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SECRETARY OF LABOR,	:	
Complainant,	:	
v.	:	OSHRC Docket No. 91-340
WELL SOLUTIONS, INC., RIG NO. 30,	:	
Respondent.	:	

DECISION

BEFORE: WEISBERG, Chairman; FOULKE and MONTOYA, Commissioners.

BY THE COMMISSION:

At issue is whether the Secretary proved that Well Solutions, Inc. ("WS"), while servicing an oil well near the south Texas town of Dilley, failed to comply with the general duty clause of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act"), and two safety and health standards promulgated under the Act.[1] Administrative Law Judge Stanley M. Schwartz[2] affirmed the three citation items, and we affirm them for the following reasons.

[1]WS petitioned for review of all the items affirmed by the judge, but only three were directed for review. The Commission ordinarily does not decide issues that are not directed for review. *E.g., Tampa Shipyards, Inc.*, 15 BNA OSHC 1533, 1535 n.4, 1991-93 CCH OSHD ¶ 29,617, p. 40,097 n.4 (No. 86-360, 1992) (consolidated); see 29 C.F.R. § 2200.92(a).

[2]Following the death of Administrative Law Judge E. Carter Botkin, who presided over the hearing in this case, the case was reassigned to Judge Schwartz, without objection from either party.

I. BACKGROUND

On July 5, 1990, four employees of WS were changing the pump on a relatively new oil well that was drilled horizontally in Austin Chalk, a geological formation in that area. Because this well had been producing 95 percent water, the well's owner consulted independent petroleum engineer Roderick Grant, who then called independent contract pumper Travis Pickett ("the company man") to arrange for the well servicing. Pickett hired WS to perform the "rod and tube job" needed to install a larger pump that would extract more fluid, and consequently more oil, out of the well. The WS crew, consisting of rig operator Maudis Smith, derrick man Julio Mendoza, and floor hands (and brothers) Eugene and Herbert Gilbert, began work on the well about 9:00 a.m. Because there was no WS rig supervisor at the site, Pickett gave instructions to rig operator Smith, who was the working supervisor of the crew. Pickett left the site shortly after the crew opened up the well and began its work, and he did not return to the well until 4:30 p.m.

At about 10:30 a.m., WS Assistant Manager Armando Flores visited the well site because Smith had called him to say that they had just rigged up and the well was flowing. However, by the time Flores arrived the well had stopped flowing, and he left the well site. WS rig supervisor Simon Ramos was making rounds that day because he was not assigned to a particular rig. He arrived at the site about 4:00 p.m., by which time the crew had pulled out the rods and tubing and changed the pump. However, he never left his truck because, at Smith's request, he immediately went to get "pipe dope," a compound used to join sections of tubing. Ramos returned with it about thirty minutes later. The crew had reinserted a few of the tubes into the well when a "blowout" occurred, and oil suddenly started flowing 1 to 2 feet high. Despite the crew's efforts, at Pickett's direction, to put more tubing down to calm the flow, the oil very quickly rose to heights of 20 to 30 feet. The crew then tried to shut the well off by bolting down the flange but was stopped by the ensuing fire. Smith and Mendoza died in the fire; the Gilbert brothers each suffered third-degree burns over much of their bodies.

A device called a "blowout preventer" ("BOP"), which takes about forty-five minutes to install, had been brought to the site that morning by WS. However, it was not used. The type of BOP at the site operated hydraulically to close in on the tubing to prevent a blowout.

The Gilbert brothers testified that they heard Pickett tell Smith that morning not to use the BOP because he did not want to pay for it.[3]

II. THE GENERAL DUTY CHARGE

The Secretary alleged that, by exposing its employees to the hazards of explosion and fire resulting from blowout conditions, WS violated the general duty clause, section 5(a)(1) of the Act, 29 U.S.C. § 654(a)(1).[4] To establish a violation of this provision, the Secretary must prove that (1) there was an activity or condition in the employer's workplace that constituted a hazard to employees, (2) either the cited employer or its industry recognized that the condition or activity was hazardous, (3) the hazard was causing or likely to cause death or serious physical harm, and (4) there were feasible means to eliminate the hazard or materially reduce it. *E.g., Industrial Glass*, 15 BNA OSHC 1594, 1597, 1991-93 CCH OSHD ¶ 29,655, p. 40,170 (No. 88-348, 1992); *Coleco Indus.*, 14 BNA OSHC 1961, 1963, 1991-93 CCH OSHD ¶ 29,200, p. 39,070 (No. 84-546, 1991).

In this case, the hazard consists of conditions at a well site during a "rod and tube job" that *increased* the likelihood of a well blowout and resulting fire. *See Pelron Corp.*, 12 BNA OSHC 1833, 1835, 1986-87 CCH OSHD ¶ 27,605, p. 35,872 (No. 82-388, 1986); *Davey Tree Expert Co.*, 11 BNA OSHC 1898, 1899, 1983-84 CCH OSHD ¶ 26,852, p. 34,399 (No. 77-2350, 1984); *Phillips Petroleum Co.*, 11 BNA OSHC 1776, 1779, 1983-84 CCH OSHD ¶ 26,783, p. 34,254 (No. 78-1816, 1984), *aff'd without published opinion* (10th Cir. 1985). At issue is whether this hazard was "recognized" under section 5(a)(1); that is, whether it was known by either the employer or its industry. *E.g., Waldon Healthcare Center*, 16 BNA OSHC 1052, 1061, 1993 CCH OSHD ¶ 30,021, p. 41,154 (No. 89-2804, 1993) (consolidated).

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[3]WS normally charged its customers $80 a day to rent the BOP and $130 for installation, which takes one hour of labor. Pickett testified that he told Smith to use the BOP. However, we need not determine what Pickett told Smith in order to dispose of this case.

[4]Section 5(a)(1) provides:

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

We find that the record in this case establishes that the hazard was recognized in the well-servicing industry, and that WS could have materially reduced this hazard through the use of a BOP device. George Bagnall, the Secretary's expert witness, is a consulting petroleum engineer and long-standing member of the American Petroleum Institute. Bagnall testified that BOP's are required for all well servicing jobs, and they were particularly necessary for this job because the well was unpredictable in that it was relatively new, in Austin Chalk, and horizontal. He explained that BOP's may not be needed when the well has been pulled numerous times over a number of years and has never shown any life. However, he noted that the opposite is true in this case because tubing at this well had been pulled only once or twice before. Bagnall also noted that the well was drilled in Austin Chalk, which is a faulted and fractured formation throughout the area. He added that the well here would also be unpredictable because it was drilled horizontally, instead of vertically, with the specific intent to intersect the fractures, and thus open up more of the oil producing formation. WS supervisor Ramos and company man Pickett corroborated this testimony by agreeing that horizontal wells are unpredictable and dangerous. Ramos also testified that horizontal wells yield "a lot more gas" than normal because, after going down so far, the bore is shot on a horizontal, thereby crossing a number of formations in order to pick up oil out of old wells. Pickett also testified that all chalk wells require BOP's.

Rather than rebutting Bagnall's testimony as to the need for a BOP at this particular well, WS expert witness John Copeland, Executive Vice President of the Association of Oilwell Servicing Contractors, deferred to Bagnall's opinion. Noting his lack of familiarity with the south Texas area and its Austin Chalk formation where this well had been drilled, Copeland declined to give an opinion based on the evidence at the hearing as to whether the hazard posed at this well was such that a BOP should have been used. Instead, he specifically deferred to Bagnall on this issue after acknowledging that Bagnall is very familiar with the area.

WS's claim that it is common practice in its industry to rely on the company man to determine whether a BOP is needed does not excuse WS's failure to comply with the general duty clause. Even when it is customary in the industry, an oil well servicing company may not completely rely on well operators or owners to meet the Act's requirements on behalf

of its own employees because to do so improperly shifts the well servicer's responsibility for the health and safety of its employees to third parties. *Brock v. City Oil Well Service Co.*, 795 F.2d 507, 511-12 (5th Cir. 1986);[5] *Pride Oil Well Service*, 15 BNA OSHC 1809, 1815, 1991-93 CCH OSHD ¶ 29,807, p. 40,585 (No. 87-692, 1992). Section 5(a)(1) requires that "[e]ach employer" furnish employment and a place of employment free from recognized hazards that cause death or serious physical harm. Thus, the Act places ultimate responsibility for compliance with its requirements on the employer, who cannot contract away those duties to another party. *E.g., City Oil Well*, 795 F.2d at 511-12; *Central of Ga. R.R. v. OSHRC*, 576 F.2d 620, 624 (5th Cir. 1978); *Tri-State Steel Constr., Inc.*, 15 BNA OSHC 1903, 1916 n.23, 1991-93 CCH OSHD ¶ 29,852, p. 40,740 n.23 (No. 89-2611, 1992), *aff'd on other grounds*, 26 F.3d 173 (D.C. Cir. 1994), *cert. denied*, No. 94-921 (Mar. 20, 1995). Moreover, company man Pickett[6] testified that, as is usual for such rod and tube jobs, he did not intend to supervise WS's crew that day.

Based on the evidence discussed above, we conclude that the hazard was recognized, the only element of a section 5(a)(1) violation at issue here. We therefore affirm the section 5(a)(1) citation.

III. THE 29 C.F.R. § 1910.151(b) CHARGE

The Secretary alleged that WS violated 29 C.F.R. § 1910.151(b)[7] because there was no one at the remote oil well site throughout the time its crew was working there who had been trained in first aid, which was necessary as there was no medical facility nearby. We reject WS's argument that the judge erred in affirming the item, and we find that the

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[5]This case may be appealed to the Fifth Circuit, because WS has its principal office in Texas and the alleged violation occurred there.

[6]Grant, Pickett's supervisor, was not at the well site for much of the day and did not consider it his job to supervise WS employees.

[7]Section 1910.151(b) requires:

> In the absence of an infirmary, clinic, or hospital in near proximity to the workplace which is used for the treatment of all injured employees, a person or persons shall be adequately trained to render first aid. . . .

evidence establishes that no person trained in first aid was at the well site with the crew throughout the day.[8] The crew at the well consisted of the two Gilbert brothers, Smith, and Mendoza. The Gilberts testified that they had not received any training in first aid prior to the accident. Eugene Gilbert testified that he did not believe that working supervisor Smith had such training because he would have known of it, for they were close cousins who had grown up together. Herbert Gilbert was not sure if Smith had received such training. There was no specific testimony addressing whether Mendoza had been trained in first aid. Armando Flores, WS Assistant Manager, who took the order to service the well and was in charge of sending the rig to the site and assuring that it was properly equipped, testified that he had not been trained in first aid and did not know if any of the crew assigned to the jobsite had been so trained. The judge found his testimony dispositive because there was no rig supervisor assigned to this job, and Flores had the responsibility of assuring that at least one employee assigned to the site had the necessary first aid instructions.[9]

WS's contention that the Secretary did not make a sufficient effort to determine whether the two deceased workers had first aid training is without merit. While the best evidence would have been the testimony of Smith and Mendoza, they did not survive the fire. In such situations, the Secretary should be able to rely on the *best available evidence*, which is what he did here. *See Trumid Constr. Co.*, 14 BNA OSHC 1784, 1787 & n.12, 1990 CCH OSHD ¶ 29,078, p. 38,857 & n.12 (No. 86-1139, 1990).

Based on the testimony noted above, we conclude that the Secretary has introduced sufficient evidence to establish a prima facie showing of a violation. WS presented no evidence to rebut the Secretary's case, even though it would have possession of any first aid

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[8]To prove a violation of a standard, the Secretary must show the applicability of the standard, employee access, employer knowledge, and failure to comply with the terms of the standard. *See, e.g., Gary Concrete Prods.*, 15 BNA OSHC 1051, 1052, 1991-93 CCH OSHD ¶ 29,344, p. 39,449 (No. 86-1087, 1991). Only the last element is at issue here.

[9]Although rig supervisor Ramos testified that he had received first aid training, he was not assigned to this worksite and, because he was performing his job of checking various worksites that day, he did not arrive at the well site until about 4:00 p.m. The standard addresses access to first aid throughout the workday.

training records. While the Secretary's evidence is not overwhelming, it is sufficient in the absence of rebuttal, and therefore we conclude that the Secretary has proven a violation of section 1910.151(b). "The necessary quantum of evidence to prove a fact 'is surely less in a case . . . where it stands entirely unrebutted in the record by a party having full possession of all the facts, than in a case where there is contrary evidence to detract from its weight.'" *CF & T Available Concrete Pumping*, 15 BNA OSHC 2195, 2198, 1991-93 CCH OSHD ¶ 29,945, p. 40,938 (No. 90-329, 1993) (quoting *Astra Pharmaceutical Prods. v. OSHRC*, 681 F.2d 69, 74 (1st Cir. 1982)); *see Noranda Aluminum, Inc. v. OSHRC*, 593 F.2d 811, 814 & n.5 (8th Cir. 1979).

IV. THE 29 C.F.R. § 1910.1200(h)(2)(iii) CHARGE

The Secretary cited WS for a serious violation of 29 C.F.R. § 1910.1200(h)(2)(iii)[10] because it did not train its employees in the measures they should take to protect themselves from the chemical hazards they faced while performing well servicing, such as the expulsion of crude oil and methane gas during a blowout. The judge affirmed this item, and we do the same for the following reasons.

Contrary to WS's claim, the words of this standard, unlike those in section 1910.151(b) discussed above, only require the Secretary to prove that one employee was not

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[10]WS was cited for violating the following standard, which at the time of the inspection and citation was designated as section 1910.1200(h)(2)(iii):

> (h) *Employee information and training.* Employers shall provide employees with . . . training on hazardous chemicals in their work area at the time of their initial assignment, and whenever a new hazard is introduced . . . .
>
> . . . .
>
> (2) *Training.* Employee training shall include at least:
>
> . . . .
>
> (iii) The measures employees can take to protect themselves from these hazards, including specific procedures the employer has implemented to protect employees from exposure to hazardous chemicals, such as appropriate work practices, emergency procedures, and personal protective equipment to be used[.]

In 1994, the standard was recodified at 29 C.F.R. § 1910.1200(h)(3)(iii), and the introductory sentence under "(h)" was placed elsewhere.

properly trained. Rig supervisor Ramos testified that he had never received any training regarding the hazardous chemicals with which he works.[11] Although not assigned to the particular crew at the well, Ramos was a WS employee who was at the site. Moreover, he was a supervisor, and when such employees are not trained it indicates a lax safety program. *See generally Brock v. L.E. Myers Co.,* 818 F.2d 1270, 1277 (6th Cir. 1987), *cert. denied*, 484 U.S. 989 (1987); *Consolidated Freightways Corp.*, 15 BNA OSHC 1317, 1321, 1991-93 CCH OSHD ¶ 29,500, p. 39,810 (No. 86-351, 1991). Even though it had access to all the training records, WS did not rebut Ramos' testimony that he had not been trained concerning the hazardous chemicals with which he works. Although the Secretary's evidence is limited,[12] it was not rebutted, and we find that WS violated the terms of the standard (the only element of proof at issue, see *supra* note 8). *See, e.g., Astra Pharmaceutical*, 681 F.2d at 74; *CF & T Available Concrete*, 15 BNA OSHC at 2198, 1991-93 CCH OSHD at p. 40,938.

V. CHARACTERIZATION AND PENALTY FOR EACH ITEM

Concerning the section 5(a)(1) violation, the direction for review, incorporated by reference into the briefing notice, includes the issue of whether the judge erred in finding the violation willful. However, WS did not discuss the willfulness issue in its petition for review or in its brief before the judge, and it did not file a brief on review. We therefore conclude that WS has abandoned the willfulness issue, and we decline to address it.[13] *See*

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[11]In ruling on an item not directed for review that involved another provision of the hazard communication standard, the judge indicated that the hazard communication standard applies to the methane gas and crude oil present at the well site, citing 29 C.F.R. § 1910.1200(b)(2). The record also shows that WS employees were exposed to other chemicals in their work.

[12]Crew member Herbert Gilbert gave conflicting testimony as to whether he had been trained regarding chemicals with which he worked, and therefore we do not rely on that evidence.

[13]Chairman Weisberg also would find on the merits, in agreement with the judge, that the violation was willful. A violation is willful if it is committed with intentional, knowing, or voluntary disregard for the requirements of the Act *or* with plain indifference to employee safety. *E.g., E.L. Davis Contracting Co.*, 16 BNA OSHC 2046, 2051, 1994 CCH OSHD ¶ 30,580, p. 42,342 (No. 92-35, 1994). The record in this case shows that WS acted with plain indifference to employee safety.

(continued...)

Bay State Ref. Co., 15 BNA OSHC 1471, 1475, 1991-93 CCH OSHD ¶ 29,579, p. 40,025 (No. 88-1731, 1992); *StanBest, Inc.*, 11 BNA OSHC 1222, 1224-25 n.4, 1983-84 CCH OSHD

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[13](...continued)

Bagnall, the Secretary's expert witness, testified that BOP's should be used in oil well servicing in general. WS was well aware of the blowout hazards that well servicing employees faced while replacing pumps and tubing at wells. Albert Fudge, Jr., WS District Manager, acknowledged that, as Bagnall testified, pulling tubing presents the same hazards whether done as production or servicing. Illustratively, WS's work rule for its well production division requires the use of BOP's because, as Joseph Gallegos, WS Administration Manager, testified, there is no supervisor on production rigs. Its work rule for well servicing, on the other hand, states that BOP's are to be used only "if needed." Yet, there was no rig supervisor on site in this case either, only the rig operator.

Even if BOP's are not required for all well servicing, the testimony of Bagnall, Ramos, and Pickett shows clearly that BOP's are particularly necessary where wells are horizontal, in Austin Chalk, or relatively new, for such wells are unpredictable. All three conditions were present here. As WS's own rig supervisor Ramos testified, "any horizontal well is considered . . . dangerous" and results in "a lot more gas" than normal because, after going down so far, the bore is shot on a horizontal, thereby crossing a number of formations in order to pick up oil out of old wells.

Here, WS, through its supervisors, was aware that the conditions at this specific well posed a particular hazard. *See, e.g., Pride Oil Well Service*, 15 BNA OSHC at 1814, 1991-93 CCH OSHD at pp. 40,583-84. In addition to the facts and testimony noted above, Assistant Manager Flores testified that while briefly at the site in the late morning he told Smith "to be sure and use" a BOP. Also, when Ramos returned with the pipe dope and first went up to the well, he asked derrick man Mendoza why the BOP was not on. Nevertheless, despite its knowledge, WS chose to defer to the company man Pickett to make the decision as to whether or not to use the BOP, a decision based not on safety considerations but rather on a willingness to pay for the installation. Pickett did not consider himself the supervisor of the crew and was not at the well for most of the day. WS supervisors Flores and Ramos testified that they would continue to work at wells where the company man had not ordered a BOP installed, even though they considered them dangerous. As Bagnall testified, the crew in this case was permitted to work under conditions that should have alerted any knowledgeable person that a BOP was required.

Where, as here, the employer continues operations in the face of obvious hazardous conditions, the violation has been found willful. *See E.L. Davis Contracting Co.*, 16 BNA OSHC at 2051-52, 1994 CCH OSHD at p. 42,342; *see also Mineral Industries & Heavy Construction Group, Brown & Root, Inc. v. OSHRC*, 639 F.2d 1289, 1295 (5th Cir. Unit A 1981); *Empire-Detroit Steel Div., Detroit Steel Corp. v. OSHRC*, 579 F.2d 378, 385-86 (6th Cir. 1978); *Morrison-Knudsen Co./Yonkers Contracting Co.*, 16 BNA OSHC 1105, 1126-27, 1993 CCH OSHD ¶ 30,048, pp. 41,284-85 (No. 88-572, 1993), *petition for review filed*, No. 93-1385 (D.C. Cir. June 15, 1993); *A.P. O'Horo Co.*, 14 BNA OSHC 2004, 2013, 1991-93 CCH OSHD ¶ 29,223, p. 39,134 (No. 85-369, 1991).

¶ 26,455, p. 33,618 n.4 (No. 76-4355, 1983). Accordingly, we affirm the judge's finding that WS willfully violated section 5(a)(1). WS does not take issue with the judge's assessment of a $9,000 penalty, as the Secretary proposed; therefore, we assess a penalty of $9,000 for the section 5(a)(1) violation.

WS does not contest, and the direction for review does not specifically mention, the judge's characterization of the violations of sections 1910.151(b) and 1910.1200(h)(2)(iii) as "serious" (causing or likely to cause death or serious physical harm), as the Secretary alleged, see section 17(k) of the Act, 29 U.S.C. § 666(k); therefore, we conclude that the violations of the two standards are serious. WS does not challenge the judge's assessment, consistent with the Secretary's proposal, of a penalty of $700 for each of these two violations; therefore, we assess a penalty of $700 for each of them.

VI. SUMMARY

Based on the analyses above, we affirm citation no. 2, item 1, alleging a willful violation of section 5(a)(1) of the Act, and we assess a penalty of $9,000. We affirm citation no. 1, item 3, alleging a serious violation of section 1910.151(b), and we assess a penalty of $700. We affirm citation no. 1, item 9, alleging a serious violation of section 1910.1200(h)(2)(iii), and we assess a penalty of $700.

It is so ordered.

Stuart E. Weisberg
Stuart E. Weisberg
Chairman

Edwin G. Foulke, Jr.
Edwin G. Foulke, Jr.
Commissioner

Velma Montoya
Velma Montoya
Commissioner

Dated: April 19, 1995

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SECRETARY OF LABOR, Complainant, v. WELL SOLUTIONS, INC., RIG NO. 30, Respondent.	Docket No. 91-0340

NOTICE OF COMMISSION DECISION

The attached decision by the Occupational Safety and Health Review Commission was issued on April 19, 1995. **ANY PERSON ADVERSELY AFFECTED OR AGGRIEVED WHO WISHES TO OBTAIN REVIEW OF THIS DECISION MUST FILE A NOTICE OF APPEAL WITH THE APPROPRIATE FEDERAL COURT OF APPEALS WITHIN 60 DAYS OF THE DATE OF THIS DECISION.** See Section 11 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 660.

FOR THE COMMISSION

April 19, 1995
Date

Ray H. Darling, Jr.
Executive Secretary

Docket No. 91-0340

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SECRETARY OF LABOR
Complainant,
v.
WELL SOLUTIONS, INC., RIG #30
Respondent.

OSHRC DOCKET
NO. 91-0340

NOTICE OF DOCKETING OF ADMINISTRATIVE LAW JUDGE'S DECISION

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on November 10, 1993. The decision of the Judge will become a final order of the Commission on December 10, 1993 unless a Commission member directs review of the decision on or before that date. ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW. Any such petition should be received by the Executive Secretary on or before November 30, 1993 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary
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Petitioning parties shall also mail a copy to:

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If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 606-5400.

FOR THE COMMISSION

Ray H. Darling, Jr.

Date: November 10, 1993

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 91-0345

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SECRETARY OF LABOR, Complainant, v. WELL SOLUTIONS, INC., RIG #30, Respondent.	OSHRC DOCKET NO. 91-0340

APPEARANCES:

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Dallas, Texas
For the Complainant.

George R. Carlton, Jr., Esquire
Dallas, Texas
For the Respondent.

Before: Administrative Law Judge Stanley M. Schwartz[1]

DECISION AND ORDER

This is a proceeding brought before the Occupational Safety and Health Review Commission ("the Commission") pursuant to section 10 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* ("the Act").

The Occupational Safety and Health Administration ("OSHA") conducted an inspection of a well site outside of Dilley, Texas, from July 8-10, 1990, after a tragic accident which occurred on July 5, 1990. As a result of the inspection, Respondent was issued a serious citation, a willful citation and an "other" citation. Respondent contested all three citations, and a hearing was held November 22-23, 1991.

[1]Although this case was heard by Administrative Law Judge E. Carter Botkin, it has been reassigned to the undersigned for decision due to the death of Judge Botkin. The parties were notified of the reassignment, and over thirty days have elapsed without comment from either party.

Background

The record shows Respondent had a well servicing crew at the site on July 5 changing the pump on the well.[2] The well, which was horizontal and drilled in Austin chalk, was relatively new and was producing 95 percent water, and the purpose of the pump change was to get more fluid, and consequently more oil, out of the well; Roderick Grant, a petroleum engineer consultant to Hydroex, the well operator, made the decision to change the pump, and Travis Pickett, a Hydroex contract pumper, requested the job.[3] Armando Flores, an assistant manager with Respondent, took Pickett's request and sent a crew, a rig and other equipment, including a blowout preventer ("BOP") to the site; the crew consisted of Maudis Smith, the rig operator, Julio Mendoza, the derrick man, and Herbert and Eugene Gilbert, the floor hands.[4]

Once at the site, the crew rigged up and waited for Pickett, who arrived about 9 a.m. and gave instructions to Smith. The crew then opened up the well and began its job, and Pickett left. The well emitted gas upon being opened up, and Smith called Flores and told him it was flowing. Flores arrived about 10:30 a.m., and the crew continued its job, which involved pulling the rods and tubing, changing out the pump and reinserting the tubing and rods. Flores left around 11:45 a.m., when the crew was still pulling the rods.[5]

The well emitted more gas when the crew pulled the tubing, which they finished around 4 p.m. Pickett and Grant were back at the site by this time, and Simon Ramos, one of Respondent's rig supervisors, had also arrived. Grant told Pickett how he wanted the bottom hole assembly run back in, which Pickett passed on to Smith, and Ramos left to get

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[2]Respondent apparently sold its workover rigs to Pool Company ("Pool") in late 1990 or early 1991 and, while still in business, no longer performs well servicing.

[3]Grant and Pickett are self-employed.

[4]Herbert and Eugene Gilbert are brothers, and Maudis Smith was their cousin.

[5]Grant was at the site twice that morning, looking for Pickett. The first time was shortly after Pickett left, and the second time was around 11:45 a.m., when Flores was still there; Pickett returned around 1:30 p.m., and he and Grant went to lunch and then visited other well sites.

some "pipe dope" to use in replacing the tubing; when he returned about thirty minutes later the pump was installed and the crew was ready to put the tubing back in.

The well was blowing gas as the crew began reinserting the tubing, and after several joints had been put in oil started flowing. The flow was initially 1 to 2 feet high and the crew, on Pickett's instructions, tried to put more tubing in to calm it down; however, the flow quickly got out of control and rose to 20 or 30 feet. The crew had not installed the BOP and was attempting to carry out Pickett's suggestion of putting a flange in place on the wellhead to cap the flow off when it ignited. Smith and Mendoza died in the ensuing fire, Pickett received second-degree burns, and the Gilbert brothers received third-degree burns over much of their bodies and are disabled as a result.

Willful Citation Number 2

The gravamen of this citation is that employees were exposed to the hazards of a blowout, and that the failure to use a BOP was a willful violation of section 5(a)(1) of the Act, the general duty clause. To establish a 5(a)(1) violation, the Secretary must show that (1) the employer failed to render its workplace free of a hazard, (2) the employer or the industry recognized the hazard, (3) the hazard caused or was likely to cause death or serious physical harm, and (4) there was a feasible means to reduce or eliminate the hazard. *Baroid Div. of N.L. Indus., Inc. v. OSHRC*, 660 F.2d 439 (10th Cir. 1981); *National Realty and Constr. Co. v. OSHRC*, 489 F.2d 1257 (D.C. Cir. 1973); *Indus. Glass*, 15 BNA OSHC 1594, 1992 CCH OSHD ¶ 29,655 (88-348, 1992). The evidence in this regard follows.

The record shows a BOP is a device which can be put on a well after the rods have been removed to prevent a blowout like the one that occurred at the site; BOP's can be installed in about forty-five minutes, can be manual or hydraulic, and operate by closing off the flow of oil.[6] (Tr. 19; 56; 91-92; 110; 183-84; 229; 236; 254; 267; 384-85; 430; 437). The record further shows that at the time of the accident, Respondent charged $80.00 for the rental of a BOP and $130.00 for its installation. (Tr. 19). The company's well servicing

[6]The BOP at the site was the hydraulic type, which cuts off the flow very quickly. (Tr. 91-92; 384).

safety provisions require the installation of BOP's "if needed," while its production safety provisions prohibit running or pulling tubing without them. *See* C-1, pp. 10 and 16.

Albert Fudge was a district manager for Well Solutions at the time of the accident.[7] He testified the company's policy was to use a BOP unless the well operator representative said not to, that the operator is presumed to know the condition of its wells, and that servicing companies follow the operator's instructions; in his experience it would not be considered unsafe to work on a well like the one at the subject site without a BOP if those were the operator's instructions. Fudge noted that production and servicing are different, but that pulling tubing and rods is the same in either operation. (Tr. 11-13; 17-18; 23-27).

Joseph Gallegos, Respondent's administration manager, testified the company's production provisions require BOP's on all rod and tube jobs because it sends no rig supervisors to those jobs and does not want to leave the decision up to the crew; in well servicing, however, the decision is left up to the operator due to its knowledge of the well. Gallegos said that in his opinion, there was nothing at the site to indicate the crew should have overridden the operator's representative. (Tr. 447; 450-54).

Armando Flores, who still works for Well Solutions, testified the company policy was to use a BOP whenever rods and tubing were pulled, but that if the operator refused to pay for it a BOP was not used; employees in that situation were to call in and talk to a supervisor if the well looked dangerous. Flores noted Pickett requested a BOP but not a rig supervisor, which indicated he would be in charge; however, Smith, as the rig operator, was the company employee in charge of the job. Flores also noted it was not unusual to request a BOP, and that if it was needed it was used; although the well was dead he told Smith to use the BOP before leaving and did not know if Pickett countermanded his order, but it was within his authority to do so. (Tr. 39-46; 53-59; 65-66).

Herbert Gilbert testified he considered Smith his supervisor at the site, but that Pickett was the person giving instructions; he heard Pickett tell Smith not to use the BOP because the operator didn't want to pay for it, and he had been on similar jobs and not used BOP's for the same reason. Gilbert said the well was "pretty well dead" when they first

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[7]Fudge is currently a rig supervisor with Welltech. (Tr. 12).

started working on it, as Pickett told them it was, but that gas blew out of it all day; it got stronger when the tubing was pulled and stronger still when they reinserted the tubing, he smelled and saw fumes and heard the well blowing throughout the day, and the last 120 feet of tubing they pulled were wet with oil.[8] Gilbert was initially not concerned about the well, but became concerned as it got worse. (Tr. 74-77; 81-82; 85-90; 99-113; 413-17).

Eugene Gilbert testified he heard Pickett tell Smith the operator did not want to pay for the BOP; he assumed Pickett thought the well was safe and a BOP was unnecessary, and agreed that servicing companies rely on what operators' representatives tell them. Gilbert further testified, however, that he smelled gas coming from the well all day, that it got stronger as they progressed, especially after pulling the tubing, and that he saw fumes after they began putting the tubing back in; the amount of gas coming out that day concerned him, he believed at the time they should use the BOP, and Smith himself said he wanted to when they were pulling the tubing. (Tr. 122-30; 140-53).

Simon Ramos, currently a Pool field supervisor, testified that Well Solutions crews took BOP's to their jobsites but did not put them on unless the well operators paid for them; he might have called in for permission to leave if a well was obviously unsafe, but the operator was the boss and was presumed to know the well's condition.[9] Ramos said any horizontal well is dangerous because it produces more gas and is unpredictable; the well in this case was gurgling when he handed Mendoza the pipe dope, but he did not realize the danger until it began spewing oil.[10] Ramos also said he had the authority to tell Smith what to do when he was at the site, even though he was not assigned to it, but that he did not try to exercise his authority until the well got out of control; he was attempting to signal the crew to turn off the rig and get away when it blew up. (Tr. 155-56; 160-68; 175-92).

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[8]Gilbert indicated the well was also gurgling throughout the day. (Tr. 417-18).

[9]Ramos indicated this was also Pool's policy. (Tr. 176-79; 184-85).

[10]Ramos said there was time to put on the BOP after he returned with the pipe dope, and apparently asked Mendoza just before the blowout why this had not been done. (Tr. 162; 180; 185; 189).

David Schmidt was a Well Solutions rig supervisor at the time of the accident.[11] He testified he had worked on both vertical and horizontal chalk wells in which Pickett told him not to use BOP's, that it is customary to rely on the well operator in this regard, that he had never been concerned or overridden the operator when BOP's were not used, and that there had been no accidents on the chalk wells he had worked on without BOP's. (Tr. 455-60).

Travis Pickett testified he had contracted with Well Solutions before for similar jobs, and that while he gives orders pursuant to the well operator's instructions he does not supervise such jobs. He further testified he ordered a BOP for the subject site, that he told Smith to install it that morning, and that he did not say he did not want a BOP because he did not want to pay for it. Pickett noticed the BOP was not installed when giving Grant's instructions to Smith; either Smith or Mendoza said it was not needed, and he did not tell them to put it on since there was no indication of a problem at that time. Pickett said that chalk wells and horizontal wells are unpredictable, and that all chalk wells require BOP's; he recalled no other chalk well jobs with Well Solutions in which BOP's were not used. (Tr. 199-201; 208-11; 223-24; 229-38).

Roderick Grant testified he noticed the BOP in the trailer around noon, when the crew was just completing pulling the rods, and that he noticed it again just minutes before the blowout; he did not tell anyone the well was dead or to not use the BOP, and while he did not smell gas or see anything coming out until right before the accident anyone could have suggested putting the BOP on before replacing the tubing. (Tr. 253-58; 266-67).

George Bagnall has a B.S. in gas and petroleum engineering, has been a registered professional engineer with the State of Texas since 1959, and has been a consulting petroleum engineer since 1952; he has also been a member of the American Petroleum Institute ("API") for most of his career, and has served as an API chapter chairman and regional vice chairman. Bagnall testified it is the custom and practice of the well servicing industry to use BOP's since the servicer does not know the condition of wells and has to protect itself and employees. Bagnall agreed the well operator's representative is generally the overall supervisor and informs the servicer of unusual conditions and how he wants the

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[11]Schmidt is presently a Pool rig supervisor. (Tr. 455).

job done, but disagreed that the representative is responsible for telling the servicer how to protect employees from normal hazards. He noted he had observed many servicing operations and discussed safety with and formulated procedures for many servicing companies, and that his policy, and that of the companies he talked to, was to always install BOP's. (Tr. 374-77; 381; 386-95; 399-401; C-15).

Bagnall further testified that while there are some wells that may not require BOP's, such as those that have been pulled numerous times over a number of years without showing any signs of life, it was his opinion all knowledgeable persons would agree a BOP was required on the subject well; the well gurgled and was gassing throughout the day and the last of the tubing had oil on it, all signs of a live well, and the well was fairly new, horizontal and in Austin chalk. Bagnall noted horizontal wells in Austin chalk have more producing formation exposed, that gassing and wet tubing were things that should have alerted the crew, and that Pickett should have been aware of the well's condition. He also noted there was no difference between production and servicing as far as pulling rods and tubing, and that he knows of well servicers that use BOP's even if the operator refuses to pay for them and leave sites if ordered not to use them. (Tr. 376-84; 395-96; 402-12).

John Copeland is a petroleum engineer who has been in the well servicing industry since 1959.[12] Copeland has also held several positions in the Association of Oil Well Servicing Contractors ("AOSC") and was employed as its executive vice president from 1985 until 1990. Copeland testified he was on the AOSC safety committee which wrote OSHA standards for well servicing, and that while they were not adopted due to the drilling industry's objection to the cost those standards did not require the use of BOP's at all times. He further testified that the OSHA compliance officer who inspected the site asked him if the industry practice was to use BOP's on all servicing jobs; R-1, his response, was that it is strictly a decision of the well owner or operator and that the servicing company relies on that decision. (Tr. 419-30).

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[12]Copeland had his own servicing business until 1981, at which time it became Well Solutions. (Tr. 420-21; 432).

Copeland was unable to give an opinion as to whether the well required a BOP, and said he would defer to Bagnall in that regard since he himself was not very familiar with horizontal or South Texas wells. He noted that while the BOP should have been put on once the well began blowing and flowing there was no time to do so before the blowout, and that he did not think what occurred prior to that time was anything that should have alerted the crew. Copeland found no fault on the part of the servicing company for relying on the well operator because it had no way of knowing the well's condition. He also found no fault on the part of the crew; they were just doing what they were told, and if they had tried to override Pickett's decision they would probably have been run off the site. (Tr. 427-46).

Based on the foregoing, the Secretary has met all of the elements required to show a 5(a)(1) violation. Respondent's own safety rules establish its awareness of the hazard of pulling or running tubing without BOP's, and Bagnall testified that BOP's are required for all servicing jobs and were particularly necessary for the subject job because the well was new, horizontal and in Austin chalk. Bagnall's credentials, noted *supra*, are impressive, and his testimony was supported by Ramos and Pickett, who agreed horizontal wells are unpredictable; Pickett also testified that all chalk wells require BOP's. Moreover, Bagnall's testimony was not rebutted. Copeland admitted he could not give an opinion as to whether a BOP was required since he was not very familiar with the type of well at the site, and while he and various other witnesses testified, essentially, that there was nothing to indicate a hazard before the blowout, such testimony is not credited. Although the well was apparently not very active at the beginning of the job, the Gilbert brothers, the only two witnesses who were at the site all day, testified the well was gassing all day, that the gas got stronger as the day went on, and that the last 120 feet of tubing were wet with oil; Herbert Gilbert also testified he heard the well blowing and gurgling throughout the day. Bagnall's opinion was that these conditions were clear indications of a live well that should have alerted any knowledgeable person a BOP was required. I agree, and so find.

Respondent contends it was entitled, pursuant to industry custom and practice, to rely on the well operator's decision as to whether a BOP was needed; it points to the evidence in this regard, and to the testimony indicating Pickett told the crew not to install the BOP. However, the Fifth Circuit has held, and the Commission has agreed, that a well servicing

company may not "use industry custom to shift its statutory responsibility for the health and safety of its employees to third parties." *See Brock v. City Oil Well Serv. Co.*, 795 F.2d 507, 511 (5th Cir. 1986) and *Pride Oil Well Serv.*, 15 BNA OSHC 1809, 1813, 1992 CCH OSHD ¶ 29,807, p. 40,583. Respondent's contention is therefore rejected, and a 5(a)(1) violation is established.

The Secretary, as noted above, has characterized this violation as willful. To demonstrate a willful violation, the Secretary must show the violation was committed "with intentional, knowing or voluntary disregard for the requirements of the Act or with plain indifference to employee safety." *Williams Enter., Inc.*, 13 BNA OSHC 1249, 1256, 1986-87 CCH OSHD ¶ 27,893, p. 36,589 (No. 85-355, 1987).

It is clear from the record that industry practice requires the use of BOP's in well servicing, particularly in horizontal and chalk wells, and that Respondent was well aware of the hazards of pulling or running tubing without BOP's. It is equally clear that despite this awareness the company's policy was to use a BOP in well servicing only if the well operator agreed to pay for it, and that it was not uncommon for employees to service wells, including chalk and horizontal wells, without BOP's. Further, the crew in this case was allowed to work under conditions which, as Bagnall testified, should have alerted any knowledgeable person a BOP was required. Under the facts of this case, a willful violation is established. This citation is accordingly affirmed, and the proposed penalty of $9,000.00 is assessed.

Serious Citation Number 1

Item 1 - 29 C.F.R. § 1910.23(c)(1)

Robert Konvicka, the OSHA compliance officer ("CO") who inspected the site, testified that a walkway along the side of the rig and the driller's work platform at its rear were 49 5/8 and 46.5 inches from the ground, respectively, and that neither had guardrails; he spoke to the rig's manufacturer and learned that the tires, which had melted and were flat, would have made both the walkway and platform 6 to 8 inches higher when inflated. Konvicka identified C-5-7 as photos of the platform. He saw guardrail inserts on the platform and a guardrail on the ground next to it, but did not know whether the guardrail had been installed, and he saw no guardrails on the ground next to the walkway. Konvicka

first said the rig had been sitting on its tires because the rims were on the ground; he then said he did not know such was the case and indicated the rig could have been up on its screw jacks, which he did not discuss with the manufacturer. (Tr. 270-73; 279-85; 339-46).

John Copeland testified that a rig supported by screw jacks is kept at the same height, similar to a car being jacked up, and that the tires going flat on such a rig would not affect its height. He further testified screw jacks would not be affected by fire unless it was hot enough to melt them, but that tires would burn and their rims would drop down due to the rig's suspension. (Tr. 438-40).

Joseph Gallegos testified that R-2 was a photo of the rig he took immediately after the fire pursuant to his investigation of the incident; he noted the handrail along the side of the rig that was bent down to the ground by the fire, which he concluded had been in position before the fire. Gallegos further testified the screw jacks on the rig were screwed out, and that while the heat and the derrick falling over had shifted the rig its height would have been the same. (Tr. 447-50).

The subject standard provides, in pertinent part, as follows:

> Every open-sided floor or platform 4 feet or more above adjacent floor or ground level shall be guarded by a standard railing....

Although the CO initially testified that the rig had been sitting on its tires at the time of the fire, he then admitted he did not know this was the case and that the rig could have been up on its screw jacks. The testimony of Copeland and Gallegos, taken together, was that the screw jacks were out and that the rig's height would have been the same before the fire. Since the Secretary did not rebut this testimony and that of the CO was equivocal, it is concluded, based on the record, that only the walkway was required to be guarded. However, even assuming *arguendo* that both the walkway and platform required guards, it is found there was no violation of the standard. My reasons follow.

In regard to the platform, it is clear the CO believed the guardrail on the ground next to it was not in place before the fire. However, he apparently did not ask anyone if it had been, and it is obvious from his own photos that the rig sustained substantial damage which may well have resulted in the guardrail being displaced. In regard to the walkway, the CO testified he did not see a guardrail on the ground next to it. The testimony of Gallegos, on

the other hand, was that there was a bent-over guardrail on the ground which he concluded had been in place before the fire. The testimony of Gallegos is supported by R-2, and I find that the CO's testimony, without more, does not overcome this evidence. On the basis of the record, the Secretary has not shown that either the platform or the walkway violated the standard. This item is accordingly vacated.

Item 2 - 29 C.F.R. § 1910.141(c)(1)(i)[13]

The subject standard provides, in pertinent part, as follows:

> Except as otherwise indicated in this paragraph (c)(1)(i), toilet facilities ... shall be provided in all places of employment....

The record shows there were no toilet facilities at the site, and that employees went to some nearby woods for this purpose. (Tr. 97-98; 138-39; 288-89; 346-47). Respondent does not dispute the lack of toilet facilities, but contends the standard does not apply to temporary worksites. I disagree, based on 1910.141(c)(1)(ii), which states as follows:

> The requirements of paragraph (c)(1)(i) of this section do not apply to mobile crews or to normally unattended work locations so long as employees working at these locations have transportation immediately available to nearby toilet facilities which meet the other requirements of this subparagraph.

It is clear from the foregoing the subject standard does apply to temporary worksites unless employees have "transportation immediately available to nearby toilet facilities." Moreover, since 1910.141(c)(1)(ii) is an exception to the standard, it is Respondent's burden to demonstrate its applicability. Respondent presented no evidence in this regard; accordingly, this item is affirmed as a nonserious violation, and no penalty is assessed.

Item 3 - 29 C.F.R. § 1910.151(b)

The subject standard provides, in pertinent part, as follows:

> In the absence of an infirmary, clinic, or hospital in near proximity to the workplace which is used for the treatment of all injured employees, a person or persons shall be adequately trained to render first aid.

The record establishes that the jobsite was at least ten miles from Dilley, the nearest town, and that an ambulance arrived twenty to thirty minutes after the blowout and fire

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[13]The Secretary amended this item to allege an "other" violation with no proposed penalty. (Tr. 288-89).

occurred. (Tr. 49-51; 137-38; 170-71; 244; 259; 276). Respondent does not dispute the applicability of the standard, but contends the Secretary has not demonstrated that none of the employees at the site was trained in first aid. I disagree.

The four individuals assigned to the site were Maudis Smith and Julio Mendoza, the two employees who died, and Herbert and Eugene Gilbert. The Gilbert brothers testified they had had no training in first aid, and while Herbert Gilbert believed Smith had "probably" had first aid training because he was an operator he was not sure of this fact and Eugene Gilbert did not believe Smith had had such training.[14] (Tr. 95-96; 138). Simon Ramos, a rig supervisor, testified he had had first aid training; however, he was not assigned to the site and his arrival at 4 p.m. was due to his responsibility to check on various jobsites that day. (Tr. 155-59; 167-68; 174-75). Armando Flores testified he had not been trained in first aid, and that he did not know if anyone assigned to the site had been. (Tr. 41-42).

The testimony of Flores, in my view, is dispositive of this citation item. Flores, an assistant manager, took the order to service the subject well and was responsible for sending the rig to the site and making sure the crew had everything it needed before leaving, particularly since there was no rig supervisor assigned to the job. (Tr. 35-42; 53). Pursuant to the requirements of the standard, this responsibility included assuring that at least one employee assigned to the site had the necessary first aid training. That Flores did not know if any of the employees had such training convinces the undersigned of the company's lack of compliance with the standard, especially in light of the testimony of the Gilbert brothers and the fact that Respondent presented no evidence on this issue. Based on the record, I find the Secretary has met his burden of establishing a serious violation. This citation item is affirmed, and the proposed penalty of $700.00 is assessed.

Item 4 - 29 C.F.R. § 1910.157(e)(3)

The subject standard provides as follows:

> The employer shall assure that portable fire extinguishers are subjected to an annual maintenance check....The employer shall record the annual

[14]Eugene Gilbert testified he would have known if Smith had had first aid training because they had grown up together and were close. (Tr. 138).

> maintenance date and retain this record for one year after the last entry or the life of the shell, whichever is less. The record shall be available to the Assistant Secretary upon request.

The record demonstrates that there were two 20-pound fire extinguishers located near the rig carrier that did not have tags on them to show they had had annual inspections, and that the CO believed the standard required the extinguishers to have such tags. (Tr. 292-93; 349-50). However, as Respondent points out, the standard does not require tags; rather, it requires annual inspections to be recorded and the production of such records upon request. The CO acknowledged he did not test the extinguishers and, more significantly, that he made no request for their inspection records. (Tr. 349-50). In the absence of such a request, the Secretary cannot demonstrate a violation of the standard. This item is accordingly vacated.

Item 5 - 29 C.F.R. § 1910.307(b)

Robert Konvicka testified he spoke with Don Carter, senior engineer of IRI, the manufacturer of the rig, and that he learned the indicator lights in the control panel and the contacts on the side of the transmission were not approved for Class I, Division 1 locations; Carter also told him that explosion-proof equipment had not been requested for those areas when the rig was ordered. Konvicka considered the site a Class I, Division 1 location because of the potential for ignitable quantities of methane and natural gas, particularly since the well was horizontal and in Austin chalk. (Tr. 294-95; 350-52; 370-71).

The subject standard provides as follows:

> Equipment, wiring methods, and installations of equipment in hazardous (classified) locations shall be intrinsically safe, approved for the hazardous (classified) location, or safe for the hazardous (classified) location.

A Class I location is defined at 1910.399(a)(24) as one "in which flammable gases or vapors are or may be present in the air in quantities sufficient to produce explosive or ignitible mixtures." A Class I, Division 1 location is defined at 1910.399(a)(24)(i) as a location:

> (a) in which hazardous concentrations of flammable gases or vapors may exist under normal operating conditions; or (b) in which hazardous concentrations of such gases or vapors may exist frequently because of repair or maintenance operations or because of leakage; or (c) in which breakdown or faulty operation of equipment or processes might release hazardous concentrations

> of flammable gases or vapors, and might also cause simultaneous failure of electric equipment.

Respondent contends the site was not a Class I, Division 1 location because the well was primarily a water well which was emitting insignificant amounts of gas prior to the blowout. This contention is rejected. The discussion in regard to the willful citation, *supra*, establishes that the well was blowing gas all day, particularly after the tubing was pulled, and that horizontal chalk wells have more producing formation exposed, produce more gas and are more unpredictable than other wells. Based on the record and the definitions set out above, it can only be concluded that the well was, in fact, a Class I, Division 1 location.

Respondent next contends that the rig was the standard vehicle made for well servicing throughout the industry, and that to accept the Secretary's position one must also conclude the manufacturer intentionally included an unsafe design in its equipment. I disagree. The CO's testimony indicates explosion-proof equipment can be ordered on rigs to be used at sites having a potential for producing ignitable amounts of gas or vapor. Since Respondent failed to rebut this testimony, it is found the rig violated the standard. This item is affirmed as a serious violation, and the proposed penalty of $800.00 is assessed.

Items 6 - 29 C.F.R. § 1910.1200(e)(1)(i)

Robert Konvicka testified there were materials such as epoxy, cleaners and solvents at the site, which can cause dermatitis, as well as methane gas and crude oil, which can result in fires and burn injuries; he noted the epoxy, cleaners and solvents were in the back of the truck used to transport the BOP, and that when C-8, the company's hazard communication ("HAZCOM") program, was mailed to him it did not contain a list of chemicals as required. (Tr. 296-98; 303; 353-56).

The subject standard provides as follows:

> Employers shall develop, implement, and maintain at the workplace, a written hazard communication program ... which ... includes ... [a] list of the hazardous chemicals known to be present using an identity that is referenced on the appropriate material safety data sheet (the list may be compiled for the workplace as a whole or for individual work areas)....

Based on the language of the standard and the CO's testimony, which Respondent did not rebut, the company was required to have a list of the chemicals in the truck as well

as the methane gas and crude oil at the site.[15] Respondent does not dispute it had no such list, but contends the Secretary is "elevating form over substance" and that employees were trained in the hazards of their work. Herbert Gilbert testified there were monthly safety meetings which addressed, *inter alia*, hazardous chemicals; Simon Ramos, on the other hand, testified he had had no training in hazardous chemicals. (Tr. 96-97; 175). Regardless, the overall record in this case shows a lack of concern regarding employee safety in general and HAZCOM requirements in particular. Moreover, I note the highly volatile nature of methane gas and crude oil, and that one of the purposes of HAZCOM is to inform employees of hazardous chemicals to which they may be exposed. I find, therefore, that the failure to have a list of the chemicals in this case was a serious violation. This item is affirmed as a serious violation, and the proposed penalty of $600.00 is assessed.

Item 7 - 29 C.F.R. § 1910.1200(e)(1)(ii)

Robert Konvicka testified the company's HAZCOM program did not address methods used to inform employees of chemicals they might encounter in non-routine tasks such as cleaning or welding tanks; he noted there were frac tanks and long-haul trucks at the Pearsall office, but that he did not ask whether company employees cleaned or welded this equipment. (Tr. 273; 298-300; 356-59; 371).

The subject standard provides as follows:

> Employers shall develop, implement, and maintain at the workplace, a written hazard communication program ... which ... includes ... [t]he methods the employer will use to inform employees of the hazards of non-routine tasks (for example, the cleaning of reactor vessels), and the hazards associated with chemicals contained in unlabeled pipes in their work areas.

Respondent does not dispute its HAZCOM program did not address the subject standard, but suggested at the hearing the requirement did not apply to it. This suggestion is rejected, based on the CO's unrebutted testimony that all HAZCOM programs are

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[15]Respondent's suggestion that the chemicals in the truck were not used and that the standard does not apply to methane gas and crude oil is rejected. Herbert Gilbert testified he used different chemicals in his job, and the rig was supplied with what was needed before going to the site. (Tr. 37; 97). Moreover, the standard applies to "any chemical which is known to be present in the workplace in such a manner that employees may be exposed under normal conditions of use or in a foreseeable emergency." *See* 29 C.F.R. § 1910.1200(b)(2).

required to include the elements cited in this case. (Tr. 371). However, while the record establishes a violation, it is classified as nonserious since there is no evidence employees performed the types of work discussed by the CO. This citation item is accordingly affirmed as an "other" violation, and no penalty is assessed.

Item 8 - 29 C.F.R. § 1910.1200(e)(2)(ii)

The subject standard provides as follows:

> Employers who produce, use, or store hazardous chemicals at a workplace in such a way that the employees of other employer(s) may be exposed (for example, employees of a construction contractor working on-site) shall additionally ensure that the hazard communication programs ... include ... [t]he methods the employer will use to inform the other employer(s) of any precautionary measures that need to be taken to protect employees during the workplace's normal operating conditions and in foreseeable emergencies....

The record establishes, and Respondent does not dispute, that its HAZCOM program did not address the methods it used to inform other employers of hazardous chemicals at its worksites. (Tr. 301-02; 359-62). However, the discussion regarding item 6, *supra*, shows that the chemicals Respondent took to the subject site were materials which could cause dermatitis, a nonserious injury. Moreover, while it is clear that the methane gas and crude oil at the site could and did result in serious injury, the only other individuals at the site were representatives of the well operator, who, as Respondent points out, were presumed to know of the well's condition. Although the record demonstrates that Respondent's program did not comply with the standard, it is found the violation was nonserious. This item is therefore affirmed as an "other" violation, and no penalty is assessed.

Item 9 - 29 C.F.R. § 1910.1200(h)(2)(iii)

The subject standard provides as follows:

> Employee training shall include at least....[t]he measures employees can take to protect themselves from [hazardous chemicals], including specific procedures the employer has implemented to protect employees from exposure to hazardous chemicals, such as appropriate work practices, emergency procedures, and personal protective equipment to be used.

The record shows that the CO determined employees had not been trained in measures to protect themselves from hazardous chemicals based on his conversation with Herbert Gilbert. (Tr. 302-03). As noted in item 6, Gilbert testified that the company held safety meetings addressing hazardous chemicals, which indicates he may have misunderstood the CO's questions. (Tr. 96-97). Regardless, the discussion pertaining to the willful citation, *supra*, clearly demonstrates that BOP's are required for the work performed at the site and that Respondent's employees were not instructed to use BOP's to protect themselves from exposure to gas and crude oil. This citation item is accordingly affirmed as a serious violation, and the proposed penalty of $700.00 is assessed.

"Other" Citation Number 3 - Items 1(a) and 1(b)

Item 1(a) alleges a violation of 29 C.F.R. § 1904.2(a), which provides, in pertinent part, as follows:

> Each employer shall ... maintain in each establishment a log and summary of all recordable occupational injuries and illnesses for that establishment....The log and summary shall be completed in the detail provided in the form and instructions on form OSHA No. 200.

Item 1(b) alleges a violation of 29 C.F.R. § 1904.2(b)(2), which provides as follows:

> At each of the employer's establishments, there is available a copy of the log which reflects separately the injury and illness experience of that establishment complete and current to a date within 45 calendar days.

The record establishes that the company's OSHA 200 logs for 1989 and 1990, which were sent to the CO after his inspection, were not completed as required; zeros had not been entered in the total spaces for columns 1 and 2 and 7 through 13 on the 1989 log, and the 1990 log, which had entries up to October 29, 1990, did not reflect the fatalities resulting from the subject incident. (Tr. 326-34; C-13-14). Respondent does not dispute that the logs were not completed as required, but contends that the violations should be classified as *de minimis* and that no penalty should be assessed. I disagree. These items are accordingly affirmed as nonserious violations, and the proposed penalty of $100.00 is assessed.

Conclusions of Law

1. Respondent, Well Solutions, Inc., is engaged in a business affecting commerce and has employees within the meaning of section 3(5) of the Act. The Commission has jurisdiction of the parties and of the subject matter of the proceeding.

2. Respondent was in willful violation of section 5(a)(1) of the Act.

3. Respondent was in serious violation of 29 C.F.R. §§ 1910.151(b), 1910.307(b), 1910.1200(e)(1)(i) and 1910.1200(h)(2)(iii).

4. Respondent was in "other" violation of 29 C.F.R. §§ 1904.2(b)(2), 1910.141(c)(1)(i), 1910.1200(e)(1)(ii) and 1910.1200(e)(2)(ii).

5. Respondent was not in violation of 29 C.F.R. §§ 1910.23(c)(1) and 1910.157(e)(3).

Order

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Item 1 of citation 2 is AFFIRMED as a willful violation, and a penalty of $9,000.00 is assessed.

2. Items 3, 5, 6, and 9 of citation 1 are AFFIRMED as serious violations. A penalty of $700.00 each is assessed for items 3 and 9, a penalty of $800.00 is assessed for item 5, and a penalty of $600.00 is assessed for item 6.

3. Item 1 of citation 3 is affirmed as an "other" violation, and a penalty of $100.00 is assessed.

4. Items 2, 7 and 8 of citation 1 are AFFIRMED as "other" violations, and no penalties are assessed.

6. Items 1 and 4 of citation 1 are VACATED.

Stanley M. Schwartz
Administrative Law Judge

Date: November 3, 1993