, we find a penalty of \$7,500 to be appropriate.

Facts

Item 12 of the 1995 citation had alleged that Offshore had violated the standard at 29 C.F.R. § 1915.1030(c)(1)(i). Under the settlement agreement, that item had become a final order. The compliance officer indicated that Offshore needed a bloodborne pathogens exposure control plan because it had designated first-aid responders who could be exposed to blood and other bodily fluids. At the time of the inspection that had led to the initial citation, the compliance officer had given Offshore a "generic" fill-in-the-blanks exposure control plan to be used as a guide. When the CO asked to see the company's exposure control plan during the follow-up inspection in August, she was given the generic plan that had been left. Only a few of the blanks had been filled in. One of Offshore's supervisory employees told the CO that the plan was incomplete because, when he had begun to work on it, the company's general manager had told him that there was more important work to be done. By the time the compliance officer returned in October to complete the reinspection, the plan had been completed.

Offshore's safety director testified that Offshore did not need a plan because there had been no exposures to bloodborne pathogens during the period between the time the citation had become a final order and the reinspection. He indicated that, because Offshore had done no confined space work in that period, the rescue team could not have been required to perform any rescues.

The judge found that Offshore had failed to abate the violation because, when the CO began the follow-up inspection, it had not completed the plan. On review, Offshore claims

⁷(...continued)

(C) The procedure for the evaluation of circumstances surrounding exposure incidents as required by paragraph (f)(3)(i) of this standard.

that it had abated the violation by not scheduling any confined space work during the relevant period, making it unnecessary even to have a rescue team. Offshore also argues that the Secretary has the burden of proving that its employees were exposed to bloodborne pathogens.

Discussion

It is clear that Offshore did not have an exposure control plan when the compliance officer asked to see it during the follow-up inspection. The question is whether any of the company's arguments excuses it from having one. We find that they do not. Offshore's arguments linking this violation to the rescue team are misplaced. As discussed above, we have found that confined space entries were being made, so the rescue team was, in fact, needed.

A more fundamental difficulty with the company's position is that the exposure control plan is not limited to members of the confined space rescue team. It must cover every employee who may reasonably be expected to come into contact with potentially infectious materials during the performance of his or her duties. Such employees would include the designated first aid providers, who might be exposed to bloodborne pathogens in rendering assistance to a fellow employee who had been injured in any number of ways not having anything to do with a confined or enclosed space. It is clear from the record that Offshore had such employees and was, therefore, required to have an exposure control plan. Given the nature of the work being done on the *Captain Rusty* -- cutting out and replacing large, heavy steel plates that might have sharp edges -- an injury that would cause bleeding was reasonably foreseeable. Because the record clearly establishes that Offshore had never had a plan until after the August reinspection, we conclude that it had failed to abate the previously-cited violation.

Penalty

The Secretary proposed a penalty of \$75,000 for this failure to abate, and the judge assessed that amount. Offshore argues on review that the amount assessed by the judge is

excessive. Having considered the four factors set out in section 17(j) of the Act, we agree with the company that that amount is not appropriate for the failure to abate here.

We do not deem this to be a high gravity violation because the shipyard is not the kind of employer, such as a hospital or a dentist's office, where exposure to bloodborne pathogens is considered to be very likely. We do not minimize the hazard here, but we find a comparatively low likelihood of exposure. Similarly, we give Offshore more credit than did the compliance officer for its size. Although it was a subsidiary of a large company, Offshore itself was a fairly small operation, with a total of 25 employees on the site, only ten of whom worked in the shipyard itself. It appears that the rest were administrative personnel who worked in the company's offices, which supports our finding of low likelihood of exposure. In addition, Offshore had fired the general superintendent who deemed it unimportant to complete the exposure control plan. Further, as the compliance officer admitted, this was a "paper violation," and there had been partial abatement before the reinspection. By the time the compliance officer returned to complete her follow-up inspection, the plan had been completed. We also note that Offshore had ceased operations at this shipyard. While an employer cannot escape its responsibility for a violation by going out of business, the fact that this shipyard is out of operation is a small factor in our considerations.

All factors considered, we deem a penalty of \$7,500 to be appropriate for this failure to abate.

CONCLUSION

For the reasons set out above, we find that Offshore did commit a repeated violation of 29 C.F.R. § 1915.12(d)(2), which required it to perform confined space training, and that it did fail to abate the previously-cited violations of 29 C.F.R. § 1915.12(e), which required that it have a shipyard rescue team or arrange for an outside rescue team, and 29 C.F.R. § 1915.1030(c)(1)(i), which required it to have an exposure control plan. We assess a

penalty of \$7,500 for the repeated violation and \$14,000 and \$7,500 for its failure to abate the two previously-cited violations.

/s/
Thomasina V. Rogers
Chairman

/s/
Stuart E. Weisberg
Commissioner

Dated: July 3, 2000

VISSCHER, Commissioner, concurring in part, dissenting in part:

I concur in finding failure to abate violations of 29 C.F.R. § 1915.12(e), for failure to establish a rescue team, and 29 C.F.R. § 1910.1030(c)(1)(i), for failure to establish a control plan for occupational exposure to bloodborne pathogens. I do not agree, however, that the Secretary has proven a violation of 29 C.F.R. § 1915.12(d)(2), and therefore would vacate the alleged repeat violation.

Section 1915.12(d)(2) requires that maritime employers such as Offshore:

ensure that each employee who enters a confined space, enclosed space or other areas with dangerous atmospheres is trained to:

- (i) Recognize the characteristics of the confined space;
- (ii) Anticipate and be aware of the hazards that may be faced during entry;
- (iii) Recognize the adverse health effects that may be caused by the exposure to a hazard;
- (iv) Understand the physical signs and reactions related to exposures to such hazards;
- (v) Know what personal protective equipment is needed for safe entry into and exit from the space;
- (vi) Use personal protective equipment; and
- (vii) Where necessary, be aware of the presence and proper use of barriers that may be needed to protect an entrant from hazards.

As defined in section 1915.4(p), a “confined space” is “a compartment of small size and limited access such as a double bottom tank cofferdam, or other space which by its small size and confined nature can readily create or aggravate a hazardous exposure.” The term “enclosed space” is defined in 1915.4(q) as “any space, other than a confined space, which is enclosed by bulkheads and overhead. It includes cargo holds, tanks, quarters, and machinery and boiler spaces.”

When the compliance officer arrived at the worksite, she learned that an Offshore employee, McConaughay, was welding deck plates to enclose the top of a large (approximately 12 feet by 13 feet by 19 feet) ballast tank of a ferry that was undergoing repairs. She also learned that McConaughay had not been given confined space training by Offshore. At the compliance officer’s request, McConaughay was replaced by another employee who had received confined space training. Thereafter, OSHA cited Offshore for allowing McConaughay to work in a “confined space” without proper training.

The judge found that the ballast tank was “an enclosed space, rather than a confined space” and the majority agrees with the judge. I agree that the ballast tank *when completed* would meet the standard’s definition of an enclosed space.⁸

The record does not show, however, that the ballast tank was enclosed when McConaughay was welding deck plates on it before he was removed from this job. As the compliance officer testified, the deck plates McConaughay was welding made up the top of the tank, and he was in the process of “welding himself in; in other words, enclosing it as he went.” Though the record is not entirely clear, the strongest inference to be made is that McConaughay had not completed the process of “enclosing himself in” before he was removed from the job. The compliance officer herself agreed that “a lot” of the top of the tank had been open when McConaughay began welding that morning, and another employee was assigned to complete this welding job after McConaughay was removed.⁹

The standard is intended to protect employees from the hazards that may be encountered upon entering a confined or enclosed space, the noxious or oxygen-deficient atmosphere that may occur in an area that is closed in. Here, that situation never occurred. I agree with the majority that, if the ballast tank had been enclosed, the standard would not have required the Secretary also to prove that the ballast tank presented an actual hazard in order for the training requirements of section 1915.12(d) to be triggered. But the clear language of the standard requires training only if the space the employee enters is either “confined” or “enclosed,” or is another “area[] with [a] dangerous atmosphere[.]” Because

⁸Similarly, it is clear that Offshore’s witnesses, who also expressed the opinion that the ballast tank was an “enclosed space” rather than a “confined space” were referring to the tank as completed.

⁹In addition to the open top, the ballast tank had two substantial openings on the sides, each approximately 10 feet by 2 feet when McConaughay was working on it.

the evidence does not show that the ballast tank in question met any of these descriptions during the time McConaughay was working on it, I would vacate the citation.¹⁰

/s/ _____
Gary L. Visscher
Commissioner

Date: July 3, 2000

¹⁰Commissioner Weisberg argues that when McConaughay entered the ballast tank, it was already an “enclosed space” within the meaning of the standard because the employer was in the process of enclosing it. As I understand his argument, any space could become a statutory enclosed space during its construction even before the top and sides have gone on.