



United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR,

Complainant,

v.

JIMERSON UNDER-GROUND, INC.,

Respondent.

OSHRC Docket No. 04-0970

APPEARANCES:

Eve Marie Stocker, Attorney; Charles F. James, Counsel for Appellate Litigation; Daniel J. Mick, Counsel for Regional Trial Litigation; Joseph M. Woodward, Associate Solicitor; Howard M. Radzely, Solicitor; Department of Labor, Washington, DC
For the Complainant

C. Thomas Behrman, Esq.; Robin N. Blanchette, Esq.; Simon W. Hendershot, III, Esq.; Kerr & Hendershot, P.C., Houston, TX
For the Respondent

DECISION

Before: RAILTON, Chairman, and ROGERS, Commissioner.

BY THE COMMISSION:

Jimerson Under-Ground, Inc. ("Jimerson") was the general contractor on a sewer-line project. Following a fatal accident in which two Jimerson employees and two employees of a subcontractor were overcome while working in a manhole, the Occupational Safety and Health Administration ("OSHA") issued two citations to Jimerson alleging violations of various general industry standards relating to permit-required confined space ("PRCS") hazards, workplace hazard assessments and personal protective equipment. The Secretary characterized one of the PRCS violations as willful and the remaining violations as serious. She proposed a total penalty of \$69,800.

Judge Robert A. Yetman affirmed the citations at issue, but characterized the allegedly willful PRCS violation as serious. He assessed a total penalty of \$16,600. For the following reasons, we reverse and remand the case for further proceedings in a manner consistent with this opinion.¹

BACKGROUND

Jimerson is a construction company that works on municipal projects involving underground utilities, water and sanitary services, and storm sewers. On July 15, 2003, Jimerson entered into a contract with the city of Edinburg, Texas to “reline” the sewer main leading to Edinburg’s wastewater treatment plant. The project, which took over two months to complete, required Jimerson to clean approximately 1,400 feet of Edinburg’s existing sewer line, a 36-inch line composed of vitrified clay tile (“VCT”), and insert a new, 30-inch polyvinyl chloride (“PVC”) pipe in that line. Because the PVC pipe was smaller in diameter, Jimerson had to grout between the two lines. The contract also called for Jimerson to remove and reconstruct five manholes connected to the line.

To reach the existing sewer line, Jimerson first had to excavate a “push pit,” which served as a surface from which its employees could break open the sewer main and push the PVC pipe sections through the existing line. Jimerson shored the push pit, which was 25 feet long, 10 feet wide and 17 feet deep, and also poured a concrete floor inside the pit. Jimerson then used an excavator to lower PVC pipe sections into the pit and push them through the existing sewer line.

Because Edinburg’s sewer system remained in use when Jimerson was not actively working on the sewer line, Jimerson could not begin its work until the sewage flow was reduced and the atmosphere in the push pit tested. Jimerson maintained it used a five-step procedure to accomplish this that involved: (1) stopping the flow in the line at both upstream and downstream wastewater stations; (2) setting plugs (inflatable bladders) in the line; (3) bypassing the section of line between the plugs; (4) cleaning the line with

¹ Because we have decided this case on the basis of the record and the briefs before us, we deny Jimerson’s motion for oral argument.

potable water and vacuuming it (subcontractor L&B Vactor Services performed this work); and (5) conducting atmospheric testing in all four corners of the pit. Employees of Jimerson and L&B Vactor performed some of these tasks by accessing the sewer line through manholes. On November 11, 2003, two L&B Vactor employees were overcome while working in a manhole and died. Two Jimerson employees, Robert Dose, Jimerson's project coordinator, and Gerard Bustillo, a laborer, were also overcome as they attempted to rescue the L&B Vactor employees. Dose and Bustillo were rescued by firefighters and survived.

After an investigation of this incident, OSHA issued the subject citations, which Jimerson timely contested. In its pleadings, Jimerson claimed that the cited general industry standards did not apply to the alleged conditions because the work performed by its employees on the Edinburg project was construction. *See* 29 C.F.R. § 1910.12(a) ("The standards prescribed in part 1926 of this chapter . . . shall apply . . . to every employment and place of employment of every employee engaged in construction work."). Five days before the hearing was scheduled to commence, the Secretary filed a motion to amend the complaint and the citations to allege in the alternative that Jimerson violated various construction standards and also section 5(a)(1) of the Occupational Safety and Health Act, 29 U.S.C. § 651-678 ("the Act").² When the judge took up the Secretary's motion on the first day of the hearing, Jimerson requested a continuance. The judge did not grant Jimerson's request, but stated that he would "entertain a [continuance] motion at the conclusion of either the Secretary's case or . . . the Respondent's case." Jimerson never renewed its request for a continuance and there is nothing in the record to show that the judge ever ruled on the Secretary's motion to amend.

DISCUSSION

Based upon our review of the record, we find that Jimerson's work on the Edinburg project constituted construction work. According to 29 C.F.R. § 1910.12(b),

² This was the Secretary's third motion to amend. On two prior occasions, the Secretary moved to make minor amendments to the complaint. The judge granted both motions.

“construction work” includes “work for construction, alteration, and/or repair, including painting or decorating.” Work that involves replacing existing equipment is considered “work for . . . alteration” and, therefore, “construction work,” under this section. *United Telephone Co. of the Carolinas*, 4 BNA OSHC 1644, 1646, 1976 CCH OSHD ¶ 21,043, pp. 25,323-24 (No. 4210, 1976) (erecting and removing telephone poles and transferring lines is reconstruction constituting “alterations,” and, therefore, constitutes construction work as defined in section 1910.12(b)).

The judge rejected Jimerson’s claim that it was engaged in construction work because he characterized the task of pushing a PVC pipe through the existing sewer line as “maintenance” based on OSHA Compliance Directive CPL 2.100 (May 15, 1995) which states, “[t]he relining of a sewer line using a sleeve which is pushed through a section of the existing system is maintenance.” See *Gulf States Utilities Co.*, 12 BNA OSHC 1544, 1546, 1984-85 CCH OSHD ¶ 27,422, pp. 35,523-24 (No. 82-867, 1985) (employer performing maintenance not engaged in construction work). We disagree with the judge. The evidence establishes that Jimerson’s workers were replacing, not relining, the existing sewer line. The specifications for the PVC pipe Jimerson installed expressly state that the “A2 Liner provides a *new pipe* with traditional direct-bury strength ... meaning that the new liner *does not rely on the existing host pipe* for long-term structural performance.” (Emphases added.) Also, Jimerson’s contract with the City of Edinburg specifically called for the “*replacement* of 36 [inch] RCP Sanitary Sewer Line with 30 [inch] slip lining.” (Emphasis added.) Because Jimerson’s work required the installation of a new pipe of smaller bore that did not rely on the existing sewer line for performance, we find that Jimerson was engaged in the replacement of existing equipment and, therefore, was engaged in “work for . . . alteration.” *United Telephone*, 4 BNA OSHC at 1644, 1976 CCH OSHD at p. 25,324.

Furthermore, we note that Jimerson’s work was an integral part of a larger project involving the replacement of equipment. Paul Torres, Wastewater Superintendent for the City of Edinburg, testified that Jimerson’s work was part of a master plan to

replace all the city's sewer lines, which Torres described as “big-time construction.”³ Where work is an integral part of a larger project that involves the alteration of equipment or property, the Commission has held that the work is covered under the construction standards. *Active Oil Serv., Inc.*, 21 BNA OSHC 1184, 1186 (No. 00-0553, 2005) (removing two oil tanks and oil-burning equipment constituted construction work because it was an “integral part of [an] alteration” that “required excavating the ground around . . . underground tanks and physically removing them”).

Because Jimerson’s work involved the alteration of Edinburg’s existing sewer line, we find that its activities constituted construction work under the plain language of section 1910.12(b), and therefore, the general industry standards do not apply to the cited conditions.⁴ Accordingly, on remand, the judge must determine whether to grant the Secretary’s motion to amend the complaint and the citations in order to allege in the alternative that Jimerson violated provisions of the construction standards and also section 5(a)(1) of the Act. *See Reed Eng’g. Group, Inc.*, 21 BNA OSHC 1290, 1291 (No. 02-0620, 2005) (leave to amend freely given but Respondent must have reasonable opportunity to develop defense where new factual issues added).

³ To support her claim that Jimerson’s work on the Edinburg project was maintenance, the Secretary relies on the Commission’s decision in *Gulf States Utilities Co.*, 12 BNA OSHC at 1546, 1984-85 CCH OSHD at pp. 35,523-24. In that case, the Commission found that the replacement of vandalized insulators on electrical lines was maintenance because the lines were kept in the same condition they were before being damaged. However, unlike Jimerson’s work on the Edinburg project, the Commission emphasized that the insulators “were not replaced as part of a systematic plan for upgrading the porcelain insulators,” but because they were in fact damaged. *Id.* at 1546, 1984-85 CCH OSHD at pp. 35,523-24.

⁴ Because we find that Jimerson’s activities constituted construction work under the plain language of section 1910.12(b), we need not address the Secretary’s claim that her interpretation as stated in CPL 2.100 is reasonable and controlling in this case. *See Unarco Commercial Prod.*, 16 BNA OSHC 1499, 1502-03, 1993-95 CCH OSHD ¶ 30,294, p. 41,732 (No. 89-1555, 1993) (it is unnecessary to look outside standard itself where language of standard is sufficiently clear).

ORDER

We vacate the citations as alleged under the general industry standards, and we remand the case to the judge for him to rule on the Secretary's outstanding motion to amend and to conduct any further proceedings as necessary.

SO ORDERED.

/s/ _____
W. Scott Railton
Chairman

/s/ _____
Thomasina V. Rogers
Commissioner

Dated: March 3, 2006



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SECRETARY OF LABOR,

Complainant,

v.

JIMERSON UNDER-GROUND, INC.,
and its successors,

Respondent.

OSHRC DOCKET NO. 04-0970

APPEARANCES:

For the Complainant:

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For the Respondent:

Thomas Behrman, Esq., Simon W. Hendershot, III, Esq., Robin Blanchette, Esq., Kerr, Hendershot
& Alvarez, Houston, Texas

Before: Administrative Law Judge: Robert A. Yetman

DECISION AND ORDER

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C. Section 651-678; hereafter called the "Act").

Respondent, Jimerson Under-Ground, Inc. (Jimerson), at all times relevant to this action maintained a place of business at the municipal sewer project on M Road, Edinburg, Texas, where it was engaged, *inter alia*, in relining an existing sewer main. Jimerson admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

On November 11, 2003, two employees of a Jimerson subcontractor, L&B Vactor, were overcome while working in a manhole and died (Tr. 91, 577). Two Jimerson employees, Robert Dose and Gerard Bustillo, were also overcome while attempting to rescue the L&B Vactor employees. Dose and Bustillo, however, were rescued (Tr. 91, 577; Exh. R-18). Following this accident, on November 12, 2003, the Occupational Safety and Health Administration (OSHA) conducted an inspection at Jimerson's Edinburg work site. As a result of that inspection, Jimerson was issued one "serious" and one "willful" citation alleging violations of the general industry standards of the Act. By filing a timely notice of contest

Jimerson brought this proceeding before the Occupational Safety and Health Review Commission (Commission). On February 10, 2005, the Secretary moved to amend the citation to allege, in the alternative, violations of OSHA's construction standards. That motion was taken under consideration (Tr. 13-16). On February 15-17, 2005, a hearing was held on this matter in San Antonio, Texas. At the hearing the Secretary withdrew "serious" citation 1, items 4 and 6(a) and (b), and "willful" citation 2, item 1(g). The parties have submitted briefs on the issues and this matter is ready for disposition.

FACTS

In mid-2003, Jimerson was hired by the city to slip line the sewer main coming into the Edinburg wastewater treatment plant on M Road in Edinburg as part of a municipal sewer project (Tr. 44, 100, 108; Exh. R-62, R-63, R-64). Paul Torres, Edinburg's wastewater treatment plant superintendent, testified that the relining was undertaken as preventive maintenance on a 25 year old main (Tr. 45, 51). Although the master plan called for the replacement of some other lines, this main was still in service, and Torres stated that Edinburg had not experienced any problems with this portion of the line (Tr. 46, 100). The job required that Jimerson clean approximately 1400 feet of the existing 36-inch line and reline it with a 30-inch PVC line (Tr. 48, 50, 52, 521). In addition, Jimerson was to grout between the two lines and remove and reconstruct manholes on the line (Tr. 131, 521).

When Jimerson started work on the M Road site, it first excavated a "push pit". The push pit was approximately 25 feet long by 10 feet wide and was 17 feet deep; it was excavated around the existing sewer main, which was broken open at that point. The pit was shored and had a poured concrete floor. It provided a work area from which Jimerson could push the liner into the main (Tr. 59, 101, 473; Exh. C-2, C-3, C-4).

Michael Roop is an expert in confined space entry and rescue (Tr. 313-327).¹ His firm's clients include municipal wastewater plants and water departments working in sewers (Tr. 308-09, 317-18). Roop testified that, while the replacement of manholes and the excavation and reinforcement of the push pit are classified as construction, the relining of existing sewers is "maintenance" and is governed by OSHA's general industry standards (Tr. 327-29). Roop referred to a May 5, 1995 OSHA Compliance Directive

¹ Jimerson argues that Roop's testimony was inadmissible expert testimony, which should be stricken from the record, citing *Daubert v. Merrell Dow Pharmaceuticals, Inc. (Daubert)*, 113 S. Ct. 2786 (1993). However, Annotated Fed. R. Evid. 702, which was revised in response to *Daubert*, states that expert testimony reasonably based on the witness' experience, in conjunction with his other knowledge, skill, training or education is generally admissible. According to the comments to that rule, the reliability of such testimony should be determined through traditional means of attacking relevant, even if shaky testimony, including vigorous cross-examination, and the submission of contrary evidence. Because Roop demonstrated substantial expertise in the area of confined space entry, his testimony is accepted.

CPL 2.100 - Application of the Permit-Required Confined Spaces (PRCS) Standards, 29 CFR

1910.146, which states:

Generally speaking, refurbishing of existing equipment and space is maintenance; reconfiguration of space or installation of substantially new equipment (as for a process change) is usually construction. Those spaces identified under 1910.146(c)(1) as permit spaces that are undergoing maintenance or modifications, which do not involve construction, would be subject to the General Industry standards.

A confined space created during or as a result of construction activity or entered to perform construction activity would usually fall within the scope of the 29 CFR 1926 standards and the general duty clause until the space is turned over for General Industry operations.

Some examples:

* * *

* The relining of a sewer line using a sleeve which is pushed through a section of the existing system is maintenance.

(Tr. 329; Exh. C-10, pg. 15). Roop testified that the relining of an existing sewer line is specifically defined in the directive as maintenance, which is covered under the general industry standards (Tr. 330-31, 339). Roop further opined that the push pit, while constructed to access the sewer main, had been completed before Jimerson began pushing pipe (Tr. 332-35). Once the trench box was in place and the concrete floor laid, it became a semi-permanent structure falling under the definition of a “confined space” set forth in §1910.146(b):

Confined space means a space that:

(1) is large enough and so configured that an employee can bodily enter and perform assigned work; and

(2) has limited or restricted means for entry or exit (For example, tanks, vessels, silos, storage bins, hoppers, vaults, and pits are spaces that may have limited means of entry.); and

(3) is not designed for continuous employee occupancy.

(Tr. 332-35).

Jimerson’s expert, David David (Tr. 592-610; Exh. R-78) disagreed with Roop’s assessment (Tr. 612). Jimerson is engaged in the construction business, and entered into a standard construction contract with the city of Edinburg (Tr. 430-35; Exh. R-62, R-63, R-64). Mr. David believed that because Jimerson dug the push pit and broke open the existing sewer main using construction equipment and techniques, the relining job should have been classified as construction rather than maintenance (Tr. 612-13, 626). David believed it was relevant that Edinburg’s sewer main had failed further south, downstream from Jimerson’s project, and had actually been replaced with 30 inch line (Tr. 614-15).

Roop agreed that replacement of old pipe would fall under the construction standard, but pointed out that this is not what was being done in this case (Tr. 339).

Robert Dose, Jimerson's project coordinator, testified that before work was started at the M Road site, he and Tony Madla, Jimerson's foreman, discussed the hazards associated with the job with a representative of the City of Edinburg (Tr. 519). Dose testified that the major concerns discussed were the shoring of the push pit and the means of addressing a gas monitor alarm (Tr. 519). It is undisputed that sewage produces hydrogen sulfide (H₂S) in concentration (Tr. 90, 346). The Material Safety Data Sheet (MSDS) for hydrogen sulfide states:

Highly toxic – may be fatal if inhaled. Inhalation of a single breath at a concentration of 1000 ppm [parts per million] (.01%) may cause coma. . . . There is a rapid loss of smell on exposure to gas above 150 ppm, and this means that the extent of exposure may be underestimated.

(Exh. C-12, p. 2). The gas can be unexpectedly released in quantities from 10 parts to 1000 parts per million (ppm) when the sewage is disturbed (Tr. 90, 349). OSHA standards permit exposure to H₂S in amounts of less than 10 ppm (Tr. 138). Exposure to 100 ppm of H₂S can cause the loss of smell, headaches and dizziness (Tr. 348). If the symptoms go unrecognized, further exposure can result in brain damage or death (Tr. 348-49). Sewage also produces methane gas and carbon monoxide (Tr. 90, 346). Roop testified that, even when diluted with clean water, sewage has the potential to create a hazardous atmosphere within a matter of seconds (Tr. 346-49, 352).

Dose testified that the City of Edinburg kept self-contained breathing apparatus at the treatment plant, which Jimerson was welcome to use (Tr. 520). The city's representative, Paul Torres, testified that Jimerson's use of the plant's rescue equipment was never discussed prior to the start of the project (Tr. 83, 121). However, Jimerson did borrow the equipment for a manhole job, and Torres stated that the City of Edinburg would never have refused to supply Jimerson employees with personal protective equipment (PPE) if they needed it (Tr. 120-22). Edinburg's trailer, where the confined space equipment was stored, was located approximately 500 feet from the push pit (Tr. 79-82). Paul Torres estimated that it would take up to 40 minutes to retrieve and set up the equipment, and enter the pit (Tr. 82).

For the duration of the job, sewage flowed through the pipe and into the pit during the day (Tr. 59, 89, 110; Exh. C-2; C-3). No work was performed during the day. Before beginning work in the push pit each night, Jimerson had the treatment plant draw the flow down in the line (Tr. 114-17, 521, 548). When the levels had been lowered to a minimal flow, Jimerson set plugs in the lines and pumped the remaining flow through a system of aluminum irrigation pipes, isolating the section of line where Jimerson would

be pushing pipe next (Tr. 522-23, 548, 563). Their subcontractor, L&B Vactor, then flushed the sewer and push pit with a “jetter head” attached to a fire hydrant supplying potable water (Tr. 120, 133, 498, 522, 530). It took approximately 6 to 12 hours to clean the line. On some nights no pipe could be pushed (Tr. 120).

Tony Madla supervised Respondent’s employees working on the M Road project, including: Elias Barron Martinez, the front end loader operator; Abel Rosales, Irineo Serrato, and Lucas Hernandez, laborers; and Gerard Bustillo, Madla’s stepson (Tr. 208-10, 469, 491). According to Madla, Bustillo was responsible for air testing (Tr. 471).

Bustillo testified that it was his job to test the atmosphere for oxygen levels and toxic gases (Tr. 492-93, 495-97). Jimerson’s expert, David, testified that Jimerson used a Lumidore MicroMax four-gas monitor, known as a “sniffer” (Tr. 617-18; Exh. R-79). Bustillo stated that there were only two occasions, early on in the M Road project, when Jimerson’s sniffer detected a hazardous atmosphere (Tr. 125, 497). During the first part of October, 2003, Jimerson employees entered a manhole with a hazardous atmosphere in order to remove an obstruction with a chipper, or jackhammer (Tr. 73, 124, 497). During that entry Jimerson employees wore respiratory equipment borrowed from the City of Edinburg’s confined space trailer, including respirators and masks with supplied air (Tr. 73-74, 125, 497). Edinburg employees helped Jimerson set up a tripod and harness rig for Dose and Bustillo, both of whom entered manhole number 23-95 wearing harnesses and rescue lines (Tr. 73, 125, 528; Exh. C-8). Edinburg employees filled out a confined space entry permit for Jimerson’s employees prior to that entry (Tr. 74, 125).

Hilario Trevino, an operator with the City of Edinburg, testified that a day or two after the October entry discussed above, he observed Robert Dose enter the same manhole to take some pictures (Tr. 147, 157). Dose was wearing only his street clothes, and had no PPE (Tr. 143, 145-47). Trevino did not see Jimerson conduct any atmospheric monitoring prior to Dose’s entry (Tr. 146-47).

In addition to Dose, Bustillo, Rosales and Hernandez would occasionally enter a manhole to set a plug (Tr. 252-53, 471). According to Bustillo the plugs were generally set from the surface (Tr. 493). The plug was dropped down the manhole and into the pipe, maneuvered with a 20-foot pole and inflated from the top (Tr. 494). Bustillo could only recall two occasions when an employee had to enter a manhole to manually set a plug (Tr. 494). Abel Rosales, on the other hand, testified that the plugs frequently could not be set from the top (Tr. 217). He would climb into the hole with the plug and chain and hold the plug in the pipe for two or three minutes until it could be inflated (Tr. 217). Rosales estimated that he went into a manhole between 10 and 15 times to set plugs (Tr. 216-17). He stated that he sometimes encountered a half foot to a foot of flowing sewage in the pipe (Tr. 218). Hernandez only worked for Jimerson a week

prior to the November 11, 2003 accident (Tr. 243). Hernandez testified that he and Rosales were assigned to enter the manholes to set plugs when they couldn't be set from the top (Tr. 252). He stated that he would encounter up to a foot of sewage when entering a manhole (Tr. 252-53).

Madla stated that before anyone entered a manhole, the sniffer was dropped into the space (Tr. 475, 479). Rosales testified that he saw Bustillo test the manholes only two or three of the times he went down (Tr. 221). Jimerson admits that the manholes were not continuously monitored (Tr. 222, 482, 505). When employees entered the manholes to set plugs they wore only rubber boots, dust masks and leather gloves (Tr. 219, 477-79, 502). The gloves were not lined with rubber or plastic (Tr. 480). A respirator was used only during the October entry (Tr. 477). Neither Rosales nor Hernandez wore respirators when entering manholes to set plugs (Tr. 219-20, 253). None of the employees entering the manholes wore retrieval lines (Tr. 219, 253, 479).

Both Dose and Madla stated that before anyone entered the push pit, the sniffer was also dropped into that space (Tr. 475, 479, 548). Bustillo testified that he monitored all four corners of the push pit before work began (Tr. 498). Martinez, Rosales, Serrato and Bustillo worked in the push pit, tying the pipe and pushing it into the existing main (Tr. 211, 470). Rosales testified that he never saw anyone testing the air in the push pit before he entered (Tr. 215-16).

The witnesses disagreed as to the amount of water and sewage in the push pit. Serrato and Hernandez both testified that they assisted L&B Vactor in cleaning out the push pit before work could begin (Tr. 231, 244-45). Serrato stated that he would go into the pit with a shovel almost every day to clean out the sludge, which contained sewage (Tr. 231-32). According to Serrato, he would place the mud, or sewage from the floor of the pit into a basket which was then pulled from the pit (Tr. 231). An Edinburg employee, Hilario Trevino, testified that he saw three or four Jimerson employees pushing pipe in the pit while standing in approximately 18 inches of flowing sewage (Tr. 148-51). Trevino stated that he determined the liquid in the push pit was sewage based upon its color and odor (Tr. 151). Dose testified that there were only six to eight inches of groundwater seepage and potable water in the bottom of the push pit after cleaning (Tr. 525). According to Bustillo, there was no sewage present after L&B Vactor had completed cleaning (Tr. 498-99). However, Bustillo agreed that the three to five inches of groundwater in the pipe and push pit was probably contaminated with sewage that had leaked from the sewer when it was in service (Tr. 502-504, 509). Bustillo testified that the liquid flowing out of the sewer into the push pit while Jimerson employees were pushing pipe appeared clear with some "soot" in the bottom of it (Tr. 504). Rosales testified that the plugs did not completely stop the flow of sewage, and mixed sewage and water frequently ran from the main, adding to the groundwater in the push pit (Tr. 211-13, 228-29).

Finally, Torres testified that, in his experience, sewer plugs will initially stop the flow of sewage, but will begin to allow seepage as they deflate (Tr. 88).

Bob Vasquez is a supervisor for Shoreline Plumbing, another Jimerson subcontractor (Tr. 159-60). Shoreline was hired to videotape the interior of the sanitary sewer main on the M Road project between October 7 and October 10, 2003 (Tr. 159-60). Vasquez testified that when he arrived on the M Road site on October 7 he observed two men working in the push pit, trying to stop the flow from the upstream sewer main with a balloon plug so that work could proceed downstream towards the lift station (Tr. 161). According to Vasquez, there was a good flow of what was clearly sewage coming into the push pit (Tr. 163). Vasquez testified that the men in the pit were taking direction from Tony Madla, Jimerson's foreman, and from Robert Dose, the project supervisor (Tr. 162, 196). Vasquez stated that the men in the pit were Jimerson employees (Tr. 162, 168-69, 187-88), and no one was wearing PPE (Tr. 164, 166). Vasquez testified that during that evening, he asked the trackhoe operator to pick up the video camera from Shoreline's truck and to lower it into the push pit (Tr. 166). The men in the pit unloaded the camera and put it in the pipe (Tr. 166).

Vasquez returned the night of October 8, 2003 and observed Respondent's employees in the pit. Although the employees were successful in inserting the plug into the upstream main; six to eight inches of stagnant sewage remained in the push pit (Tr. 167, 169-70). Vasquez did not see anyone monitoring the atmosphere in the push pit at any time (Tr. 170-71). As during the previous night, none of the workers wore rubber gloves, harnesses or respirators (Tr. 170-71). Bob Braun, of L&B Vactor, stood with Vasquez and watched Tony Madla direct the setting of the plug (Tr. 168). According to Vasquez, L&B Vactor's employees were at street level standing near the vactor truck (Tr. 169).

On October 9, 2003, Vasquez watched Respondent's employees go into the push pit while approximately a foot of sewage was flowing through the pit (Tr. 173-74). Vasquez did not see any atmospheric testing taking place (Tr. 173). He asked Robert Dose whether he had a gas monitoring system, and Dose showed him the sniffer, which was in a plastic case in the back seat of Dose's truck (Tr. 183). Vasquez stated that he never saw the sniffer in use (Tr. 183). Respondent's employees wore no PPE other than leather gloves and waders (Tr. 153-74). The employees were setting a plug in place, directed by Tony Madla (Tr. 173-74). Vasquez testified that he saw a worker on his knees who was trying to push the plug in; the worker slipped and fell, and the water came up over the top of his waders (Tr. 175-76).

According to Vasquez, Robert Dose entered manhole 23-95 during the evening of October 10, 2003, to guide Shoreline's camera into the main (Tr. 177-78, 180, 198). The manhole was approximately 24 inches in diameter, and 16 to 17 feet deep (Tr. 179). No atmospheric testing was conducted prior to

Dose's entry (Tr. 178). There was no ventilation in the manhole (Tr. 178). Dose was not wearing a respirator, retrieval line or harness (Tr. 179), and was in the manhole for approximately 20 minutes (Tr. 180). When Dose exited the manhole, he and the camera were dripping with sewage (Tr. 181).

Shoreline concluded its videotaping on October 10 when Jimerson encountered the offset in the main at manhole 23-95 (Tr. 192-93).

Applicability of the General Industry Standards

As a threshold matter, Respondent argues that it was engaged in construction on the Edinburg site, and was improperly cited under the general industry standards. However, based on the record as a whole, the relining operation undertaken by Jimerson constituted maintenance work and was, therefore, subject to the general industry standards. Jimerson was not engaged in the construction of a new sewer system, where sewage is not present. Rather, it was engaged in the modification of the existing sewer in order to prevent further deterioration of the existing main. Specifically, Jimerson was pushing a PVC liner through a 1400 foot section of the existing sewer, an activity that is specifically designated as maintenance in OSHA's 1995 Compliance Directive, CPL 2.100, set forth above.

It is well settled that the interpretation of a standard by the promulgating agency is controlling unless "clearly erroneous or inconsistent with the regulation itself." *Udall v. Tallman*, 380 U.S. 1, at 16, 87 S.Ct. 792, at 801 (1965). *See; Nooter Construction Co.*, 16 BNA OSHC 1572, 1994 CCH OSHD ¶29,729 (No. 91-237, 1994). The reviewing court should defer to the Secretary if the Secretary's interpretation is reasonable. *Martin v. OSHRC (CF&I Steel Corp.)*, 111 S.Ct. 1171, 1179 (1991). In this case, the Secretary's interpretation is based on sound safety policies explicated in agency directives and is reasonable.² Prior to issuing CPL 2.100, OSHA issued an August 11, 1994 memorandum to its regional administrators, discussing the distinction between construction and maintenance:

There is no specified definition for "maintenance", nor a clear distinction between terms such as "maintenance", "repair", or "refurbishment." "Maintenance activities" can be defined as making or keeping a structure, fixture or foundation (substrates) in proper condition in a routine scheduled, or anticipated fashion. This definition implies "keeping equipment working in its existing state, i.e., preventing its failure or decline." However, this definition (taken from the directive on confined spaces) is not dispositive; and, consequently, determination on whether a contractor is engaged in maintenance operations rather than construction activities must be made on a case-by-case basis, taking into account all information available at a particular time.

* * *

² On facts similar to the instant case, the Iowa District Court for Polk County reached this same conclusion in *Insituform Technologies v. Employment Appeal Board*, CV-5282, 4/4/05. *See* Complainant's post hearing brief, Exh. A.

[W]here an activity cannot be easily classified as construction or maintenance even when measured against all of the above factors, the activity should be classified so as to allow application of the more protective 1910 or 1926 standard, depending on the hazard. . . .

(Complainant's post hearing brief, Exh. B). The August 11, 1994 letter clearly establishes OSHA's intent to apply the more stringent of the construction or general industry standards when there is any doubt as to the category in which an activity falls. OSHA's intent is to provide the maximum protection possible for employees exposed to hazards which appear to be covered by both standards.

After the initial construction of the Edinburg sewer main was completed, it was turned over for general industry operations, *i.e.*, sewage was channeled through the system. At that point the general industry standards at §1910 clearly became applicable to all sewer entries. Active sewer systems fall under OSHA's definition of permit required confined spaces as defined by §1910.146(b), in that they constitute a confined space that "contains or has a potential to contain a hazardous atmosphere. Appendix E to §1910.146 specifically discusses entry into sewer systems, noting that:

There rarely exists any way to completely isolate the space (a section of a continuous system) to be entered; . . . because isolation is not complete, the atmosphere may suddenly and unpredictably become lethally hazardous (toxic, flammable or explosive) from causes beyond the control of the entrant or employer. . . .

This record supports OSHA's conclusion that complete isolation of an active sewer system cannot be ensured. The testimony establishes that despite drawing down the flow of sewage, rerouting the flow, installing plugs, and vactoring the line, complete elimination of sewage from the Edinburg main could not be ensured during the entire work process. Sludge remained in the main after vactoring (Tr. 554-56, 561, 564; Exh. R-73); contamination from outside the old main could seep back in with the groundwater (Tr. 501-02) and plugs could deflate, allowing sewage to trickle back through the main (Tr. 660). Based upon the high probability that a hazardous atmosphere would develop in this sewer system, which remained operational throughout the relining operation, it is reasonable to classify Jimerson's operation as maintenance and subject to the more stringent standards contained in the general industry standards.

Employees entering manholes were clearly entitled to the protection of §1910.146(b), which governs permit required confined spaces. In addition, the push pit, once completed, became part of Edinburg's sewer system, through which sewage was channeled every day. Employees pushing pipe worked within a section of operational sewer; thus, subject to the provisions of the general industry standards. Though some construction activities had been involved in the preparation of the push pit, and were to be undertaken in the replacement of the manholes, the relining of the sewer itself constituted

maintenance as defined by OSHA. Jimerson was, therefore, correctly cited under the general industry standards.

Alleged Violation of §1910.132(d)(2)

Serious citation 1, item 1 alleges that on or about November 7, 2003 through November 11, 2003: 29 CFR 1910.132(d)(2): The employer did not certify that the required workplace hazard assessment had been performed through a written certification that identified the work place evaluated, the person certifying that the evaluation had been performed, the date of the hazard assessment and that identifies the document as a certification of hazard assessment:

At this location employees were conducting a maintenance operation on a municipal, sanitary sewer system installing a slip lining into an existing sewer main. The employer did not develop a written hazard assessment for personal protective equipment to ensure proper protective equipment was provided and its use enforced.

Discussion

Jimerson admits that it did not prepare a written hazard assessment for the M Road job. Jimerson argues that it did assess the hazards associated with the cited job, and that any violation is, at most, *de minimis*.

In order to prove a violation of section 5(a)(2) of the Act, the Secretary must show by a preponderance of the evidence that: (1) the cited standard applies, (2) there was a failure to comply with the cited standard, (3) employees had access to the violative condition, and (4) the cited employer either knew or could have known of the condition with the exercise of reasonable diligence. *See, e.g., Walker Towing Corp.*, 14 BNA OSHC 2072, 2074, 1991-93 CCH OSHD ¶29,239, p. 39,157 (No. 87-1359, 1991).

_____ **Applicability.** Respondent admits that this standard was correctly applied to its workplace, as §1910.132(d)(2) was specifically incorporated into the construction standards by Appendix A of 29 C.F.R. §1926 (Jimerson's post hearing memorandum brief, p. 20). Moreover, as discussed fully above, the standard applies to the maintenance activity, relining the existing sewer main, in which Jimerson was engaged at the time of the alleged violation.

The violation. The cited standard provides:

The employer shall verify that the required workplace hazard assessment has been performed through a written certification that identifies the workplace evaluated; the person certifying that the evaluation has been performed; the dates(s) of the hazard assessment; and, which identifies the document as a certification of hazard assessment.

Respondent admits that it did not prepare a written certification of hazard assessment. The cited violation has been established.

Penalty

A penalty of \$4,200.00 is proposed for this violation. OSHA Area Director Vernonia Redden testified that the proposed penalty takes into account the number of employees Jimerson employs, 80, and includes a 40% reduction for size (Tr. 277). Redden testified that the violation was classified as high gravity, as Jimerson's failure to properly assess the workplace hazards could result in employee exposure to toxic fumes, which may cause permanent disability or death (Tr. 279). Respondent argues that the violation should be classified as *de minimis*.

De minimis. A violation is *de minimis* when there is technical noncompliance with a standard, but the departure bears such a negligible relationship to employee safety or health as to render inappropriate the assessment of a penalty or the entry of an abatement order. *Cleveland Consolidated, Inc.*, 13 BNA OSHC 1114, 1987-90 CCH OSHD ¶27,829 (No. 84-696, 1987).

As described by Robert Dose, Jimerson's hazard assessment consisted of his determination that any hazard in the manholes or push pit could be detected prior to any employee entry. The hazard could then be eliminated, or, when not possible, PPE could be obtained from the City of Edinburg (Tr. 568-69). The record establishes that this assessment was inadequate. It is clear from the evidence that changing conditions in sewers can cause the release of toxic gases, including hydrogen sulfide, methane and carbon monoxide, after the initial monitoring is completed and employees have entered the confined space (Tr. 90, 136, 352). Both Paul Torres and Michael Roop testified, without contradiction, that lethal concentrations of toxic gases can be released when sewage is disturbed (Tr. 90, 346-49). Under such conditions, a positive flow respirator should be provided to all employees entering manholes, regardless of initial testing results, or of the amount of time the employees intended to spend in the hole (Tr. 351-54). Continuous ventilation should be provided in the push pit to prevent the accumulation of toxic gases (Tr. 365-66, 426). Jimerson's summary assessment of the hazards present at the M Road work site failed to recognize the need for respiratory equipment for employees entering manholes to set plugs where sewage was likely to be and was, in fact, disturbed. It made no provision for ventilating the push pit, where employees spent most of their shifts. Jimerson's assessment also failed to provide any means for rescuing employees who might be overcome by toxic fumes in the performance of that task (Tr. 581).

The Secretary argues that Jimerson's failure to certify its hazard assessment contributed to the inadequacy of its assessment. In the preamble to the final rule the Secretary states that the written certification was intended to ensure that employers took their responsibilities for assessing possible hazards seriously.

Paragraph (d) of the final rule is a performance-oriented provision which simply requires employers to use their awareness of workplace hazards to enable them to select the appropriate PPE for the work being performed. Paragraph (d) clearly indicates that the employer is accountable both for the quality of the hazard assessment and for the adequacy of the PPE selected. . . . The Agency has found that a written certification is a reasonable means by which to establish accountability for compliance.

A finding that the admitted violation was *de minimis* in this case would relieve Jimerson from any responsibility for failing to adequately assess the hazards cited in this case, and would effectively eliminate its accountability for accurately assessing hazards its employees might encounter in the future. The record establishes that Jimerson's assessment of the hazards associated with manhole entries should have taken into account the possibility that sewage, from which hydrogen sulfide, methane, and carbon monoxide may be released, could be present. The intent of the cited standard is to ensure that Jimerson take responsibility for its failure to do so. The failure to perform and certify that an adequate hazard assessment had been performed in this case was a "serious" violation of the Act in that the violative condition or practice gave rise to a "substantial probability" of death or serious physical harm. *See* §17(k) of the Act.

In determining the penalty the Commission is required to give due consideration to the size of the employer, the gravity of the violation and the employer's good faith and history of previous violations. The gravity of the offense is the principle factor to be considered. *Nacirema Operating Co.*, 1 BNA OSHC 1001, 1972 CCH OSHD ¶15,032 (No. 4, 1972). Gravity factors to be considered include: (1) the number of employees exposed to the risk of injury; (2) the duration of exposure; (3) the precautions taken against injury, if any; and (4) the degree of probability of occurrence of injury. *Kus-Tum Builders, Inc.* 10 BNA OSHC 1049, 1981 CCH OSHD ¶25,738 (No. 76-2644, 1981).

The gravity of the cited violation is high, in that all of Jimerson's employees worked in the unventilated push pit (Tr. 213-16, 233-34, 236, 247, 249). At least four Jimerson employees, Dose, Bustillo, Rosales and Hernandez entered manholes without respirators, or means of rescue (Tr. 147, 157, 216-17, 252-53, 476-77, 494). Jimerson's attempts to isolate the section of sewer main to be relined were inadequate. The probability of injury must be deemed high, as two employees were actually overcome by hazardous atmospheres. The proposed penalty of \$4,200.00 is appropriate, and will be assessed.

Alleged Violation of §1910.134(d)(1)(i)

Serious citation 1, item 2 alleges that on or about November 7, 2003 through November 11, 2003: 29 CFR 1910.134(d)(1)(i): The employer did not select and provide an appropriate respirator based on the respiratory hazard(s) to which the worker was exposed and workplace and user factors that affect respirator performance and reliability:

Municipal sewer project, M Rd. Edinburg TX – Jimerson employees entered manholes and the sanitary sewer access pit (push pit) to conduct a maintenance operation. Employees entered, the push pit to insert a slip lining through the existing sewer conduit.

The employer did not ensure employees were provided respirators for use prior to assignment to the tasks.

The cited standard provides:

The employer shall select and provide an appropriate respirator based on the respiratory hazard(s) to which the worker is exposed and workplace and user factors that affect respirator performance and reliability.

Applicability. Respondent admits that this standard was correctly applied to its workplace, as §1910.134(d)(1)(i) was specifically incorporated into the construction standards by Appendix A of 29 C.F.R. §1926 (Jimerson’s post hearing memorandum brief, p. 20). Moreover, as discussed fully above, the standard applies to the maintenance activity, relining the existing sewer main, in which Jimerson was engaged at the time of the alleged violation.

The violation. Respondent maintains that it did select an appropriate respirator, *i.e.*, the supplied air respirators belonging to the Edinburg waste water treatment plant (Tr. 73-74, 125, 497). Jimerson further argues that because Edinburg made those respirators available for Jimerson’s employees, that the respirators were “provided”.

The respiratory standards are intended to specify broad performance criteria and require the employer to make a reasonable estimate of employee exposure. 63 Fed. Reg. 1152, 1299 (Jan. 8, 1998). Compliance with §1910.134(d)(1)(i) requires that the employer select and provide respirators offering protection against the hazards employees might reasonably be expected to encounter.

In this case, the testimony establishes that respirators were required in the push pit. The record supports the conclusion that the push pit fit the definition of a confined space, in that (a) it was large enough and so configured that employees could bodily enter and perform assigned work, (b) had limited or restricted means for entry or exit, and (c) was not designed for continuous employee occupancy. *See* §1910.146(b). It is uncontroverted that Edinburg ran sewage through the pit every day. The pit, therefore, was part of the sewer system. As noted above, Jimerson’s assessment of the hazards associated with sewer entries should have taken into account the possibility that hydrogen sulfide, methane, and carbon monoxide could accumulate rapidly in the confined space. All of the witnesses admitted that there was some quantity of sewage mixed with water in the push pit while work was performed. As Torres and Roop testified, lethal concentrations of toxic gases can be released when sewage is disturbed (Tr. 90, 346-49).

Michael Roop did not believe that respirators were necessarily required for employees working within the push pit (Tr. 365, 426). Because of the size of the pit and the type of work performed there, ventilation would have been an appropriate choice to control the possibility of a hazardous atmosphere developing in the pit (Tr. 365-66, 426). Jimerson, however, did not provide forced air ventilation in the push pit (Tr. 213-16, 233-34, 236, 247, 249), and could not ensure that the atmosphere in the push pit remained safe. In the absence of ventilation, as Roop testified, respiratory protection should be worn (Tr. 426-27).

In addition, Jimerson's employees entered manholes in order to set plugs, which were intended to stop the flow of sewage into the downstream portions of the main where pipe was to be pushed. The atmosphere within a sewer manhole can change instantly; therefore, any initial monitoring of a manhole may not be reflective of the conditions an employee may encounter when he disturbs sewage in the pipe (Tr. 90, 349, 352, 415). Jimerson maintains that the "Venturi action" created by vactoring the lines every night effectively ventilated the sewer lines (Tr. 641). Any ventilation, however, ended before Jimerson employees began pushing pipe. Under these conditions, a positive flow respirator should be provided to all employees entering manholes, regardless of initial testing results, or of the amount of time they intend to spend in the hole (Tr. 351-54, 414-15).

The testimony establishes that in addition to the project coordinator, Dose, employees Bustillo, Rosales and Hernandez entered manholes without respirators (Tr. 147, 157, 216-17, 252-53, 476-77, 494). The evidence fails to support Jimerson's contention that it provided respiratory equipment to those employees. Jimerson's foreman, Tony Madla, was present for the manhole entries, but did not offer the employees respiratory equipment (Tr. 220-21, 477). Nothing in the record suggests that either Rosales or Hernandez knew that any respiratory equipment, other than dust masks, were available to them (Tr. 214). Neither Madla nor Dose testified that they ever told the crew that they could borrow the equipment from the waste water treatment plant if they wanted to use it, or move Edinburg's confined space trailer to the site of the push pit (Tr. 581, 583).

Under these circumstances, where the only respirators on the site were stored off site in a trailer controlled by another employer it cannot be found that Jimerson provided its employees with respirators. The violation has been established.

Penalty

The gravity of the cited violation is high. As discussed above, all of Jimerson's laborers, including Rosales, Serrato, Hernandez and Bustillo worked in the push pit without ventilation or respiratory protection. In one case Jimerson's project coordinator, Dose, actually crawled into the 36 inch sewer pipe

south of the push pit to view the pipe (Tr. 574-75). Although the atmosphere in the pipe had not been tested, Dose entered without a respirator (Tr. 574-75). Moreover, Serrato and Hernandez, without wearing PPE, assisted L&B Vactor in cleaning sewage out of the push pit, which could have resulted in the release of hazardous fumes (Tr. 231, 244-45, 346-49). Dose, Bustillo, Rosales and Hernandez entered manholes without respirators to set plugs (Tr. 216-17, 252). Setting the plugs was part of the isolation process and those employees were entering the sewer *before* the system had been isolated. Finally, two of Jimerson's employees were overcome by hazardous atmospheres while in a manhole.

A penalty of \$4,200.00 was proposed for this item and will be assessed.

Alleged Violation of §1910.138(a)

Serious citation 1, item 3 alleges that on or about November 7, 2003 through November 11, 2003:

29 CFR 1910.138(a): The employer did not select and require employees to use appropriate hand protection when employees' hands were exposed to hazards:

Municipal sewer project, M Rd. Edinburg TX – Jimerson employees involved in a maintenance operation entered a sanitary sewer access pit.

- a. Employees entered manholes and the sanitary sewer access pit/push pit to excavate, apply concrete, conduct welding operations and install sanitary sewer lining.

The employer did not provide and require employees to use personal protective equipment such as but not limited to, rubber gloves, during sewer entry operations.

Facts

Jimerson had latex rubber gloves as well as leather gloves available for its employees' use (Tr. 474). Jimerson, however, allowed the employees to decide which gloves to use; most opted for the leather (Tr. 213, 219, 226, 474). Both Dose and Bustillo testified that the employees preferred wearing the leather gloves when handling pipe and chains, as the latex would tear (Tr. 500, 520). Employees were not required to wear gloves. Hernandez testified that he did not wear gloves when entering a manhole (Tr. 253). Ireneo Serrato testified that the cloth gloves he wore became wet immediately, and protected his hands from exposure to mud but not water (Tr. 234).

Roop testified that, in his experience, layered rubber and leather gloves are used when working in sewers (Tr. 363). The leather gloves provide protection from physical injury, but do not prevent dermal exposure to sewage (Tr. 364). The rubber gloves provide protection from the bacterial hazards posed by sewage, which may carry dysentery, cholera, hepatitis and a variety of other diseases (Tr. 89-90, 364).

Discussion

The cited standard provides:

Employers shall select and require employees to use appropriate hand protection when employees' hands are exposed to hazards such as those from skin absorption of harmful substances; severe cuts or lacerations; severe abrasions; punctures; chemical burns; thermal burns; and harmful temperature extremes.

The testimony establishes that Jimerson made latex gloves available; however, it did not require its employees to wear impervious gloves, as discussed above, to prevent the absorption of harmful bacteria. The violation is established.

Penalty

The severity of this violation was considered to be "lesser" by the Secretary, and a penalty of \$1,200.00 was proposed for this item (Tr. 282). All of Jimerson's employees were exposed to this hazard; however, the gravity of this violation is low because the health hazards to which the employees were exposed due to the violation, although serious, were not likely to result in death. A penalty of \$1,200.00 will be assessed.

Alleged Violation of §1910.146(e)(1)

Serious citation 1, item 5 alleges that on or about November 7, 2003 through November 11, 2003: 29 CFR 1910.146(e)(1): Before entry was authorized, the employer did not document the completion of measures required by 29 CFR 1910.146(d)(3) by preparing an entry permit:

Municipal sewer project, M Rd. Edinburg TX – Jimerson employees entered manholes and a sanitary sewer access/push pit to conduct a maintenance operation. The employer did not prepare an entry permit to ensure all hazards associated with entry into a municipal sewer system were eliminated and/or all the safeguards for the confined space entrants were addressed.

Discussion

Section 1910.146(b) states that *permit-required confined space* (permit space) means a confined space that has one or more of the following characteristics: (1) Contains or has a potential to contain a hazardous atmosphere. . . . Subparagraph (e)(1) governs entry into permit spaces, stating that:

Before entry is authorized, the employer shall document the completion of measures required by paragraph (d)(3) of this section by preparing an entry permit.

As previously noted, the record establishes that both the manholes and the push pit were confined spaces in that they were large enough and so configured that (a) employees could bodily enter and perform assigned work, (b) had limited or restricted means for entry or exit, and (c) were not designed for continuous employee occupancy. *See* §1910.146(b). Permits were required prior to entry because of the

possibility that sewage, which has the potential for creating a hazardous atmosphere, was likely to be present.

It is uncontested that Jimerson never completed an entry permit prior to allowing its employees to enter manholes or the push pit (Tr. 568-570). Dose testified that Jimerson had no procedure in place for determining whether a confined space required a permit for entry (Tr. 590). Neither Dose nor Madla was familiar with the use of entry permits for confined spaces (Tr. 486-88, 590). Bustillo never saw an entry permit on the M Road site (Tr. 505). Jimerson's sole defense to this violation is that the general industry standard cited is inapplicable to its work site. As discussed fully above the general industry standards are applicable to work which takes place in a sewer in operation. The violation has been established.

Penalty

The determination of what constitutes an appropriate penalty is within the discretion of the Review Commission. The Commission has wide discretion in the assessment of penalties for distinct but potentially overlapping violations. *H.H. Hall Constr. Co. (Hall)*, 10 BNA OSHC 1042, 1981 CCH OSHD ¶25,712, (No. 76-4765, 1981).

Citation 1, item 5 alleges that Jimerson did not document the completion of the measures specified under §1910.146(d)(3). Subparagraph (d)(3) requires the employer to develop and implement safe means, procedures, and practices for safe permit space entry operations. This conduct is also penalized under willful citation 2, item 1, which specifically references Jimerson's failure to meet the criteria set forth in (d)(1) through (d)(14), including subparagraph (d)(3). It is uncontested that Jimerson failed to recognize either the Edinburg sewer or its push pit as permit-required confined spaces or to comply with the regulations in place for such spaces. The Secretary cites Jimerson for its failure to properly assess the hazards to which its employees would be exposed under both §§1910.146(d) and (e), resulting in multiple penalties for the same course of conduct. Because the conduct and the penalty criteria for citation 1, item 5 and citation 2, item 1 are overlapping, these items are combined for purposes of assessing a penalty. A determination of the appropriate penalty for Jimerson's conduct is discussed below.

Alleged Violation of §1910.146(d)

Willful citation 2, item 1 alleges:

29 CFR 1910.146(d): Under the permit-required confined space program required by 29 CFR 1910.146(c)(4), the employer did not meet the criteria set forth in (d)(1) thru (d)(14) and (k) of this paragraph:

Municipal sewer project, M Rd. Edinburg TX – Jimerson employees involved in a sewer maintenance operation were entering manholes and a sewer sanitary access pit/push pit. The employer did not:

- a. Identify and evaluate the atmospheric hazards associated with sanitary sewer entry prior to each entry into the access pit;
- b. Providing each authorized entrant with the opportunity to observe any monitoring of the space;
- c. Implement the means, procedures and practices necessary to isolate the permit space prior to each entry;
- d. Implement the means, procedures and practices necessary to purge, inert, flush, or provide ventilation to the permit space as necessary to eliminate or control atmospheric hazards;
- e. Ensure employees used ventilation equipment properly;
- f. Ensure that pre-entry testing was performed to the extent feasible before entry was authorized and continuously monitor entry conditions in the areas where authorized entrants are working;
- h. Ensure each authorized entrant used a chest or full body harness with a retrieval line attached at the center of the entrant's back near shoulder level, or above the entrant's head.

Facts

Jimerson introduced testimony that Bustillo monitored the manholes and push pit prior to each employee entry (Tr. 475, 479, 498, 548). That testimony was contradicted by Bob Vasquez, who stated that, at least during the videotaping of the pipe, the sniffer was in the back of Dose's truck (Tr. 183). The laborers entering the push pit each day did not observe monitoring, and it is uncontroverted that the monitoring was not continuous (Tr. 215-16, 221-22, 255, 482, 505). It is clear that Jimerson attempted to isolate the push pit by drawing down and rerouting the flow and then flushing and plugging the sewer line (Tr. 114-20, 498, 521-23, 548, 530, 563). However, the record shows that completely eliminating the possibility that the atmosphere in the manholes or push pit would become hazardous was not likely (Tr. 554-56, 561, 564, 501-02, 660). Jimerson did not use forced air ventilation to purge the permit spaces while its employees worked in them (Tr. 213-16, 233-34, 247, 249). The men generally did not wear harnesses or retrieval lines in the pit or in the manholes (Tr. 213, 483).

The violation is established.

Penalty

This item is classified as "willful", and a penalty of \$56,000.00 was proposed. The Commission has defined a willful violation as one "committed with intentional, knowing or voluntary disregard for the requirements of the Act or with plain indifference to employee safety." *Valdak Corp.*, 17 BNA OSHC 1135, 1136, 1993-95 CCH OSHD ¶30,759, p. 42,740 (No. 93-239, 1995), *aff'd*, 73 F.3d 1466 (8th Cir. 1996). Under Commission precedent, it is not enough for the Secretary to show that an employer was aware of the conduct or conditions that constitute the alleged violation. The Secretary must differentiate a willful violation by showing that the employer had a heightened awareness of the illegality of the violative conduct or conditions, and by demonstrating that the employer consciously disregarded OSHA regulations, or was plainly indifferent to the safety of its employees. *Propellex Corporation (Propellex)*,

18 BNA OSHD 1677, 1999 CCH OSHD ¶31,792 (No. 96-0265, 1999). In *Propellex*, the Commission noted that the Secretary must show that the employer was actually aware, at the time of the violative act, that the violative conduct or condition was unlawful, or that it possessed a state of mind such that if it were informed of the unlawful nature of the conduct, it would not care. *Johnson Controls*, 16 BNA OSHC 1048,1051, 1993-95 CCH OSHD ¶30,018, p. 41,142 (No. 90-2179, 1993). The Commission went on to provide examples of an employer's heightened awareness, citing cases where an employer has been previously cited for violations of the standards in question, or has otherwise been made aware of the requirements of the standards, and is on notice that violative conditions exist. *Id.*

The Secretary relies mainly on the existence of the high gravity violations cited in this case. She points out that Jimerson's foreman, Madla, had 40 years of experience in sewer construction (Tr. 468). Dose, Jimerson's project coordinator, had 15 years of experience (Tr. 514). Moreover Dose received confined space training and received a confined space certification from Vallen Knowledge Systems in 2002 (Tr. 466-67; Exh. R-2, R-6). Yet Dose testified that it was his understanding that confined spaces could be dealt with merely by testing the space prior to entry. "[T]he way we do things, if there's a hazard you either use a blower to clear the hazard out or breathing apparatus system and continue to work."

The Secretary points to a pattern of unaccountability within Jimerson's officers. Alicia Jimerson, the owner, did not know whether Jimerson had a written confined space program (Tr. 441). Tom Nugent, Jimerson's liaison with its field crews never visited the M Road work site until after the fatalities occurred (Tr. 444).

From this scant evidence it cannot be concluded that Jimerson either had a heightened awareness of the illegality of the violative conduct or conditions or was plainly indifferent to the safety of its employees. Jimerson has never been found in serious violation of any OSHA standard before this case (Tr. 437). Jimerson has a written, albeit cursory, safety program (Tr. 452, Exh. R-1). It conducted yearly training, and held weekly tool box safety meetings (Tr. 438, 456, 462; Exh. R-27). On this job, Jimerson made a concerted, though ultimately unsuccessful, attempt to isolate the confined spaces in which its employees worked. Initial testing was conducted. The record shows that on the only known occasion when Jimerson's testing actually indicated there was a hazardous atmosphere present in a manhole, Dose secured PPE from the City of Edinburg before commencing work there. For these reasons, the Secretary failed to show that the cited violation was willful. However, it is clear, for the reasons already set forth, that this violation is "serious". In view of the high gravity of the violations, a penalty in the amount of \$7,000.00 is assessed.

Findings of Fact

All findings of fact relevant and necessary to a determination of all issues have been made above. Fed. R. Civ. P. 52(a). All proposed findings of fact inconsistent with this decision are hereby denied.

Conclusions of Law

1. Jimerson is engaged in a business affecting commerce and has employees within the meaning of Section 3(5) of the Act.
2. Jimerson, at all times material to this proceeding, was subject to the requirements of the Act and the standards promulgated thereunder. The Commission has jurisdiction of the parties and of the subject matter of this proceeding.
3. At the time and place alleged, Jimerson was in violation of 29 CFR §1910.132(d)(2), and said violation was serious within the meaning of the Act.
4. At the time and place alleged, Jimerson violated the provisions of 29 CFR §1910.134(d)(1)(i), and said violation was serious within the meaning of the Act.
5. At the time and place alleged, Jimerson was in violation of 29 CFR §1910.138(a), and said violation was serious within the meaning of the Act.
6. At the time and place alleged, Jimerson was in violation of 29 CFR §1910.146(e)(1), and said violation was serious within the meaning of the Act.
7. At the time and place alleged, Jimerson was in violation of 29 CFR §1910.146(d), and said violation was serious within the meaning of the Act.

ORDER

1. Citation 1, item 1, alleging violation of 29 CFR §1910.132(d)(2) is AFFIRMED and a penalty of \$4,200.00 is ASSESSED.
2. Citation 1, item 2, alleging violation of 29 CFR §1910.134(d)(1)(i) is AFFIRMED and a penalty of \$4,200.00 is ASSESSED.
3. Citation 1, item 3, alleging violation of 29 CFR §1910.138(a) is AFFIRMED and a penalty of \$1,200.00 is ASSESSED.

4. Citation 1, item 5, alleging violation of 29 CFR §1910.146(e)(1) and Citation 2, item 1, alleging violation of 29 CFR §1910.146(d) are AFFIRMED as “serious” violations of the Act, and a combined penalty of \$7,000.00 is ASSESSED.

/s/
Robert A. Yetman
Judge, OSHRC

Dated: August 8, 2005