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. ACTIVE OIL SERVICE, INC., Respondent.	OSHRC Docket No. 00-0553

DECISION

Before: RAILTON, Chairman and ROGERS, Commissioner.

BY THE COMMISSION:

After two employees of Active Oil Service, Inc. ("Active") were overcome while cleaning an underground oil storage tank, the Occupational Safety and Health Administration ("OSHA") investigated the incident and issued a citation alleging a willful violation of the Occupational Safety and Health Act of 1970 ("the Act"), 29 U.S.C. §§ 651-678.[1] Active contested that citation, and a hearing was held before Administrative Law Judge Covette Rooney, who affirmed the citation. For the reasons below, we find that a violation was established. We find, however, that the violation was not willful as found by the judge, but that it was a repeated violation.

Facts

Temple Sharey-Tefilo in South Orange, New Jersey contracted with Active to remove two underground oil storage tanks that were no longer used after the temple converted its heating system from oil to gas. On August 9, 1999, Active sent a crew consisting of foreman Ken Kaplan and three other employees, Thomas Caldwell, Leon

[1]Other citations, issued at the same time, alleging serious and other than serious violations, are not before us on review.

Eady, and Daniel Mazzetti, to remove the tanks. Before the tanks could be removed from the ground and taken to a scrap yard to be cut up, the interiors had to be cleaned to remove all sludge and oil residue. This required an employee to enter the tank with a squeegee and scrape the oil residue to the bottom of the tank, where it could be vacuumed out. Once the residue was vacuumed out, the interior would be wiped with rags to remove as much oil as possible.

The smaller of the two tanks, a 3,000-gallon tank, was removed on the morning of August 9 without incident. Mazzetti volunteered to clean the second tank, a 5,000-gallon tank. He wore a protective Tyvek suit but did not wear a respirator because he had left the one issued to him by Active at Active's office. According to Mazzetti, foreman Kaplan saw that he was dressed to clean the tank, told him to be careful and watched him enter the tank. Within seconds after Mazzetti entered the tank, he was overcome. Caldwell, who was acting as attendant, entered the tank without protection to rescue Mazzetti and was also overcome. After Kaplan telephoned 911, the local police and fire department arrived at the scene. The fire department rescued the two employees from the tank and took them to the hospital. Both recovered.

In the citation, OSHA alleged that Active had violated section 5(a)(1) of the Act, 29 U.S.C. § 654(a)(1),[2] the Act's "general duty" clause, because "[e]mployees were allowed to enter Permit Required Confined Spaces without such spaces being evaluated and deemed safe for entry prior to entrance." We first address Active's claim that section 5(a)(1) does not apply.

I. Was section 5(a)(1) of the Act properly cited?

It is well established that section 5(a)(1) cannot apply if a standard specifically addresses the hazard cited. *See, e.g., New York State Elec. & Gas Corp.*, 17 BNA OSHC 1129, 1993-95 CCH OSHD ¶ 30,745 (No. 91-2897, 1995), *aff'd in pertinent part*, 88 F.3d 98 (2d Cir. 1996); *Ted Wilkerson, Inc.*, 9 BNA OSHC 2012, 1981 CCH OSHD

[2]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."

¶ 25,551, (No. 13390, 1981); *Sun Shipbuilding & Drydock Co.*, 1 BNA OSHC 1381, 1973-74 CCH OSHD ¶ 16,725 (No. 161, 1973). Active argues that the confined space standard set forth at 29 C.F.R. § 1910.146 governs the situation here, and that section 5(a)(1) therefore was not properly cited. The judge rejected this argument based on her conclusion that Active was engaged in construction work at the temple worksite and the fact that section 1910.146 by its own terms does not apply to construction.[3]

We agree with the judge that the tank removal performed by Active was construction work as defined in 29 C.F.R. § 1910.12(b): "*Construction work* means work for construction, alteration, and/or repair, including painting and decorating." The temple's conversion from oil to gas heat constituted an alteration of the temple and its surrounding property. Removing the oil tanks and oil-burning equipment was an integral part of this alteration that required excavating the ground around the underground tanks and physically removing them. Accordingly, we find that section 1910.146 did not apply and that section 5(a)(1) of the Act was properly cited here.

II. Has a violation been established?

To establish a violation of the general duty clause, the Secretary must show that:

> (1) a workplace condition presented a hazard, (2) the employer or its industry recognized the hazard, (3) the hazard was likely to cause serious physical harm, and (4) there was a feasible and useful means of abatement that would eliminate or materially reduce the hazard.

Kokosing Constr. Co., 17 BNA OSHC 1869, 1872, 1995-97 CCH OSHD ¶ 31,207, p. 43,724 (No. 92-2596, 1996). Active does not dispute that entering an underground storage tank prior to conducting pre-entry testing in order to determine whether the tank's atmosphere is safe constitutes a recognized hazard that is likely to cause serious harm. It is also undisputed that Active had established confined space entry procedures that would have abated the cited hazard if implemented at the temple worksite. On review, Active argues only that the Secretary has failed to show that the company could have foreseen or

[3]Section 1910.146(a) states: "This section does not apply to agriculture, to construction, or to shipyard employment . . ."

anticipated that its procedures would not be followed by foreman Kaplan and employee Mazzetti. *See Tampa Shipyards, Inc.*, 15 BNA OSHC 1533, 1535, 1991-93 CCH OSHD ¶ 29,617, p. 40,097 (No. 86-360, 1992) (consolidated) (to establish general duty clause violation, evidence must show that employer "knew, or with the exercise of reasonable diligence could have known, of the violative conditions.") (citing *United States Steel Corp.*, 12 BNA OSHC 1692, 1699, 1986-87 CCH OSHD ¶ 27,517, p. 35,671 (No. 79-1998, 1986), citing *Getty Oil Co. v. OSHRC*, 530 F.2d 1143, 1145 (5th Cir. 1976)).

In citing Active for allowing employees "to enter Permit Required Confined Spaces without such space being evaluated and deemed safe for entry prior to entrance[,]" the Secretary has focused the violation on foreman Kaplan's conduct in allowing Mazzetti, and then Caldwell, to enter the tank before it was properly monitored and adequately ventilated. The judge determined that Active had actual knowledge of the violation based on her finding that the "credible evidence" established Kaplan was aware that Mazzetti was about to enter an untested tank without the proper equipment, yet did nothing to prevent him from doing so.

We find that the record does not support the judge's finding of actual knowledge. Because Kaplan did not testify at the hearing, the judge based her conclusion solely on testimony from Mazzetti.[4] However, her finding that Mazzetti's testimony established

[4]Active argues that the judge erred in refusing to admit Kaplan's sworn statement to OSHA into evidence. Assuming *arguendo* that this particular statement was admissible – a matter we need not decide - we find that under the circumstances in this case, the judge did not abuse her discretion.

At the hearing, the Secretary used Kaplan's statement to examine the compliance officer about whether Kaplan had made certain statements. Active did not object to the use of the statement for this purpose but requested that the entire statement be admitted. The judge did not rule on the request at that time. Active then attempted to use the statement the same way on cross-examination of the compliance officer. The judge noted, however, that Active had listed Kaplan as a witness and indicated that she preferred to hear his testimony live. The next day, Active renewed its request to admit the statement "to obviate the necessity for a witness coming in tomorrow," but the judge again stated that she preferred to have a live witness. At this point, Active acquiesced in her ruling and stated that Kaplan was under subpoena for the next morning. We see no abuse of

Kaplan knew that Mazzetti was "about to enter" an untested tank without the proper equipment does not establish that Kaplan had *actual knowledge* of Mazzetti's entry. Mazzetti acknowledged that Kaplan had told Mazzetti that he wanted to "cut a hole" in the tank, then Kaplan went up onto the seat of the excavator to eat his lunch. Having imparted this information to Mazzetti, Kaplan might well have assumed that Mazzetti would wait until further preparations for entry had been made. Although Mazzetti claims that Kaplan "watched" him enter the tank, it is simply not clear from his testimony whether Kaplan was able to see the opening of the tank from his location on the backhoe. Further, based on Mazzetti's testimony, Kaplan and the excavator would have been located behind Mazzetti as Mazzetti faced the tank, so it is doubtful that he could tell whether Kaplan was even looking at him, let alone "watching" him. Under these circumstances, we cannot agree with the judge that actual knowledge has been established.[5]

We must therefore determine whether the record supports a showing of constructive knowledge. Whether constructive knowledge has been shown involves a consideration of several factors, including the employer's obligation to have adequate work rules and training programs, to adequately supervise employees, to anticipate

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discretion in the judge's preference to observe the demeanor of a live witness who would be subject to cross-examination over the admission of the transcript.

On the final day of the hearing, Active did not call Kaplan or explain on the record why he was not being called. Nor did it renew its motion to admit the statement when it was clear that Kaplan would not testify. On these facts, we cannot say that the judge erred in denying Active's prior request to admit the sworn statement when she expected the witness to appear live and Active's request was not renewed when Kaplan did not appear. We therefore do not consider Kaplan's sworn statement to OSHA in reviewing the record to determine whether knowledge has been established.

[5]To the extent the judge based her decision on Kaplan's awareness that Mazzetti actually entered the tank, the evidence as a whole does not support that finding, based on the relative physical locations involved. In particular, it is doubtful that Mazzetti could tell that Kaplan "watched" him, given Mazzetti's testimony that the excavator was behind him.

hazards to which employees may be exposed, and to take measures to prevent the occurrence of violations. *Pride Oil Well Serv.*, 15 BNA OSHC 1809, 1814, 1991-93 CCH OSHD ¶ 29,807, p. 40,584 (No. 87-692, 1992).

There is no dispute that Active had work rules that, had they been observed here, would have eliminated the hazard. The record shows, however, that Active's safety program was poorly enforced. For example, although both Active's confined space entry procedures and its tank decommissioning plan require positive ventilation while a person is in a tank, the record establishes that this was not done at the temple worksite during the cleaning of the first tank. A fan to force clean air into the tank was left on the truck and not used before the first tank was entered. Kaplan's expressed intention to cut another hole in the second tank suggests that he planned to use the same method of "passive" ventilation for that tank as well. In addition, both Active's procedures and plan contemplate that the person entering the tank will wear a safety harness and lifeline to facilitate rescue in the event of an emergency. According to testimony from the temple's executive director, who personally observed the removal of the first tank, neither the employee who entered the first tank, Caldwell, nor his attendant outside the tank, Eady, wore a safety harness. Moreover, the safety tripod to be used in the event of a rescue was at the site but was left on the truck. Testimony from several witnesses who observed the worksite at the time that Mazzetti and Caldwell were rescued from the second tank confirms that none of this safety equipment was in use at the time of that tank's entry either.

Kaplan was in charge of both tank entries, and the fact that he felt free to disregard the company's established confined space safety procedures is strong evidence of lax enforcement of Active's program. *Pride Oil Well*, 15 BNA OSHC at 1815, 1991-93 CCH OSHD at p. 40,585.[6] That the other three members of the crew, including Mazzetti, also

[6]In finding that Active did not take adequate safety precautions at the temple worksite, the judge relied in part on an adverse inference she drew from Active's failure to call Kaplan as a witness. Her action was premised on Kaplan not being equally available to both parties. She relied on *United States v. Busic*, 587 F.2d 577 (3d Cir. 1978), *rev'd on*

"felt free to disregard" the company's confined space entry procedures constitutes further evidence of an inadequate program. *Little Beaver Creek Ranches, Inc.*, 10 BNA OSHC 1806, 1811, 1982 CCH OSHD ¶ 26, 125, p.32, 879 (No. 77-2096, 1982).

The record also establishes additional shortcomings in Active's program. A former Active employee geologist, Eugene Fowler, testified that the eight-hour refresher training conducted by an outside consultant shortly before the temple worksite accident was simply a session in "what to tell OSHA" about a fatal accident that had occurred at a different Active worksite just one week earlier.[7] While Fowler acknowledged that the instructor told employees what protective equipment to use, Fowler testified that employees pointed out to the instructor that such equipment was not always available on Active's worksites.

Further, we note that Fowler also testified about troubling comments made in his presence by Conrad Manisera, Active's president. While Fowler was traveling in an automobile with Manisera, Kaplan, and Manisera's mother, the owner of the company, to a wake for the Active Oil employee killed in the earlier accident, Manisera commented that they would never get anything done if they did things by the book. The compliance officer testified that Kaplan had related that statement to her as well. This statement, made by the president of the company in the presence of the owner of the company, could easily have given Kaplan the impression that following Active's safety procedures was not a high priority.[8]

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other grounds, 446 U.S. 398 (1980). *Busic*, however, holds that where neither the government nor the defendant calls a witness who is available to both, an inference is not warranted. Here, because Kaplan was available to both parties, the inference was not warranted, and we set it aside.

[7]The incident in which that employee died was the subject of a citation that was recently affirmed by Commission. *Active Oil Service, Inc.*, 21 BNA OSHC 1092 (No. 00-482, 2005). We do not consider the record evidence in that case in reaching our decision here.

[8]In addition, the compliance officer testified that Kaplan had complained to Manisera that he – Kaplan – could not do everything that was expected of him at a worksite and that

Under these circumstances, we find that Active's failure to effectively implement its confined space entry program establishes that it had constructive knowledge of Kaplan's violation at the temple worksite.[9] Accordingly, we affirm the general duty clause violation.

III. Characterization and penalty

The citation alleged that this violation was willful, and the judge found that it was willful. We find that the record does not support that characterization and reverse the judge.

To establish that a violation was willful, the Secretary bears the burden of proving that the violation was committed with either an intentional disregard for the requirements of the Act or with plain indifference to employee safety. *A.P. O'Horo Co.*, 14 BNA OSHC 2004, 2012, 1991 CCH OSHD ¶ 29,223, p. 39,133 (No. 85-0369, 1991); *Williams Enterp.*, 13 BNA OSHC 1249, 1256-57, 1986-87 CCH OSHD ¶ 27,893, p. 36,589 (No. 85-355, 1987); *see Babcock & Willcox Co. v. OSHRC*, 622 F.2d 1160, 1167 (3d Cir.1980); *Frank Irey, Jr. v. OSHRC*, 519 F.2d 1200 (3d Cir.1974). A willful violation is differentiated from others by an employer's heightened awareness of the illegality of the conduct or conditions and by a state of mind, *i.e.*, a conscious disregard of or plain indifference to the safety and health of employees. *Williams Enterp., Inc.*, 13 BNA OSHC at 1256-57, 1986-87 CCH OSHD at p. 36,589. There must be evidence that an employer knew of an applicable standard or provision prohibiting the conduct or condition and consciously disregarded the standard. *Hern Iron Works, Inc.*, 16 BNA OSHC 1206, 1215, 1993 CCH OSHD ¶ 30,046, p. 41,256 (No. 89-433, 1993).

The judge affirmed the section 5(a)(1) citation as willful based on her finding that Kaplan was aware that Mazzetti intended to enter the tank without ventilating or testing

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safety was suffering. According to the CO, Kaplan told him that Manisera had replied, "If you don't like it, there's the door."

[9]To the extent our holding here is governed by the law of the Third Circuit embodied in *Pennsylvania Power & Light Co. v. OSHRC*, 737 F.2d 350, 358 (3d Cir. 1984), we find that the Secretary's proof of constructive knowledge satisfies the foreseeability requirements of that case.

it or making use of a harness or a safety tripod and did nothing to stop him. Because the record does not support the judge's finding that Kaplan had actual knowledge that Mazzetti was entering the tank, we cannot find that Kaplan knowingly and deliberately allowed the violation to occur. Our inquiry therefore is whether Kaplan's state of mind was so indifferent to safety that "if he were informed of the rule, he would not care." *Brock v. Morello Bros. Constr., Inc.*, 809 F.2d 161, 164 (1st Cir. 1987).

As we stated in our discussion finding that Active had constructive knowledge, Active had a safety program that would have abated the cited hazard had it been followed. It also had all the equipment necessary to abate the violations either on the site or in company vehicles at the site. Although Manisera's comments suggest that he had little regard for safety requirements, he was not at the worksite at the time of the violation. While Manisera's comments and attitude likely contributed to Kaplan's lax approach in failing to ensure that the appropriate safety rules were followed, we cannot find, based on this record, that Kaplan's laxness with respect to the cited condition rose to the level of plain indifference. *See AJP Constr. Inc. v. Secretary of Labor*, 357 F.3d 70, 75 (D.C.Cir. 2004)(constructive knowledge or mere negligence suffices for a non-willful violation but willfulness requires conscious disregard or plain indifference to Act's requirements).

For example, the evidence indicates that Kaplan did not always disregard confined space safety requirements. The record shows that air in the first tank was tested and an entry permit was issued. Caldwell was also wearing a respirator when he entered the first tank. In addition, the CO testified that Kaplan had complained to Active's management about safety deficiencies. Furthermore, there is no evidence that Kaplan was aware of Active's prior confined space violations in 1989 and 1990. And while Kaplan was aware of the accident the week before that led to the citations affirmed in *Active Oil Service, Inc.*, 21 BNA OSHC 1092 (No. 00-482, 2005), we do not know the extent of his knowledge of the specific circumstances. Without more information about Kaplan's state of mind at the time of the cited violation, we cannot say that he acted willfully.

Although the citation alleged that this violation was willful, the Secretary amended

the citation in the complaint to allege in the alternative that the violation was repeated. Having found that the violation was not willful, the Commission must now consider whether the evidence establishes a repeated violation.[10]

A violation is properly classified as repeated under section 17(a) of the Act if, at the time of the alleged repeated violation, there was a Commission final order against the same employer for a substantially similar violation. *E.g.*, *Jersey Steel Erectors*, 16 BNA OSHC 1162, 1167-68, 1993 CCH OSHD ¶ 30,041, p. 41,219 (No. 90-1307, 1993), *aff'd without published opinion*, 19 F.3d 643 (3d Cir. 1994); *Potlatch Corp.*, 7 BNA OSHC 1061, 1063, 1979 CCH OSHD ¶ 23,294, p. 28,171 (No. 16183, 1979). The Commission has held that similarity of abatement is not the criterion; the test is whether the two violations resulted in substantially similar hazards. *Stone Container Corp.*, 14 BNA 1757, 1762, 1987-90 CCH OSHD ¶ 29,064, p.38, 819 (No. 88-310, 1990).

The citation in this case alleged a violation of section 5(a)(1) of the Act in that employees were exposed to the hazard of asphyxiation from lack of oxygen or chemical hazards because they were allowed to enter permit required confined spaces without those spaces having been evaluated and deemed safe for entry. In 1989, Active was cited for a violation of section 5(a)(1) for allowing employees to enter an underground fuel tank to clean it, exposing them to the hazards of inhaling a toxic substance, asphyxiation, and fire or explosion. We find that the 1989 final order clearly involves a hazard substantially similar to the one before us. We therefore find the violation repeated within the meaning of section 17(a) of the Act.

We reject Active's argument, made to the judge, that a prior citation more than three years old should not be used as the basis for a repeated violation when the

[10]The parties addressed the repeated issue in their post-hearing briefs to the judge, but the judge found it unnecessary to address the question because she found the violation to be willful. Consequently, neither party has addressed on review the issue of whether the violation was repeated. The Commission will not ordinarily decide an issue on which the judge has not had a chance to rule. Rule 92(c) of the Commission's Rules of Procedure, 29 C.F.R. § 2200.92(c). Here, however, the judge had the opportunity to decide this issue and declined to do so. The issue is therefore ripe for the Commission to decide.

Secretary's Field Operations Manual directed OSHA's staff not to issue a citation for a repeated violation unless the prior violation occurred within the last three years. The Commission recently addressed and rejected this same argument in *Hackensack Steel Corp.*, 20 BNA OSHC 1387, 1392-93, 2002-04 CCH OSHD ¶ 32,690, p. 51,566 (No. 97-755, 2003). The Commission has long held that the amount of time between violations does not affect whether a violation is repeated. *Potlatch Corp.*, 7 BNA OSHC at 1064, 1979 CCH OSHD at pp. 28,172-73.

Having affirmed a repeated violation, we next turn to the assessment of an appropriate penalty. In assessing penalties, section 17(j) of the Act requires the Commission to give due consideration to the gravity of the violation and the employer's size, history of violation, and good faith. 29 U.S.C. § 666(j). *J. A. Jones Construction Co.*, 15 BNA OSHC 2201, 2214, 1991-93 CCH OSHD ¶ 29,964, p. 41,033 (No. 87-2059, 1993). The Secretary proposed a penalty of $42,000 for this violation when it was alleged to be willful. The judge found the violation to be willful and assessed that amount. Here, the gravity of the violation was high. At the time of this violation, Active was a small company with 22 employees which had two prior final orders against it.[11] Following the citations that led to those prior final orders, Active had developed a written confined space entry program and a tank-decommissioning plan. It had also had its employees trained by an outside consultant. Although those efforts standing alone could merit some credit for good faith, that is outweighed here by Manisera's attitude, as reflected in his comments, and Kaplan's negligent approach to safety. Having considered the factors in the statute, we find $20,000 to be an appropriate penalty for this repeated violation.

[11] We also note that the Commission issued a final order against Active earlier this year. *See supra* n. 7.

IV. Order

Accordingly, we affirm a repeated violation of section 5(a)(1) of the Act and assess a penalty of $20,000.

SO ORDERED.

/s/
W. Scott Railton
Chairman

Dated: July 15, 2005

/s/
Thomasina V. Rogers
Commissioner

THE SECRETARY OF LABOR, Complainant, - v.- ACTIVE OIL SERVICE, INC. d/b/a ACTIVE TANK & ENVIRONMENTAL SERVICES, Respondent.	OSHRC DOCKET NO. 00-0553

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BEFORE: Covette Rooney
Administrative Law Judge

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to section 10 (c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 651 *et seq*. ("the Act"). At all times relevant to this action, Respondent Active Oil Service, Inc., d/b/a Active Tank & Environmental Services ("Active Oil"), operated a business involved in the cleaning, removal and demolition of underground storage tanks. The Secretary's allegation that Active Oil is an employer engaged in a business affecting commerce was deemed admitted in my order dated June 8, 2001. I accordingly hold that the Commission has jurisdiction over the subject matter and the parties within the meaning of section 3(5) of the Act.

On August 9, 1999, two Active Oil employees lost consciousness while inside an underground oil tank Active Oil had been retained to excavate and remove from a work site in

South Orange, New Jersey. The ensuing OSHA inspection resulted in the issuance of a serious citation alleging violations of 29 C.F.R. § 1910.134(e)(1) and 29 C.F.R. § 1910.134(f)(1), and a willful citation alleging a violation of section 5(a)(1) of the Act. A third citation, alleging an "other than serious" violation of 29 C.F.R. §1910.134(m)(2)(i)(B, C, & E), was not contested and became a final order of the Commission on June 8, 2001.

Active Oil filed a timely notice of contest of Citation 2, Item 1, the alleged willful violation, and of the classification and proposed penalties for Citation 1, Items 1 and 2, the alleged serious violations. A hearing was conducted from July 23 - 26, 2001. Post-hearing briefs and replies have been submitted and this matter is ready for disposition.

Background

On August 9, 1999, four Active Oil employees proceeded to the premises of Temple Sharey-Tefilo in South Orange, New Jersey, to excavate and remove two oil tanks. It was Active Oil's practice to manually clean the walls of the interior of an oil tank before excavating it. The evidence demonstrated that Kenneth Kaplan, the foreman for the Active Oil crew and the only employee authorized to issue a confined space entry permit, let employee Thomas Caldwell enter the first tank even though no positive ventilation was performed and the on-site safety tripod was not positioned over the man-way.[1] Kaplan had issued an entry permit, however, and allowed time for natural ventilation to occur in the first tank, which was cleaned and excavated without incident. (Tr. 103-104, 109-111, 214-215, 374, 467, Exh. C-5).

While the crew was preparing for the removal of the second tank, employee Daniel Mazzetti descended into the tank to clean sludge from its sides. The credible evidence demonstrated that Kaplan was aware that Mazzetti entered the tank for this purpose. However,

[1] Samuel Bernstein, the president of Temple Sharey-Tefilo, observed the cleaning and excavation of the first tank and testified at the hearing that no positive ventilation was applied. Daniel Mazzetti, the third crew member, was within hearing distance of the tank and testified that he did not hear noise from a ventilation blower. Thomas Eady, the fourth member of the crew, testified that he applied positive ventilation to the first tank. However, I observed Eady's demeanor on the witness stand and the evasive manner in which he responded to questions. Moreover, his testimony is in direct contradiction to a statement he had previously given OSHA. (Tr. 472-484, 215). Based on the record, Eady's testimony is not credited, and I find that no positive ventilation was performed on the first tank.

contrary to Active Oil's confined space entry procedures and tank decommissioning plan, the air in the tank was

not tested for the presence of toxic vapors or contaminants, the oxygen level was not checked, positive ventilation was not performed, and a confined space entry was not issued.[2] (Tr. 114-116, 122-123, Exhs. C-3, C-4). Further, Mazzetti was not wearing a face respirator or a safety harness and the safety tripod was not positioned over the man-way of the tank. (Tr. 107-108).

Mazzetti testified that he began to feel dizzy shortly after entering the tank and that he started to make his way back to the man-way. He called up to Caldwell, who handed down a 3-foot ladder, which, based on the evidence, was not high enough to reach the man-way. While attempting to reach the opening, Mazzetti lost consciousness and fell. Caldwell then entered the tank to try to rescue Mazzetti, and he too, lost consciousness. Mazzetti and Caldwell were ultimately removed from the tank by the South Orangetown Fire Department and were taken by ambulance to St. Barnabas Hospital, where they recovered. (Tr. 123-127, 259-260).

The Alleged Willful Violation

Citation 2, Item 1 alleges that Active Oil was in willful violation of section 5(a)(1) of the Act.[3] To show a section 5(a)(1) violation, the Secretary must establish that:

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[2] The confined space entry procedures, written in 1995, require that the supervisor at the work site test the atmosphere of any confined space for flammability, oxygen deficiency and toxicity, ensure that the atmosphere in the tank is safe, and issue a confined space area permit, before allowing an employee to enter the space. The supervisor must also determine what type of protective measures are necessary, and, if the confined space contains sludge or other residue, or gases or vapors, ensure that the area is purged and that positive ventilation is provided before entry. The procedures further require that any employee entering a tank wear a lifeline and harness, and, if the area is oxygen deficient, a self-contained breathing apparatus or supplied airline respirator. The tank decommissioning plan similarly sets forth safety procedures which must be followed before an employee is allowed to enter a confined space, and specifically describes positive ventilation as the insertion of a blower into either the man-way or the vent line. (Exh. C-3, C-4).

[3] Section 5(a)(1), also called the "general duty clause" 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

> (1) a condition or activity in the employer's workplace presented a hazard to the employees, (2) the cited employer or the employer's industry recognized the hazard, (3) the hazard was causing or likely to cause death or serious physical harm, and (4) feasible means existed to eliminate or materially reduce the hazard.

Waste Management of Palm Beach, 17 BNA OSHC 1308, 1309 (No. 93-128, 1995) citing *Walden Healthcare Ctr.*, 16 BNA OSHC 1052, 1058 (No. 89-2804, 1993). I find that the Secretary has met her burden of establishing a section 5(a)(1) violation.

The evidence clearly demonstrated the existence of the hazardous condition. OSHA Compliance Officer ("CO") Dionne Williams testified that a confined space oil tank may contain a toxic atmosphere or have insufficient oxygen, which can result in the asphyxiation of an employee if appropriate steps are not taken to reduce or eliminate the hazard. (Tr. 316-317). On the day in question, as indicated above, positive ventilation was not performed in either tank, and neither monitoring nor passive ventilation took place in the second tank.[4] The hazardous condition was aggravated because the employees who entered the second tank did not wear face masks or safety harnesses. In addition, no tripod was used for either tank for the purpose of non-entry rescue. The fact that both Mazzetti and Caldwell lost consciousness shortly after they entered the second tank further proved the existence of the hazard at the work site.

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to his employees.

[4] Kaplan did not testify at the hearing. As the foreman for the job, Kaplan would have provided material testimony regarding what safety precautions, if any, were performed, and whether Active Oil's own safety procedures were reviewed with the crew. Despite Respondent's assertions to the contrary, Kaplan was not available to the Secretary on an equal basis, as he was an Active Oil employee, and there was no actual evidence that Kaplan's employment with the company had terminated. It is well settled that, if a party has the power to produce a witness with relevant information, but fails to do so, a presumption is created that the testimony, if produced, would be unfavorable. *U.S. v Busic* 587 F.2d 577 (3d. Cir. 1978). *See also* 2 Wigmore 285 (3d ed.). Here, Active Oil identified Kaplan as a hearing witness and continually represented that Kaplan would be produced to give testimony. However, after the Secretary had rested, Active Oil's attorney announced that Kaplan no longer worked for the company and that he would not be testifying. (Tr. 503-507, 525, 693-694). In these curcumstances, I find that the Secretary is entitled to an inference that Kaplan's testimony would have been adverse to Active Oil's position on both of the issues stated above.

The evidence also demonstrated that Active Oil recognized the hazard. A recognized hazard is defined in terms of conditions or practices over which the employer can reasonably be expected to exercise control. *Morrison-Knudson Co./Yonkers Contracting Co., a Joint Venture,* 16 BNA OSHC 1105 (No. 88-572, 1993). As to control, Active Oil had the ability to inspect the subject site to ensure that its employees were complying with its safety rules. Also, Kaplan was present at the site and stood next to Mazzetti while the latter suited up to enter the second tank. In fact, Mazzetti testified that he told Kaplan that he intended to enter the second tank. Mazzetti also testified that the only safety instruction Kaplan gave him was to be careful. (Tr. 114-116).

In addition to the above, the evidence demonstrated that Active Oil's own confined space entry procedures and tank decommissioning plan set forth specific steps which should be taken to reduce the hazards associated with exposure to the toxic atmospheres that are inherent in working in underground oil tanks. (*See supra* note 2). Even without evidence of industry custom, this is sufficient.[5] *See Gen. Elec. Co.,* 10 BNA OSHC 2034 (No. 79-504, 1982). Moreover, Active Oil's failure to inspect the work site to ensure that its employees complied with its safety rules, combined with Kaplan's own personal knowledge that Mazzetti was about to enter the tank, and his failure to abate the hazard, established that Active Oil had both actual and constructive knowledge that a violation was imminent. *See Pa. Power & Light Co.,* 737 F.2d 360 (3d Cir. 1984).

The evidence further demonstrated that the hazard in this case was likely to cause death or serious injury. Both Mazzetti and Caldwell lost consciousness shortly after entering the tank and required removal by ambulance to a hospital. Finally, the evidence demonstrated that feasible means existed to eliminate or materially reduce the hazard. These methods are described in detail in Active Oil's confined space entry procedures and tank decommissioning plan. (Exhs. C-3, C-4).

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[5] There was also ample evidence of national consensus standards, such as those prepared by the American Petroleum Institute, and the American National Standard Institute, which address the hazards at issue here. These evidence industry custom and similarly establish the recognition element of the Secretary's case in chief. (Tr. 353-354, 618, Exh. C-3, p.2). *See, Inland Steel Co.,*12 BNA OSHC 1968, 1970 (No. 79-3286, 1986).

Active Oil argues that there was no violation because Mazzetti either (1) simply fell into the tank, or (2) entered it against Active Oil's instructions and without the company's knowledge. There was no evidence supporting the first theory, other than a statement Mazzetti gave OSHA on August 10, 1999. However, Mazzetti explained at the hearing that this statement was false and was fabricated at the urging of company managers. Mazzetti testified that he subsequently decided to "come straight" with OSHA and tell the truth. (Tr. 127-129). I observed Mazzetti's demeanor on the witness stand and the manner in which he explained why he fabricated his statement to OSHA on August 10. Moreover, Mazzetti's hearing testimony was corroborated by statements made by Kaplan and by Active Oil's president to the police and the New Jersey Department of Environmental Protection officers who responded to the scene. In any case, the tank's man-way was only 18 inches wide, which renders Active Oil's argument highly implausible.[6] (Tr. 62, 259-269, 289, 531-533).

Active Oil's second argument, that the accident occurred as a result of the unpreventable misconduct of Mazzetti, is similarly rejected.[7] First, Active Oil did not establish that it had adequately communicated its rules to its employees. While there was evidence that some of its employees underwent Hazmat or other training, there was no evidence that the confined space entry procedures and tank decommissioning plan were distributed and discussed with all members of the crew. For example, Eady did not know what a "safe personal exposure limit" was, and he had not seen Active Oil's confined space entry program. (Tr. 483, Court Exh. 1). Second, Active Oil did not take adequate steps to discover violations. As discussed above, Kaplan had actual and constructive knowledge of the violation, and his knowledge may be imputed to Active Oil by virtue of his supervisory position. *See Halmar Corp.,* 18 BNA OSHC 1014 (No. 94-2043, 1997). There was no evidence, however, that Kaplan took any real steps to

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[6] Mazzetti had also donned a protective suit before entering the tank, which I find indicated an intention to enter the tank. (Tr. 293-294).

[7] An employer wishing to establish a defense of unpreventable employee misconduct must prove that (1) it has established work rules designed to prevent the violation; (2) it has adequately communicated these rules to its employees; (3) it has taken steps to discover violations; and (4) it has effectively enforced the rules when violations have been discovered. *See Cerro Metal Products Div.* 12 BNA OSHC 1821 (No. 78-5159, 1986).

prevent the violation from occurring or to protect the employees from exposure to the hazard. Finally, as indicated above, there was no evidence that Active Oil undertook to inspect its premises to ensure that its employees complied with its confined space entry procedures and tank decommissioning plan. This was not, therefore, unpreventable employee misconduct. *See Pa.Power & Light Co.*737 F.2d 350 (3d Cir. 1984).

Active Oil's last argument is that a specific standard, 29 C.F.R. §1910.146, applies, and that it was therefore improper to charge it with a 5(a)(1) violation. However, 29 C.F.R. §1910.146 expressly states that it does not apply to construction work. [8] Active Oil's work involved the excavation and removal of in-ground tanks which had previously serviced a structure. To remove the tanks, Active Oil demolished an asphalt driveway with jackhammers and then dug into the ground with the excavator. (Tr. 99, 199, 358, 425, 674).[9] This work was an integral part of the construction of the building and I find that Active Oil was involved in construction work at the site.

Classification and Proposed Penalty

The Secretary has classified this citation item as willful. A violation is willful if committed with intentional disregard for the requirements of the Act or with plain indifference to employee safety. The focal point for this determination thus centers on the employer's state of mind at the time the violation was committed. *Brock v Morello Bros. Constr.,* 809 F.2d 161, 164 (1st Cir. 1987); *Monfort of Colorado, Inc.,* 14 BNA OSHC 2055, 2063 (No. 87-1220, 1991). The Secretary must show that the employer had a "heightened awareness" of the illegality of the conduct at issue. *See e.g., Pentecost Contracting. Corp.,* 17 BNA OSHC 1953, 1955 (No. 92-

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[8] 29 C.F.R. §1910.146 provides as follows:

> (a) *Scope and application*. This section contains requirements for practices and procedures to protect employees in general industry form the hazards of entry into permit-required confined spaces. This section does not apply to...construction...

Construction is defined in 29 C.F.R. §1910.12(b) as "work for construction, alteration or repair...."

[9] In so finding, I note that Active Oil obtained a construction permit for the work from the Township of South Orange. (Exh. R-20).

3788, 1997); *Williams Enter., Inc.*13 BNA OSHC 1249 (No. 85-355, 1987) An employer who knows an employee is exposed to a hazard and fails to correct or eliminate the hazardous exposure commits a willful violation if the employer knows of the legal duty to act. *See Sal Masonry Contractors, Inc.,* 15 BNA OSHC 1609, 1613 (No. 87-2007, 1992); *Tampa Shipyards, Inc.,* 15 BNA OSHC 1533, 1541 (No. 86-360, 1992). The Third Circuit, the jurisdiction in which this case arises, has held that a willful violation is characterized by an "obstinate refusal to comply" with safety and health requirements which differs little from the Commission test and that of the majority of the circuit courts. *Universal Auto Radiator Mfg. Co. v. Marshall,* 631 F.2d 20, 23, (3d Cir. 1980), quoting *Babcock & Wilcox v. OSHRC,* 622 F.2d 1160, 1167-1168 (3d Cir. 1980).

As is indicated above, Kaplan was aware of the fact that Mazzetti intended to enter the tank even though positive ventilation and appropriate atmospheric testing had not been performed and no safety tripod was used. Kaplan also allowed the safety harnesses to remain on the utility truck at the site, (Tr. 108), and did nothing to ensure that any of the employees who entered either tank wore them. Kaplan thus acted with intentional disregard for the requirements of the Act and in plain indifference to employee safety. As supervisor, Kaplan's state of mind may be imputed to Active Oil for classification purposes. *See Continental Roof Sys., Inc.,* 18 BNA OSHC 1070, 1071 (No. 95-1716, 1997).

In addition, Active Oil had committed prior OSHA violations involving unsafe entries to confined spaces. (Exh. C-1, C-2). These prior violations show that Active Oil had a heightened awareness of the illegality of its conduct. Despite these prior violations, however, there was no evidence that Active Oil endeavored to inspect its various work sites to ensure that its designated supervisors and other employees were following its safety rules. Rather, the evidence showed that Active Oil's president had expressed a concern that nothing would get done if they had to work "according to the book." (Tr. 667-669). I accordingly find that this citation was properly classified as willful.[10]

[10] Because I find that this citation item is properly classified as willful, there is no need to evaluate whether the Secretary's proposed alternative classification of "repeat" is appropriate.

The Secretary has proposed a penalty of $42,000.00 for this citation item. (Tr. 329-330). In determining the appropriate penalty, the Commission, as the final arbiter of penalties, must give due consideration to the gravity of the violation and the employer's size, history and good faith. *J.A. Jones Constr. Co.,* 15 BNA OSHC 2201, 2213-2214 (No. 87-2059, 1993). These factors are not necessarily accorded equal weight, and gravity is generally the most important factor. *Trinity Indus., Inc.,* 15 BNA OSHC 1481, 1483 (No. 88-2691, 1992). The gravity of a violation depends upon such matters as the number of employees exposed, the duration of exposure, precautions taken against injury, and the likelihood that an injury would result. *J.A. Jones, supra*. I find the severity of the violation in this case to be high because of the serious nature of permanent disability or death which could occur as a result of the cited hazard. I similarly find a greater probability, based on the nature of the work and Active Oil's failure to inspect. The Secretary's 40 % adjustment for size was appropriate, as Active Oil had only 22 employees at the time of the inspection, and no adjustment for good faith was warranted because of the company's violation history. (Tr. 328-331). I conclude that the proposed penalty is appropriate and accordingly, a penalty of $42,000.00 is assessed.

The Serious Violations

As discussed above, Active Oil contests only the proposed classifications and penalties of Citation 1, Items 1 and 2. Item 1 alleges a violation of 29 C.F.R. §1910.134(e)(1).[11] CO Williams testified that this item was classified as serious because of the serious nature of the injury, such as cardiac arrest, that could occur to an employee who was not medically fit to perform work requiring the use of a respirator. (Tr. 330-331). I find the serious classification appropriate and affirm Item 1 as serious. The Secretary has proposed a penalty of $900.00 for this item. Taking into account the gravity and severity of the violation, as well as the good faith, history and size of the company, I find that the proposed penalty is appropriate. A penalty of $900.00 is accordingly assessed.

[11] 29 C.F.R. § 1910.134(e)(1) requires an employer to provide a medical evaluation to determine an employee's ability to use a respirator prior to requiring that the employee use one.

Item 2 alleges a violation of 29 C.F.R. § 1910.134(f)(1).[12] CO Williams testified that this item was classified as serious because an employee not properly fitted for a respirator could become exposed to harmful toxins while wearing the respirator and could suffer serious injury, such as peripheral neuropathy, as a result. (Tr. 332). I find the serious classification appropriate and affirm this item as serious. The Secretary has proposed a penalty of $900.00 for this item. Based on the gravity and severity of the violation, and taking into consideration the company's history, size and good faith, I find the proposed penalty appropriate. A penalty of $900.00 is accordingly assessed.

Findings of Fact and Conclusions of Law

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

ORDER

Based upon the foregoing decision, it is hereby ORDERED that:

1. Citation 1, Item 1, alleging a violation of 29 C.F.R. § 1910.134(e)(1) is AFFIRMED as serious and a penalty of $900.00 is assessed.

2. Citation 1, Item 2, alleging a violation of 29 C.F.R. §1910.134(f)(1) is AFFIRMED as serious and a penalty of $900.00 is assessed.

3. Citation 2, Item 1, alleging a willful violation of section 5(a) of the Act, is AFFIRMED and a penalty of $42,000.00 is assessed.

/s/
COVETTE ROONEY
JUDGE, OSHRC

Dated: February, 4, 2002
Washington, DC

[12] 29 C.F.R. §1910.134(f)(1) requires an employer to ensure that employees use tight-fitting face-piece respirators which pass appropriate qualitative or quantitative fit tests.