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SECRETARY OF LABOR
Complainant,
v.
CNG TRANSMISSION CORPORATION
Respondent.

OSHRC DOCKET
NO. 93-0152

# NOTICE OF DOCKETING OF ADMINISTRATIVE LAW JUDGE'S DECISION

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on February 9, 1994. The decision of the Judge will become a final order of the Commission on March 11, 1994 unless a Commission member directs review of the decision on or before that date. ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW. Any such petition should be received by the Executive Secretary on or before March 1, 1994 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

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

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Petitioning parties shall also mail a copy to:

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

FOR THE COMMISSION

Ray H. Darling, Jr.

Date: February 9, 1994

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 93-0152

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| SECRETARY OF LABOR,<br><br>Complainant,<br><br>v.<br><br>CNG TRANSMISSION CORPORATION,<br><br>Respondent. | OSHRC Docket No. 93-152 |

APPEARANCES:

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Before: Administrative Law Judge Nancy J. Spies

## DECISION AND ORDER

On November 30, 1992, the Secretary issued CNG Transmission Corporation (CNG) two citations resulting from an inspection conducted by Occupational Safety and Health Administration (OSHA) Compliance Officer Andrew Berestecky. Berestecky began his inspection on June 4, 1992, in response to a report of the deaths of two employees at a worksite in Hopwood, Pennsylvania, on June 2, 1992. CNG contested the citations at a hearing held in Pittsburgh, Pennsylvania, on June 3 and 4, 1993.

At the beginning of the hearing, the Secretary moved to vacate items 1a and 1b of Citation No. 1 (Tr. 7-8). The Secretary's motion is granted. Remaining at issue are the following items:

- Item 2 of Citation No. 1, alleging a serious violation of § 1910.27(b)(1)(ii), for failing to ensure that the distance between the rungs of a ladder did not exceed 12 inches and were uniform throughout the length of the ladder.
- Item 3 of Citation No. 1, alleging a serious violation of § 1910.151(c), for failing to provide suitable facilities for quick drenching or flushing of the eyes and body within the work area for immediate emergency use.
- Item 1 of Citation No. 2, alleging a willful violation of § 5(a)(1), for failing to furnish employees employment and a place of employment free from recognized hazards that are causing or are likely to cause death or serious physical harm to employees.
- Item 2a of Citation No. 2, alleging a willful violation of § 1910.1200(c)(1)(ii), for failing to develop, implement and maintain at the workplace a written hazard communication program, including the methods the employer uses to inform employees of the hazards of non-routine tasks.
- Item 2b of Citation No. 2, alleging a willful violation of § 1910.1200(f)(5)(i), for failing to ensure that each container of hazardous chemicals in the workplace is labeled, tagged or marked with the identity of the hazardous chemical(s) contained therein.
- Item 2c of Citation No. 2, alleging a willful violation of § 1910.1200(f)(5)(ii), for failing to ensure that each container of hazardous chemicals in the workplace is labeled, tagged or marked with appropriate warning hazards.
- Item 2d of Citation No. 2, alleging a willful violation of § 1910.1200(g)(8), for failing to maintain copies of the required material safety data sheets for each hazardous chemical in the workplace and to ensure they are readily accessible during each work shift to employees when they are in their work area(s).

- Item 2e of Citation No. 2, alleging a willful violation of § 1910.1200(h), for failing to provide employees with information and training on hazardous chemicals in their work area at the time of their initial assignment and whenever a new hazard is introduced into their work area.

This case is complicated by the question of who was acting as the employer of the exposed employees for the purposes of the Occupational Safety and Health Act of 1970 (Act). CNG and Union Drilling (Union) were cited with identical citations. It is necessary to delve into the relationship between CNG and Union in order to explain the dispute regarding whether either or both companies acted as an employer.

## Background

In 1990 CNG began preparing an old gas field in Hopwood, Pennsylvania, for the underground storage of natural gas (Tr. 13, 57). CNG would hire one of several contractors it dealt with to redrill a well. After the redrilling was completed, the well would undergo a two-step "fracing" process in which the same operation is repeated twice. Fracing is performed by forcing a mixture of water, nitrogen, hydrochloric acid, sand, and other materials into the well so that the mixture fractures the rock strata and creates the storage area (Tr. 11-13, 46-48).[1]

In 1991 CNG hired Delta Drilling to redrill a well referred to as UW 103 (Tr. 17, 46). After Delta Drilling had redrilled UW 103, CNG hired Halliburton Services to perform the fracing (Tr. 12). Halliburton Services provided all of the chemicals used in the fracing process (Tr. 14). After the fracing liquid was pumped into the well under pressure, the well was capped. It was then necessary to recover the frac fluid in the "flow-back" operation. The frac fluid contained under pressure underground was piped into a "flow-back" tank (also referred to as the "blow-back" tank). The flow-back tank contained a baffle to blunt

[1] Because much of the evidence relevant to Union's case was identical with that of CNG's case, the first portion of the hearing generated a transcript that was used in both cases. The transcript citations are found in the transcript labeled "CNG Transmission Corporation."

the impact of the returning frac fluid mixed with sand under pressure (Tr. 49-51). The flow-back tank was partially open at the top (Exh. C-2). The frac fluid was then piped into a nearby 500-barrel "frac" (or "wheely") tank (Exh. C-2; Tr. 21). The flow-back tank was leased from Whip Stock (Tr. 14). CNG leased the frac tank from Union (Tr. 54).

At the rear of the frac tank, the floor of the tank formed a 2- or 3-foot long step to accommodate the wheels underneath it (Exh. C-2, Photograph A). At the front of the frac tank was a "manhole" next to the foot of the ladder which was used to gain access to the top of the frac tank. The manhole cover was posted with a sign written in English and Spanish. The English portion of the sign read (Exh. C-2, Photograph D):

DANGER
DO NOT ENTER
THIS TANK MAY CONTAIN
FATAL VAPORS

On top of the frac tank were two openings, a manhole cover used to enter the tank in order to clean it out, and a smaller opening (Tr. 69). The manhole was approximately 19 by 21 inches, and the smaller opening was 1 or 2 inches in diameter (Tr. 37, 268). A ladder descended from the top manhole into the frac tank (Exh. C-5; Tr. 74). The top manhole is above the elevated section of the tank's bottom. The smaller opening is above the lower section of the floor (Tr. 52).

On June 2, 1992, the second phase of the fracing process began at UW 103 (Tr. 254). The first phase had been completed the week before (Tr. 124). James Simons, a production specialist from CNG, coordinated the second phase of the fracing process at UW 103. He was not involved in the first phase (Tr. 11, 25).

Generally, CNG used its own people to perform the flow-back operation, but Simons explained CNG was "under such a heavy workload that year that [it] did not have the people, so [CNG] contracted outside help to do that work" (Tr. 18). Brian Sheppard, an engineer for CNG, called Arthur Dennis Chidester (Sheppard referred to him as "Dan"), a drilling superintendent for Union, in July 1991 (Tr. 327-328). Union had done some drilling for CNG in the past (Tr. 328). Sheppard told Chidester that CNG "needed

personnel to help rig up the flow line and then monitor the flow back for the flow back operation" (Tr. 329).

Sheppard asked Chidester for a two-man crew. Chidester asked Sheppard if he would mind using two two-man crews so that the personnel could be rotated and the employees could keep their benefits active. Sheppard agreed to this arrangement (Tr. 330-331).

Union assigned Mike Phipps, A. Harley Doyle, George Burkhammer, Bob Davisson and Herb Sias to the UW 103 site.[2] Davisson and Sias were on the day crew, and Doyle and Burkhammer were on the night crew (Tr. 17). Prior to this assignment, neither Davisson nor Sias had ever done any flow-back work (Tr. 128, 171).

Sias testified that Davisson, who was his supervisor at Union, asked him if he wanted the assignment. Sias told him that he had never done flow-back work before. Davisson assured Sias that the crew they were relieving would tell them what to do when they arrived at the site (Tr. 171). When they arrived at UW 103, Union employees Doyle and Mike Phipps explained to Davisson and Sias that they had to monitor the tank gauges and measure the depth of the frac fluid in the wheely tank every two hours (Tr. 172-173). One of the crew, Sias remembers him as Doyle, told Sias and Davisson how they were measuring the frac fluid. He said that they were going into the tank through the top manhole. Davisson never went into the frac tank. He went down the ladder the first day (Tr. 126). Sias went down through the manhole once or twice (Tr. 173, 189-190) but then told Davisson, "I don't like the idea of going down in here" (Tr. 173). Sias and Davisson began measuring from the smaller opening by dropping the weighted end of a 16-foot steel tape measure to the floor of the tank (Tr. 127, 173). A fluid level gauge on the frac tank was inoperable (Tr. 29, 34, 200). Having discovered this method measuring the level of the frac fluid, Davisson and Sias demonstrated it to the night crew on June 2, 1992, and warned them not to go down into the frac tank (Tr. 180-181).

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[2] Apparently, the night crew for the first night of the fracing process consisted of Doyle and Phipps. The next night Doyle was paired with Burkhammer.

Earlier that day, Simons and the Union crew detected a leak in the flow-back tank. Simons decided to reconfigure the piping and between 5:00 p.m. and 5:30 p.m. directed Davisson and Sias to bypass the flow-back tank and flow the liquid directly into the frac tank (Tr. 14, 63, 67).

The gas pressure which had escaped when the frac fluid was passing through the flow-back tank now flowed directly into the frac tank. Sias, who stood on top of the frac tank after the reconfiguration, stated that the frac tank began pulsating: "The tank was just--the sides [were] going in and out of it and the top the same way .... It was just moving back and forth, the metal on the sides of the tank. The top was just moving back and forth" (Tr. 162).

The new configuration also caused the liquid to foam up to the top of the frac tank (Tr. 133, 141-142). Sias and Davisson asked Simons to get some defoamer for the frac tank. Halliburton delivered several containers of the defoamer as Davisson and Sias were being relieved by Doyle and Burkhammer (Tr. 36, 141, 177).

Davisson and Sias reported to work on the morning of June 3, 1992, at 7:00 a.m. They saw no sign of Doyle and Burkhammer whom they were supposed to relieve (Tr. 145, 181). The foam was still a foot or two from the top of the frac tank (Tr. 161, 181). The measuring tape had been stuck in the small opening on top of the tank. Sias and Davisson started pumping the frac fluid out of the frac tank to see if the missing men were in there. Eventually, the bodies of Doyle and Burkhammer were found at the bottom of the ladder inside the frac tank (Tr. 145, 200). The cause of death was later determined to be asphyxiation (Tr. 295).

## Who Was the "Employer" for Purposes of the Act?

"Only an 'employer' may be cited for a violation of the Act." *Vergona Crane Co.*, 15 BNA OSHC 1782, 1783, 1992 CCH OSHD ¶ 29,775 (No. 88-1745, 1992). Section 3(5) of the Act defines an "employer" as "a person engaged in a business affecting commerce who has employees." Section 3(4) of the Act defines a "person" as "one or more individuals, partnerships, associations, corporations, business trusts, legal representatives, or any

organized group of persons." Section 3(6) defines "employee" as "an employee of an employer who is employed in a business of his employees which affects commerce."

Both CNG and Union were cited as employers of the four men monitoring the level of the frac fluid. Union, and to a lesser extent, CNG, argue that the other party is the employer for purposes of the Act. The Secretary argues that both parties are liable as employers under the Act. Review Commission case law establishes some guidelines for determining who of two employers is responsible for the safety of employees.

Last year the Commission reiterated its "economic realities test" formulated to determine whether an employment relationship exists between employees and the alleged employer. In *Loomis Cabinet Company*, 15 BNA OSHC 1635, 1637, 1992 CCH OSHD ¶ 29,775 (No. 88-2012, 1992), the Commission stated that it had "considered a number of factors" when making the determination, including:

1) Whom do the workers consider their employer?

2) Who pays the workers' wages?

3) Who has the responsibility to control the workers?

4) Does the alleged employer have the power to control the workers?

5) Does the alleged employer have the power to fire, hire, or modify the employment condition of the workers?

6) Does the workers' ability to increase their income depend on efficiency rather than initiative, judgment, and foresight?

7) How are the workers' wages established?

*Van Buren-Madawaska*, 13 BNA OSHC at 2158, 1989 CCH OSHD at p. 37,780 (quoting *Griffin & Brand*, 6 BNA OSHC at 1703, 1978 CCH OSHD at pp. 27,600-01).

In an earlier case, *MLB Industries, Inc.*, 12 BNA OSHC 1525, 1985 CCH OSHD ¶ 27,408 at p. 35,570 (No. 83-231, 1985), the Commission emphasized that the primary factor to be considered in determining whether an employment relationship exists is control:

> The express purpose of the Act is to "assure so far as possible every working man and woman in the Nation safe and healthful working conditions." 29 U.S.C. § 651(b). To effectuate this purpose it is appropriate for the Commission, in considering whether an employment relationship exists, to place primary reliance upon who has control over the work environment such that abatement of the hazards can be obtained.

In another case from last year, the Commission addressed a recent Supreme Court decision which accorded with Commission precedent regarding the primacy of the issue of control in analyzing an employment relationship:

> The Supreme Court recently held that the term "employee" in a federal statute should be interpreted under common law principles, unless the particular statute specifically indicates otherwise. *Nationwide Mutual Insurance Co. v. Darden*, 112 S.Ct. 1344, 1348 (1992). *See Loomis Cabinet Co.*, 15 BNA OSHC 1635, 1637 (No. 88-2012, 1992). The Court noted that all aspects of the relationship are relevant, but that the central inquiry is as follows:
>
> > In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.
>
> 112 S.Ct. at 1348 (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-752 (1989) (footnotes omitted)). Thus, the central inquiry under both tests is the question of whether the alleged employer has the right to control the work involved. *See Loomis*, 15 BNA OSHC at 1638.

*Vergona Crane Co.*, 15 BNA OSHC at 1784.

In the present case, CNG contacted Union and requested the company to send over some employees to monitor the fracing process. After Union did so, its involvement with

the project, other than paying the employees' wages, essentially ended (Tr. 70-73). Chidester, Union's supervisor, testified that he assigned the employees to the project and stated, "I remained their supervisor as far as sending them out of the shop, and if I got a call telling me we needed them tomorrow or to have them there at 6:00 a.m. or whatever, I was their supervisor in that capacity" (Tr. 88). Chidester never visited the UW 103 worksite (Tr. 88-89).

Union supervisors were not present at the site, nor did they ever instruct the employees on what they were to do or how to do it. When Davisson asked Sias if he wanted to work on the UW 103 well, Sias stated, "I have never done that before." Davisson replied, "We will show you when you get there. The guy you are relieving will explain to you what you are doing and tell you what to do" (Tr. 171). The crew that Davisson and Sias relieved had been instructed by James Simons, CNG's production specialist, who testified, "I told them at what point we should be opening the valve up to begin process of the flow back, and we also discussed the measurements of the tank" (Tr. 19).

Sias testified that he considered CNG personnel to be the supervisors of the project. Simons gave the crew instructions on how to perform the work. Simons and another CNG supervisor, Dave Taylor, would ask to see the logbook that the employees kept. As Sias stated, "If we are drilling a well for a certain company, when the guy asks you to do something, you do what he tells you or you try to. We consider that's who we are working for" (Tr. 176).

Davisson and Sias were instructed by CNG to change the choke (Tr. 176-177): "They told us what size choke to put in. We knocked the line apart and put a choke in it." On June 2, 1992, when the flow-back tank was leaking, it was Simons who ordered Davisson and Sias to reconfigure the pipe so that the frac fluid flowed directly into the frac tank (Tr. 67, 177). When asked if it was necessary to call Union to request permission to allow the employees to reconfigure the pipe, Simons replied, "No" (Tr. 67).

Applying the Supreme Court's employment test cited in *Darden, supra*, it is apparent that CNG was an employer of the crews leased from Union for purposes of the Act. All of the witnesses testified that the flow-back operation did not require a highly skilled workforce. Davisson stated that he did not consider the work that he was asked to do difficult or

complicated (Tr. 146). Sias testified that the job he was asked to do did not require any special skills (Tr. 195). Simons went so far as to state, "We could pick two people off the street to handle this job" (Tr. 314). CNG was not relying on any particular expertise of the Union workers. The crews did not have to supply any special tools or equipment. The work was done at CNG's well site UW 103. CNG had the right to assign additional projects to the workers, as evidenced by the events of June 2, 1992, when Simons asked Davisson and Sias to assist him in realigning the pump so that fluid bypassed the flow-back tank and went directly into the wheely tank. CNG informed Union what time the workers were to report to the jobsite (Tr. 70-73). When the job was completed, CNG either told the employees on the site not to return or called Union, whichever was easier (Tr. 72). The flow-back operation is part of the regular business of CNG and, ordinarily, CNG used their own employees to flow back the wells during the fracing process (Tr. 18).

Under both the Supreme Court's and the Commission's formulations of their employment tests, in which the most significant factor is whether the alleged employer has the right to control the work involved, CNG was an employer of the employees leased from Union. CNG controlled the UW 103 well and controlled the employees' performance of their work. The only instructions and orders the employees received were from CNG personnel. CNG is an employer of the Union employees within the meaning of the Act. In *Union Drilling* (No. 93-154), the companion case to the present case, it was determined that Union was not an employer of the employees monitoring the frac fluid for purposes of the Act.

## CITATION NO. 1

### Item 2: Alleged Violation of § 1910.27(b)(1)(ii)

The Secretary alleged a serious violation of § 1910.27(b)(1)(ii), which provides:

> The distance between rungs, cleats, and steps shall not exceed 12 inches and shall be uniform throughout the length of the ladder.

The frac tank was equipped with fixed ladders on the front and rear to allow access to the top of the tank. The ladder at the rear of the tank was missing two rungs (Exh. C-2, Photograph A; Tr. 212-213).

Compliance Officer Berestecky explained the hazard presented by the missing rungs (Tr. 213-214):

> [The ladder] was available for use. There were no measures taken to ensure that employees would not use it. For example putting duct tape across the ladder. My concern was that if you were on top, if you ascend the wheely tank from the front, get on top and decide that the way you want the rear ladder, you may have a bit of a problem on your hands once you reach that fifth rung down, because it is not there.
>
> This particular vehicle was being used at all times, day and night, and there was no artificial lighting in the area . . . .

CNG counters that the Secretary failed to prove that any employee used the ladder at the rear of the frac tank. Sias testified that he always used the ladder at the front of the tank (Tr. 185). Sias' testimony does not establish, however, that the other employees did not use the faulty ladder. Furthermore, as Berestecky testified, the faulty ladder was available for use. The Secretary need only prove that the employees had access to the hazard, not that they were actually injured by it.

The missing rungs were obvious to anyone who visited the site (Tr. 214). CNG personnel, including Simons, were at the site and should have, with reasonable diligence, observed the missing rungs and taken steps to abate the hazard.

Berestecky testified that the missing rungs created the hazard that an employee descending the ladder could fall and injure himself, resulting in "anything from a simple abrasion to a contusion to fractures or concussions" (Tr. 220-221). The site was relatively isolated, which may have delayed medical treatment.

The Secretary has established that CNG was in serious violation of § 1910.27(b)(1)(ii).

Item 3: Alleged Violation of § 1910.151(c)

The Secretary charged CNG with a serious violation of § 1910.151(c), which provides:

> Where the eyes or body of any person may be exposed to injurious corrosive materials, suitable facilities for quick drenching or flushing of the eyes and body shall be provided within the work area for immediate emergency use.

The chemicals used in the fracing process included liquified nitrogen and hydrochloric acid (Tr. 17). There was neither an eye wash station or a deluge shower at the site (Tr. 217). Sias and Davisson told Berestecky that "there had been times when the material got on their skin and caused some burning sensation" (Tr. 218). Davisson recounted how it felt when he got some frac fluid on his arm (Tr. 130): "It kind of burnt your skin. We thought it was from the wind or something, that stuff getting on us. I don't know whether it came out of the well. It left a little tingle on your skin and on your arm." Davisson did not wipe the fluid off of his arm, nor did he seek medical treatment for it. The tingling sensation lasted for "[j]ust a minute maybe" (Tr. 144).

CNG argues that, while hydrochloric acid is used in the fracing process, it was substantially diluted with water and was largely used up when it reacted with the underground rock (Tr. 48). Simons testified that he had come into contact with frac fluid on "numerous" occasions and had never sustained any kind of damage or discomfort as a result (Tr. 314-316). Brian Sheppard, an engineer for CNG, testified that he had gotten frac fluid on his skin "well over 100 times" and that he had never suffered any ill effect from it (Tr. 333-334).

The Secretary did not submit the results of any chemical analysis of the frac fluid. Berestecky took a sample of the fluid on June 11, nine days after the accident (Tr. 254). He testified that he sent the sample to the Salt Lake City laboratory, which determined that the sample "was predominantly water with a pH of roughly 5" (Tr. 252). The pH of a neutral solution is 7.

The cited standard applies to "injurious corrosive materials." The Secretary has failed to establish that the frac fluid was either injurious or corrosive. The employees who came in contact with the frac fluid suffered no ill effects from it, other than a tingling sensation that lasted less than a minute. The Secretary presented no expert testimony, either chemical or medical, to establish the composition and acidity of the frac fluid. The

sample taken by Berestecky, which was not representative of the frac fluid at the time of the accident, was determined to be mostly water.

Absent more conclusive evidence, it cannot be determined that the frac fluid qualified as an "injurious corrosive material." The Secretary has failed to prove that the cited standard applies to the frac fluid. Item 2 is vacated.

## CITATION NO. 2

### Item 1: Alleged Violation of § 5(a)(1)

The Secretary alleged a willful violation of § 5(a)(1) of the Act, which provides:

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

The Secretary contends that CNG's failure to train the employees leased from Union in confined space entry procedures constituted a willful violation of § 5(a)(1).

> To prove that an employer violated § 5(a)(1), the Secretary must show: (1) that a condition or activity in the employer's workplace presented a hazard to employees, (2) that the cited employer or the employer's industry recognized the hazard, (3) that the hazard was likely to cause death or serious physical harm and (4) that feasible means existed to eliminate or materially reduce the hazard. *United States Steel Corp.*, 12 BNA OSHC 1692, 1697-98, 1986-87 CCH OSHD ¶ 27,517, p. 35,669 (No. 79-1998, 1986).

*Coleco Industries, Inc.*, 14 BNA OSHC 1961, 1963, 1991 CCH OSHD ¶ 29,200 (No. 84-546, 1991).

(1) A condition in the workplace presented a hazard to employees.

Berestecky testified that the primary hazard presented to the employees at the site was the absence of an adequate oxygen supply in the frac tank. The nitrogen gas emanating from UW 103 displaced the oxygen in the frac tank, rendering the air in the tank inadequate to sustain human life (Tr. 224). The nature of the hazard is obvious from the deaths of the two men who were found in the frac tank.

(2) CNG recognized the hazard.

In CNG's safety manual, *Guide to Job Safety & Health*, pages 11 and 12 address "Working in a Confined Space" (Exh. R-3). On page 11, the manual states (emphasis added):

> Typical confined spaces would include vaults, manholes, pipe, vessels, *tanks*, etc.
>
> Before entering a confined space, the atmosphere must be tested to determine if a flammable gas is present or *oxygen has been displaced to the extent that the remaining air is inadequate for safe breathing. The minimum acceptable level of oxygen content for safe breathing is 19½ percent.*

The manual goes on to detail how the employees must test for the oxygen concentration before entering the confined space, notify their supervisors if there is any indication of oxygen deficiency, use a self-contained breathing apparatus (SCBA) or air-line breathing apparatus to enter a confined space with an oxygen deficiency, prepare an emergency rescue plan prior to entering the confined space, and have at least one standby person outside the confined space to provide assistance if necessary. The section on confined spaces concludes (Exh. R-2, pg. 12):

> All employees who are subject to entering an area containing an unsafe atmosphere must be trained in the use and maintenance of self-contained breathing apparatus (SCBA) or air-line breathing apparatus.

CNG's safety manual provides strong evidence that CNG recognized the hazard presented by entering the frac tank. The manual specifies tanks as confined spaces and directly addresses the issue of oxygen displacement. CNG realized that approximately 1.5 million cubic feet of nitrogen was being used in the fracing process (Tr. 227). The invoice for the nitrogen was signed by CNG's Simons (Exh. C-8).

CNG recognized that entering the frac tank during the fracing process was a hazard.

(3) The hazard was likely to cause death or serious physical harm.

The seriousness of the hazard is demonstrated by the deaths of the two employees.

(4) Feasible means existed to eliminate or materially reduce the hazard.

Had CNG actually implemented its confined space program by training the employees leased from Union, it could have materially reduced the hazard.

Davisson and Sias, the two Union employees assigned to the UW 103 project both testified that they were never instructed by anyone from CNG not to enter the tank (Tr. 132, 180). Simons testified that he told one of the two employees not to go into the tank but could not remember which one (Tr. 22-23). Having observed the demeanor of the witnesses and character of their testimony in light of the facts, Simons' testimony that he warned one of the two workers to stay out of the tank is regarded as self-serving and is rejected. Furthermore, Simons stated that he had no discussions whatsoever with Burkhammer or Doyle, the employees who died in the tank (Tr. 42). The decision by Sias and Davisson not to enter the tank to take the frac fluid measurement was reached on their own, with no warnings or instructions from CNG.

The likelihood of an accident occurring was increased by the fact that the gauge on the tank for the fluid level was broken. Simons stated, "I have worked around these tanks basically since they have been made, and if these tanks are not brand new, normally the gauge does not work" (Tr. 34).

CNG relies on the warning signs posted on the outside of the tank to exculpate itself from the responsibility of training the employees in confined space entry. The signs are an inadequate substitute for confined space training. The other crew from Union was the first to give Sias and Davisson their instructions. "They said they were going down in the tank getting readings" (Tr. 150). Sias and Davisson had no reason to believe this procedure was incorrect (Tr. 150). Simons stated that he expected the employees to measure the fluid level by climbing on top of the tank and sticking a steel tape measure down into the tank (Tr. 34). Considering the top of the frac tank contained an opening large enough for a man to fit through and had a ladder descending from the opening into the tank, it is not surprising that employees assigned to measure the fluid would enter the frac tank to take the measurements. Training in confined space entry would have alerted them to the dangers in doing so.

The Secretary has established that CNG violated § 5(a)(1) by its failure to train the employees in confined space entry.

> A willful violation is one committed with intentional, knowing or voluntary disregard for the requirements of the Act, or with plain indifference to employee safety. *E.G., Williams Enterprises, Inc.*, 13 BNA OSHC 1249, 1256-57, 1986-87 CCH OSHD ¶ 27,893, p. 36,589 (No. 85-355, 1987). It is differentiated from other types of violations by a "heightened awareness--of the illegality of the conduct or conditions--and by a state of mind--conscious disregard or plain indifference." *Id.*
>
> A finding of willfulness is not justified if an employer has made a good faith effort to comply with a standard, even though the employer's efforts are not entirely effective or complete. *Id.* Also, a violation is not willful if the employer had a good faith opinion that the violative conditions conformed to the requirements of the cited standard. However, the test of good faith for these purposes is an objective one--whether the employer's belief concerning a factual matter, or concerning the interpretation of a standard, was reasonable under the circumstances. *Id.* 13 BNA OSHC at 1259, 1986-87 CCH OSHD at p. 36,591.

*Calang Corp.*, 14 BNA OSHC 1789, 1791, 1990 CCH OSHD ¶ 29,531 (No. 85-319, 1990).

CNG's violation of § 5(a)(1) in this instance does not rise to the level of willfulness. CNG did not demonstrate plain indifference to the employees' safety. The fact that it had a confined space entry program prior to OSHA requiring such a program shows that CNG was concerned with employee safety. The fact that CNG failed to train the employees leased from Union is a serious violation of § 5(a)(1), but it does not manifest a heightened awareness of the illegality of the violation. The frac tank was posted with warnings not to enter it. The measurements could be taken from outside the tank. CNG believed, mistakenly, that this was sufficient to keep the employees from entering the tank. While this was a tragic miscalculation on the company's part, it is not willful behavior. If the employees had been required to enter the frac tank and had still not been trained in confined spaces, that would amount to willful conduct. CNG should have trained the employees in confined spaces on the basis of their access to the interior of the frac tank, but its violation is a serious violation.

## Item 2: Alleged Violations of the Hazard Communication Standard, § 1910.1200

The Secretary charged CNG with willful violations of five sections of § 1910.1200, the hazard communication standard. The cited standards are:

Item 2a - § 1910.1200(e)(1)(ii):

> (e) *Written hazard communication program.* (1) Employers shall develop, implement, and maintain at the workplace, a written hazard communication program for their workplaces which at least describes how the criteria specified in paragraphs (f), (g), and (h) of this section for labels and other forms of warning, material safety data sheets, and employee information and training will be met, and which also includes the following:
>
> * * *
>
> (ii) The methods the employer will use to inform employees of the hazards of non-routine tasks (for example, the cleaning of reactor vessels), chemicals contained in unlabeled pipes in their work areas.

Item 2b - § 1910.1200(f)(5)(i):

> (f) *Labels and other forms of warning.* (5) Except as provided in paragraphs (f)(6) and (f)(7) the employer shall ensure that each container of hazardous chemicals in the workplace is labeled, tagged or marked with the following information:
>
> (i) Identity of the hazardous chemical(s) contained therein.

Item 2c - § 1910.1200(f)(5)(ii):

> (ii) Appropriate hazard warnings.

Item 2d - § 1910.1200(g)(8):

> (g) *Material safety data sheets.* (8) The employer shall maintain copies of the required material safety data sheets for each hazardous chemical in the workplace, and shall ensure that they are readily accessible during each work shift to employees when they are in their work area(s).

Item 2e - § 1910.1200(h):

> (h) *Employee information and training.* Employers shall provide employees with information and training on hazardous chemicals in their work area at the time of their initial assignment, and whenever a new hazard is introduced into their work area.

CNG has a written hazard communication program (Tr. 249). The fracing process required the employees to work with nitrogen and hydrochloric acid. It is undisputed that CNG failed to inform the employees leased from Union of the potential hazards of the fracing process, to mark the flow-back and frac tanks with appropriate hazard warnings, to provide information identifying the chemicals used in the fracing process, to make available material safety data sheets (MSDSs), and to provide training in working with nitrogen and hydrochloric acid (Tr. 23, 128, 178).

CNG raises several arguments, each without merit. First, CNG argues that UW 103 was a temporary, not a permanent, worksite. There is no provision in the Act making the hazard communication standard applicable to only permanent worksites. As long as CNG had employees on the site, it was required to comply with the standard.

Second, CNG argues that Halliburton Services brought the frac fluid onto the site and that, while Halliburton was on the site, it had the MSDSs available for the employees. When Halliburton left, it took the MSDSs with it. This is of no help to CNG. The standard requires that "the employer" make available at all times the MSDSs. It has already been established that CNG was the employer of the employees leased from Union for purposes of the Act. The employees from Union were not even on the site when Halliburton delivered the frac fluid to UW 103.

Third, CNG argues that the Secretary failed to prove that the employees were dealing with hazardous chemicals that required MSDSs. While CNG acknowledges that hydrochloric acid and liquified oxygen went into UW 103, no accurate analysis of the frac fluid coming back from UW 103 was done. CNG may have a point regarding the hydrochloric acid, which was diluted with water. The same cannot be said, however, for the nitrogen. The MSDS for nitrogen warns that "GAS REDUCES OXYGEN AVAILABLE FOR

BREATHING" and that it should be used "ONLY WITH ADEQUATE VENTILATION" (Exh. C-1). Had the employees been told specifically that they were dealing with nitrogen, and had they had access to the MSDS for it, they may have been less likely to enter the frac tank.

Finally, CNG argues that the warning signs posted on the frac tank were sufficient to put the employees on notice that they were not to enter the frac tank. The hazard communication standard mandates a number of very specific requirements for communicating information to employees regarding the chemicals they will be using. The standard cannot be satisfied by recourse to a general warning sign permanently posted on a tank.

The Secretary has established that CNG was in violation of the five cited provisions of § 1910.1200. The Secretary cited the violations as willful, but presented no evidence that established that CNG demonstrated either intentional disregard of the Act or plain indifference to employee safety. The violations were, however, of a serious nature, involving the failure to instruct employees in the use of a potentially (and in this case, actually) deadly [illegible]. The violations are classified as serious.

Penalty Determination

Under § 17(j) of the Act, the Commission has authority to assess appropriate penalties against the employer, "giving due consideration" to "the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations." Because the Secretary cited the violations as willful, the compliance officer did not believe it was necessary to delve into CNG's size, good faith, and history of previous violations (Tr. 272). The Secretary did not submit any evidence on these points. CNG volunteered that it had received one citation in the past ten years (Exh. R-3; Tr. 353). While the size of CNG is unknown, there was no evidence of bad faith on the part of CNG at any time relevant to this case. The gravity of the offenses was severe, with death as the likely outcome of the violations.

Upon due consideration of all of these factors, it is determined that the following penalties are appropriate:

Citation No. 1

| | |
|---|---|
| Item 2 | $2,000 |

Citation No. 2

| | |
|---|---|
| Item 1 | $7,000 |
| Items 2a-2e | $7,000 |

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

## ORDER

Based upon the foregoing decision, it is hereby ORDERED:

(1) That item 2 of Citation No. 1, alleging a violation of § 1910.27(b)(1)(ii), is affirmed and a penalty of $2,000 is assessed;

(2) That item 3 of Citation No. 1, alleging a violation of § 1910.151(c), is vacated;

(3) That item 1 of Citation No. 2, alleging a violation of § 5(a)(1), is affirmed as serious and a penalty of $7,000 is assessed; and

(4) That items 2a through 2e, alleging violations of §§ 1910.1200(e)(1)(ii), (f)(5)(i), (f)(5)(ii), (g)(8), and (h), are affirmed as serious and a total penalty of $7,000 is assessed.

/s/ Nancy J. Spies
NANCY J. SPIES
Judge

Date: January 31, 1994