OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR, Complainant, v. HURON REAL ESTATE ASSOCIATES, LLC. Respondent.	OSHRC Docket No. 07-0339

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BEFORE: G. Marvin Bober
Administrative Law Judge

DECISION AND ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT

This matter is before the Commission pursuant to a timely Notice of Contest filed by the employer pursuant to the Occupational Safety and Health Act of 1970; 29 U.S.C. §§651-678 ("the Act").

Following a fatal accident at the employer's facility in Endicott, N.Y. involving an explosion in the employer's power house, the Secretary issued one citation alleging several

serious violations of the Act. After the employer filed its Notice of Contest, the Secretary withdrew several items. Remaining before the Commission for disposition are two items. Item 1 alleges a violation of 29 CFR §1910.36(g)(1)[1] and carries a proposed penalty of $1750. Item 3(c) alleges a violation of 29 CFR §1910.147(e)(1)[2] The proposed penalty for this item is $3500.

With discovery completed, the parties have agreed that there are no factual matters in dispute. Accordingly, rather than proceed to an administrative trial, each party has filed a Motion for Summary Judgment. The purpose of a motion for summary judgment is to avoid the necessity of a trial when there is no dispute as to the facts. *Zweig v. Hearst Corp.*, 521 F.2d 1129, 1135-1136, (9th Cir. 1975), *cert. denied*, 96 S.Ct. 469 (1975). Under the Federal Rules of Civil Procedure (FRCP) 56(c), summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

Having reviewed all relevant pleadings, depositions, answers to interrogatories, admissions and affidavits, together with the memoranda of law filed by the parties in support of their motions, I conclude that there are no outstanding material issues of fact and that summary

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[1]The standard provides:

§1910.36 Design and construction requirements for exit routes.

* * *

(g) *An exit route must meet minimum height and width requirements.* (1) The ceiling of an exit route must be at least seven feet six inches (2.3 m) high. Any projection from the ceiling must not reach a point less than six feet eight inches (2.0 m) from the floor.

[2]The standard provides:

§1910.147 The control of hazardous energy (lockout/tagout).

* * *

(e) *Release from lockout or tagout.* Before lockout or tagout devices are removed and energy is restored to the machine or equipment, procedures shall be followed and actions taken by the authorized employee(s) to ensure the following:

(1) *The machine or equipment.* The work area shall be inspected to ensure that nonessential items have been removed and to ensure that machine or equipment components are operationally intact.

judgment is appropriate.

Lock-Out/Tag-Out Violation: 29 CFR §1910.147(e)(1)

A. Undisputed Facts

Huron Real Estate Associates ("Huron") owns and operates a multi-building facility in Endicott, N.Y. Most of the buildings receive heat and hot water through a high-pressure steam system fed from boilers located in the Power House (Building 39) to other buildings through pipes that run either above or below the ground. (Murphy Affidavit ¶5) Valves located throughout the system allow workers to deenergize buildings or portions of buildings when repair or maintenance work is done on equipment connected to the steam system. At full capacity, the high-pressure steam system operates at 400 degrees Fahr. and 250 pounds of pressure per square inch. (Brigg Affidavit ¶5).

In late July 2006, Huron needed to replace a malfunctioning pressure reducing valve[3] ("PRV") in the steam system in Building 14. On or about July 29, 2006, Huron's maintenance personnel locked and tagged out two valves on the high-pressure steam system leading to the PRV. The system was locked and tagged out at the gate valve in Building 14 and at the output valve in Building 39. (Briggs Affidavit ¶8, Everitt Affidavit ¶5). Huron employees verified that the PRV was isolated by determining that the pipe was cold and the pressure gauge was at zero.

The replacement of the PRV was performed on August 2, 2006 by an outside contractor, Evans Mechanical (Everitt Affidavit ¶ 6). The contractor placed his own locks and tags on the valve in Building 14 and in Building 39. (Everitt Affidavit ¶ 4-6) After completion of the work, the contractor removed his tools, equipment and the old PRV from the work area and removed his locks and tags. He then notified Huron that the work was done and that the steam could be restored to the system. (Everitt Affidavit ¶ 4-9).

Because the Huron maintenance personnel shift ended shortly after the contractor completed its work, Huron decided that the steam would be turned on the next day. On August 3,

[3]A PRV reduces the high-pressure steam from the boiler to lower pressure that can be used to produce heat and hot water in the building.

2006, Huron's Powerhouse Planner, John Briggs was directed to assist Ron Walter and Marion Korcipa in restarting the steam system. (Briggs Affidavit ¶ 9) Briggs removed his locks and tags from the gate valve in Building 39 and cracked open the valve. Walter and Korcipa were positioned a the gate valve in Building 14. (Briggs Affidavit ¶ 9). Communicating by radio, Walter told Briggs that the system was warming up "a little bit" and to "go ahead with more steam. (Briggs Affidavit ¶ 10). Briggs cracked the valve open some more.(Briggs Affidavit ¶ 10). Briggs heard steam rushing through the line. It did not sound right to him and he started to turn the valve back off. As he was doing so, Campbell called him on the radio and told him to make sure the steam was turned off. Briggs checked the valve to ensure it was closed and went to Building 14. (Briggs Affidavit ¶ 11-12) A short time later, the gate valve in Building 14 ruptured, killing Korcipa and seriously injuring Walter (Walter Affidavit ¶ 7).

Later that day, OSHA Compliance Officer David Heckman, along with several Huron officials, visited Building 14 (Heckman Affidavit ¶ 4-7). They located and tried to open a drain valve located in the steam pipe slightly upstream of the ruptured gate valve. *(*Heckman Affidavit ¶10) . The valve was clogged with rust and debris and at first would not open. After inserting a metal object into the valve, it opened and began to drain water. Approximately, 130 gallons of water were drained form the pipeline (Heckman Affidavit ¶ 10).

Ron Walters stated that, in his experience, drain valves were not used before reenergizing the steam line (Heckman Affidavit ¶ 12). Rather, the procedure was to crack open the valves gradually and allow the system to warm up slowly (Walter Affidavit ¶ 9).

Once pressurized, Huron used a system of traps in the steam line to remove condensate (Kirsner Affidavit ¶ 6).

The parties agree that the accident was caused by a leaking gate valve in Building 14 that could have been as small as 1/80th of a human hair. Apparently, although the gate valve was closed and locked out, it continued to leak steam that condensed into water. Over the course of the five days that the valves had been closed, water filled much of the pipe between the buildings. When the valve in Building 39 was opened, high pressure steam became trapped in the subcooled condensate. This generated an over-pressurization in the pipe which was transmitted to the valve

in Building 14 and caused the valve to rupture thereby releasing condensate and steam into the Utility Room. This phenomenon is referred to as "condensate-induced water hammer" (Kirsner Affidavit ¶ 6).

B. **Huron's Motion for Summary Judgment**

The heart of Huron's motion for summary judgment is that the explosion of the boiler was not the result of, and was improperly cited as a Lockout/Tagout (LOTO) violation. Huron sets forth several arguments in support of its proposition.

1. Application of the LOTO regulations are limited to situations where the energization or start-up is "unexpected." Here, there was no unexpected energization of the steam system. Rather, employees were intentionally and knowingly bringing the system back on line at the time of the accident and were actively attempting to drain condensate from the system through the use of traps. It is undisputed that the energization by Briggs and Walter was intentional and the affected employees were aware it was occurring. (Huron Memorandum of Law, pp. 6-12, Huron Reply Memorandum of Law at pp. 4-5)

2. The cited standard requires that workers clean-up after themselves and restore machines to their normal condition (such as replacing guards removed for maintenance during the LOTO). Here, however, the Secretary makes no allegation, and there is no evidence, that the area was not inspected or that employees failed to remove all non-essential items from the work area. Nor is their any evidence that the PRV valve was not operationally intact. Rather, the Secretary is twisting the regulation to require that workers inspect not only the work area, but the entire system (including underground pipes) prior to reenergizing the equipment. Indeed, the Secretary's new interpretation of the standard amounts to an unlawful application of strict liability, and assumes that where there was an accident, there must have been a violaton. (Huron Reply Memorandum of Law at 7-9)

3. Finally, Huron argues that summary judgment should be granted and the item vacated because the citation claimed that the violation occurred in Building 39, when the gate valve that ruptured, the condensate drain and the bypass valve were all located in Building 14. (Huron Memorandum of Law at p. 23)

C. **Secretary's Motion for Summary Judgment**

The Secretary contends that the requirements of the standard "are clear and unambiguous and not susceptible to different interpretations. (Secretary's Memorandum in Opposition p. 13) However, even if there is some ambiguity the Commission should give effect to the Secretary's interpretation so long as the interpretation sensibly conforms to the purpose and wording of the regulation. *Martin v. OSHRC (CF & I)*, 499 U.S. 144, 150-51 (1991).

The cited standard is performance-based and provides employers with flexibility to develop procedures to protect employees from exposure to hazardous energy in a wide-range of situations. The standard requires protection against hazardous energy during "the servicing and/or maintenance of equipment." The definition of "servicing and/or maintenance" specifically includes "setting up which is defined at 29 CFR §1910.147(b) as "[a]ny work performed to prepare a machine or equipment to perform its normal production operation." The cited standard requires that "a final verification be performed to ensure that it is safe to energize the equipment after servicing is complete." 54 Fed. Reg. 36679. It also requires that, before LOTO devices are removed and energy restored, procedures be taken to ensure that the equipment is operationally intact. (Secretary's Memorandum in Opposition, p. 11-13)

Here, Huron failed to ensure that the equipment was operationally intact before energy was restored. The activities on August 3 could be considered "setting up" under the terms of the standard and, consequently, were an integral part of the "servicing or maintenance" activities that are specifically covered by the standard. This period of "servicing or maintenance" continues until normal production operations resume. Therefore, before removing the locks and tags and beginning to pressurize the steam line, respondent did not take steps to ensure that the system was operationally intact. (Secretary's Memorandum in Opposition pp. 13-16) In his deposition, Huron's expert, Wayne Kirsner, stated that valves sometimes leak. (Kirsner Deposition, p. 32) The introduction of only a small amount of high-pressure steam into the pipe line resulted in the water hammer that ruptured the gate valve. Thus, it was Huron's duty under this performance standard to devise a procedure to control the release of hazardous energy during the "setting up" process and ensure that the system was operationally intact. That procedure should have required

employees to open the drain valves in Building 14 to and verify that all condensate had been removed from the lines. Huron failed to fulfill its obligation thereby violating the standard and exposing its employees to a serious hazard. (Secretary's Memorandum in Opposition, p. 17)

D. **Disposition of Motions**

The standard requires that, before removing locks and tags, the employer must utilize procedures and take action to ensure that the "work area shall be inspected to ensure that nonessential items have been removed and to ensure that machine or equipment components are operationally intact." Thus the standard has two requirements: (1) that the work area be inspected to remove nonessential items and (2) the work area be inspected to ensure that machine or equipment components are operationally intact. As to the first part of the standard, there is no ambiguity. Neither is there any allegation that this portion of the standard was violated. Contrary, to the Secretary's assertion, however, the second provision is ambiguous. What does it mean to say that a machine is "operationally intact"?

The Secretary properly points out that under the Supreme Court decision in *CF & I*, the Commission must defer to her reasonable interpretation of an ambiguous standard, so long as the interpretation sensibly conforms to the purpose and wording of the regulation. *CF & I* does not, however, give the Secretary the right to call a square peg round when it can fit into the round hole only after being smashed by a sledgehammer. That is the case here.

Where a standard is susceptible to different interpretations, the Commission will consider statements made in the preamble to the standard as the most authoritative guide to the standard's meaning. *Safeway Store No. 914*, 16 BNA OSHC 1504, 1511 (No. 91-373, 1993). According to the Preamble:

> When the work is completed paragraph (e)(1) *merely* requires that before the equipment is reenergized, the employees who did the servicing or maintenance work complete the job by replacing guards and other machinery components and cleaning up after themselves.
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> * * *
>
> Paragraph (e)(1) requires that the workplace around the machine or equipment be inspected to ensure that nonessential items have been removed and that equipment components are operationally intact. This step ensures that tools, machine parts and

> materials have been removed, *and that mechanical restraints, guards, and other machine parts have been replaced* before returning the machine or equipment to its operational mode. Depending on the complexity of the machinery and the type and degree of servicing performed, visual inspection alone might be sufficient to meet this requirement, or there might have to be additional measures such as check lists and other administrative procedures.

54 FR 36679 (Sept. 1, 1989)(emphasis added)

From this, it is clear that the purpose of the relevant portion of the standard is to ensure that parts removed for service and maintenance during the lockout/tagout be replaced prior to reenergization of the machine. Indeed, the quoted passage twice states that the standard requires that parts be *replaced.* What happened here however, was a failure on the part of Huron to detect and correct a leak and *remove* the accumulated water. To adopt the Secretary's interpretation would extend the regulation to require an overall safety check of the machinery and hold the employer responsible under the LOTO standards for inadequacies in its service and maintenance program. This is clearly at odds with the stated purpose of the standard to *merely* require "that before the equipment is reenergized, the employees who did the servicing or maintenance work complete the job by replacing guards and other machinery components and cleaning up after themselves."

The Secretary argues that, under the Preamble, the standard requires that "a final verification be performed to ensure that it is safe to energize the equipment after servicing is complete." 54 Fed. Reg. at 36679. A reading of the first part of the paragraph reveals the essential flaws in the Secretary's interpretation.

> Because each servicing employee will have his/her own lockout or tagout device attached to the energy isolating device during the servicing operation, the person in charge of the servicing operation will first determine whether all such devices have been removed by the servicing employees. This is an essential step in the procedure, and paragraph (e) requires that a final verification be performed to ensure that it is safe to reenergize the equipment after servicing is completed.

54 Fed.Reg at 36679

From this passage, it is clear that the "verification" discussed is to ensure that all lockout and tagout devices have been removed. Failure to conduct such a verification could result in a

premature startup, where an employee has yet to remove his LOTO device because he has not yet completed his work and/or because he is still in harm's way.

The last part of the paragraph states:

> Further, a check on the satisfactory completion of the work can also ensure that the machine or equipment will not be damaged by its start up. Although the purpose of the final check is to protect employees, it can also prevent needless downtime of the machine or equipment because the servicing or maintenance was not done correctly and/or completely the first time.

Upon a cursory reading, this final part of the paragraph could interpreted as supporting the Secretary's interpretation. However, when read in the context of the entire portion of the Preamble devoted to this standard, it becomes clear that the Secretary's interpretation is unsupported. This passage must be read in light of that portion of the Preamble that states that the standard "merely requires that....the employees who did the service and maintenance work *complete the job by replacing guards and other machinery components and cleaning up after themselves."*

I recognize that, had the system not been shut down, the steam would not have condensed into the water which caused the water hammer that ruptured the valve. However, I find nothing in the standard that could reasonably be interpreted to require Huron to adopt procedures requiring that the system be drained prior to reenergization. To accept such an interpretation would also require employers to anticipate and inspect for a limitless number of potential problems that could arise upon reenergization of a machine. For example, under the Secretary's interpretation of the standard an employer could be required to anticipate damage to belts or metal fatigue in certain parts that might under unusual stress during reenergization; or it could be required to check all switches and circuitry for potential damage due to power surges encountered during a startup[4]. Such a requirement would go far beyond the express purpose of the standard which is *merely* to have employees complete the job by replacing guards and other machinery components and

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[4] This is not to say that anticipating such failures may not be required under other standards or that absent such standards a failure to properly inspect might not constitute a recognized hazard under Section 5(a)(1)(the Act's General Duty Clause). It is to say, however, that it is not a violation under the cited LOTO standard.

cleaning up after themselves.

Finally, the last part of the above quoted paragraph states that "[d]epending on the complexity of the machinery and the type and degree of servicing performed, visual inspection might be sufficient" or the employer might have to use "additional measures such as check lists and other administrative procedures." The Secretary would read this as requiring written procedures that would account for all types of potential hazards. However, I find nothing in the *cited* standard that requires that such written procedures require anything more than a list of those things that must be replaced or reattached before LOTO can be lifted.

The Secretary's interpretation of her regulations must "reflect clear, rational decision-making that gives regulated members of the public adequate notice of their obligations. *S.G. Loewendick & Sons, Inc. v. Reich*, 70 F.3d 1291, 1297 (D.C. Cir. 1995) The Secretary's interpretation of the standard does not do so.

. Therefore, I find that the Preamble establishes that the standard was only intended to apply to the replacement of machine parts that were removed or disabled as part of the LOTO procedure, and cannot reasonably be extended to inadequacies inherent in the employer's service and maintenance procedures[5].

Accordingly, Huron's Motion for Summary Judgment is granted.

Egress Violation: 29 CFR §1910.36(g)(1)

A. Undisputed Facts

OSHA Compliance Officer Dave Heckman responded to the accident on August 3 and visited the plant on several occasions in the company of members of Huron's management. Each time they entered the area of the ruptured gate valve in Building 14, they entered through a doorway located in the northwest corner of the room. Along the path from that doorway to the ruptured gate valve were two overhead valve handles associated with horizontal piping. Using a

[5]Because I conclude that the standard does not apply to the cited condition, I do not reach the issues raised by Huron regarding whether the explosion constituted an "unexpected release of energy" or whether the citation was flawed because the Secretary cited the wrong building.

steel tape, Heckman measured one valve handle to be 57 inches above the floor, and the other valve handle to be 51 inches above the floor. The valve handles were approximately 12 inches apart and both were located over the walkway. When members of the inspection party walked under these valve handles, they had to bend over to avoid contact with them (Heckman Affidavit ¶7). Ron Walter struck his head on one of the valves when he was exiting the area immediately after the accident (Heckman Affidavit ¶ 8). There was a second exit path leading from the area of the gate valve to a door in the southeast corner of the room that did not have protruding overhead valves. However, Heckman and the Huron personnel accompanying him never used that doorway when exiting the area (Heckman Affidavit ¶ 9). There is no question that Huron knew of the valves.

As a result, the Secretary cited (with two subitems) Huron for a violation of 29 CFR §1910.36(g)(1).

B. Huron's Motion for Summary Judgment

Huron sets forth two grounds in support of its motion for summary judgment. First, Huron interprets the standard as requiring only that it maintain at least one exit access of appropriate height, without obstructions. It points to photographic Exhibit D from the affidavit of Brian Murphy that depicts an emergency access door in an area where there are no projections reaching a point less than six feet eight inches in height. There is no dispute that the exit door was present during the inspection, that it complied with the height requirements of the standard, that the compliance officer opened it and saw that it lead to a hallway which led outside, and that the door was unobstructed. (Heckman deposition, pp. 106-108)(Respondent's Motion for Summary Judgment at p.8) Respondent argues that there is nothing in the regulation that requires an employer to ensure that every door in a room has an exit access not less than six feet eight inches from the floor. Instead, it requires that there be "an" exit route that complies with the regulation from each location in the building. (Huron Memorandum of Law at pp. 7-9)

Huron also argues that to interpret the standard as requiring every door as an exit route would, in effect, turn every space in a building into part of an emergency exit route. However, the standard is not neither a regulation of utility rooms, offices or doorways nor a general building

code. It argues that there would be no need for specific emergency exit route regulations if every space in a building were part of the exit route. (Huron Reply Memorandum at 2).

Moreover, Huron contends that the interior of the utility room does not fall under the regulation because it was not part of an "exit route." It notes that 29 CFR §1910.34(c) provides that "An example of an exit access is a corridor on the fifth floor of an office building that leads to a two-hour fire resistance-rated enclosed stairway (the Exit)." The interior of the utility room, Huron argues, is not part of a hallway or corridor leading to an exit. Indeed, the door leading from the utility room was not an "exit" which is defined at 29 CFR §1910.34(b) as "that portion of an exit route that is generally separated from other areas to provide a protected way of travel to the exit discharge. An example of an exit is a two-hour fire resistance-rated enclosed stairway that leads from the fifth floor of an office building to the outside of the building."

It points out that the doorway in the utility room is not an "exit discharge" as it did not lead outside. Rather, it was just a doorway to a utility room that was not part of the emergency exit route. Huron points out that it had an exit access through the first floor corridor of the building that led to the portion of an exit route separated from other areas and that the utility room was not part of this exit route. (Huron Reply Memorandum at 2-4) **C. Secretary's Motion for Summary Judgment**

The Secretary labels untenable Huron's position that as long as it maintained one safe exit path in the room, it is permitted to maintain other exit paths that are impeded and expose employees to serious injuries. The Secretary points out that standards must be liberally construed to effectuate the remedial purposes of the Act. *Whirlpool Corp. v. Marshall*, 445 U.S.1 (1980). Here, the intent of the standard is to ensure that exit routes are unimpeded by overhead projections to allow fast and efficient egress in case of emergency. The Secretary argues that Huron's position assumes that in an emergency, employees will have the time and presence of mind to make reasoned decisions about selecting an exit path. She points out that, in the panic following the valve rupture, Walter chose to use the cited exit path to leave the Utility Room. Moreover, the inspection party never used the unimpeded exit path on six occasions. Accordingly, the Secretary concludes that Huron's interpretation would defeat the purpose of the standard and expose

employees to injury. (Secretary's Memorandum in Opposition at pp. 9-10)

D. Disposition of Motions

In this instance, I find that the Secretary's interpretation of the standard is reasonable and entitled to deference under *CF & I.*

Huron's contention that it complied with the standard by providing one unobstructed "exit route" is without merit. The cited standard states that "*an* exit route must" not have projections reaching down less than six feet from the ground. Huron interprets this as meaning that even if there are multiple exit routes, the standard is met if just one of those routes ("an exit route") is in compliance. Under Huron's interpretation, an employer can have any number of exit routes that contain improper obstructions and still be in compliance with the standard if there is just one exit route that contains no improper obstructions. Thus, the only employees protected by the standard would be those lucky enough to have work stations near the sole compliant exit route. Extending Huron's analysis to other egress standards demonstrates the absurdity of its interpretation. For example, 29 CFR §1910.36(d)(1) is entitled "An exit door must be unlocked" and reads "Employees must be able to open an exit route door from the inside." Under Huron's interpretation, in a workplace with multiple exit route doors, an employer would be free to lock all the doors but one from the inside, thereby rendering useless (and dangerous if employees run to them in an emergency) all but the single unlocked door. Standards are not to be interpreted in a manner that creates an absurd result. *Unarco Commercial Products,* 16 BNA OSHC 1499, 1502 (No. 89-1555, 1993). The interpretation put forth by Huron would produce such an absurd result.

Furthermore, I note that in this section of the regulations, the Secretary uses the term "an exit" and "each exit" interchangeably. For example, 29 CFR §1910.36(a)(1) is entitled "An exit route must be permanent." Yet the standard reads: "Each exit route must be a permanent part of the workplace."

I also find no merit in Huron's contention that the Secretary's interpretation of the standard would, in effect, turn every space in a building into part of an emergency exit route and effectively constitute a building code.

An "exit route" is defined at 29 CFR §1910.34(c) as "a continuous and unobstructed path

of exit travel *from any point within a workplace* to a place of safety (including refuge areas). An exit route consists of three parts: the exit access; the exit; and, the exit discharge.(An exit route includes all vertical and horizontal areas along the route.)" (emphasis added) Also, an "exit access" is defined as "that portion of an exit route *that leads to an exit."* (emphasis added).

While the example given in the definitions (fire-resistant stairway) is not relevant here, it is only an example and, while illustrative, was not intended to be exclusive. The critical point is that an "exit route" is a path that employees take *from any point within a workplace* to a place of safety.

Here, the door in the utility room was used as an emergency exit, as evidenced by its use by the seriously injured Walter following the valve rupture. Although the door was not the designated emergency exit, as the Secretary properly points out, during an emergency, employees may not have the time or presence of mind to seek out the "designated" emergency exit. Therefore, the path leading to that door was an "exit access" and was properly considered an "exit route" by the Secretary.

The record here is clear that the path of travel from the utility room to the door that was regularly used as an exit from the utility room had obstructions in violation of the cited standard. Also, an employee exiting in an emergency situation could sustain serious injury if his or her head hit the projection.

To establish the knowledge element of a violation, it is necessary only for the Secretary to establish that the employer had actual or constructive knowledge of the physical conditions that constitute a violation. The Secretary need not show that the employer understood or acknowledged that the physical conditions were actually hazardous. *Danis Shook Joint Venture XXV,* 19 BNA OSHC 1497, 1501 (No. 98-1192, 2001). The record shows that, the compliance officer entered the Utility room approximately six times, each time in the company of Huron personnel. Each time that the inspection party entered the room, they had to bend over to avoid making contact with the valve handles. The record establishes that Huron had knowledge of the condition.

Accordingly, the Secretary's Motion for Summary Judgment on the item is granted and the

Item is affirmed. The Secretary proposed a penalty of $1750 for the item. I find this an appropriate penalty under the factors set forth in section 17(j) of the Act. 29 USC §666(j).

ORDER

For reasons stated above, Huron's Motion for Summary Judgment to Dismiss Item 3(c) of the citation for violation of 29 CFR §19190.147(e)(1) is GRANTED and the Item is VACATED. The Secretary's Motion for Summary Judgment to Affirm Item 1(a) and (b) of the citation for violation of 29 CFR §1910.36(g)(1) is GRANTED. The Item is AFFIRMED and a penalty of $1750 is ASSESSED. All corresponding cross-motions for summary judgment filed by the parties are DENIED.

/s/

G. MARVIN BOBER

Judge, OSHRC

Dated: October 22, 2007

Washington, D.C.