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.

CLEAN FUELS OF INDIANA, INC.,
Respondent.

OSHRC Docket No. 15-1121

ON BRIEFS:

Scott Glabman, Senior Appellate Attorney; Charles F. James, Counsel for Appellate Litigation; Ann Rosenthal, Associate Solicitor of Labor for Occupational Safety and Health; Edward C. Hugler, Acting Secretary; U.S. Department of Labor, Washington, D.C.
For the Complainant

Paul J. Waters, Attorney; Waters Law Group, Clearwater, FL
For the Respondent

DECISION

Before: SULLIVAN, Chairman; ATTWOOD and LAIHOW, Commissioners.

BY THE COMMISSION:

Clean Fuels of Indiana, Inc. is a fuel filtration and tank cleaning company. In December 2014, a Clean Fuels employee was found unresponsive and later died from gasoline inhalation while cleaning tanks at a construction site in Daytona Beach, Florida. Following the incident, the Occupational Safety and Health Administration conducted an inspection and issued Clean Fuels an 11-item serious citation. The only issue before us is whether Administrative Law Judge Heather A. Joys erred in finding that the cited general industry standards in four of these citation items—Item 1 (failure to guard an open manhole) and Items 3a-3c (permit-required confined spaces)—

apply to Clean Fuels' work at the construction site.[1] Specifically, the judge rejected the company's argument that it was engaged in construction work and affirmed all but one of these items as violations of the cited general industry standards with a penalty of $6,600. For the following reasons, we reverse the judge and vacate all four citation items.[2]

BACKGROUND

RaceTrac, a large fuel retailer and convenience store operator, hired Clean Fuels to clean newly installed underground fuel tanks at a new RaceTrac being built in Daytona Beach, Florida. Under construction at the RaceTrac worksite was a retail store and a gas station. To prepare the fuel tanks for storing and dispensing fuel to customers, Clean Fuels removes any water, rust, and construction debris remaining inside the tanks as a result of the installation process.[3] This requires a two-person crew to make three separate visits to the worksite.[4]

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[1] In the briefing notice, the Commission also requested that the parties "address whether—if the judge did not err in finding violations of the general industry standards cited in Citation 1, Items 3(b) and (c)—the violations should be grouped for penalty purposes." Because we vacate both items, this issue is moot.

[2] The judge vacated Item 3a on the basis that the Secretary failed to establish noncompliance with the cited provision. Because we find that the cited general industry standard does not apply, we vacate the item on that basis. However, we do not disturb the judge's findings with respect to Items 2a-2g. These items all involve alleged violations of the respiratory protection standard, 29 C.F.R. § 1910.134, which expressly states in its introductory language that it "applies to General Industry . . . and Construction" work. 29 C.F.R. § 1926.103 ("The requirements applicable to construction work under this section are identical to those set forth at 29 CFR 1910.134 of this chapter.").

[3] Clean Fuels refers to its work on a gas station under construction as a "construction project." The company also performs tank cleaning work that it refers to as a "retail project." Retail projects involve cleaning already operational tanks when they become contaminated by water or other impurities or, less often, when they are mistakenly filled with the wrong type of fuel by a supplier (e.g. a diesel tank is filled with gasoline). Retail projects are typically completed in one visit and involve cleaning only one tank.

[4] On the first visit, which occurs the day before the initial fuel delivery, the crew verifies that the tanks have been installed, a concrete tank pad has been poured over them, and any water has been removed. The following day, the fuel supplier partially fills the tanks and the crew then filters the fuel to remove construction debris (such as pea gravel), rust, and hard water stains. The third and final visit occurs during the week prior to opening, after the tanks have been filled with fuel. The crew again filters the fuel to remove any smaller, finer materials remaining in the tanks. In addition, the crew checks that each type of fuel is in the correct tank, and if not, transfers the fuel to the correct tanks.

During the crew's second visit to the RaceTrac worksite, one of the crew members was found unresponsive inside one of the regular fuel tank's subterranean, or submersible, turbine pump (STP) wells after apparently having fallen in, and he later died from the effects of gasoline inhalation.[5] As a result of the accident, Clean Fuels did not finish cleaning the tanks, and the fuel in the unfinished tanks failed Florida state standards and could not be sold after the opening of the RaceTrac.[6]

DISCUSSION

"It is well established that OSHA's construction standards, rather than any comparable general industry standards, cover activities that constitute 'construction work' under 29 C.F.R. § 1910.12." *Ryder Transportation Servs.*, 24 BNA OSHC 2061, 2062 (No. 10-0551, 2014). "Construction work," is defined as "work for construction, alteration, and/or repair, including painting and decorating." 29 C.F.R. § 1910.12(b). The Commission has consistently held that "construction work" also encompasses "related activities that are an integral and necessary part of construction work." *B.J. Hughes, Inc*., 10 BNA OSHC 1545, 1546-47 (No. 76-2165, 1982); *Active Oil Serv., Inc.*, 21 BNA OSHC 1184, 1186 (No. 00-0553, 2005) (removal of two oil tanks and oil-burning equipment constituted construction work because it was an "integral part of [an] alteration that required excavating the ground around the underground [oil] tanks and physically removing them."). *Compare Snyder Well Serv., Inc.*, 10 BNA OSHC 1371, 1373 (No. 77-1334, 1982) (vacating construction standard violations where "swabbing [oil wells] was not shown to be either construction work by itself or to be integrally related to oil well drilling," when the well drilling had been completed and swabbing could be performed "years after a well is drilled and has begun production.").

[5] The STP wells were five feet, five inches deep and approximately 26 inches in diameter. Although the crew accessed the tanks through the STP wells and other openings, they conducted all of their work from above on the surface of the tank pad. Based on the record, no one witnessed how exactly the crew member ended up in the well.

[6] The RaceTrac opened sometime between February and early March 2015. In early March, the Florida Department of Agriculture inspected the quality of the gas station's fuel and determined that gasoline from the premium tank, which Clean Fuels had not yet cleaned, was not suitable for sale, and shut down both the premium grade and mid-grade gasolines for failing to meet the state's consumer protection standards for gasoline. The RaceTrac remained open but could not sell these gasoline grades until Clean Fuels returned to complete its work on the premium tank.

Here, the judge concluded that Clean Fuels' work was neither necessary nor integral to the construction of the RaceTrac because, in her view, it could be completed after construction was finished, as demonstrated by the fact that the RaceTrac opened before Clean Fuels finished cleaning all of the tanks. *Id.* Relying on the Commission's decision in *Royal Logging Co.*, the judge also concluded that the company's work was not construction work because it was "ancillary to and in aid of a non[-]construction function"—specifically, selling fuel. 7 BNA OSHC 1744, 1750 (No. 15169, 1979) (road building activities in support of logging operation were ancillary to and in aid of the employer's non-construction logging function), *aff'd*, 645 F.2d 822 (9th Cir. 1981). On review, the Secretary defends these findings, while Clean Fuels maintains that "the entire purpose of constructing the [RaceTrac's] gas station [was] to sell fuel" and therefore its work was absolutely "an integral or necessary part of the construction" project.[7]

We agree with the company. In determining that Clean Fuels' work was not "necessary and integral" to the construction of the RaceTrac, the judge conflated the opening of the RaceTrac "retail store" with completion of the construction project as a whole, which also included the gas station. But construction of the RaceTrac was not complete until Clean Fuels completed its "part of the total work." *United Tel. Co. of the Carolinas*, 4 BNA OSHC 1644, 1645 (No. 4210, 1976) (erecting and removing telephone poles found to be construction work in part because it was "incidental to subsequent construction and a part of the total work to be performed"). It is clear from the record that the gas station could not "beg[i]n production" until Clean Fuels finished cleaning all the tanks.[8] *Snyder Well Serv., Inc.*, 10 BNA OSHC at 1373. Indeed, unrebutted

[7] Clean Fuels also argues that its work "altered and improved the condition of the tanks," and thus meets the definition of "construction work" under 29 C.F.R. § 1910.12(b). Because we conclude that Clean Fuels' work was "integral and necessary" to the ongoing construction project, we need not address this argument. *B.J. Hughes, Inc*., 10 BNA OSHC at 1546-47.

[8] In *Snyder Well*, the Commission rejected the Secretary's contention that a "swabbing" process to remove materials clogging newly drilled oil wells constituted construction work. 10 BNA OSHC at 1373. In reaching this conclusion, the Commission emphasized that "oil well swabbing may be done years after a well is drilled and has begun production," and was thus "unconvinced that oil well swabbing is itself construction work or that it is integrally related to oil well drilling." *Id.* Here, however, Clean Fuels' work was "integrally" related to the construction project because, as discussed above, the RaceTrac could not "beg[i]n production" until Clean Fuels completed its work on the tanks. Likewise, the very purpose of Clean Fuels' cleaning work was to remove contaminants directly tied to the construction process and therefore, it had to perform its work in conjunction with the construction project, not "years after" its completion. *Id.*

testimony from multiple Clean Fuels employees, including the Safety Director, establishes that cleaning the tanks to remove rust, water, and construction debris is necessary to prepare them to properly store fuel prior to operation, and that until Clean Fuels completed this process, the RaceTrac could not lawfully dispense fuel from all the tanks.[9]

We are also not persuaded by the judge's reasoning that Clean Fuels' work on the tanks was ancillary to the sale of fuel, which she viewed as a "non[-]construction function" akin to the work at issue in *Royal Logging*. In that case, the Secretary argued that "building trails, roads, and bridges" to effectuate the delivery of cut logs for a logging operation constituted construction work. 7 BNA OSHC at 1750. The Commission disagreed, finding that the logging operation itself was not construction and as such, there was no construction work to which the road building activity could be integrally related. *Id. See also B.J. Hughes, Inc.,* 10 BNA OSHC at 1546-57 (employer's cement service work for oil drilling companies not necessary and integral to construction where Commission determined that construction industry standards did not apply to oil well drilling). *Cf. Active Oil Serv., Inc.*, 21 BNA OSHC at 1186 (employer's work removing tanks and equipment was construction because it was integral to heating system's conversion from oil to gas, which was found to be an alteration that constituted construction work). In contrast, there is no dispute here that construction of the RaceTrac was ongoing at the time the alleged violations occurred. As the judge herself noted, Clean Fuels was performing its work "on an active construction site."[10]

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[9] The judge relies on testimony from the general contractor's superintendent to find that the timing of Clean Fuels' work would not "have an impact on the construction process." The Secretary similarly asserts that "Clean Fuels' cleaning of the tanks and fuel had no impact on the process of constructing the convenience store and gas station." These arguments fail for the reasons discussed above—Clean Fuels' work was required for the RaceTrac's gas station to operate as intended and therefore "impacted" its construction.

[10] On review, the Secretary urges us to adopt the same analytical framework as the judge, arguing that Clean Fuels' work was necessary "only to the *use* of the gas station *after* the construction project was finished." (Second emphasis added.) But as we have already found, the gas station was part of the RaceTrac construction project, so the project was not, in fact, finished until Clean Fuels finished the required tank cleaning work. We also note, however, that the Secretary's proposed framework would exclude coverage of numerous activities commonly performed in the course of a construction project. For example, cleaning newly installed windows, fixtures, cabinets, or floors during the construction of the RaceTrac would not, under this framework, qualify as construction activities. Put simply, the Commission has long held that that even a non-construction activity is considered construction when performed as a necessary part of a

In short, Clean Fuels' work did not occur in support of the RaceTrac's *existing* fuel operations. Rather, Clean Fuels performed its work so that the RaceTrac could *commence* fuel operations. Therefore, because Clean Fuels' work was "inextricably linked" to the construction of the RaceTrac, it qualifies as "construction work." *Anthony Crane Rental*, *Inc. v. Sec'y of Labor*, 70 F.3d 1298, 1303 (D.C. Cir. 1995) (holding that the Commission did not abuse its discretion in finding employer engaged in construction because "by providing mechanic services [for a crane] on an ongoing and regular basis, [the employer] engaged in activities which were inextricably linked to the construction project in question."); *A. A. Will Sand & Gravel*, 4 BNA OSHC 1442, 1443 (No. 5139, 1976) (finding employer's work of unloading gravel for roofing project onto conveyor and making adjustments to conveyor were "an integral part of and cannot be separated from the construction activities" at the worksite).

Accordingly, we conclude that the cited general industry standards do not apply to Clean Fuels' work and therefore vacate all four citation items at issue on review.

SO ORDERED.

/s/
James J. Sullivan, Jr.
Chairman

/s/
Cynthia L. Attwood
Commissioner

/s/
Amanda Wood Laihow
Commissioner

Dated: July 28, 2020

construction project. *See Anthony Crane Rental, Inc. v. Sec'y of Labor*, 70 F.3d 1298 (D.C. Cir. 1995); *A.A. Will Sand & Gravel Corp.*, 4 BNA OSHC 1442, 1443 (No. 5139, 1976).

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Secretary of Labor, Complainant, v. Clean Fuels of Indiana, Inc., Respondent.	OSHRC Docket No. **15-1121**

Appearances:

Uche N. Egemonye, Esquire, U.S. Department of Labor, Office of the Solicitor, Atlanta, Georgia
For the Secretary

Paul J. Waters, Esquire, Waters Law Group, Clearwater, Florida
For the Respondent

BEFORE: Administrative Law Judge Heather A. Joys

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission pursuant to § 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651- 678 (the Act). Clean Fuels of Indiana, Inc. (hereinafter CFI) is a company that specializes in the cleaning of gasoline and gasoline tanks for gasoline retailers. On December 30 and 31, 2014, Occupational Safety and Health Administration Compliance Officer (CSHO) Jeffrey Lincoln conducted an inspection of CFI at 1510 South Ridgewood Avenue in Daytona Beach, Florida, following a fatal accident at that worksite. An employee of CFI died after being found unresponsive at the bottom of a well containing a submersible turbine pump (STP) at a RaceTrac retail store under construction. Based upon CSHO Lincoln's inspection, the Secretary of Labor, on May 14, 2015, issued a Citation and Notification of Penalty with three items (with subparts) to CFI alleging serious violations of 29 C.F.R. § 1910.23(a)(6) for failure to guard an open manhole; various subparts of § 1910.134 for deficiencies in its respirator program; and various subparts of § 1910.146 for failure to protect its employees from hazards associated with confined

spaces. The Secretary proposed a total penalty of $13,600.00 for the Citation. CFI timely contested the Citation. All of the violations are at issue.

I held a hearing in this matter on January 26 and 27, 2016, in Daytona Beach, Florida. The parties filed post-hearing briefs on April 29, 2016, and reply briefs on May 13, 2016.[11]

For the reasons discussed below, Items 1, 2a, 2b, 2c, 2d, 2e, 2f, 3b, and 3c are affirmed; Items 2g and 3a are vacated; and a total penalty of $11,600.00 is assessed.

Jurisdiction

At the hearing, the parties stipulated jurisdiction of this action is conferred upon the Commission pursuant to § 10(c) of the Act. The parties also stipulated at the hearing that at all times relevant to this action, CFI was an employer engaged in a business affecting interstate commerce within the meaning of § 3(5) of the Act (Tr. 8). Based upon the evidence of record and the stipulation of the parties, I find the Commission has jurisdiction of this action and CFI is an employer covered under the Act.

Background

CFI is a small family-owned business with approximately 30 employees (Tr. 342). It performs fuel and tank cleaning services for fuel retailers and bulk storage fuel facilities (Tr. 7). The process used by CFI removes water and other contaminants from fuel. The purpose of the service is to ensure that the gasoline meets State consumer protection standards. A station whose gasoline does not meet these standards can be prohibited by the State from selling its gasoline.

The Fuel Cleaning Process

CFI performs two services at retail sites. Prior to delivery of the initial supply of fuel at a newly constructed retail store, the tanks and fuel must be cleaned to remove water and

[11] In its Answer, CFI raised several affirmative defenses including isolated or unpreventable employee misconduct and infeasibility of compliance. It did not address those defenses in its post-hearing brief. Contrary to the explicit direction of my Order of February 19, 2016, CFI indicated it was reserving "the right to argue that defense in a reply brief or otherwise before the Review Commission…" Respondent's Post-Hearing Brief at p. 35, n. 2. It did not address these affirmative defenses in its Reply Brief. Therefore, I am deeming those affirmative defenses not addressed in its briefs, and any other arguments not addressed in either party's brief, abandoned. *Georgia-Pacific Corp*., 15 BNA OSHC 1127, 1130 (No. 89-2713, 1991).

construction debris. At existing stores, fuel can become contaminated and CFI performs a remediation service. The accident that precipitated the OSHA inspection in the instant matter arose during the former type of work. The same crew can perform either service and all equipment necessary for either service is contained in the same truck operated by the CFI crew.

The procedure for the services performed at new retail stores was described consistently by CFI employees as a three-day process. When the tanks are placed in the ground, they are filled with either water or gasoline to act as ballast, ensuring the tanks remain below grade (Tr. 274, 314). [12] Once the tanks are in place and the concrete tank pad has been laid over them, the water is removed (Tr. 275). CFI's first step in this process is to ensure the tanks are completely dry (Tr. 275, 315). This is done by removing the automatic tank gauge (which is not operational at the time) and manually checking the water level with a flashlight and stick (Tr. 315-16). If water remains in the tank, CFI removes it until the tank is dry. This first step is generally done the day before the gasoline has been scheduled to be delivered and, once complete, the tanks are ready to be filled with gasoline (Tr. 280).

The CFI crew returns to the site on the day gasoline is scheduled to be delivered. They inspect the equipment to ensure it is operating properly and bring any problems to the attention of the construction crew (Tr. 282). The supplier fills the tanks to approximately 50% capacity (Tr. 281, 320). The crew then cleans the tank of hard water stains, solids, or any construction debris that may have entered the tank (Tr. 281-82, 322). This is done by removing covers to the access ports, including the STP well, and removing the STP.[13] Next a "stinger" or jet that circulates the fuel and blasts the residue off the sides of the tank is inserted into the tank (Tr. 322, 324-26, 332; Exhs. C-11 p. 10; R-18 p. 19). Fuel is pulled from one access port, run through the filtration system in the CFI truck, and returned through another (Tr. 325-28). During this process, the crew are watching the intake and output through "site glasses" on the filtration equipment (Tr. 326-28; Exh. C-11 p. 4). Once the intake is as clear as the output, the crew will sample the fuel from the bottom of the tank (Tr. 328). Samples are taken every 5 to 10 minutes

[12] Tanks set to contain E85 fuel (or gasoline that is 85% ethanol) are initially filled with gasoline of a lower grade (or E10 which is 10% ethanol) rather than water because there is no way to correct the degradation of the E85 fuel if contaminated with water (Tr. 277-78). The E10 fuel is transferred to another tank and E85 delivered after CFI's final visit to the worksite (Tr. 278).

[13] An STP is used to pump the fuel from the tank where it is stored to the dispenser (Tr. 321).

until there is no visual particulate (Tr. 328). Once the fuel is visually clear, the crew replaces the covers and moves on to the next tank (Tr. 331). The process of cleaning one tank of gasoline takes approximately 2½ hours (Tr. 331).

The crew returns a third day. Any gasoline in the wrong tank (in a lower grade tank) is transferred to the correct tank, the tanks are topped off, the gasoline is run through the filtration process, and its quality is verified (Tr. 283-84, 334). Once these steps are complete, the gasoline is ready for inspection by the State Department of Agriculture.

This procedure was contrasted in the record with that performed on existing retail stores with contaminated fuel. Upon being notified by a store that there is a problem with its gasoline quality, CFI dispatches one of its two-man crews to the site. After assessing the work that needs to be done, CFI provides the retailer with an estimate of the cost for the services (Tr. 377).[14] Once the scope of the work is determined, CFI begins the cleaning process in the same manner as performed during the second stage of the process described above with one exception. Because the fuel is often contaminated with water, water must be removed with a coalescer (Tr. 289-90). In contrast, because CFI has removed all the water from the tanks prior to delivery of new fuel, the water coalescer is not necessary at a newly constructed store (Tr. 290).

Both processes are performed by a two-man crew consisting of a lead fuel technician and a side technician (Tr. 340). The lead fuel technician receives notice of the crew's assignment via email from John Baumgartner, CFI's operations manager (Tr. 392). The crew involved in the accident had performed both types of processes.

The lead fuel technician is the more experienced member of the crew and directs the work at the site. CFI requires an individual to go through on-the-job training to become a lead fuel technician. First, the employee performs the work of a side technician with another, more experienced, lead fuel technician. After a time, the employee is sent to company headquarters in Indiana to train with other lead fuel technicians (Tr. 373). Once that training is complete, the employee is sent out with his own two-man crew to worksites. The lead fuel technician does not

[14] CFI presented evidence the contracting and billing process is different for existing stores and new construction (Tr. 252-58; Exhs. R-24 and R-25). While an existing store is charged a variable rate based upon the services needed (Tr. 255-56), the services performed at a newly constructed store are billed on a flat fee basis because the scope of work is known at the time CFI is hired (Tr. 257). With regard to RaceTrac, CFI deals with different divisions of that corporation depending on whether it is for an existing store or new construction (Tr. 257-58, 319).

have authority to hire, fire, or discipline the side technician (Tr. 340-41, 393). He does direct the work of the side technician and is considered the individual with oversight of the worksite, including addressing any safety issues (Tr. 341, 372-73, 391, 431-32, 490).

The Accident

The worksite at issue was located at a RaceTrac retail store under construction on South Ridgewood Avenue in Daytona Beach, Florida. Venture Construction had contracted to construct the store (Tr. 51). At the time of the accident, construction was largely complete with only finishes to the interior of the store, some caulking of the tank pads, and landscaping left to be completed (Tr. 51-52, 54). The gasoline tanks, tank pad, covers, and gasoline lines were complete (Tr. 52, 54-55). The electricity had not been turned on (Tr. 195, 335).

CFI had contracted directly with RaceTrac to perform the tank preparation and fuel cleaning service six months prior. CFI was notified via email on December 17, 2014, gasoline was to be delivered to the site on December 29, 2014 (Exh. C-2). Prior to the delivery day, CFI needed to ensure the tanks were ready to receive fuel.

On December 28, 2014, CFI dispatched a two-man crew consisting of the Lead Fuel Technician[15] and the Side Technician[16] to the South Ridgewood Avenue worksite. According to the Lead Fuel Technician, who testified at the hearing, the crew checked the tanks to ensure they were ready for fuel delivery and then left the worksite (Tr. 447). They returned early on December 29, 2014, and waited for the gasoline delivery (Tr. 447). The gasoline was not delivered until late in the afternoon (Tr. 447-48). At this point in the day, it was growing dark and the crew used their truck lights to illuminate their work (Tr. 195). Once the gasoline was delivered, the crew began the process of cleaning the tank. The first tank cleaned contained regular gasoline (Tr. 459). The crew completed the process on that tank and had begun the process of moving the hoses and other equipment to the next tank (Tr. 134,460-62). The Lead Fuel Technician testified after taking a reading, he went to the cab of the truck to record the tank level (Tr. 462). He believed this process took him only a few minutes (Tr. 468). In the meantime, the Side Technician was moving hoses. The men had left the covers off the tank

[15] The Lead Fuel Technician testified he had been with the company since June 2014 (Tr. 444).

[16] At the time of his death, the Side Technician had been with the company for less than one year (Tr. 396).

openings because they had noticed the odor of gasoline and wanted to allow the tanks to "air out." (Tr. 134, 465-66). Neither had donned a respirator. The Lead Fuel Technician testified they opted to let the tanks vent because putting on respirators would have taken time and "time is money." (Tr. 470).

Once he had completed his paperwork, the Lead Fuel Technician went to continue to assist in setting up for the next tank. He did not immediately see the Side Technician and assumed he had gone to the restroom (Tr. 137, 472). He testified he found that unusual because the crew generally would let one another know if they were leaving the area for any reason (Tr. 472). At some point, the Lead Fuel Technician decided to look for the Side Technician (Tr. 473). As he walked past the well containing the STP, he saw the Side Technician lying in the well with his legs wrapped around the STP (Tr. 137, 437). The Side Technician was unresponsive (Tr. 137). The Lead Fuel Technician entered the STP well and attempted to pull the Side Technician out, but was unable to do so (Tr. 137, 473). Someone called 911.

The Daytona Beach Fire Department was dispatched to the worksite and arrived at 6:24 p.m.[17] (Tr. 79). A firefighter wearing fire retardant clothing and a self-contained breathing apparatus (SCBA), entered the tank and removed the Side Technician (Tr. 81, 84). The Side Technician was transported to the hospital where he died. The autopsy revealed the Side Technician had toxic levels of benzene, toluene, xylene, and ethylbenzene in his system (Tr. 160; Exh. C-14).

Battalion Chief Robert Turner of the Daytona Beach Fire Department was at the scene of the rescue and testified at the hearing. He stated it was dark at the worksite at the time they arrived (Tr. 80). The rescue team noticed the odor of gasoline coming from the tank in which the Side Technician was found (Tr. 84). Chief Turner used a four-gas meter[18] to test the atmosphere in the tank (Tr. 96). According to Chief Turner, the alarm on the meter sounded, indicating a hazardous atmosphere of less than 19.5 percent oxygen (Tr. 96-97, 112). After the Side

[17] The Daytona Beach Police Department was also dispatched to the RaceTrac following the rescue attempts (Tr. 38). Crime Scene Technician Thomas Youngman was called to the scene and took the photographs that are in the record at Exhibits C-1 and R-18 (Tr. 37-48).

[18] Chief Turner testified the meter tests for oxygen, carbon monoxide, sewer gas or methane, and explosives (Tr. 102).

Technician was transported to the hospital, Chief Turner turned the worksite over to CFI (Tr. 97).

Due to the accident, CFI was not able to complete the fuel and tank cleaning process (Tr. 337). The store opened with one of the tanks not having been cleaned or the fuel filtered. Upon testing by the State, the fuel failed to meet consumer protection regulatory standards and the store was prohibited from selling it (Tr. 291, 339). The store remained open. CFI came later and completed its work, allowing the store to resume sale of all the fuel (Tr. 338).

The Inspection

The Daytona Beach Fire Department notified the OSHA Jacksonville Area Office of the accident the same day (Tr. 118). CSHO Lincoln[19] was assigned to perform the inspection. He went to the worksite the following morning (Tr. 118). He observed the worksite was still under construction, with work being done inside the store and grading being performed outside (Tr. 118-19, 193). CSHO Lincoln first contacted Norman Higgins, the construction site superintendent for Venture Construction (Tr. 119). He next contacted Robert Vanover, CFI's safety and human resources director via telephone (Tr. 120). He later met with Addam Vanover[20], a lead fuel technician with CFI. At the time of the hearing, Addam Vanover held the position of auditor, responsible for inspecting CFI worksites for compliance with company policy. CSHO Lincoln interviewed Addam Vanover, Robert Vanover, and the Lead Fuel Technician involved in the accident (Tr. 121, 132).

During his inspection, CSHO Lincoln took photographs and measurements of the worksite (Tr. 122; Exh. C-11). He measured the depth of the STP well at 5 feet, 5 inches (Tr. 128; Exh. C-11, p. 8). The outer rim of the hole was 39 inches; the inner rim was 26 inches (Tr.

[19] CSHO Lincoln has been with OSHA as a CSHO for 6 ½ years (Tr. 115). Prior to that, he served for 20 years as a naval aviator (Tr. 115). He holds a Bachelor's Degree in mechanical engineering and a Master's Degree in aeronautical engineering. He is also a graduate of the Navy's Aviation Safety Officer Course (Tr. 117). During his military service, CSHO Lincoln had experience with use of half-face-piece respirators and SCBA (Tr. 115-16). He was also authorized to and performed permit required confined space entry (Tr. 117).

[20] Addam Vanover was at the worksite the night of the accident after being dispatched there by his father, Greg Vanover (Tr. 342). Greg Vanover held the position of vice president with CFI. The relationship between Addam Vanover and Robert Vanover was not clarified on the record.

128-29; Exh. C-11 p. 9). CSHO Lincoln did not perform any air sampling in or around the STP well (Tr. 129).

During his interview with Addam Vanover and the Lead Fuel Technician, CSHO Lincoln asked about CFI's use of respirators. According to CSHO Lincoln, he was informed CFI uses half-face tight fitting respirators with 3M brand organic vapor cartridges (Tr. 138, 164; Exh. C-11, p. 5). The Lead Fuel Technician told CSHO Lincoln both he and the Side Technician had used the respirators during their fuel filtration process, but had taken them off just prior to the accident (Tr. 138-39). CSHO Lincoln noted Addam Vanover had facial hair and asked whether he was able to use a respirator with it (Tr. 140-41). CSHO Lincoln requested CFI provide him with the company's safety program, the OSHA 300 logs, and, later, the respiratory protection program and medical screening forms (Tr. 143). Although CFI provided him with a safety program and respirator fit test sign-in sheets, CSHO Lincoln testified he did not receive a respiratory protection program or medical evaluations (Tr. 143). CSHO Lincoln also inquired about the company's confined space entry program. CSHO Lincoln testified he was informed CFI had a policy not to allow entry into any well deeper than 4 feet.

Based upon his inspection, CSHO Lincoln recommended citations be issued to CFI. CSHO Lincoln recommended a citation alleging a violation of § 1910.23(a)(6) be issued for failure to guard the open access port to the STP well. He recommended citations for violations of various subparts of § 1910.134 based upon his discussions with Addam Vanover and the Lead Fuel Technician which led him to conclude CFI did not have an adequate respiratory protection program. He recommended citations for violations of various subparts of the standard at § 1910.146 for failure to protect employees from the hazards associated with confined spaces based on his conclusion employees were exposed to the toxic vapors in the STP well during their work duties. CFI timely contested the citations. CFI argues the cited general industry standards do not apply to the conditions at the worksite because CFI was engaged in construction work. To the extent any of the cited standards would apply to the conditions at the worksite, CFI argues it was not in violation of those standards.

DISCUSSION

The Secretary's Motion to Amend

Post-hearing, the Secretary moved to amend Item 3c, Citation 1. The amendment sought would change the date of the alleged violation in the violation description from December 23,

2014, to December 29, 2014. The Secretary contends the change is intended to conform to the evidence and does not change the underlying legal theories or factual allegations. CFI did not oppose the motion and has not alleged any prejudice should amendment be permitted.

It is well recognized Fed. R. Civ. Pro. 15 governs the amendment of pleadings before the Commission. *Miller Brewing Co.*, 7 BNA OSHC 2155 (No. 78-3216, 1980); *Brown & Root, Inc.*, 8 BNA OSHC 1055 (No. 76-3942, 1980). Rule 15(a) directs that leave to amend should be freely given where justice so requires. An amendment is not prejudicial where it does not change the cause of action. The test of whether an amendment changes a cause of action is whether the "original and amended charges arise out of the same conduct, transaction, or occurrence." *Id., citing, Miller Brewing Co*., 7 BNA OSHC 2155. The Secretary's proposed amendment does not change the alleged conduct or conditions. Rather, it seeks only to correct the date to allege conduct on the night of the accident. Evidence adduced at trial by both parties addressed conditions and conduct on the night of the accident or December 29, 2014. CFI never raised a defense based on an allegation it had no employees on site on December 23, 2014. It did not raise an objection to the Secretary's motion to amend nor claim any prejudice. Therefore, I find the amended allegation was tried by consent. The Secretary's motion to amend Item 3c is GRANTED.

Applicability of the General Industry Standards

A threshold issue to be resolved in this matter is whether the General Industry Standards at 29 C.F.R. § 1910 apply to the conditions at the worksite.[21] CFI contends the work being performed by its employees was construction work as that term is defined in 29 C.F.R. § 1910.12(b) and under Commission precedent because it was integral and necessary to completion of construction of the RaceTrac. Therefore, CFI asserts, the Construction Standards at 29 C.F.R. § 1926, rather than the General Industry Standards, apply. Although conceding the RaceTrac was still under construction at the time of the accident and inspection, the Secretary contends the work being performed at the worksite was the same as work performed at existing retail stores and not integral to construction of the store. Consequently, the work does not fall

[21] The provisions of 29 C.F.R. § 1910.134 cited in Items 2a – 2g apply to construction work. 29 C.F.R. §§ 1926.103 and 1910.134 ("This Section applies to ….construction (1926)"). A determination of whether CFI was engaged in construction or general industry work is not necessary for finding applicability of those standards.

within the definition of construction work. For the following reasons, I determine the work was not construction work and the General Industry Standards are applicable to the work performed by employees of CFI.

The definition of construction work is found at 29 C.F.R. § 1910.12(b) which states, "For purposes of this section, *Construction Work* means work for construction, alteration, and/or repair, including painting and decorating. See discussion of these terms in § 1926.13 of this title." The Sixth Circuit has held that the "explicit reference to section 1926.13 in 1910.12(b) mandates that the interpretation of the terms 'construction, alteration, and repair' in the Construction Safety Act, Davis-Bacon Act, and Miller Act should 'have considerable precedential value' in defining the term 'construction work' in section 1910.12." *Brock v. Cardinal Indus*., 828 F.2d 373, 377 (6th Cir. 1987).

The Secretary's regulations implementing the Davis-Bacon Act state:

> The terms "construction" or "repair" mean all types of work done on a particular building or work at the site thereof…, all work done in the construction or development of the project, including without limitation, altering, remodeling, installation (where appropriate) on the site of the work of items fabricated off-site, painting and decorating, the transporting of materials and supplies to and from the building or work by the employees of the construction contractor or construction subcontractor, …or work…by persons employed by the contractor or subcontractor.

29 C.F.R. § 5.2(j). The term "subcontractor" is defined in 29 C.F.R. § 1926.13(c) as "a person who agrees to perform any part of the labor or material requirements of a contract for construction, alteration or repair." The Commission has held the regulations at 29 C.F.R. § 1926 apply to "employers who are actually engaged in construction work or who are engaged in operations that are an integral and necessary part of construction work." *Snyder Well Serv. Inc*., 10 BNA OSHC 1371, 1373 (No. 77-1334, 1982).

Based on a review of the totality of the circumstances, I conclude the work performed by CFI employees was not construction work. Although performed while the construction project was underway, the service performed by CFI was not integral and necessary to completion of the construction work. CFI was not a subcontractor of Venture Construction, but contracted directly with RaceTrac (Tr. 52). While I am mindful a certain amount of coordination between Venture Construction and CFI was necessary for CFI to perform its service, I find nothing in the record to suggest the timing of CFI's service would have an impact on the construction process. The

testimony of Venture's site superintendent is consistent with my finding (Tr. 59-60). CFI's service could have been performed after construction of the RaceTrac was complete and, therefore, was not a necessary part of the construction process. *See Snyder Well Serv*., 10 BNA OSHC at 1373. In fact, the store did open and was operating for some time after the accident, even though CFI had not completed its work (Tr. 291, 337).

It is undisputed CFI was performing its services on an active construction site. Uninstalled equipment remained in boxes and the electricity had not yet been turned on. Although a nexus to a construction site is necessary to find activities are construction work, such a finding is not dispositive. Rather, the work performed must also be integral to the construction work. To rely strictly on a finding of a nexus to a construction site would lead to absurd results. For example, were this the case, a retail establishment's salesforce could be found to be performing construction work if that store remained open during a renovation project. Because CFI's activities were not integral to completion of the construction project, its activities on the worksite were not construction work.

In so finding, I am guided by the Commission's holding in *Royal Logging Company*, 7 BNA OSHC 1744 (No. 15169, 1979). In *Royal Logging*, the Commission held the employer's road building activities, which would normally be considered construction, were not construction because they were "ancillary to and in aid of its primary nonconstruction function." *Id*. at 1750. The service performed by CFI was necessary for RaceTrac to sell fuel – a nonconstruction purpose. It was not necessary to complete the construction of the store itself. CFI was not performing construction work because the services it performed were ancillary to and in aid of a nonconstruction function.

Nor am I persuaded that the distinction between the process used at existing sites to clean contaminated fuel and that used on construction sites renders one service construction and the other not. Commission precedent is clear the factors to consider are those that relate to the activities' impact on the completion of the construction project, not the construction project's impact on the activities at issue.

For the foregoing reasons, I find CFI was not engaged in construction work and the general industry standards cited by the Secretary apply to the work performed at the worksite.[22]

The Citation

The Secretary has the burden of establishing the employer violated the cited standard. To prove a violation of an OSHA standard, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies; (2) the employer failed to comply with the terms of the cited standard; (3) employees had access to the violative condition; and (4) the cited employer either knew or could have known with the exercise of reasonable diligence of the violative condition. *JPC Group, Inc.*, 22 BNA OSHC 1859, 1861 (No. 05-1907, 2009).

Item 1: Alleged Serious Violation of 29 C.F.R. § 1910.23(a)(6)

Item 1 alleges:

> On or about December 29, 2014, at the pump well manhole, a removable standard railing was not installed, exposing employees to a 5 feet and 5 inches fall hazard. An employee died after fall[ing] into the unprotected opening.

The standard at 29 C.F.R. § 1910.23(a)(6) reads:

> Every manhole floor opening shall be guarded by a standard manhole cover which need not be hinged in place. While the cover is not in place, the manhole opening shall be constantly attended by someone or shall be protected by removable standard railings.

Applicability of the Standard

The cited standard falls under subpart D of the General Industry Standards which covers walking and working surfaces. Section 1910.23 covers generally "guarding floor and wall openings and holes." The standard at § 1910.23(a)(6) mandates an employer protect employees from falls into any "manhole floor opening." To apply to CFI worksite, the opening to the STP well opening, depicted in Exhibits C-1 and R-18, must meet the definition of a "manhole floor opening."

[22] I note CFI's safety and health program at Exhibit C-9 as well as all its training records (Exh. R-17), reference the General Industry Standards. Any claim CFI lacked notice of the applicability of those standards lacks merit.

The definitions applicable to § 1910.23 are found at § 1910.21. The standard at § 1910.21(a)(2) defines "floor opening" as

> An opening measuring 12 inches or more in its least dimension, in any floor, platform, pavement, or yard through which persons may fall; such as a hatchway, stair or ladder opening, pit, or large manhole. Floor openings occupied by elevators, dumb waiters, conveyors, machinery, or containers are excluded from this subpart.

There is no dispute the STP well opening met the size requirements of the standard's definition of a floor opening. In its Reply, CFI argues the STP well is occupied by the STP and, therefore, falls within the exception for those openings occupied by machinery. CFI's argument ignores Commission precedent. In *National Rolling Mills Co*., 4 BNA OSHC 1719, 1720 (No. 7987, 1976), the Commission held:

> The clear intent of the exception is to exclude only those openings which are fully occupied by the listed items so that there is no hazard of falling into the opening. The inclusion of elevators and dumbwaiters, which totally cover a floor opening, strongly indicates that the terms 'machinery' and 'conveyors' should be interpreted as encompassing only those which completely occupy the opening. Respondent's interpretation of the exception would permit a pit filled only partially with a machine to be unguarded even though it presents the same or a greater hazard as a totally empty pit. We will not adopt such an unreasonable interpretation since it would be inconsistent with the purposes of the Act.

As evidenced by the Side Technician's position in the STP well, the STP does not so occupy the STP well as to prevent a fall into it. The STP well opening was a floor opening under the standard.

The standards do not define "manhole." The parties both argue the definition that should be applied is the same dictionary definition of manhole found in the Merriam-Webster's Dictionary. That definition reads, "a hole through which a man may go esp. to gain access to an underground or enclosed structure." *Merriam Webster's New Collegiate Dictionary* (1981). The Secretary contends because the opening is a hole through which a man would go to access the STP well and the STP, it meets the definition of a manhole. CFI contends because its employees did not enter the STP well pursuant to its policy not to enter any well deeper than 4 feet, it is not a hole through which a man may go. I find CFI's definition overly narrow and not consistent with the intent of the standard. *Peavey Grain Co*., 15 BNA OSHC 1354, 1359, (No. 89–3046, 1991) (narrow definition rejected as incapable of effectuating standard's evident purpose).

Because the standard does not define the term manhole, it is reasonable to apply a

common understanding or dictionary definition of the term. The definition referenced above is consistent with common usage of the term manhole[23] and I agree with the parties it is applicable. The record establishes the STP well opening meets this definition. The purpose of the opening is to access the STP well.[24] The opening is large enough for a man to fit through and the well itself is large enough to hold a man as evidenced by the accident and subsequent rescue efforts. Even if CFI employees are prohibited from entering the well, others are not. Addam Vanover testified if CFI employees cannot remove the STP with their tools, a maintenance company would be called to do so (Tr. 359-60). In its post-hearing brief, CFI concedes some work in the STP well would require entry. Respondent's Post-Hearing Brief at p. 15. That CFI did not use the opening as a manhole does not mean it is not one.

I am not persuaded because it prohibited its employees from entering the STP well, CFI lacked fair notice of the applicability of the standard. Constitutional due process requires only that the cited employer be given "a fair and reasonable warning;" it "does not demand that the employer be *actually aware* that the regulation is applicable to his conduct or that a hazardous condition exists." *Faultless Div., Bliss & Laughlin Indus., Inc. v. Secretary of Labor,* 674 F.2d 1177, 1185 (7th Cir.1982). Moreover, "a standard is not impermissibly vague simply because it is broad in nature." *J.A. Jones Constr. Co.,* 15 BNA OSHC 2201, 2205, (No. 87–2059, 1993). Instead, "a broad regulation must be interpreted in the light of the conduct to which it is being applied, and external objective criteria, including the knowledge and perceptions of a reasonable person, may be used to give meaning to such a regulation in a particular situation." *Id.* at 2205–06. CFI cannot reasonably argue it could not have recognized the fall hazard created by a 26 inch floor opening of a 5 feet, 5 inch deep well. Nor do I find persuasive an argument it lacked warning the standard would be interpreted so as to give the term "manhole" its common, dictionary definition. CFI was well aware a man could enter the STP well through the opening. It gave its employees a specific prohibition against doing so and required its employees to call

[23] As the Secretary points out, Chief Turner, a disinterested witness, referred to the STP well opening as a manhole (Tr. 81, 100-01).

[24] I find unpersuasive CFI's argument that the STP well is not a manhole because it does not provide access to any other area or structure. The STP well is an underground structure. The STP well's *opening* is a manhole through which a person gains access to it.

someone else when entry was required. CFI's argument it lacked fair notice of the applicability of the standard is without merit.

Failure to Comply with the Terms of the Standard

The standard allows for the employer to protect employees from accidental falls into the opening of a manhole by either a standard manhole cover, temporary guardrails, or by someone "constantly" attending it. 29 C.F.R. § 1910.23(a)(6). The Lead Fuel Technician admitted the manhole cover to the STP well remained off and no removable standard railings had been used (Tr. 82-83, 485; Exh. C-1 pp. 1-3). In failing to ensure the STP well manhole was guarded, CFI violated the cited standard.

CFI contends it was in compliance because the two crew members were constantly attending the manhole. This contention lacks merit. There is no Commission precedent addressing the meaning of the terms "constantly attended by someone." The plain meaning of the term "constant" is "invariable" or "unchanging." *See Merriam Webster's New Collegiate Dictionary* (1981). To attend means "to be present at" something. *Id*. Giving the terms their plain meaning, to constantly attend to something would be to be invariably present at it. I find an employee who is otherwise engaged in a work activity cannot be constantly attending an open manhole.[25] Both employees were engaged in their work activities while the STP well remained uncovered (Tr. 484). At the time of the accident, the Lead Fuel Technician was completing paperwork while the Side Technician moved hoses (Tr. 134, 211; Exh. C-13).[26] At some point, the Lead Fuel Technician moved the truck while the Side Technician performed other work (Tr. 464). During this time, both men were focused on their tasks and neither was "constantly" attending the STP well opening.

CFI appears to concede both men were performing their work. In its post-hearing brief, CFI states "Given that no one else was present at the worksite, the mere moving of equipment to

[25] In so holding, I am guided by the reasoning of the ALJ in *Longhorn Service Company*, 25 BNA OSHC 1572 (No. 13-1458, 2015).

[26] On this issue I credit the statement given by the Lead Fuel Technician to CSHO Lincoln during the inspection (Exh. C-13). The Lead Fuel Technician's testimony on this issue was inconsistent with both his interview statement and his deposition testimony (Tr. 483-484). When confronted on cross examination, he became uncomfortable and evasive, hedging his testimony. Based on his inconsistencies and evasive demeanor, I find the Lead Fuel Technician's testimony less than credible on this issue.

a spot a few feet away from the openings cannot be considered leaving the STP well opening unattended." Respondent's Post-Hearing Brief at p. 19.[27] I disagree. In addressing a similar construction standard, the Commission has held that the purpose of such requirements is to ensure against "accidental situations when employees are not looking precisely where they are walking." *Stearns-Rogers, Inc.*, 7 BNA OSHC 1919, 1922 (No. 76-2326, 1979).[28] The purpose of the standard at § 1910.23(a)(6) is likewise to prevent accidental falls. That the employees are in a position to see the open manhole while performing their work duties is not the equivalent of being constantly mindful of their location. While performing their duties, the crew could not have been constantly aware of where they were walking; they would be exposed to exactly the hazard the standard was intended to address. Because both crew members were performing work duties, the open manhole to the STP well was not constantly attended. CFI was in violation of the 29 C.F.R. § 1910.23(a)(6).

Employee Exposure to a Hazard

The standard presumes a hazard where its terms are not followed. To establish exposure to the hazard, "the Secretary ... must show that it is reasonably predictable either by operational necessity or otherwise (including inadvertence), that employees have been, are, or will be in the zone of danger." *Delek Ref., Ltd*., 25 BNA OSHC 1365, 1376 (No. 08-1386, 2015) (*citing Fabricated Metal Prods., Inc.*, 18 BNA OSHC 1072, 1074 (No. 93-1853, 1997)). The zone of danger is the "area surrounding the violative condition that presents the danger to employees." *Boh Bros. Constr. Co., LLC*, 24 BNA OSHC 1067, 1085 (No. 09-1072, 2013) (*citing RGM Constr. Co.*, 17 BNA OSHC 1229, 1234 (No. 91-2107, 1995)). The Lead Fuel Technician and the Side Technician worked throughout the tank pad in proximity to the STP well opening. While doing so, they were exposed to the hazard of falling into the STP well while performing their duties at the worksite. Nothing prevented either from accidentally falling into the STP well,

[27] CFI makes a similar concession in its Reply, stating, "the employees were never more than 10 or 15 feet away from [the STP well opening], and then only briefly when moving equipment…" Respondent's Reply Brief at p. 9.

[28] CFI's reference in its Reply to the Secretary's interpretation of "unattended" in the context of the powered industrial truck standard is inapposite as the purpose of the two standards' requirements are not the same.

particularly while they were attending to separate work duties. The Secretary has established employee exposure.

Employer Knowledge of the Violation

The Secretary must establish CFI had knowledge of the violative condition. In order to establish employer knowledge of a violative condition, the Secretary must show that the employer knew, or with the exercise of reasonable diligence could have known of a hazardous condition. *Dun Par Eng'd Form Co.*, 12 BNA OSHC 1962, 1965-66 (No. 82-928, 1986). An employer is required to make a reasonable effort to anticipate the particular hazards to which its employees may be exposed during the course of their scheduled work. *Automatic Sprinkler Corporation of America*, 8 BNA OSHC 1384, 1387 (No 76-5089, 1980). Knowledge of a supervisory employee may be imputed to an employer. *ComTran Group, Inc., v. U.S. Dept. of Labor,* 722 F.3d 1304 (11th Cir. 2013).[29] An employee who has been delegated authority over another employee, even if only temporarily, is considered to be a supervisor for purposes of imputing knowledge to an employer. *American Engineering & Development Corp.*, 23 BNA OSHC 2093, 2012 (No. 10-0359, 2012); *Diamond Installations, Inc.*, 21 BNA OSHC 1688 (Nos. 02-2080 & 02-2081, 2006); *Tampa Shipyards, Inc.*, 15 BNA OSHC 1533 (Nos. 86-360 and 86-469, 1992).

It is undisputed having the STP well manhole open is a necessary part of the fuel cleaning process and CFI would have been aware of that condition. CFI's safety and health program addresses floor openings on walking/working surfaces (Exh. C-9 pp. B20-1 - B20-3). In it, the company mandates the use of railings or covers for "Every temporary floor opening." (Exh. C-9 p. B20-2). The program makes no mention of the use of an attendant or allowing employees to attend floor openings as an alternative to guardrails. CFI did not contend it supplied its crews

[29] Under the Act, an employer may seek review in the court of appeals in the circuit in which the violation occurred, the circuit in which the employer's principal office is located, or the District of Columbia Circuit. 29 U.S.C. § 660(a). The Secretary may seek review in the circuit in which the violation occurred or in which the employer has its principal office. 29 U.S.C. § 660(b). This case arose in Florida, which is in the 11th Circuit. CFI's principle place of business is in Indiana which is in the 7th Circuit. In general, where it is highly probable that a Commission decision would be appealed to a particular circuit, the Commission has applied the precedent of that circuit in deciding the case, "even though it may differ from the Commission's precedent." *Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2067 (No. 96-1719, 2000).

with temporary guardrails to protect the open manhole openings.[30] The Lead Fuel Technician testified it takes both crew members to move the hoses (Tr. 460-61). With the exercise of reasonable diligence, CFI should have been aware the STP well manhole is open during work operations and that it was not guarded by either temporary guardrails or an employee constantly attending it.[31]

In addition to constructive knowledge, the Lead Fuel Technician's actual knowledge of the worksite conditions is imputable to CFI. The Lead Fuel Technician was aware the STP well manhole was open and neither guarded with temporary guardrails nor constantly attended on the night of the accident. As previously discussed, the Lead Fuel Technician was aware the Side Technician was engaged in work activities on the tank pad while he attended to his paperwork and moved the truck. The duties of the Lead Fuel Technician include obtaining the crew's job assignment, directing the work of the Side Technician, and providing guidance on safety issues (Tr. 372-73, 392, 431-32). Under Commission precedent, the Lead Fuel Technician was a supervisor for purposes of imputing knowledge to CFI. The Lead Fuel Technician's actual knowledge of the violative condition is imputed to CFI. *See John H. Quinlan d/b/a Quinlan Enterprises v. Secretary of Labor*, 812 F.3d 832, 841-42 (11th Cir. 2016) (holding a supervisor's knowledge of his own and a subordinate's simultaneous misconduct is imputed to the employer).

Classification of Item 1

The Secretary alleges Item 1 is a serious violation. A violation is serious when "there is a substantial probability that death or serious physical harm could result" from the hazardous condition at issue. 29 U.S.C. § 666(k). The Secretary need not show that there was a substantial probability that an accident would occur; only that if an accident did occur, death or serious physical harm would result. The STP well is over 5 feet deep. An employee inadvertently walking into the STP well would likely sustain serious physical injuries (Tr. 147). He could also be overcome by the oxygen-deficient atmosphere (Tr. 148). The Secretary has established a serious violation of 29 C.F.R. § 1910.23(a)(6).

[30] CFI presented testimony suggesting the use of temporary guardrails would impede the work. CFI ultimately abandoned its infeasibility affirmative defense.

[31] I find this to be the "ordinary" case referenced in the 11th Circuit's decision in *ComTran* in which knowledge is established where a supervisory employee was or should have been aware of the exposure of his subordinate to the hazardous condition. *ComTran*, 722 F.3d at 1308, n. 2.

Item 2a: Alleged Violation of 29 C.F.R. § 1910.134(c)(1)

Item 2a alleges:

On or about December 29, 2014, at the RaceTrac Store number 2367 job site, the employer had not developed and implemented a written respiratory program for employees required to wear a tight fitting 3M model 6200 respirator during fuel tank cleaning operations while overexposed to toxic aromatic vapor components of gasoline. An employee died from an overexposure to benzene, ethyl benzene, xylene, acetaldehyde, and toluene. The required elements of items (i) through (ix) of the 29 CFR 1910.134(C)(1) standard were not in effect, specifically:

1. **The employer had not established procedures for respirator selection based on contaminant concentration.**
2. **The employer had not conducted medical evaluations of employees required to wear respirators.**
3. **The employer had not developed written procedures for the use of respirators in routine and reasonably foreseeable emergency situations.**
4. **The employer had not developed procedures for cleaning disinfecting, storing, inspection, repairing, discarding, and otherwise maintaining respirators.**
5. **The employer had not developed procedures for evaluating the effectiveness of the program.**

The standard at 29 C.F.R. § 1910.134(c)(1) requires:

In any workplace where respirators are necessary to protect the health of the employee or whenever respirators are required by the employer, the employer shall establish and implement a written respiratory protection program with worksite-specific procedures. The program shall be updated as necessary to reflect those changes in workplace conditions that affect respirator use. The employer shall include in the program the following provisions of this section, as applicable:

1910.134(c)(1)(i): Procedures for selecting respirators for use in the workplace;
1910.134(c)(1)(ii): Medical evaluations of employees required to use respirators;
1910.134(c)(1)(iii): Fit testing procedures for tight-fitting respirators;
1910.134(c)(1)(iv): Procedures for proper use of respirators in routine and reasonably foreseeable emergency situations;
1910.134(c)(1)(v): Procedures and schedules for cleaning, disinfecting, storing, inspecting, repairing, discarding, and otherwise maintaining respirators;
1910.134(c)(1)(vi): Procedures to ensure adequate air quality, quantity, and flow of breathing air for atmosphere-supplying respirators;
1910.134(c)(1)(vii): Training of employees in the respiratory hazards to which they are potentially exposed during routine and emergency situations;
1910.134(c)(1)(viii): Training of employees in the proper use of respirators, including putting on and removing them, any limitations on their use, and their maintenance; and

1910.134(c)(1)(ix): Procedures for regularly evaluating the effectiveness of the program.

Applicability of the Standard

The standard at 29 C.F.R. § 1910.134(c)(1) requires an employer to establish and implement a respiratory protection program where either "respirators are necessary to protect the health of the employees or whenever respirators are required by the employer…" CFI provided respirators to its fuel technicians and required their use whenever an employee was performing "a task that could generate vapors," such as changing filters on the equipment in the truck, or any time an employee smelled gasoline vapors (Tr. 346, 349, 378, 385, 410, 421, 478-79). The standard applies and CFI was required to establish and implement a written respiratory protection program.

Failure to Comply with the Terms of the Standard

The Secretary contends CFI's respiratory protection program was deficient because it was not site-specific and did not contain procedures for respirator selection; medical evaluations; emergency procedures; cleaning procedures; and did not contain procedures for regular evaluation of the program's effectiveness (Tr. 150-57). No respiratory protection program was provided to CSHO Lincoln upon request during his inspection (Tr. 143). The record contains what CFI purports to be its written respiratory protection program at Exhibit R-14. Robert Vanover testified he was informed by a consulting company he hired that Exhibit R-14 was obtained from the OSHA website. A cursory review of the document reveals it to be a PowerPoint presentation covering the contents of the standard at 29 C.F.R. § 1910.134.

The standard at 29 C.F.R. § 1910.134 is a performance standard that must be interpreted in light of what is reasonable. Based upon my review of the contents of Exhibit R-14, I find no reasonable employer would conclude it was compliant with the cited standard. It is lacking the "worksite-specific procedures and elements required for respirator use" mandated by 29 C.F.R. § 1910.134(c). *See also* 63 Fed. Reg. 1152-01, 1187 (January 8, 1998). Much of the content is inapplicable to the conditions encountered by employees of CFI during their work activities or to the type of respirators used by employees of CFI. Among other deficiencies, the program does not contain a provision for medical evaluations and CFI concedes it did not conduct them. The program does not provide instruction on cleaning of respirators. It contains no information regarding selection of respirators. It lacks a schedule or rule for changing of the respirator

cartridges. It does not contain a provision for evaluating the effectiveness of the program. To the extent Exhibit R-14 is CFI's written respiratory protection program, it fails to comply with the requirements of 29 C.F.R. § 1910.134(c)(1). To the extent CFI suggests because the PowerPoint was obtained from OSHA's website, it should be found compliant, I disagree. On the second page of the document is the following proviso:

> This program is intended to be a resource for instructors of Occupational Safety and Health and not a substitute for any of the provisions of the Occupational Safety and Health Act of 1970 or for any standards issued by the United States Occupational Safety and Health Administration (OSHA).

(Exh. R-14 at p. 2). An employer reading this sentence could not reasonably conclude the document serves a substitute for a compliant respiratory protection program.

I disagree with CFI's contention the violations alleged in Items 2b-2g are mere duplications of the allegations in Item 2a. In the preamble to the standard, the Secretary emphasized the need for the respiratory protection program to be in writing:

> OSHA's experience and that of the industrial hygiene community have demonstrated that health and safety programs can best be effectively implemented and evaluated when written. In addition, because workplaces differ substantially, each program must be tailored to the specific conditions of the workplace if it is to protect employee health, and developing a written program is the most efficient way of ensuring that the program reflects the unique characteristics of each workplace. Developing and writing down worksite-specific procedures requires employers to design their respiratory protection programs to address the respiratory hazards in their particular workplace, and this process requires employers to think about and document all relevant information pertaining to the hazardous atmospheres that their employees may encounter under normal operating conditions or during reasonably foreseeable emergencies that may occur in the workplace. Finally, OSHA's enforcement data indicate that compliance with the previous standard has not been optimal, particularly in smaller workplaces, and a written program will help employers, employees, and compliance officers gauge the adequacy of a given program.

63 Fed. Reg. 1152-01, 1187-88.[32] Because of the importance of documentation of the program provisions, CFI's failure to have a compliant written program is a violation distinct from the failure to comply with the requirements of the standards cited in Items 2b – 2g.

Employee Exposure to a Hazard

A respiratory protection program is intended to ensure appropriate respirators are properly used in order to protect employees from inhalation hazards to which they may be exposed. CFI management conceded employees were exposed to gasoline vapors. On the night of the accident CFI's crew and rescue personnel smelled gasoline vapors. The Side Technician's autopsy report indicates he was exposed to fatal levels of some of the components of gasoline (Exh. C-14). According to the Material Safety Data Sheet for gasoline, gasoline poses an inhalation hazard to the "nose, throat, lungs and respiratory tract." (Exh. R-15 p. 2). It can also pose an inhalation hazard to the central nervous system (Exh. R-15 p. 2). The purpose of a written safety and health program is to ensure effective protection of employees. The Secretary has established employees of CFI were exposed to inhalation hazards associated with gasoline vapors as a result of CFI failure to develop and implement a respiratory protection program.

Employer Knowledge of the Violation

There is no dispute CFI was aware its employees were exposed to gasoline vapors and that there were occasions employees used respirators for respiratory protection. It is also undisputed CFI management was aware of the contents of its purported respiratory protection program. Robert Vanover testified he trained employees using the program contained in Exhibit R-14 (Tr. 398). Addam Vanover testified employees receive annual refresher training on the program (Tr. 349).

CFI contends it reasonably relied on the consultant it hired to develop a respiratory protection program. Such reliance was not reasonable under the circumstances. The program provided by the consultant was nothing more than a PowerPoint presentation summarizing the contents of the standard itself. It contains the proviso referenced above indicating it was not a

[32] The Commission has recognized the language in the preamble is "the best and most authoritative statement of the Secretary's legislative intent." *American Sterilizer Co.,* 15 BNA OSHC 1476, 1478 (No. 86-1179, 1992); *Phelps Dodge Corp.*, 11 BAN OSHC 11441, 1444 (No. 80-3203, 1983).

substitute for compliance with the standard. Reasonable diligence requires an employer, at a minimum, read its safety programs before implementing them. Even a cursory review of the PowerPoint presentation would have lead to the conclusion it was not a substitute for the written program required under 29 C.F.R. § 1910.134(c)(1).[33] The Secretary has established CFI's knowledge of the violation.

Item 2b: Alleged Violation of 29 C.F.R. §1910.134(d)(1)(i)

Item 2b alleges:

> On or about December 29, 2014, the employer had not determined all respiratory hazards that would affect the selection, performance, and reliability of respirators worn by employees who were exposed to gasoline vapors and diesel exhaust gases while filtering fuel tanks.

The standard at 29 C.F.R. §1910.134(d)(1)(i) reads:

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

Applicability of the Standard

Like the requirements of 29 C.F.R. § 1910.134(c), the requirements of § 1910.134(d)(1) apply whenever an employer provides respirators to employees and requires their use. 63 Fed. Reg. 1152-01, 1196-97. CFI provided its employees with respirators and mandated use under certain conditions. The standard applies.

Failure to Comply with the Terms of the Standard

The Secretary contends CFI failed to make an adequate assessment of the chemicals to which its employees were exposed before selecting the respirator for its employees to use (Tr. 159). CFI provided employees with half-face tight fitting respirators for use at the worksite (Tr. 138). According to Robert Vanover, he selected the 3M 6003 cartridge filter for use with the respirator based on the manufacturer's representation that the cartridge was suitable for use in

[33] Addam Vanover, who currently performs the job of auditor, inspecting CFI worksites for compliance with the respiratory protection program, testified employees are to use respirators when "performing any of the listed tasks." (Tr. 349). He also testified the rule requiring the use of respirators when the employee smells gas is "in our training manual." (Tr. 378). This suggests Addam Vanover had not read the program, as it contains neither the rule regarding use of respirators when an employee smells gas nor a list of tasks requiring respirator use.

"environments where petrochemicals would be present." (Tr. 411-12). He testified he consulted several manufacturer's documents found at Exhibits R-4; R-5; R-6; R-7; R-8; and R-9 (Tr. 412-14). Robert Vanover had also performed atmospheric testing in the winter of 2013 at a worksite in Ohio (Tr. 408). On that occasion, he tested only for hexane (Tr. 408; Exh. C-15). He testified he could not recall specifically why he only tested for hexane, but believed it was because his review of the MSDS for gasoline lead him to conclude hexane was "more prevalent and presented more of a hazard." (Tr. 409-10). The Secretary contends this evaluation was inadequate because it did not take into account all of the components of gasoline or the different concentration levels that might be found at different worksites at different times. I agree with the Secretary that CFI did not comply with the requirements of the standard.

As noted in the preamble to § 1910.134(d)(1), the standard is intended to ensure that employers take into consideration "the context of the workplace and worker conditions that may reduce or impair the effectiveness of a respirator otherwise appropriate for the hazard" when selecting a respirator. 63 Fed. Reg. 1152-01, 1196. The preamble goes on:

> There is general agreement that taking working conditions into account is crucial to proper respirator selection: a respirator that is protective under some conditions of wear will fail under others, while a respirator that is appropriate for a given hazard may not be workable in a particular workplace…

Id. Workplace factors such temperature and humidity may also affect the physiological stress on the wearer as well as the effectiveness of the filters and cartridges. *Id*. CFI failure to take into account the difference in workplace conditions between the tested workplace (a location in Ohio in the winter) and other workplaces (many of which are in southern states) violated the mandates of the standard. CFI's contention that providing respiratory protection that may be used for exposure to petrochemicals is sufficient simply ignores the provisions of the standard requiring the employer take into consideration "workplace and user factors that affect respirator performance and reliability." The Secretary has established CFI failed to comply with the cited standard.

Nor could CFI have reasonably relied on the information it points to from the cartridge manufacturer to make its respirator selection. Robert Vanover did not explain how he used the documents referenced, he simply testified that he did. Upon careful review of these documents, I am unable to find a basis for Robert Vanover's reliance on these documents. The manufacturer's overview of the cartridge from its product catalog provides only a general description of the

types of respiratory irritants from which it may provide protection (Exh. R-4). The User Instructions provide even less information and prohibit use where concentrations of contaminants are unknown (Exh. R-5 at p. 3). Exhibit R-6 is an "Article Information Letter" that states "User is responsible for determining whether 3M product is fit for a particular purpose and suitable for user's method of use or application." The Selection Guide indicates the cartridge is approved for use to protect against "Certain Organic Vapors, Chlorine, Hydrogen Chloride, and Sulfur Dioxide or Hydrogen Sulfide or Hydrogen Fluoride and Particulates." (Exh. R-7). It does not specifically indicate approval for use with petrochemicals or all the chemical components of gasoline (*Compare* Exh. R-15 to R-7). The manufacturer's selection guide contained in Exhibit R-8 recommends air sampling and, if concentrations are unknown, it recommends air-supplied respirators be provided (Exh. R-8 at pp. 11, 13-14). It also recommends a full-face respirator for use with exposure to gasoline (Exh. R-8 at p. 57).[34] Exhibit R-9 summarizes the results of a study that gives no indication it is applicable to CFI's worksites or work activities. CFI's reliance on these documents to select respirators for use at its worksites does not meet the requirements of the standard.

Employee Exposure to a Hazard

The proper selection of respirators ensures employees are protected from those hazards to which they may be exposed. Failing to take into consideration both the conditions of the worksite and the respiratory irritants to which employees may be exposed resulted in CFI employees being exposed to the hazards associated with inhalation of gasoline vapors previously discussed. In addition, respirators that are not appropriate to the environment can increase the stress level on employees wearing those respirators. 63 Fed. Reg. 1152-01, 1196. CFI required its employees to wear respirators despite having failed to ensure those respirators were appropriate for the worksite conditions. The Secretary has established employee exposure.

Employer Knowledge of the Violation

Robert Vanover made the selection of respirator for use by CFI employees. He did so without knowledge of exposure levels for all components of gasoline or all worksite conditions

[34] CFI points out the document contains a recommendation for the use of organic vapor cartridges which the company provided. While correct, this ignores that the document also contains a recommendation these be used with full-face respirators, which it did not provide.

that affect exposure to respiratory hazards. He also made the determination based on documentation that did not contain sufficient information. CFI had knowledge of the inadequacy of its respirator selection process.

Item 2c: Alleged Violation of 29 C.F.R. § 1910.134(d)(3)(iii)(B)(2)

Item 2c alleges:

> On or about December 29, 2104, employees wearing tight-fitting respirators with 3M 6003 organic vapor cartridges while exposed to gasoline vapors were not provided a change schedule by the employer for replacement of the cartridges.

The Standard at 29 C.F.R. § 1910.134(d)(3)(iii)(B)(2) reads:

> If there is no ESLI appropriate for conditions in the employer's workplace, the employer implements a change schedule for canisters and cartridges that is based on objective information or data that will ensure that canisters and cartridges are changed before the end of their service life. The employer shall describe in the respirator program the information and data relied upon and the basis for the canister and cartridge change schedule and the basis for reliance on the data.

Applicability of the Standard

The standard applies where air purifying respirators that do not contain ESLI (end of service life indicator) are used by employees. CFI provided its employees with respirators and mandated their use. The respirators used by CFI employees were air purifying respirators and did not have an ESLI (Tr. 375). The standard applies and CFI was required to implement a change schedule for its respirator cartridges, and to include the basis for that change schedule in its written respirator program.

Failure to Comply with the Terms of the Standard

The standard at § 1910.134(d)(3)(iii)(B) specifies the conditions under which air-purifying respirators may be used. Among those conditions is the requirement the employer implement a change schedule and document the basis for that schedule in its written respiratory protection program. 63 Fed. Reg. 1152-01, 1206-07. As explained in the preamble:

> Developing a filter change schedule involves a number of decisions. The employer must evaluate the hazardous exposure level, performance capacity of the filters being used, and the duration of employee use of the respirator, which impact on the service life calculations. *Id*.

CFI's change schedule consisted of an unwritten rule. According to Addam and Robert Vanover, employees were instructed to change the cartridges a minimum of three months "or if it

quits working." (Tr. 353; 375; 420). Employees know the cartridge has quit working if he or she can "smell gas when you put it on." (Tr. 354; 420). Robert Vanover could not recall the "exact" calculation that went into the company's three month rule (Tr. 421). He testified it was based on the time it took to perform those jobs for which the company anticipated employees would be exposed to gasoline vapors (Tr. 421-22). The Secretary contends CFI policy is inadequate because it did not include an evaluation of the exposure time or concentration (Tr. 164). As a result, CFI would not know the rate at which the cartridges are absorbing the air contaminants to which its employees may be exposed. I agree with the Secretary, CFI did not comply with the standard's requirements.

CFI's respiratory protection program contains no instruction on its cartridge change schedule. Nor does it contain any information regarding the objective basis for development of its unwritten schedule. The record is devoid of such evidence. CFI conducted no testing of the components of gasoline vapors to which its employees were exposed and therefore, could not have known whether its rule was adequate to ensure continued protection. Addam Vanover testified to significant variance from job to job in the amount of time respirators would be worn (Tr. 347). There was no credible evidence regarding how employees were to track the three month schedule.[35]

The only instruction contained in the documents upon which Robert Vanover testified he relied indicate 3M P-series particulate filters should be disposed of when damaged, soiled, or if breathing becomes difficult or, when used in environments containing only oil aerosols, after 40 hours of use or 30 days, whichever is first (Exh. R-9). To the extent Robert Vanover relied on this document, it does not support his conclusion that a filter change every three months was appropriate.

[35] The Lead Fuel Technician testified he goes by the date on the bag (Tr. 495). He explained the bag containing the cartridge is dated "when they're sent to you, it's dated before they get sent." (Tr. 495). It is not apparent from looking at the photograph of the bag whether it is dated (Exh. C-11 p. 6). The Lead Fuel Technician's testimony is not consistent with other testimony regarding how employees obtain the cartridges. Robert Vanover testified employees access cartridges from a storage unit and that they are encouraged to keep two or three spare on their trucks (Tr. 424). Addam Vanover also testified when he audits a worksite, he checks the employees' safety bag to ensure "that they have extra cartridges on them." (Tr. 350). Reliance on the date of the packaging "when it is sent" under such circumstances would not provide a reliable method to track the three month change schedule.

Based upon the totality of the evidence, I find CFI's policy to change respirator cartridges every three months was arbitrarily adopted. CFI has not developed a respirator change schedule in accordance with the requirements of 29 C.F.R. § 1910.134(d)(3)(iii)(B)(2).

Employee Exposure to a Hazard

A respirator change schedule ensures respirators are not used beyond their effective life. Failing to ensure respirators were not used after they had become ineffective resulted in CFI employees being potentially exposed to the hazards associated with inhalation of gasoline vapors previously discussed. CFI required its employees to wear respirators despite having failed to ensure those respirators were appropriate for the worksite conditions. The Secretary has established employee exposure.

Employer Knowledge of the Violation

Robert Vanover was aware of the contents of CFI respiratory protection program. He should have been aware it did not contain documentation of a respirator change schedule or the objective basis for that schedule. He could neither recall the calculations upon which the schedule was purportedly developed, nor did the documentation on which he relied comport with CFI's unwritten schedule. CFI had knowledge of the inadequacy of its respirator change schedule.

Item 2d: Alleged Violation of 29 C.F.R. § 1910.134(e)(1)

Item 2d alleges: "On or before December 29, 2014, the employer had not provided medical evaluations to employees required to wear tight fitting respirators while exposed to gasoline vapors."

The standard at 29 C.F.R. § 1910.134(e)(1) requires the employer to "provide a medical evaluation to determine the employee's ability to use a respirator, before the employee is fit tested or required to use the respirator in the workplace."

Applicability of the Standard

The standard at § 1910.134(e)(1) requires a medical evaluation prior to fit testing or respirator use. The standard applies regardless of duration of use. 63 Fed. Reg. 1152-01, 1209. CFI provided employees with respirators, fit tested those employees for their respirators, and

mandated their use. The standard applies and CFI was required to provide its employees with medical evaluations.

Failure to Comply with the Terms of the Standard

CFI does not dispute it did not provide employees with medical screenings before providing them with respirators and requiring their use (Tr. 435). When interviewed by CSHO Lincoln, employees could not recall having had such evaluations before using company supplied respirators (Tr. 165). CFI violated the cited standard.

Employee Exposure to a Hazard

The Lead Fuel Technician testified he used his respirator on December 29th, prior to the accident, when changing a filter on the filtration system (Tr. 479). He had not undergone a medical evaluation to determine whether he was able to wear a respirator prior to that date. The purpose of the medical evaluation is to ensure employees do not have a medical condition that could compromise his ability to tolerate the physiological burden imposed by respirator use (Tr. 165). 63 Fed. Reg. 1152-01, 1208. The record establishes employees were exposed to hazards associated with this physiological burden.

Employer Knowledge of the Violation

It is undisputed CFI was aware it had not provided its employees with medical evaluations. CFI was aware its employees had been fit tested, were provided with respirators, and expected employees to use them. CFI had knowledge of the violation.

Item 2e: Alleged Violation of 29 C.F.R. § 1910.134(h)(1)

Item 2e alleges:

> On or about December 29, 2014, employees performing fuel tank filtration wore respirators that had not been properly cleaned following use with gasoline vapors, allowing migration of contaminants throughout the respirators.

The standard at 29 C.F.R. § 1910.134(h)(1) states:

> The employer shall provide each respirator user with a respirator that is clean, sanitary, and in good working order. The employer shall ensure that respirators are cleaned and disinfected using the procedures in Appendix B-2 of this section, or procedures recommended by the respirator manufacturer, provided that such procedures are of equivalent effectiveness.

Applicability of the Standard

The standard requires where employees use respirators, the employer is required to provide them in a clean, sanitary and working condition. The standard applies whenever respirators are provided or used. CFI provided employees with respirators and mandated their use. The standard applies.

Failure to Comply with the Terms of the Standard

The Secretary contends CFI did not comply with the terms of the standard because the company did not have written procedures for cleaning respirators, did not store the respirators in a manner that ensured no cross contamination, and used only wipes to clean out respirators (Tr. 166-68). During the inspection, CFI did not provide CSHO Lincoln with any written procedures for cleaning respirators. The Lead Fuel Technician told CSHO Lincoln he was storing his respirator in a bag on the side of his truck (Tr. 167). CSHO Lincoln found this inadequate because the company had not instituted any procedures to ensure the respirator was not subject to contamination during storage (Tr. 167). The Lead Fuel Technician told CSHO Lincoln he was provided wipes to use for cleaning the respirator (Tr. 168). The procedures CFI had in place for cleaning of respirators did not comply with the requirements of the cited standard.

Robert Vanover testified CFI respirator cleaning procedures were contained in the company's respiratory protection program or Exhibit R-14 (Tr. 416-19). According to Robert Vanover, in addition to the procedures contained on page 60 of the Exhibit R-14, employees were verbally "encouraged to clean [their respirator] as often as they feel comfortable doing so" or at a minimum every time it is used and before putting in storage (Tr. 420). The Lead Fuel Technician testified it was "drilled into" him that he was to clean his respirator every two or three times it was used or if it was visually dirty (Tr. 476).

The procedures described in Appendix B-2 include washing the respirator with warm water and a mild cleanser after disassembling it. The section of Exhibit R-14 to which CFI points contains no specific instructions. It simply reads: "Use procedures in Appendix B-2 or the equivalent manufacturer's instructions." (Exh. R-14 at p. 60). It does not specify the frequency with which respirators are to be cleaned. Rather, it reads: "as often as necessary when issued for exclusive use." *Id*. There was no showing that the use of wipes is the equivalent of the procedures contained in Appendix B-2 or recommended by the manufacturer. The inconsistencies in the testimony of Robert Vanover and the Lead Fuel Technician belie

CFI's contention it verbally instructed its employee to clean their respirators consistent with Appendix B-2, the manufacturer's instructions, or any other procedure. That is provided employees with only wipes to clean the respirators establishes CFI's procedures were inadequate. I find the preponderance of the evidence establishes CFI did not have procedures to ensure respirators were maintained in a clean condition consistent with the requirements of 29 C.F.R. § 1910.134(h)(1).[36]

Employee Exposure to a Hazard

Procedures for proper cleaning and storage of respirators ensures respirators remain effective for employee protection. Allowing the use of respirators that have not been properly cleaned resulted in CFI's employees being exposed to the hazards associated with inhalation of gasoline vapors previously discussed. CFI required its employees to wear respirators despite having failed to ensure those respirators were appropriately maintained. The Secretary has established employee exposure.

Employer Knowledge of the Violation

Robert Vanover was aware of the contents of CFI respiratory protection program. He should have been aware it did not contain documentation of respirator cleaning procedures. I find CFI's contention employees were verbally instructed on proper cleaning procedures not credible. CFI had knowledge of the inadequacy of its respirator cleaning procedures.

Item 2f: Alleged Violation of 29 C.F.R. § 1910.134(k)(1)

Item 2f alleges:

> On or about December 29, 2014, employees required to wear respirators when exposed to gasoline vapors while performing fuel tank filtration had not been trained on proper respirator cleaning, storage, filter replacement, and all chemical inhalation exposure hazards.

The standard at 29 C.F.R. § 1910.134(k) requires an employer to provide training to employees required to wear respirators on, among other things, the capabilities, proper fit, and

[36] I do not agree with CFI's contention the Secretary was required to establish employees used an unclean respirator to show non-compliance with the standard. The preponderance of the evidence establishes CFI did not have procedures that complied with, or were the equivalent of, Appendix B-2 of the standard. Failure to follow those procedures is sufficient to establish improper cleaning of respirators as referenced in the violation description.

maintenance of respirators. The standard at 29 C.F.R. 1910.134(k)(1) specifically requires the employee be able to demonstrate knowledge of the information required to be covered in the training.

Applicability of the Standard

The training requirements of 29 C.F.R. § 1910.134(k) apply whenever employees are required to wear respirators. It is undisputed CFI required its employees to use respirators. The standard applies.

Failure to Comply with the Terms of the Standard

The Secretary contends CFI violated the standard based on statements made by Addam Vanover, the Lead Fuel Technician, and the documentation provided during the inspection. CSHO Lincoln testified at the time of the inspection, Addam Vanover had a growth of facial hair (Tr. 140). When asked, Addam Vanover told CSHO Lincoln he believed he could use a respirator with facial hair as long as he could obtain an adequate seal (Tr. 140-41; 355-56). CSHO Lincoln testified when asked, Addam Vanover did not appear to understand what a medical screening was (Tr. 141-42). CSHO Lincoln testified the answers given by the Lead Fuel Technician regarding the cartridge change schedule led him to conclude he had not been properly instructed on that component of a respiratory protection program (Tr. 169). Because the company had not done air sampling for all the components of gasoline, CSHO Lincoln concluded it could not have provided training to employees on their potential exposure (Tr. 169).

I find the evidence establishes CFI did not train its employees consistent with the requirements of the standard. The cited standard requires not only that an employer provide training, but that it ensure that the employees to whom the training is provided can demonstrate knowledge of the components of that training. The Lead Fuel Technician could not provide a definitive answer as to when the company required respirators be used. In response to the question "How do you know when you need to use a respirator?" he responded, "Common sense mostly." (Tr. 478-79). He provided incorrect information regarding the requirements for cleaning his respirator. Addam Vanover's testimony regarding the use of respirators with facial hair directly contradicted CFI's program which reads: "Respirators with tight-fitting facepieces must not be worn by employees who have facial hair." (Exh. R-14 at p. 54; see also Exh. R-8 at

p. 4).[37] Neither employee had the demonstrated understanding of the components of CFI's respiratory protection program mandated by the standard. I find it particularly telling Addam Vanover, who is responsible for auditing worksites for proper respirator use (Tr. 349), was unable to state definitively whether company rules regarding respirator use were in the written program or only verbally explained to employees:

> Q: And is that –is that a rule that is communicated verbally to Clean Fuels' technicians?
> A: It is both verbally –and I believe it's in our –it's in our training manual.
> Q: Okay. And when you say, "it's in our training," would that be in Exhibit R-14?
> A: It might be. Or it might just have been something we covered verbally. I'm not an expert on the safety program.

(Tr. 378).

Robert Vanover testified he provided training to CFI employees on the contents of the company's respiratory protection program. He testified he goes through the contents of Exhibit R-14 with the employees and allows them to ask questions (Tr. 418). He initially testified he goes through "several PowerPoints" at the time individuals are hired (Tr. 394). He did not testify he covers the respiratory protection program during this initial training. CFI training records indicate the Lead Fuel Technician and Side Technician were not trained on the contents of the respiratory protection program until November 14, 2014 – several months after being hired (Exh. R-17 p. 6). The Lead Fuel Technician was unable to recall whether there was a written respiratory protection program at the worksite (Tr. 487). When pressed, he admitted he did not know what a written respiratory protection program was and that he had only received onsite training on respirator use (Tr. 487-88). The Lead Fuel Technician's testimony contradicts Robert Vanover's testimony about training of employees on the respiratory protection program.

CFI admits it did not train employees on its respiratory protection program upon hire and prior to starting work. In an attempt to explain away this shortcoming, Robert Vanover testified neither the Lead Fuel Technician nor the Side Technician would have used a respirator prior to the November 2014 training and fit testing (Tr. 406). This statement is so implausible as to lack

[37] CFI notes the standard at 29 C.F.R. § 1910.134(g)(1)(i)(A) allows an employee using a respirator to have facial hair as long as the facial hair does not "come[] between the sealing surface of the facepiece and the face.." Although Addam Vanover's testimony is a correct recitation of the standard, it is not a correct recitation of either the company's program or manufacturer's information.

credibility. The Lead Fuel Technician testified he had been hired in June of 2014 (Tr. 445). He testified he worked with Addam Vanover as a side technician before being promoted to a lead fuel technician sometime in August or September of 2014 (Tr. 446). During that period of time, he testified he did "everything" including changing filters – a task for which employees were required to wear respirators (Tr. 444). Addam Vanover testified the Lead Fuel Technician would have undergone extensive training in Indiana before being promoted (Tr. 373). To suggest the Lead Fuel Technician would not have worn a respirator during this period is disingenuous. His willingness to tell such an obvious falsehood draws into question all of Robert Vanover's testimony regarding the training he purportedly provided.

The preponderance of the credible evidence establishes CFI did not adequately train its employees in respirator fit and maintenance. CFI was in violation of the standard.

Employee Exposure to a Hazard

Effective training is necessary to ensure employees use respirators properly and the respirators are providing protection. The Lead Fuel Technician testified he used a respirator on the day of the accident. His testimony indicated he did so without the sufficient understanding of its proper use. The evidence establishes employees at the worksite were exposed to hazardous levels of gasoline vapors. The Secretary has established employee exposure.

Employer Knowledge of the Violation

Robert Vanover was responsible for training employees on the company's respiratory protection program. He would have been aware whether the training was provided and of the contents of that training. As previously discussed, I find incredible his claim he was unaware the Lead Fuel Technician would have worn a respirator prior to being trained. Given the nature of the work and the company's policy regarding when respirators are to be worn, Robert Vanover should have been aware employees would be using respirators. The Secretary has established employer knowledge of the violation.

Item 2g: Alleged Violation of 29 C.F.R. § 1910.134(l)(1)

Item 2g alleges:

> On or about December 29, 2014, the employer had not performed an evaluation to determine the effectiveness of the 3M 6200 half-face respirators with organic cartridge filters that employees were required to wear when exposed to gasoline vapors while performing fuel tank filtration at RaceTrac store number 2367.

The standard at 29 C.F.R. § 1910.134(l)(1) requires the employer to "conduct evaluations of the workplace as necessary to ensure that the provisions of the current written program are being effectively implemented and that it continues to be effective."

Applicability of the Standard

CFI provided respirators to its fuel technicians and required their use whenever an employee was performing "a task that could generate vapors," such as changing filters on the equipment in the truck, or any time an employee smelled gasoline vapors (Tr. 346, 349, 378, 385, 410, 421, 478-79). CFI was required to establish and implement a written respiratory protection program. The standard applies and CFI was required to perform an evaluation of that program.

Failure to Comply with the Terms of the Standard

The Secretary contends CFI did not comply with the terms of the standard because the company's program did not contain procedures for reviewing the effectiveness of its respirator selection or training (Tr. 170). CSHO Lincoln testified to comply with the standard the company could have conducted sampling or used a questionnaire (Tr. 170). As previously noted, CFI's respiratory protection program does not contain such procedures and there is no evidence such procedures were undertaken by the company. Robert Vanover admitted the company had done no job hazard analysis at the sited worksite (Tr. 433). He testified the company would become aware of overexposure of its employees through employee "feedback." (Tr. 438). Addam Vanover testified he does audits of worksites in his new position to ensure compliance.

Section 1910.134(l) requires the evaluation contain two components – an evaluation of the worksite and consultation with employees – both with the purpose of ensuring the respiratory protection program is being effectively implemented. The cited standard at § 1910.134(l)(1) addresses the worksite evaluation. It does not prescribe the manner in which such evaluations

are to be conducted and does not require air sampling. In adopting the final rule, the Secretary determined a more "performance-oriented" standard was appropriate and eliminated from the proposed rule specific references to annual evaluations and random worksite audits. 63 Fed. Reg. 1152-01, 1263. Under the final rule, such evaluations must be conducted "as necessary." The standard does not define "as necessary." The preamble indicates factors to consider include,

> …the nature and extent of workplace hazards, types of respirators in use, variability of workplace processes and operations, number of respirator users, and worker experience in the use of respirators.

63 Fed. Reg. 1152-01, 1263. The Secretary appears to argue because CFI did not perform a jobsite hazard analysis specific to each worksite, it failed to comply with the terms of the standard. The Secretary did not explain how the factors discussed in the preamble necessitate an evaluation of every worksite to which CFI crews may be dispatched. Because the cited standard is a performance standard, the Secretary has the burden to prove not only what a reasonable evaluation of a respiratory protection program would include, but also when one is necessary under the particular circumstances of the worksite and work activities. The Secretary did not present such evidence. For that reason, I find the Secretary has not met his burden to establish CFI violated the standard.[38] Item 2g of Citation 1 is vacated.

Classification of Items 2a – 2f

The Secretary contends the violations alleged in Items 2a through 2f are serious. As previously noted, the MSDS for gasoline indicates exposure from inhalation can result in irritation to the respiratory and central nervous system. Effects to the central nervous system "may include headache, dizziness, loss of balance and coordination, unconsciousness, coma, respiratory failure, and death." (Exh. R-15 p. 2). Based on the evidence discussed herein, I find the Secretary has established a serious injury could result from failure to use, or improper use of, respiratory protection. The inadequacies in CFI's respiratory protection program discussed herein exposed its employees to a serious hazard. In addition, failure to ensure employees are physically capable of using a respirator can pose a serious hazard to employees due to the

[38] In so holding, I note that the lack of procedures for such evaluations in CFI's written respiratory protection program was addressed in Item 2a.

increased physiological load associated with respirator use. The Secretary has met his burden to establish Items 2a through 2f are serious violations.

Item 3a: Alleged Violation of 29 C.F.R. § 1910.146(c)(1)

Item 3a alleges:

> On or about December 29, 2014, at RaceTrac Store 2367, the employer did not evaluate the job site to determine that the Submersible Turbo Pump wells were permit-required confined spaces, exposing employees to a toxic atmosphere.

The standard at 29 C.F.R. § 1910.146(c)(1) requires: "The employer shall evaluate the workplace to determine if any spaces are permit-required confined spaces."

Applicability of the Standard

In order for the standard to apply, the employer's workplace must first contain confined spaces that have the potential to be permit-required. Section 1910.146(b) defines a "confined space" as one that

> **(1) Is large enough and so configured that an employee can bodily enter and perform assigned work; and**
> **(2) Has limited or restricted means for entry or exit (for example, tanks, vessels, silos, storage bins, hoppers, vaults, and pits are spaces that may have limited means of entry): and**
> **(3) Is not designed for continuous employee occupancy.**

All three listed conditions must be met for a space to qualify as a confined space. CSHO Lincoln testified the STP well met the criteria for a confined space because an employee could enter the well, access in and out of the well was limited, and employees did not normally work in the well (Tr. 172). There is little dispute the STP well was a confined space. Employees could enter the well through the manhole, and, as previously discussed, the well would be entered by contractors in the event CFI's tools were inadequate to remove the STP. Entry into and out of the well could only be made via the manhole which measured 26 inches at its inner opening. Although some work might be performed in the well, it was intended to house the STP and not designed for continuous occupancy by employees. The standard applies and CFI was required to conduct an evaluation to determine whether the STP well was a permit-required confined space.

Failure to Comply with the Terms of the Standard

The Secretary contends CFI violated the standard because the Lead Fuel Technician failed to evaluate the cited worksite to determine whether the STP well was a permit-required confined space. CFI contends it complied with the terms of the standard because it evaluated the STP well, determined it was over 4 feet deep and, as a permit-required confined space, was not to be entered by employees (Tr. 424-26). The Lead Fuel Technician measured the STP well before commencing work and determined it was greater than 4 feet (Tr. 382-83; 448-49). The Lead Fuel Technician testified in doing so, he determined the company policy to not enter the well applied (Tr. 449). The Secretary contends because CFI does not specifically train its employees that doing so is determining whether the space meets the definition of a permit-required confined space, it has not complied with the terms of the standard. I disagree.

The citation specifically addresses only CFI's failure to evaluate the cited worksite to determine whether the STP well was a permit-required confined space. CSHO Lincoln was told during the inspection about CFI's policy prohibiting entry into the STP well if it was over 4 feet deep (Tr. 217-18). That policy is documented in a memorandum to employees dated April 4, 2013 (Exh. R-13). The Lead Fuel Technician measured the STP well to determine whether entry was prohibited. In the preamble to the confined space standard, the Secretary clarified § 1910.146(c)(1) "requires only the identification of permit spaces. The detailed evaluation and classification of hazards found within the space is addressed by paragraph (d)(2)." 58 Fed. Reg. R 4462, 4481 (January 14, 1993). There is no requirement the evaluation be reduced to writing. Given the minimal requirements of the standard, the Lead Fuel Technician's measuring of the STP well to determine whether it was more than 4 feet deep was sufficient to comply with CFI's obligation to evaluate the worksite.[39] The Secretary has failed to meet his burden to establish CFI violated the cited standard and Item 3a is vacated.

[39] In so holding, I make no finding with regard to the validity of CFI's determination only those STP wells in excess of 4 feet deep are permit-required confined spaces or that shallower STP wells are not permit-required. The record contains no evidence regarding how CFI reached that conclusion. The citation only alleges CFI failed to evaluate the worksite at which the accident occurred and, specifically, the STP well. I am constrained by the specific allegations in the citation. The Lead Fuel Technician did make an evaluation of the worksite and the STP well. *See Drexel Chemical Co*., 17 BAN OSHC 1908 (No. 94-1460, 1997)(holding failure to identify all permit-required confined spaces in a worksite does not necessarily establish failure to conduct an evaluation in violation of 29 C.F.R. § 1910.146(c)(1).)

Item 3b: Alleged Violation of 29 C.F.R. § 1910.146(c)(2)

Item 3b alleges:

> On or about December 29, 2014, at RaceTrac store 2367, the employer did not post danger signs or provide other effective means of alerting employees to the danger posed by toxic atmosphere in the Submersible Turbine Pump wells, exposing employees to a toxic atmosphere.

The standard at 29 C.F.R. § 1910.146(c)(2) reads:

> If the workplace contains permit spaces, the employer shall inform exposed employees, by posting danger signs or by any other equally effective means, of the existence and location of and the danger posed by the permit spaces.
>
> NOTE: A sign reading DANGER -- PERMIT-REQUIRED CONFINED SPACE, DO NOT ENTER or using other similar language would satisfy the requirement for a sign.

Applicability of the Standard

The cited standard applies where a worksite contains a permit-required confined space. As previously discussed, the STP well meets the regulatory definition of a confined space. For that well to be a "permit space" it must also meet the regulatory definition of permit-required confined space. The regulation defines a permit-required confined space as one that has one or more of the following characteristics:

> **(1) Contains or has a potential to contain a hazardous atmosphere;**
> **(2) Contains a material that has the potential for engulfing an entrant;**
> **(3) Has an internal configuration such that an entrant could be trapped or asphyxiated by inwardly converging walls or by a floor which slopes downward and tapers to a smaller cross-section; or**
> **(4) Contains any other recognized serious safety or health hazard.**

29 C.F.R. § 1910.146(b). A hazardous atmosphere is defined as one "that may expose employees to the risk of death, incapacitation, impairment of ability to self-rescue (that is, escape unaided from a permit space), injury, or acute illness from" among other causes, "atmospheric oxygen concentration below 19.5 percent or above 23.5 percent." 29 C.F.R. § 1910.146(b). Testing performed by the Daytona Beach Fire Department showed the STP well to contain an atmosphere containing an oxygen concentration below 19.5 percent (Tr. 96-97; 112). The Secretary has established the STP well was a permit space and the standard applies.

Failure to Comply with the Terms of the Standard

There is no dispute CFI did not post signs warning employees of the hazards of the STP wells (Tr. 178; Exh. C-1). CFI contends it complied with the standard because it informed employees not to enter any well in excess of 4 feet deep.[40] In consideration of commentators' objections to the proposed standard, the Secretary wrote in the preamble to the standard:

> OSHA believes that this language will require employers to protect their employees but will also allow them to use the most cost-effective method available. For example, employers who are already providing sufficient training to protect their employees effectively need not purchase and maintain unnecessary signs. On the other hand, employers can choose to post danger signs to protect employees if they desire. Whatever method is used, the standard requires it to inform employees exposed to the hazards posed by permit-required confined spaces of the existence, location, and danger of those spaces. Additionally, the provision in the final rule makes it clear that the sign is to indicate the danger involved in permit space entry, not to list all the specific hazards that might be encountered…
>
> In enforcing this provision, OSHA will check to ensure that methods other than warning signs are truly effective in imparting the required information to employees. General training in the OSHA standard, for example, cannot be expected to adequately inform employees of the location of permit spaces in the workplace. The final rule places the burdens of identifying the spaces and of controlling the resultant hazards on the employer not on the employee.

58 Fed. Reg. 4462, 4483. The alternative to posting of signs contained in the standard is not met by merely telling employees not to enter permit spaces. Addam Vanover admitted CFI's training did not include training on the definition or hazards of a permit required confined space (Tr. 381-83). CFI violated the requirements of 29 C.F.R. § 1910.146(c)(2).

Employee Exposure to a Hazard

Failure to place employees on notice of the hazards of permit-required confined spaces exposes them to the hazards associated with entry. As previously noted, entry into the STP well exposed CFI employees to an oxygen deficient atmosphere. Employees had not been trained on those hazards, only that they were not to enter the STP well if it was deeper than 4 feet. As previously discussed, that notice was insufficient. Based on Addam Vanover's testimony, the

[40] CFI also argues no signs were required because tools were needed to remove the STP well covers. In so arguing, CFI relies on an OSHA Directive and Interpretative Letter, neither of which are in the record. CFI's argument is unavailing because the STP well cover was off. It is axiomatic a secure cover prevents entry only when it is on.

Side Technician would not have been trained on the hazards of permit-required confined spaces. There is no evidence he was warned about the hazards he might encounter if he entered the STP well. The record contains no evidence the Lead Fuel Technician told the Side Technician the depth of the STP well or warned him not to enter it. The memorandum regarding CFI's policy on entry into wells deeper than 4 feet was issued in 2013, a year before the Side Technician began work for CFI and there is no evidence he was ever provided the memorandum. The Secretary has established the Side Technician was exposed to the hazard addressed in the cited standard.

Employer Knowledge of the Violation

There is no evidence indicating whether CFI provided signs to its employees to post at any worksite. The Lead Fuel Technician was aware no signs were posted. The Lead Fuel Technician's actual knowledge of the violation is imputed to CFI.

Contrary to Robert Vanover's testimony, Addam Vanover admitted employees were not trained in permit-required confined space entry. Both Robert and Addam Vanover were aware of the contents of employee training. CFI had knowledge signs were not posted at the STP wells and that employees had not been informed of the hazards of the STP wells by other effective means within the meaning of the standard.

Item 3(c): Alleged Violation of 29 C.F.R. § 1910.146(c)(3)

Item 3(c) alleges "On or about December 29, 2014, at RaceTrac store 2367, the employer had not prevented employees from entering the permit-required confined spaces of the Submersible Turbine Pump wells."

Section 1910.146(c)(3) requires:

> If the employer decides that its employees will not enter permit spaces, the employer shall take effective measures to prevent its employees from entering the permit spaces and shall comply with paragraphs (c)(1), (c)(2), (c)(6), and (c)(8) of this section.

Applicability of the Standard

As previously discussed, the STP well was a permit-required confined space. CFI does not dispute its policy was to prohibit employees from entry into the STP well. The standard applies and CFI was required to take effective measures to prevent employee entry into the STP well.

Failure to Comply with the Terms of the Standard

The purpose of the cited standard is to prevent accidental or inadvertent entry into permit-required confined spaces. In the preamble to the standard, the Secretary noted,

> OSHA also agrees with these comments. Paragraphs (c)(3) and (d)(1) require the employer to take steps to prevent unauthorized entry into permit-required confined spaces. These steps are intended to include measures, such as guarding and barricading, necessary to protect employees from accidentally entering a permit space. In order to ensure that employees are adequately protected against falling into or otherwise inadvertently entering a permit space, the Agency has revised the language in the proposed definition to include unintentional as well as intentional entry.

58 Fed. Reg. 4462, 4472. The Secretary went on to clarify that compliance

> could include permanently closing the space and barriers, supplemented by training employees and posting danger signs. In any event, the steps taken by the employer must be effective in preventing employee entry into permit spaces.

58 Fed. Reg. 4462, 4483.

While the Side Technician moved the hoses from one tank to the next and the Lead Fuel Technician completed his paperwork, the STP well cover remained off and the STP well remained unguarded. The Side Technician was found at the bottom of the open STP well. Although it will never be known why the Side Technician entered the STP well, whether his entry was intentional or accidental is not dispositive. The standard requires measures be taken to prevent both. Informing employees not to enter the STP well that is more than 4 feet deep does nothing to prevent accidental entry. To the extent CFI did anything, those measures were not effective under the standard.[41]

[41] As previously noted, the fact the STP well covers can be bolted down is irrelevant. At the time of the unauthorized entry, the well was open.

Employee Exposure to the Hazard

The Side Technician was exposed to the hazard posed by unauthorized entry into the STP well. The STP well contained an oxygen deficient atmosphere to which the Side Technician was exposed. The autopsy report also shows the Side Technician had been exposed to toxic levels of gasoline vapors (Exh. C-14). The Secretary has established employee exposure to the hazard.

Employer Knowledge

The Lead Fuel Technician was aware the STP well remained open while he and the Side Technician continued work at the site. The Lead Fuel Technician's knowledge of the worksite conditions is imputed to CFI. CFI has no rule requiring guarding or otherwise preventing unauthorized entry into the STP well. The Secretary has established CFI knew, or with the exercise of reasonable diligence should have known of the violation.

Classification of Items 3b and 3c

The Secretary alleges Items 3b and 3c are serious violations of the confined space standard. As discussed herein, accidental or inadvertent entry into the STP well exposed employees to the atmospheric hazards within it. An oxygen deficient atmosphere can result in an individual losing consciousness to death. As evidenced by the MSDS for gasoline, inhalation of gasoline vapors can result in serious respiratory irritation, central nervous system impairment, and ultimately, death. The Secretary has established the violations of 29 C.F.R. § 1910.146 were serious.

Penalty Determination

The Commission, in assessing an appropriate penalty, must give due consideration to the gravity of the violation and to the size, history and good faith of the employer. *See* § 17(j) of the Act. The Commission is the final arbiter of penalties. *Hern Iron Works, Inc.*, 16 BNA OSHC 1619, 1622, (No. 88-1962, 1994), *aff'd*, 937 F.2d 612 (9th Cir. 1991) (table); *see Valdak Corp.*, 17 BNA OSHC 1135, 1138 (No. 93-0239, 1995) ("The [OSH] Act places limits for penalty amounts but places no restrictions on the Commission's authority to raise or lower penalties within those limits."), *aff'd*, 73 F.3d 1466 (8th Cir. 1996). In assessing a penalty, the Commission gives due consideration to all of the statutory factors with the gravity of the violation being the most significant. OSH Act § 17(j), 29 U.S.C. § 666(j); *Capform Inc.*, 19

BNA OSHC 1374, 1378 (No. 99-0322, 2001), *aff'd*, 34 F. App'x 152 (5th Cir. 2002) (unpublished). "Gravity is a principal factor in a penalty determination and is based on the number of employees exposed, duration of exposure, likelihood of injury, and precautions taken against injury." *Siemens Energy and Automation, Inc.,* 20 BNA OSHC 2196, 2201 (No. 00-1052, 2005).

The Secretary proposed a penalty of $7,000.00 for Item 1. Both employees on the worksite were exposed to the hazard of falling into the unguarded STP wells. The well remains open for the duration of the tank cleaning process which was approximately 2 ½ hours. Two wells were open while the Side Technician moved the hoses and the Lead Fuel Technician was otherwise occupied (Exh. C-13). During this period, the Side Technician was particularly vulnerable to an accidental fall into one of the STP wells. A high gravity-based penalty is warranted. CFI is a small employer. The was no evidence the company has a significant history of OSHA violations or other accidents. CFI is entitled to a reduction in the gravity-based penalty. A penalty of $5,000.00 is assessed for Item 1.

The Secretary proposed a total grouped combined penalty of $5,000.00 for Items 2a – 2g. Item 2g was vacated. My penalty assessment takes into consideration only Items 2a – 2f. At various times throughout the workday, employees at CFI's worksite were exposed to the hazards associated with inhalation of gasoline vapors. CFI's poor implementation of its program and inadequate training made it more likely employees would either not use respirators when required or use them improperly. A high gravity-based penalty is warranted. For the reasons discussed previously, CFI is entitled to a reduction in the gravity-based penalty for its small size and lack of significant violation history. A penalty of $5,000.00 is assessed.

The Secretary proposed a total combined penalty of $1,600.00 for Items 3a – 3c. Item 3a was vacated. My penalty assessment takes into consideration only Items 3b and 3c. Both the Side Technician and Lead Fuel Technician were exposed throughout the workday to the open STP well. Although entry was not necessary to perform their work and the crew members were aware of the location of the open STP wells, an accidental fall by either crew member was possible. CFI's small size and lack of history merit a reduction in the gravity based penalty. A penalty of $1,600.00 is assessed.

I do not find CFI entitled to a reduction in any of the penalties for good faith. CFI had a written safety and health program (Exh. C-9), but had failed to implement many of its provisions

at its jobsites. Although Robert Vanover testified he provided training to employees on the program, the record makes clear this testimony was not credible. CFI's respiratory protection program is deficient for the reasons discussed herein. The Side Technician and Lead Fuel Technician were not provided with training on that program nor fit tested for their respirator until months after starting work and using respirators at jobsites. The Lead Fuel Technician felt he could ignore the requirement to use respirators when it was too time consuming to do so. Due to these deficiencies, CFI is not entitled to a reduction in the penalties for good faith.

Considering all of the statutory factors, it is determined that a penalty of $5,000.00 for Item 1, $5,000.00 for Items 2a – 2f, and $1,600.00 for Items 3b and 3c, for a total penalty of $11,600.00 is appropriate.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

ORDER

Based upon the foregoing decision, it is ORDERED that:

1. Item 1, Citation 1, alleging a violation of 29 CFR § 1910.23 (a)(6), is affirmed as a serious violation and a penalty of $5,000.00 is assessed;
2. Item 2a, Citation 1, alleging violation of 29 C.F.R. § 1910.134(c)(1), is affirmed as a serious violation;
3. Item 2b, Citation 1, alleging violation of 29 C.F.R. § 1910.134 (d)(1)(i), is affirmed as a serious violation;
4. Item 2c, Citation 1, alleging violation of 29 C.F.R. § 1910.134 (d)(3)(iii)(B)(2), is affirmed as a serious violation;
5. Item 2d, Citation 1, alleging violation of 29 C.F.R. § 1910.134 (e)(1), is affirmed as a serious violation;
6. Item 2e, Citation 1, alleging violation 29 C.F.R. § 1910.134 (h)(1), is affirmed as a serious violation;
7. Item 2f, Citation 1, alleging violation 29 C.F.R. § 1910.134 (k)(1), is affirmed as a serious violation;

8. Items 2a, 2b, 2c, 2d, 2e, and 2f, Citation 1, are assessed a total combined penalty of $5,000.00;
9. Item 2g, Citation 1, alleging a violation of 29 C.F.R. § 1910.134(1)(1), is vacated;
10. Item 3a, Citation 1, alleging a violation of 29 C.F.R. § 1910.146(c)(1), is vacated;
11. Item 3b, Citation 1, alleging a violation of 29 C.F.R. § 1910.146(c)(2), is affirmed as a serious violation;
12. Item 3c, Citation 1, alleging a violation of 29 C.F.R. § 1910.146(c)(3), is affirmed as a serious violation; and
13. Items 3b and 3c, Citation 1, are assessed a total combined penalty of $1,600.00.

SO ORDERED.

/s/

Dated: June 6, 2016

HEATHER A. JOYS
Administrative Law Judge
Atlanta, Georgia