UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. CARGILL, INC., Respondent.	DOCKET NO. 12-1583 12-1584 (Consolidated)

Appearances:

Kim P. Flores, Esq., Lauren M. Marino, Esq., Office of the Solicitor, U.S. Dept. of Labor, Kansas City, MO
For Complainant

Rodney L. Smith, Esq., Sherman & Howard LLC, Denver, CO
For Respondent

Before: Administrative Law Judge Brian A. Duncan

DECISION AND ORDER

Procedural History

This matter is before the United States Occupational Safety and Health Review Commission ("Commission") pursuant to Section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq*. ("the Act"). On March 28, 2012, the Occupational Safety and Health Administration ("OSHA") inspected Cargill, Inc.'s ("Respondent") Gordon Street facility in Topeka, Kansas. As a result of that inspection, OSHA issued two *Citations and Notifications of Penalty* ("Citations") to Respondent. These two Citations were designated as Docket No. 12-1583 (Inspection No. 283528) and Docket No. 12-1584 (Inspection No. 283671). The Citation associated with Docket No. 12-1583 alleges one serious violation of the Act, with a proposed penalty of $4,250.00. The Citation associated with Docket No. 12-1584 also alleges

one serious violation of the Act, with a proposed penalty of $4,250.00. Respondent timely contested both Citations. A trial was conducted in Wichita, Kansas on May 7–8, 2013. The parties submitted post-trial briefs for consideration.

Four witnesses testified at trial: (1) Jeremy Seyfert, Respondent's Westwego, Louisiana Plant Manager and former Farm Services Group Operations Leader for the Topeka Gordon Street Facility; (2) Steve Lowery, OSHA Compliance Safety and Health Officer ("CSHO"); (3) Corey Beacom, CSHO; and (4) Jack E. Collie, Topeka Fire Department ("TFD") Division Chief.[1]

Jurisdiction

Jurisdiction is conferred upon the Commission pursuant to Section 10(c) of the Act. (Tr. 15). Based on the parties' stipulations and the record, the Court finds that Respondent was an employer engaged in a business and industry affecting interstate commerce within the meaning of Sections 3(3) and 3(5) of the Act, 29 U.S.C. § 652(5). (Tr. 15–16). *Slingluff v. OSHRC*, 425 F.3d 861 (10th Cir. 2005).

Stipulations

1. Jurisdiction of this proceeding is conferred upon the Occupational Safety and Health Review Commission ("OSHRC") by Section 10(c) of the Act.
2. Respondent is a Delaware corporation with its principal office in Minnesota, and a place of business located at 1845 N.W. Gordon Street, Topeka, Kansas.
3. At all relevant times, Respondent was engaged in a business affecting commerce.
4. Respondent utilizes goods, equipment and materials shipped from outside the state of Kansas.

1. Fire Chief Collie's videotaped deposition testimony was played at trial in lieu of live testimony. (Tr. 156). Any references to Fire Chief Collie's deposition will be as "Collie Tr.".

5. Respondent was an employer within the meaning of the Act, employing employees at 1845 N.W. Gordon Street, Topeka, Kansas.

Background

Respondent is a large, multi-national company headquartered in Minneapolis, Minnesota, which employs approximately 150,000 employees. (Tr. 166). AgHorizons is a division of Respondent which is responsible for approximately 1,500 of those employees and 117 of Respondent's facilities, including the Gordon Street facility, located in Topeka, Kansas. (Tr. 166–167). The Gordon Street facility ("Gordon Street") is a grain elevator complex with 365 vertical concrete grain bins, also referred to as silos, and two flat grain storage sheds. The grain bins are 120.5 feet tall and range from 30 to 35 feet in diameter. (Tr. 24, 171; Ex. C-1, C-3, R-12). Gordon Street bins are used to store harvested corn, soy beans, wheat, and milo, and have a facility-wide capacity of 25 million bushels. (Tr. 168, 170). At the time of the OSHA inspection, Jeremy Seyfert managed the Gordon Street facility in his capacity as the Farm Services Group Operations Leader. (Tr. 22, 158).

Farmers and suppliers bring grain to Gordon Street where it is dumped into a pit, then transferred to the top of the row of bins by means of bucket conveyors, also known as "legs." (Tr. 185). The legs dump grain onto a horizontal conveyor, which travels along the top of the bins through a corridor known as the "gallery." (Tr. 186; Ex. R-25). The grain in the gallery is then released into a particular bin for storage by means of a "tripper" device. (Tr. 186; Ex. R-12, R-26). Once grain has been delivered into a vertical bin, it is stored for as briefly as a few days, or as long as several months. (Tr. 187).

To unload grain stored in a vertical bin, Respondent opens a mechanical gate at the bottom of the bin. Once the gate is opened, grain flows out of the bottom hole/gate, by the force

of gravity, onto a conveyor located in a tunnel below the bins. (Tr. 187). The conveyor then transports the grain to a truck, railroad car, or other bin at the facility. (Tr. 187). This process occurs at Gordon Street on a daily basis. (Tr. 187–188; Ex. R-12).

Complainant inspected Respondent's Gordon Street facility after a media report of a fire, and while on site, expanded the scope of the inspection to include issues covered by its Grain Handling Local Emphasis Program. (Tr. 46–47). The citation items at issue in this case relate to: (1) the process by which Respondent cleans out the residual grain left at the bottom of a vertical bin once it has been gravitationally emptied, and (2) Respondent's designation of the Topeka Fire Department as its permit-required confined space rescue and emergency services responder.

Discussion

To prove a violation of an OSHA standard, Complainant must establish, by a preponderance of the evidence, that: (1) the cited standard applied to the facts; (2) the employer failed to comply with the terms of the cited standard; (3) employees were exposed or had access to the hazard covered by the standard, and (4) the employer had actual or constructive knowledge of the violative condition (*i.e.*, the employer knew, or with the exercise of reasonable diligence could have known). *Atlantic Battery Co.*, 16 BNA OSHC 2131 (No. 90-1747, 1994).

A violation is "serious" if there was a substantial probability that death or serious physical harm could have resulted from the violative condition. 29 U.S.C. § 666(k). Complainant need not show that there was a substantial probability that an accident would actually occur; she need only show that if an accident occurred, serious physical harm could result. *Phelps Dodge Corp. v. OSHRC*, 725 F.2d 1237, 1240 (9th Cir. 1984). If the possible injury addressed by a regulation is death or serious physical harm, a violation of the regulation is

serious. *Mosser Construction*, 23 BNA OSHC 1044 (No. 08-0631, 2010); *Dec-Tam Corp*., 15 BNA OSHC 2072 (No. 88-0523, 1993).

Docket No. 12-1584, Citation 1, Item 1

Complainant alleged a serious violation of the Act in Citation 1, Item 1 as follows:

> 29 C.F.R. 1910.272(g)(1)(iv): The employer did not prohibit "walking down the grain" and similar practices where the employee walks on grain to make it flow within or out from a grain storage structure, or where an employee is on moving grain:
>
> Employees entering grain storage bins were exposed to injury from an engulfment hazard. Employees entered flat bottom grain storage bins to clean the bin bottoms by removing grain that would naturally flow out of the bin. After grain had been removed down to the angle of repose, employees removed their lifelines while walking on remaining grain that could measure up to 20 feet deep.

The cited standard provides:

> "Walking down grain" and similar practices where an employee walks on grain to make it flow within or out from a grain storage structure, or where an employee is on moving grain, are prohibited.

29 C.F.R. § 1910.272(g)(1)(iv).

Many of the bins at Respondent's Gordon Street facility have a flat bottom, and were constructed with a discharge opening/gate at the outer edge of the bin floor. (Ex. R-12). Because of their design, a residual, angular pile of grain is left at the bottom of these bins after they have been emptied, with the shallowest point near the discharge hole and the deepest point near the opposite wall. (Tr. 188–189; Ex. R-12). The residual grain left after a bin is emptied typically comes to rest at a slope of 27 degrees, which is the natural angle at which most grain rests—also referred to as the "angle of repose". (Tr. 189). According to Mr. Seyfert, this is the approximate angle at which all grain stored at Gordon Street comes to rest. (Tr. 189–190). In a bin with a 33-foot diameter, the highest point of a residual grain pile left once a bin has been emptied, is approximately 15 feet. (Tr. 34; Ex. R-10).

In order to avoid mixing different types of grain in a bin, and to prevent the grain from spoiling, Respondent has to manually remove the residual grain pile from each flat-bottom bin after it has been emptied. (Tr. 190–191). Respondent conducts bin cleaning operations, to force out the residual grain piles at the bottom of flat-bottom bins, approximately 200 times per year. (Tr. 191). Respondent's bin cleaning process is governed by two written policies: (1) Respondent's Confined Space Policy; and (2) Respondent's Task Procedure for Bin Cleaning. (Tr. 191–192; Ex. R-1, R-2). The Task Procedure for Bin Cleaning in effect at the time of this inspection was revised after a fatal accident in 2003, when a contractor entered a bin with severe cliffing[2] hazards and became engulfed by grain. (Tr. 268).

Respondent's bin cleaning process is detailed and extensive.[3] It was undisputed that everyone involved in the bin cleaning process is provided training and testing, which are specific to their responsibilities. (Tr. 226-228). At the time of the inspection, Respondent's typical bin cleaning crew included the following individuals:

1. **Entry Supervisor:** This person completes the confined space entry permit and oversees all aspects of the bin cleaning operation from beginning to end. (Tr. 201–202; Ex. R-1 at 3). The Entry Supervisor communicates with the Approver prior to any person entering the bin.
2. **Approver:** This individual verifies the determination of the Entry Supervisor that the bin is safe to enter and that all pre-entry safety requirements have

2. "Cliffing" is a term of art in the industry which describes grain that has adhered to the walls of a bin at an angle far in excess of the 27 degree angle of repose. (Tr. 209).
3. Respondent's written procedures concerning bin cleaning operations are accepted as factually accurate, as neither CSHO Lowery nor CSHO Beacom actually observed any bin cleaning during their inspection. (Tr. 70, 117–118). The only testifying witness with direct knowledge of how the bin cleaning process is actually implemented was Mr. Seyfert.

been met. (Tr. 196–197, 201; Ex. R-1 at 4). At the time of the inspection, this duty was handled by Mr. Seyfert.

3. **Attendant:** The Attendant continuously monitors the bin-cleaning process from a port hole on the vertical wall of the bin (used to enter and exit the bin) and communicates with other members of the bin-cleaning team. (Tr. 202–203; Ex. R-1 at 4). This person is also referred to as the "hole watch."
4. **Entrants:** A group of 3–4 individuals typically enters the bin for the purpose of removing the residual grain. This group is also known as the shovel crew. The first entrant is known as the "Prep Person" and has specific, preliminary responsibilities (see procedure discussion below). (Tr. 203–204, Ex. R-1 at 4).
5. **Winch Operator:** The Winch Operator is stationed at the life line winch, in the gallery above the bin. The Winch Operator communicates by radio with the Attendant in the event that an emergency retrieval of an entrant is required. (Tr. 204, Ex. R-21).
6. **Gate Operator:** This individual is stationed in the tunnel below the discharge/gate at the bottom of the bin. At the direction of the Entry Supervisor, the Gate Operator opens or closes the discharge gate as needed during a bin cleaning. (Tr. 204; Ex. R-12).

In addition to task-specific training, the various members of the bin-cleaning teams are also trained and tested on identification of engulfment hazards associated with grain bins, such as: (1) hung-up or cliffing grain, which rests above the natural angle of repose and poses a hazard of falling or sliding; (2) bridged material, which is a crust or "bridge" of grain that could be

covering an open pocket or void in the grain which can engulf an entrant; (3) "walking down the grain"; and (4) standing or walking "on moving grain." (Tr. 208–212; Ex. R-4 at 14–17, 19).

In order to address those hazards, as well as others, Respondent's bin cleaning crews follow this detailed Bin Cleaning Task Procedure:

1. The bin needing to be cleaned is identified. (Tr. 229; Ex. R-2 at 1).
2. An explosion-proof light is lowered into the bin from the upper gallery area. (Tr. 229–230; Ex. R-2 at 4, Ex. R-12).
3. The exterior cover of the upper port entry[4]—located on the side wall, above the ground level of the bin—is removed. If the grain is resting at or above the level of the upper port entry, the grain is above its angle of repose and the bin entry is canceled.[5] (Tr. 35, 230–232; Exs. R-2 at 1, R-15).
4. The Entry Supervisor then visually inspects the inside of the bin and the condition of the grain from the upper port entry. If the Entry Supervisor observes any hazardous conditions (i.e., cliffing, bridging, or other unsafe conditions) then no one is allowed to enter. In addition, any other member of a bin cleaning crew, including entrants, can cancel an entry if they observe a hazardous condition. (Tr. 231–233; Ex. R-2 at 2).
5. The air in the bin is then tested for unsafe levels of oxygen, carbon monoxide, flammable gases, or other hazardous contaminants prior to entry (and also monitored throughout the bin cleaning operation). (Tr. 234–236; Ex. R-2 at 2).

4. There are typically two port entries in the side wall of a flat-bottom bin. One at ground level (lower port entry) and one approximately 22 feet above the ground (upper port entry). (Ex. R-12).
5. When bin cleaning operations cannot be completed pursuant to Respondent's Bin Cleaning Task Procedures, Respondent contracts with a third party called "Mole Master," who removes all residual grain using a rotating machine which is placed inside the bin. (Tr. 233-234).

6. The Entry Supervisor then completes the Confined Space Permit form ("permit") and it is signed by all members of the bin cleaning crew. The Permit requires 28 separate safety checks prior to entry and is only valid for 12 hours. (Ex. R-3). If the entry cannot be completed in that time, a new permit must be issued. In addition to a line-by-line review of the safety checks on the permit, Mr. Seyfert testified that he often asks additional, specific questions of the Entry Supervisor prior to approving the permit. (Tr. 236–251; Ex. R-1, R-2, R-3). Once the permit is approved, the Topeka Fire Department Station 11 is notified by telephone of the impending confined space entry and the specific bin involved. At that point, the first member of the bin cleaning crew, the Prep Person, is authorized to enter the bin. (Tr. 252).
7. It is worth noting that one of the aforementioned safety checks on the permit includes reviewing the performance history of the particular bin, including any past problems with drawing grain from the bin onto the conveyor, or any past issues with moisture infiltration. (Tr. 239).
8. The Prep Person then enters the bin. (Tr. 252-254). The Prep Person wears a full-body harness that is attached to two lifelines. One lifeline is a wire cable attached to a mechanical tripod at the top of the bin in the gallery. The other is a horizontal rope line, which is manned by the Attendant. (Tr. 252–254; Ex. R-1, R-21, R-22).
9. Before anyone else enters the bin, the Prep Person performs three distinct tasks:
    - First, the Prep Person sets a grate over the discharge opening at the bottom of the bin, which prevents subsequent entrants from falling into the

discharge gate during bin cleaning operations. Once the grate is set, the discharge gate is opened to allow the residual pile of grain to be forced out. (Tr. 254–257; Ex. R-2, R-17, R-18, R-19).

- Second, the Prep Person sets up the bin cleaning equipment. Using a pendant control box hanging from the top of the bin, the Prep Person lowers a grain shovel, winch line, and sheave into the bin.[6] The winch line is run through the sheave and then attached to the shovel. The line run through the sheave will drag the shovel from the top of the residual pile down toward the bin gate/opening, forcing some of the residual grain out of the bin with each pass. (Tr. 177, 258–259; Ex. R-19, R-20, R-23, R-24).
- Third, the Prep Person inspects the residual grain pile for stability and hazards. This includes walking on the surface of the grain, while still connected to the two lifelines, from top to bottom in order to identify any of the aforementioned cliffing or bridging conditions. If any such hazardous conditions are observed, the entry is cancelled. (Tr. 259–260).

10. Once the Prep Person has completed his survey of the bin's interior, the other members of the bin cleaning crew enter the bin through the lower port entry. Generally, the subsequent entrants are not attached to a lifeline. That said, each entrant is still outfitted with a full-body harness and the two lifelines remain inside the bin in case it is necessary to rescue an entrant from the bin. (Tr. 261–262; Ex. R-2 at 5).
11. The actual process of bin cleaning typically involves four entrants - one to operate the shovel control, one to walk behind the shovel as grain is forced toward the

6. A "sheave" is a pulley that is placed at the base of the bin that connects the winch line in the upper gallery.

gate/hole, and two to assist the shovel operator. The person manning the shovel digs it into the grain at the top of the residual grain pile. The person operating the control then turns the winch on, which drags the shovel toward the grate-covered discharge opening. The other two entrants scoop grain into the path of the grain shovel with hand-held shovels. According to Mr. Seyfert, this process is labor-intensive, and the bin cleaning crews usually rotate through the various tasks. The entrants are trained not to stand in the path of the moving shovel and also to stay away from the discharge hole. (Tr. 262–267, Ex. R-1, R-2, R-23, R-24).

12. Once all of the residual grain is forced out of the bin, the shovel equipment is lifted back out of the bin to the gallery, a supervisor inspects the bin, the bin is closed, and the permit is cancelled. (Tr. 266; Ex. R-3).

The standard cited in this instance describes the requirements and prohibitions for "entry into grain storage structures." 29 C.F.R. § 1910.272(g). The facts presented in this case clearly focus on Respondent's practices and procedures for employees entering grain storage bins at Respondent's Gordon Street facility. Therefore, the Court finds that the cited standard applies.

The specific subparagraph cited in this instance prohibits employees from "walking down grain" and from being "on moving grain". 29 C.F.R. § 1910.272(g)(1)(iv). Although not technically in the definitional section, the cited standard describes "walking down grain" as "practices where an employee walks on grain to make it flow within or out from a grain storage structure." Complainant conceded at trial that it does not allege that Respondent's bin cleaning procedures constituted "walking down grain" for the purpose of making it flow within or out from the grain bin. Rather, Complainant argues that the bin cleaning process places employees

"on moving grain" and, therefore, exposes them to an engulfment hazard. (Tr. 56). The term "on moving grain" is not defined in the standard.

Specifically, Complainant argues that the shovel causes the grain to "move" both in front of and, to a lesser extent, behind (as grain falls back into the one-foot channel created by the shovel) the operator, thus placing the bin entrants "on moving grain." (Tr. 56, 322; Ex. R-23). Further, Complainant argues that the depth of the grain at its highest point in the slope when bin cleaning procedures begin—approximately 15 feet—is deep enough to pose an engulfment hazard because bridges or voids could exist below the surface.[7]

The record established that grain does not act like quicksand. An individual may sink only a few inches while walking across a still pile of grain. (Tr. 216). Mr. Seyfert testified, without contradiction, that a tractor could be successfully driven up and down a large pile of grain without sinking in. (Tr. 217). CSHO Lowery also confirmed that the depth of a pile of grain alone does not create an engulfment hazard. There must be a void or "something in the grain" to cause an engulfment concern. (Tr. 85–86). In that regard, Mr. Seyfert testified, again without contradiction, that it is impossible for a void to form underneath the residual grain left in the flat-bottomed bins because there is no discharge point below the triangular pile which remains after a bin has been emptied.[8] (Tr. 211, 215–216; Ex. R-12). That is why the shoveling process is used; to manually force the residual grain pile out of the bottom of the bin.

Respondent disputes that its employees are "on moving grain" or exposed to an engulfment hazard during the bin cleaning process. Respondent argues that its procedure is in

7. There appeared to be inconsistency between Complainant's litigation position in this case and the position of CSHO Lowrey, whose deposition testimony revealed that he did *not* believe Respondent's bin-cleaning employees were "on moving grain." (Tr. 80-81).

8. It is important to emphasize that Citation 1, Item 1 does not relate in any way to employees being in the bin during the initial, gravitational grain dump through the bottom gate. Rather, the alleged violation is based only on bin cleaning operations involving the forced removal of the residual pile of grain at the bottom of the bin that will not naturally flow out of the gate.

compliance with the cited standard and companion provisions, which permit standing or walking on grain without a lifeline once it has been determined that there are no engulfment hazards. *See* 29 C.F.R. § 1910.272(g)(2) and accompanying *Note*. Respondent maintains that its detailed procedures were specifically designed to eliminate any possibility that an employee could be exposed to the engulfment hazards addressed by the standard. Respondent further argues that it would be impossible for a void or bridging condition to exist in the residual grain pile at the bottom of a bin due to its location relative to the bin discharge point. As Mr. Seyfert testified, grain simply could not be lowered underneath a crust or bridge, creating a void, because there is no discharge point of any kind underneath the angled pile of residual grain.

Since the term "on moving grain" is not readily defined, an examination of the regulatory history of the standard is required. Courts must first look to the plain text and structure of a standard whose terms are in dispute. *Unarco Comm. Prods.*, 16 BNA OSHC 1499 (No. 89-1555, 1993). "If no determination can be reached, courts may then refer to contemporaneous legislative histories of that text. If this inquiry into the meaning of the text does not settle the question, the courts then defer to a reasonable interpretation developed by the agency charged with administering the challenged statute or regulation." *Id.* (citing *Securities Indus. Ass'n v. Federal Reserve Sys.*, 847 F.2d 890 (D.C. Cir. 1988), citing *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842 (1984)).

The Court agrees with Complainant that the cited standard contains an absolute prohibition on "walking down grain" and being "on moving grain." However, Complainant's argument that it would be inappropriate to look to other provisions of the standard to decipher the meaning of the phrase "on moving grain" is rejected. *See* 29 C.F.R. § 1910.272(g)(2); *Hughes Bros., Inc.*, 6 BNA OSHC 1830 (No. 12523, 1978) (holding that certain subsections of

the same standard should be read *in pari materia*). The regulations clearly anticipate that employees will, in some instances, work on the surfaces of grain piles, as indicated by the language at 29 C.F.R. § 1910.272(g)(2) and (h)(2). Both of which state an exception to the general prohibition; in that if an employer can demonstrate no exposure to engulfment for employees in grain storage structures, employees can be on grain without a lifeline.

In 1995, in response to a number of "engulfment and mechanical injuries and fatalities", Complainant proposed new regulatory language to address the dangerous industry practice of "walking down grain". 60 Fed. Reg. 54047, 54048 (1995); 61 Fed. Reg. 9578 (1996). In the publication of the final rule, OSHA noted that the practice of walking down grain "exposes the employee to an ever-increasing risk of engulfment as the surface layer of grain is eroded from underneath." 61 Fed. Reg. at 9579. In response, OSHA promulgated the standard cited herein by adopting (almost) wholesale, a policy from the National Grain and Feed Association (NGFA), which stated, "'Walking down grain or similar practices where employees walk on grain to get grain to flow out of a grain storage structure or where employees are on moving grain (and thus exposed to an engulfment or mechanical hazard) are not permitted.'" *Id.* The parenthetical statement, which was not included in the final standard, gives an indication of the specific hazard targeted by Section 1910.272(g)(1)(iv); namely, the presence of employees in a full, or partially filled, grain bin where grain is being drawn out of the bin from the bottom, thus creating a dynamic and unstable surface where employees could become engulfed by the grain or exposed to the discharge hole. In other words, the prohibitions against walking down grain and being on moving grain seem to be aimed at practices where employees are helping to force grain down toward a draw-off point while it is in the process of being drawn from underneath.

While subsection (h) deals with flat storage structures (as opposed to vertical grain bins), the preamble to that standard is relevant to this discussion, as both subsections (g) and (h) contain prohibitions against "walking down grain" and being "on moving grain." *See* 61 Fed. Reg. at 9581; 29 C.F.R. § 1910.272(h)(2)(ii).[9] In particular, OSHA noted that "if the grain cannot flow, avalanche, collapse or slide, and all reclaim and other equipment which could disturb the grain is properly locked out, an employee standing on grain is unlikely to be exposed to an engulfment hazard." 61 Fed. Reg. at 9581. Similarly, with respect to this potential hazard, OSHA cited to commenters who stated that "an employee entering a flat storage structure at ground level is exposed to engulfment hazards *only if there is operational draw off equipment beneath the grain which could cause the grain beneath the employee to flow*." *Id.* (emphasis added). The stated concern in either of these scenarios is the possibility that something underneath the top level of grain, and not simply the presence of an employee or equipment on top of the grain, is causing it to move or become unstable below the surface.

In the present case, Respondent illustrated that its multi-step, detailed permit procedures for bin cleaning operations are specifically focused on avoiding the hazards of unintentionally flowing, collapsing, or sliding grain. Respondent's procedures and diagrams established that the draw-off point for the vertical grain bin is exposed and grated during the bin cleaning process, which removes any possibility that the grain beneath the employees would unintentionally flow or move underneath the grain surface. (Ex. R-10, R-12). During the permitting process, Respondent ensures that the grain is resting at its angle of repose, which means that it is not capable of flowing or moving of its own accord. Further, the shovel itself only moves grain

9. The Court also notes that Respondent's flat-bottom bins are not *entirely* different from the flat storage structures referenced in Subparagraph (h). A 1996 OSHA interpretation letter defined flat storage structures as "a grain storage building or structure (unlike a bin or silo) that *will not empty completely by gravity*, and has an unrestricted ground level opening for entry." (emphasis added). Although Respondent's bins do not have an unrestricted ground level opening, it is clear from this record that they do not completely empty by virtue of gravity. (Ex. C-9)

located along a narrow path on the surface. There was no evidence that the movement of the shovel could cause grain to flow, collapse, or slide beneath the surface. The only place where a significant amount of grain is moving is in front of the shovel, where no employee is standing, and the small amount rolling back into the one-foot-deep channel created by the shovel. (Tr. 322). Respondent's procedures are designed to ensure that no unstable conditions exist below the surface, which is verified by the first entrant's inspection (while tied-off) and by the lack of a draw point underneath the residual grain pile.

Therefore, the Court finds that this record fails to establish that Respondent's bin cleaning procedure places Respondent's employees "on moving grain" as prohibited by the cited standard. Accordingly, Complainant failed to prove the violation. Citation 1, Item 1, in Docket No. 12-1584, will be VACATED.

Docket No. 12-1583, Citation 1, Item 1

Complainant alleged a serious violation of the Act in Citation 1, Item 1 as follows:

> 29 C.F.R. 1910.146(k)(1)(iii)(A): The employer did not designate emergency services that had the capacity to reach the victim(s) within a time frame that is appropriate for the permit space hazard(s) identified:
>
> Employees working in confined spaces, grain bins, tunnels and galleries are exposed to hazards associated with delayed or unavailable rescue. The employer did not have or has not assigned employees or managers as rescue personnel until the Fire Department can arrive or if the Fire Department is unavailable due to being on another call.

The cited standard provides:

> An employer who designates rescue and emergency services, pursuant to paragraph (d)(9) of this section, shall . . . [s]elect a rescue team or service from those evaluated that: Has the capability to reach the victim(s) within a time frame that is appropriate for the permit space hazard(s) identified.

29 C.F.R. § 1910.146(k)(1)(iii)(A).

As part of its permit-required confined space program, Respondent designated the Topeka Fire Department ("TFD") to respond to general emergencies, and permit-required confined space rescues in particular, at its Gordon Street facility. (Tr. 286, 289; Ex. R-3). TFD operates 12 fire stations, manned by 231 firefighters, in the city of Topeka, Kansas. TFD is a public entity that provides the community with fire response, emergency medical services, hazardous material response, and technical rescue services. (Collie Tr. 11). Among its technical rescue capabilities is confined space rescue. (Collie Tr. 12).

TFD's Technical Response Unit and most of its technical response personnel are located at TFD Station 11. (Collie Tr. 18–19). TFD Station 11 is located approximately *one-quarter of a mile* away from Respondent's Gordon Street facility and houses a fire engine (E11), a fire truck (T11), and a technical response tractor-trailer (TR11).[10] (Collie Tr. 14, 16–18, 44; Ex. R-13). According to TFD Division Chief Jack Collie, TR11 is equipped with close to a *million dollars' worth of technical rescue equipment*. (Collie Tr. 44–45). Station 11 operates 24 hours a day, 7 days a week and employs 24 firefighters, who rotate in 24-hour shifts. (Collie Tr. 16). At any given time, Station 11 is manned by two companies, which are comprised of three to four firefighters each. (Collie Tr. 16). Most of the firefighters at Station 11 have completed 80–100 hours of initial training in confined space rescue, and continually participate in additional daily training. (Collie Tr. 19, 22–23). Further, TFD regularly conducts tours and annual training drills *at the Gordon Street facility* with the assistance of Respondent's employees. (Collie Tr. 24–26; Tr. 292–293). These drills include mock emergency rescues from Respondent's grain bins and tunnels. (Collie Tr. 25).

As part of Respondent's pre-entry procedures for bin cleaning operations, which were discussed extensively with respect to Citation 1, Item 1 of Docket No. 12-1584 above,

10. TFD Station 11 can actually be seen from Respondent's Gordon Street Facility. (Tr. 287).

Respondent telephones Station 11 to notify them that an entry is about to take place and provides them with the specific bin location. (Tr. 295–296; Collie Tr. 28). If a permit-required confined space emergency actually occurs, Respondent's practice is to immediately contact Station 11, sound an alarm, and initiate the facility's Emergency Action Plan ("EAP"). (Tr. 296–297). As part of the EAP, Respondent's employees assist TFD by positioning themselves to direct the TFD responders to the location of the emergency, and by shutting down nearby equipment. (Tr. 302–304). Because it is a public fire department, however, TFD cannot absolutely guarantee the availability of its equipment or personnel, nor is TFD able to notify Respondent if and when Station 11 (or any other nearby station) goes out on a call. (Collie Tr. 51). The record established that there are three other TFD fire stations located within three miles of the Gordon Street facility: TFD 1 (1.5 miles away); TFD 3 (2.5 miles away); and TFD 6 (3 miles away). (Tr. 49–50; Ex. R-8). Further, according to Chief Collie, approximately 6 to 8 firefighters at other TFD stations are also trained in technical confined space rescue. (Collie Tr. 20).

In 2011, TFD's average response time—measured from dispatch to arrival on scene—for all incidents in the Topeka area was 4 minutes, 45 seconds. (Collie Tr. 46). TFD also maintains data for past response times specific to Respondent's Gordon Street facility. (Ex. R-9). According to the data, TFD has responded to emergency calls emanating from Respondent's Gordon Street facility 14 times in the last 9 years. (Ex. R-9). Station 11 was available to, and did, respond to every one of the reported incidents, ranging from EMS services to confined space rescue, with a response time that ranged between two and seven minutes. (Collie Tr. 46-47; Ex. R-9).

Based on the Court's calculations from the data introduced into the record, Station 11's average response time to Gordon Street was approximately 4 minutes. (Ex. R-9). On one

occasion, Station 11's responders arrived at the location of Respondent's emergency *before* Mr. Seyfert, *who was already on the property at the time of the incident*. (Tr. 290). Further, with respect to the two incidents identified by Chief Collie as confined space technical rescues, Station 11's Technical Response Unit (TR11) arrived each time within four to six minutes of receiving the initial call. (Ex. R-9). Despite these facts, as well as the discretion afforded to employers in the language of the cited regulation, Complainant argues that Respondent's decision to designate the Topeka Fire Department to respond to Gordon Street emergencies, including permit-required confined space emergencies, violated the Act.

Respondent designated its vertical bins as permit-required confined spaces, and implemented entry procedures pursuant to the permit-required confined space regulations. (Tr. 193; Ex. C-5, R-1). The Court concurs with Respondent's assessment, based on the record in this case concerning the configuration and contents of Respondent's vertical storage bins, that they are indeed permit-required confined spaces. As an initial matter, however, Respondent argues that Section 1910.146 does not apply because it is preempted by the provisions of Section 1910.272. According to 29 C.F.R. § 1910.146(a), "This section contains requirements for practices and procedures to protect employees in general industry from the hazards of entry into permit-required confined spaces." Permit-required confined spaces are defined as confined spaces that have one or more hazardous characteristics, including the potential for hazardous atmospheres or engulfment. 29 C.F.R. § 1910.146(b). Entry into permit-required confined spaces requires the designation of an emergency rescue service. 29 C.F.R. § 1910.146(k)(1).

In support of its preemption argument, Respondent points to two OSHA letters of interpretation: (1) CPL 02-00-100, "Application of the Permit-Required Confined Spaces (PRCS) Standards", 29 C.F.R. 1910.146 ("CPL 02-00-100"); and (2) Letter of Interpretation,

Ronald R. Demaray, February 8, 2008 ("Demaray Letter"). According to CPL 02-00-100, "These particular vertical standards [29 C.F.R. § 1910.272] take precedence over the permit-required confined space standard ***for the hazards they address***." CPL 02-00-100, Appendix A (emphasis added). The Demaray Letter also states that "29 C.F.R. 1910.272(g) takes precedence over the permit-required confined space standard ***for the hazards it addresses***." (Ex. C-8) (emphasis added). Although Section 1910.272(g) includes some provisions that are applicable to emergency rescue—1910.272(g)(4) (rescue equipment) and 1910.272(g)(5) (observer trained in rescue procedures and notification methods for obtaining emergency assistance)—the cited standard provides meaningful protection to employees beyond that afforded by the standards found in 1910.272(g); namely, that the standards found at 1910.146(k) specifically address the manner in which emergency rescue services should be evaluated and selected. Section 1910.272 only vaguely refers to emergency rescue services without specifically stating what is required.

As noted by the referenced OSHA interpretations, Section 1910.272 supersedes Section 1910.146 with respect to the hazards specifically associated with grain bin entries; however, according to the scope and application paragraphs of 1910.272: "This section contains requirements for the control of grain dust fires and explosions, and certain other safety hazards associated with grain handling facilities. *It applies in addition to all other relevant provision of part 1910* . . . ." 29 C.F.R. § 1910.272(a) (emphasis added). In other words, to the extent that the provisions of 1910.272 do not specifically apply to hazards associated with permit-required confined space entries, then other provisions of part 1910 apply. The Court finds that the cited provision of Section 1910.146 provides meaningful employee protection beyond that afforded by Section 1910.272. *See* 29 C.F.R. § 1910.5(c)(1); *The Cincinnati Gas & Electric Co.*, 21 BNA

OSHC 1057 (No. 01-0711, 2005) (citing *Bratton Corp.*, 14 BNA OSHC 1893 (No. 83-132, 1990)). Accordingly, the preemption argument is rejected, and the cited standard applies.

The cited standard is a performance standard in that Respondent was required to evaluate the hazards associated with its permit-required confined space entry program and select an emergency rescue service it deemed capable of providing a timely and adequate response. *See Thomas Indus. Coatings, Inc.*, 21 BNA OSHC 2283, 2287 (No. 97-1073, 2007) (holding performance standards "require an employer to identify the hazards peculiar to its own workplace and determine the steps necessary to abate them"); *see also* 63 Fed. Reg. 66018, 66023 (Dec. 1, 1998) (determination of what is "timely" based on particular circumstances and hazards of each confined space). Without specifically articulating what constitutes a "timely response," Complainant argues that Respondent's selection of TFD was "not a viable choice" because "it takes only 3 or 4 seconds to become helpless in flowing grain…and in about 20 seconds, a man can be buried."[11] Complainant argues that because TFD Station 11's Technical Response Unit (TR11) had response times of 4 minutes, 9 seconds in one instance, and 5 minutes, 55 seconds in another instance, and may not always be available because of other calls (though this has never happened), Respondent's emergency rescue service decision was improper. (Ex. R-9). In other words, although the cited regulation allows employers to make an educated choice in designating emergency rescue services, Respondent allegedly made the wrong choice.

The Court is not convinced, based upon this record, that Respondent failed to properly evaluate and select a rescue team or service that has the capability of reaching victims within a time frame that is appropriate for the hazards identified. First, it is unclear as to what Complainant would consider a timely response for Respondent's bin cleaning operations or other

11. *Complainant's Post-Hearing Brief*, p. 1

permit-required confined space activity. It is difficult to imagine a rescue team, whether internal or external, that could: (1) be notified, (2) assemble, (3) travel to, and (4) arrive at the location of any emergency in the 3-4 second or 20 second time-frames referenced by Complainant in the first sentence of its *Post-Hearing Brief*.

Complainant has stated that an employer is not expected to guarantee that a particular rescue attempt will be successful (although there is no doubt that would be Complainant's, Respondent's, and the designated rescue personnel's objective); rather:

> OSHA's measurement of a host employer's compliance . . . will not be based solely upon a rescue service's actual performance during any single instance, but instead upon the host employer's total effort prior to arranging for an outside rescue service to ensure that the prospective rescue service is indeed capable, in terms of overall timeliness, training, and equipment, of performing an effective rescue at the host employer's workplace.

59 Fed. Reg. 60735, 60738 (Nov. 28, 1994). Even CSHO Beacom acknowledged various actions that a designated rescue service would be subjected to, such as evaluation of the scene, equipping rescuers, and actually reaching the victim. (Tr. 107–108).

Second, TFD Station 11 is located only one-quarter of a mile away, is outfitted with over a million dollars' worth of technical rescue equipment, participates in regular rescue drills and tours of the Gordon Street facility, and is specifically notified each time Respondent conducts bin cleaning operations. Though not determinative, it is very persuasive that on one occasion TFD 11 arrived at the scene of a Gordon Street accident (when an employee suffered a broken arm) *before* Mr. Seyfert, *who was already on the Gordon Street facility property at the time*.

Third, Complainant's argument suggests that the only way Respondent could comply with the cited standard is by designating its own, in-house, stand-by, permit-required confined space rescue team. That suggestion is rejected for several reasons: (1) the standard allows for the choice between on-site and off-site rescue services based on various evaluation criteria; (2) there

was no evidence to suggest that an on-site rescue team would be capable of responding more quickly or more effectively (in terms of equipment or training) than TFD Station 11 or other nearby stations; and (3) stand-by rescue services are only specifically required when entrants are exposed to IDLH atmospheres—which is not asserted in this case. (Tr. 132-133, 286-287). *See* 29 C.F.R. § 1910.146(k)(1)(i) and accompanying *Note*.

Complainant's argument that TFD Station 11's possible unavailability prevents its designation is also rejected. That argument would seem to prohibit an employer from ever selecting a public emergency response service to provide permit-required confined space rescue. Such a prohibition is not articulated in the standard. While it is certainly possible that TFD Station 11 may be unavailable to respond to an emergency call at Respondent's facility, Station 11 has in fact responded to every such call during the last nine years. (Ex. R-9). There are three other TFD stations located within three miles of Respondent's facility, and firefighters trained in technical rescue at those locations can operate the Technical Response Unit at Station 11 when necessary. (Collie Tr. 49–51; Ex. R-8). Other TFD stations have historically responded to emergency calls at the Gordon Street facility as quickly, and in some instances more quickly, than TFD Station 11. (Ex. R-9).

Finally, and perhaps most importantly, Complainant's argument appears to take the non-mandatory criterion from Appendix F of Section 1910.146, and attempt to make it mandatory. Complainant introduced a 2008 OSHA interpretation letter, which discusses an employer who designated a local fire department as its off-site emergency rescue service. The letter reproduced 1910.146(k)(1) in its entirety, as well as paraphrased portions of non-mandatory Appendix F, paragraph A.3 as follows:

> Compliance may require the employer to be in close communication with the off-site rescue service immediately prior to each permit space entry. In the scenario

> you describe, the employer *must ensure* close communication with the rescue service during entry operations so that if the rescue service becomes unavailable while an entry is underway, the employer can instruct the attendant to abort the entry immediately. Entry *operations cannot resume* until the entry supervisor verifies that rescue services are able to respond in a timely manner.

(Ex. C-6) (emphasis added). Appendix F is apparently intended to help employers address the question of whether a particular emergency response service will be available to effectuate a timely rescue. By its own terms, the criteria contained in Appendix F may be considered by an employer during its evaluation process, but it is not required to do so. (Tr. 137–138). By using phrases such as "the employer must ensure" and "operations cannot resume" until Appendix F criteria are met, this interpretation letter appears to make mandatory that which the standards themselves clearly describe as non-mandatory.

The provisions of this 2008 interpretive letter also relate to an employer's obligations *during* a permit-required confined space entry. However, the cited standard in this case addresses an employer's obligations in selecting an emergency response service *prior* to an entry ever taking place. Further, the regulatory history of the standard, seems to clearly indicate that off-site rescue services can be appropriate:

> In particular, the Agency has attempted to indicate clearly that an employer who retains an off-site rescue and emergency service must ensure that the designated service has the equipment, training and overall ability to respond in a timely fashion when summoned to rescue a permit space entrant. OSHA does not thereby intend to require that host employers "guarantee" the performance of off-site services, to make compliance more burdensome for off-site services than for on-site services, or to prevent the use of off-site services. The Agency has consistently maintained that the purpose of § 1910.146(k) is to require that employers' provisions for rescue, by whatever means, are adequate.

60 Fed. Reg. 39281, 39283.

Public, professional, emergency rescue services, such as the local fire department described in this case (and more specifically, TFD's Technical Rescue Unit 11) seem more likely to have well-maintained rescue equipment, greater rescue skills and experience, and more

advanced and focused rescue training, than most employers could replicate. Based on the foregoing, the Court finds that Complainant failed to prove that Respondent selected a rescue service from those evaluated that was incapable of reaching victims within an appropriate time frame for the permit-required confined space hazards at Respondent's Gordon Street facility. Accordingly, Citation 1, Item 1 of Docket No. 12-1583 will be VACATED.

Order

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

1. Citation 1, Item 1 of Docket No. 12-1583 is VACATED.
2. Citation 1, Item 1 of Docket No. 12-1584 is VACATED.

SO ORDERED.

/s/ *Brian A. Duncan*

Date: September 16, 2013
Denver, Colorado

Judge Brian A. Duncan
U.S. Occupational Safety and Health Review Commission