UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1825 K STREET NW
4TH FLOOR
WASHINGTON, DC 20006-1246

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SECRETARY OF LABOR
Complainant,
v.
FLUIDICS, INC.
Respondent.

OSHRC DOCKET
NO. 92-0411

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 April 9, 1993. The decision of the Judge will become a final order of the Commission on May 10, 1993 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 April 29, 1993 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:

Executive Secretary
Occupational Safety and Health
Review Commission
1825 K St. N.W., Room 401
Washington, D.C. 20006-1246

Petitioning parties shall also mail a copy to:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Avenue, N.W.
Washington, D.C. 20210

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) 634-7950.

FOR THE COMMISSION

Ray H. Darling, Jr.

Date: April 9, 1993

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 92-0411

NOTICE IS GIVEN TO THE FOLLOWING:

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SECRETARY OF LABOR,

Complainant,

v.

FLUIDICS, INC.,

Respondent.

Docket No. 92-0411

Appearances:

John M. Strawn, Esquire
Office of the Solicitor
United States Department of Labor
Philadelphia, Pennsylvania
For Complainant

Stanley B. Edelstein, Esquire
Jacoby Donner & Jacoby
1515 Market Street
Philadelphia, Pennsylvania
For Respondent

Before: Administrative Law Judge John H Frye, III

DECISION AND ORDER

I. INTRODUCTION

This case involves an action by the Secretary of Labor against Fluidics Inc., a Pennsylvania-based corporation, pursuant to Section 10(c) of the Occupational Safety and Health Act of 1970[1] (the "Act"). The Secretary alleges that Respondent failed to comply with certain safety standards at its worksite at the Martin Luther King, Jr., housing project at 13th and Catherine Streets, Philadelphia, Pennsylvania. Respondent

[1] 29 U.S.C. §§ 651 et seq.

performed certain mechanical system work at this worksite under contract to the Philadelphia Housing Authority (PHA), the owner of the housing project. PHA is a governmental agency and not subject to the Act. This work involved the renovation of the heating and domestic water service systems in the four high-rise buildings and community center which comprise the housing project and included the excavation and replacement of a heating oil tank. Respondent subcontracted the excavation work to Philadelphia Construction Equipment, Inc. (PEC).

Respondent's President and owner, Gerald F. Dowling, selected Gregory Wright as foreman for the project based on Mr. Wright's past history with Respondent. Mr. Wright was in charge of the site for Respondent for the duration of the contract, and represented Respondent during the Occupational Safety and Heath Administration (OSHA) inspection.

The inspection of the worksite was conducted by the Philadelphia area office of OSHA on July 11, 12, and September 30, 1991. The July 11 and 12 inspection was conducted by Mr. Hiliary H. Holloway, a senior Compliance Officer, and Mr. Harold Williams, a Compliance Officer, in response to an anonymous complaint that workers were entering and exiting an unshored excavation by "riding the bucket" of an excavator. The September 30 inspection was conducted by Mr. Holloway and Mr. Robert McDonough.

The worksite presented special difficulties because of crime and the apparent hostility of the residents toward the workers. Workers outside were vulnerable to objects

thrown from buildings. Respondent eventually hired armed guards to protect its workers, established a policy that no worker should be outside alone, and maintained radio communication with those workers travelling from one building to another on the site.

As a result of the OSHA inspection, the Secretary issued one serious, one willful, and one other than serious citation to Respondent on January 10, 1992.[2] Respondent's notice of contest of these citations was docketed on February 10, 1992, with the Occupational Safety and Health Review Commission. The hearing in this case was held on December 9 and 10, 1992, in Philadelphia. Jurisdiction over the subject matter and the parties has been established.

II. OPINION

A. Citation 1, Item 1

Citation 1, Item 1(a) charges that four oxygen, five acetylene, and two nitrogen cylinders were stored in an upright position and were unsecured in violation of 29 C.F.R. § 1926.350(a)(9), which provides in part that:

> Compressed gas cylinders shall be secured in an upright position.

Citation 1, Item 1(b) charges that these same cylinders were not separated as required by 29 C.F.R. § 1926.350(j), which adopts §3.2.4.3 American National Standards Institute Z49.1-1967. The latter provides in part that:

> Oxygen cylinders in storage must be separated from fuel-gas cylinders. . . . by a minimum distance of 20 feet or by a non-combustible barrier at least five feet high having a fire-resistance rating of at least 1/2 hour.

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[2]In the complaint filed in this matter, citation 2 item 2 was withdrawn.

The Secretary characterizes the violations as serious and proposed a $1600 penalty. While admitting the factual allegations of the complaint, Respondent contests the penalty. Respondent asserts that the cylinders were empty, and that this fact should mitigate the proposed penalty. Respondent cites Mr. Wright's testimony for this proposition, but Mr. Wright did not indicate on direct that the cylinders were empty. He did indicate that adverse conditions on the site required that materials being delivered to the office be rushed inside and sorted later, and speculated that the cylinders had just been placed by an employee who was then called to help move additional material.

Mr. Wright admittedly was speculating as to the reason why these cylinders were not secured and appropriately separated. His speculation falls short of the kind of evidence needed to mitigate the proposed penalty. Moreover, even if he had testified that the cylinders were empty, that testimony would have been insufficient to overcome the presumption that the empty cylinders retained enough residual gas to pose a hazard. *Secretary v. Williams Enterprises of Georgia, Inc.*, 7 BNA OSHC 1900, 1903 (Rev. Com. 1979). The proposed penalty is affirmed.

B. Citation 1, Items 2a, 2b, and 3

Citation 1, Item 2a alleges a violation of 29 CFR 1926.404(b)(1)(i) for lack of an assured equipment grounding program or ground fault circuit interrupters (GFCI). The fact that ground fault circuit interrupters were absent is not contested. Although Mr. Dowling testified that Respondent had an assured equipment grounding program,[3] his testimony falls far short of establishing that a program which complies with §

[3]Tr. 431 (Dowling).

1926.404(b)(1)(iii) was in existence, as required by the standard under which the citation was issued. The Secretary has established a violation of this standard, and has proposed an appropriate penalty. This citation and penalty of $4000 are affirmed.

Citation 1, Item 2b alleges a violation of 29 CFR 1926.416(b)(2) because of strewn cords without GFCI protection. This item was grouped with 2a and the $4000 proposed penalty levied for both violations. The lack of GFCI protection is covered by Item 2a and need not be separately addressed in this item. Mr. Holloway testified that, but for the lack of GFCI protection, this item would have been classified as "other than serious." Because the two extension cords present a tripping hazard, this item is affirmed as an "other than serious" violation with a $00 penalty.

Citation 1, Item 3 alleges a violation of 29 CFR 1926.404(f)(6) for lack of a continuous path to ground. The citation correctly alleges that a drop light was plugged into a 3 into 2 prong "cheater" plug and proposes a $4000.00 penalty. Although the Secretary argues that the fact that the drop light was plugged into the cheater plug creates an inference that the drop light was not double insulated,[4] that inference is insufficient to overcome Mr. Wright's testimony to the contrary. Moreover, the lack of GFCI protection which was the subject of Item 2a adequately covers the hazard which would be posed by the drop light if it were not double insulated. Item 3 is vacated.

C. Citation 1, Items 4 through 8; Citation 2, Item 4

All of these citations concern the excavation from which the fuel tank was removed. Citation 1, Item 4 cites the lack of a safe means of egress from the excavation.

[4]Under § 1926.404 (f)(7)(iv)(C)(6) a double insulated tool need not be grounded.

Citation 1, Item 5 cites the presence of accumulated water in the excavation. Citation 1, Item 6 cites the existence of an undermined, unsupported concrete pad overhanging the excavation. Citation 1, Item 7 cites the presence of excavated materials and equipment less than two feet from the edge of the excavation. Citation 1, Item 8 cites the failure to have a competent person inspect the excavation on a daily basis. Citation 2, Item 4 alleges a failure to provide each employee in an excavation protection from cave-ins by an adequate protective system. Citation 2, Item 4, alleges a willful violation of the Act, while the other citations raise serious violations.

The excavation viewed by the compliance officers when they first arrived on the site was clearly an extremely hazardous one. The evidence supporting the findings with respect to the hazard posed to any worker in the excavation is uncontroverted.[5] However, it is not clear from the evidence whether any workers were in the excavation and, if so, when they were in it and what its condition was when they were in it. Thus the Secretary's case faces two initial problems: first, were any employees exposed to the hazards; and second, were the citations issued within the six-month limitation period set out in § 9(c) of the Act.

The evidence relevant to these two issues may be summarized as follows. When Messrs. Holloway and Williams arrived on site on July 11, there was no one in the excavation and there was no ongoing work in connection with it.[6] Messrs. Holloway and

[5]The findings reflect the state of the excavation when viewed by Messrs. Holloway and Williams, as well as certain facts relevant to defenses raised by Respondent.

[6]See Tr. 16-17, 27, 30, 128-29, 155, 168 (Holloway); 280-81 (Williams); 371-72 (Wright).

Williams did not observe anyone in the excavation.[7] One of two existing oil tanks had been removed as required by the contract with PHA and there was a question whether the excavation would need to be enlarged in order to remove contaminated soil. Consequently, no work was proceeding pending the analysis of soil samples.[8] Mr. Holloway testified that Mr. Wright told him that employees of PCE had been in the excavation on "the previous day," and Mr. Williams prepared an undated note to the same effect.[9]

It is not clear what was meant by the term "the previous day." In response to the question whether the employees were in the excavation on July 9 or July 10, Mr. Holloway testified:

> As a Statement of fact, I can not say that I really know. Again, based on experience, I have a complaint that says it was there on the 9th and the superintendents, two superintendents seem to imply that it was probably on the 9th. But because the complaint coming in on the 9th and because they specifically said there were two people in the hole, I would say that they were there on the 9th. And possibly on the 10th.[10]

Mr. Holloway also indicated that it had rained on the 10th.[11] The photographs taken by Mr. Williams show that the excavation contained an accumulation of water and that the soil in it was wet, thus corroborating Mr. Holloway's recollection.[12] Rain

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[7]Tr. 27, 30, 128-29, 155, 168 (Holloway).

[8]See Tr. 323-24 (Henderson), 371-72 (Wright); GX 5 and 6.

[9]Tr. 30 (Holloway), 284 (Williams). Mr. Williams written notation is GX 18. Mr. Holloway also testified that the PCE supervisor gave him the names of these two employees. Tr. 31-32.

[10]Tr. 160-61.

[11]Tr. 29, 161.

[12]See GX-6.

would, in all probability, prevent work on the excavation so that it would be unlikely that anyone would be in the excavation. Moreover, although Mr. Holloway thought he could detect a footprint or two in the bottom of the excavation in one of the photographs, that photograph contains no indication that anyone was in the excavation after the rain.[13]

Thus what evidence there is in support of the proposition that there were employees in the excavation indicates that this exposure would have occurred on July 9 rather than July 10, 1991.[14] In order to have been brought within the six-month limitation period, the citations would have to have been issued no later than January 9, 1992. They were issued on January 10; consequently they are barred by § 9(c) of the Act.

Moreover, even if one assumes for the sake of argument that § 9(c) does not come into play, the evidence of employee exposure is very weak. As noted above, Messrs. Holloway and Williams did not observe anyone in the excavation. Consequently, the Secretary's case in support of the proposition that exposure occurred is based entirely on the hearsay statements of Mr. Wright, Respondent's foreman, and Mr. Reitz of PCE.

Mr. Reitz did not testify. At the hearing, Mr. Wright indicated that he had not seen anyone in the excavation "... the way it looked when Mr. Holloway was there,

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[13]Tr. 173-74, 257-58; GX-6.

[14]This is consistent with the fact that the anonymous complaint was received and classified as presenting an "imminent danger" on the ninth. Tr. 254-55. Moreover, Chapter VII, ¶ B.1.c of the OSHA Field Operations Manual requires that inspections in response to reports of imminent danger are to be conducted on the same day as the report is received, or, if necessary, not later than the employer's next working day. Thus the fact that the inspection was not conducted until two days following receipt of the report corroborates Mr. Holloway's recollection that it rained on the 10th, thus preventing work.

unshored...."[15] He denied having told Mr. Holloway that he observed two PCE employees in the excavation the previous day or that he had observed employees riding the bucket.[16] He acknowledged that he had indicated in a deposition given a little over a month after the close of the job that he had been told of employees riding the bucket into the excavation and had witnessed it once. However, he explained that he was extremely nervous and ill-prepared when he gave his deposition, and that his memory was not good at that time because he had wiped the job from his memory when it was finished.[17]

Mr. Wright testified that it was only recently that he was able to remember details of the job.[18] It was clear from the demeanor of both Mr. Wright and Mr. Holloway that the worksite presented a very threatening environment. In this circumstance, I find it not surprising that there are conflicting accounts from Mr. Holloway and Mr. Wright concerning what the latter told the former while they were standing outside next to the excavation, or that Mr. Wright would have difficulty in recalling details.

The strongest evidence which the Secretary has offered that employees were exposed to the hazard posed by the excavation are the statements attributed to Messrs. Wright and Reitz. Mr. Wright denied having made the statement relied on and Mr. Reitz did not testify. Thus the evidence is insufficient to satisfy the Secretary's burden of

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[15]Tr. 347.

[16]Tr. 367-68.

[17]Tr. 396, 365-66.

[18]Tr. 366.

establishing employee exposure by a preponderance of the evidence. Even if Mr. Wright's denial is disregarded and it is taken as established that two employees were in the excavation, there is no evidence establishing the state of the excavation when that exposure occurred.[19] Even in that circumstance, the evidence is simply too sketchy to establish employee exposure to a hazard. These citations are vacated.

D. Citation 2, Item 1 and 3

Citation 2, Item 1 cites 29 C.F.R. § 1910.335(a)(2)(ii) which provides in part that:

> Protective shields, protective barriers or insulating materials must be used to protect each employee from shock, burns or other electrically related injuries while that employee is working near exposed energized parts which might be accidentally contacted.

Citation 2, Item 3 cites 29 C.F.R. § 1926.403(i)(2)(i) which provides in part that:

> Live parts of electric equipment operating at 50 volts or more shall be guarded against accidental contact by cabinets or other forms of enclosures, or by any of the following means:
>
> * * *
>
> (b) by partitions or screens so arranged that only qualified persons will have access to the space within reach of the live parts;
>
> * * *

On September 30, 1991, Mr. McDonough and Mr. Holloway observed two distinct areas in which the above standards were violated - the basement mechanical room and the penthouse mechanical room in building no. 1. There were open live electrical panels on a wall in the basement and in the penthouse. In addition, the floor in the basement was wet. There was nothing to prevent employees from coming into direct contact with

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[19]Mr. Wright testified that he and some PCE employees were in the excavation for purposes of disconnecting and unstrapping the oil tank. At the time, the excavation was about three feet deep, and the work was accomplished from the top of the tank. Tr. 362-63.

the energized surfaces. As a result, Citation 2, Items 1 and 3 charged Respondent with willful violations of the above standard and seeks $28,000 in penalties for each item.

Both Citations involve uncovered electrical panels owned by PHA. Item 1 alleges a violation because Fluidics did not provide protection to its employees aside from covering the panels and Item 3 alleges a violation against Fluidics because the panels were not covered. Fluidics asserts that these Citations both reach the same condition from different directions and accordingly should be grouped.

Indeed, when questioned, Mr. Holloway was unable to explain why the citations were not grouped, except for the fact that one item came from the 1910 General Industries Standards and the other came directly out of the Construction Standards. Moreover, Mr. Holloway was unable to explain why Fluidics is being subjected to two proposed penalties of $28,000 for essentially the same hazard. Respondent's position is well taken. These citations are grouped and one proposed penalty of $28,000 is considered for both. *Secretary v. R & R Builders, Inc.*, 15 BNA OSHC 1383, 1391-92 (Rev. Comm. 1991).

Respondent argues that Mr. Holloway's testimony on the issue of employee exposure was speculative, pointing out that he did not see any employees in the vicinity of the panels. While that is true, there was sufficient evidence to support the finding that Respondent's employees passed by and worked in the area of the electrical panels. That is sufficient to satisfy the requirement that employee access to a hazard must be shown in order to show that a violation of the Act has occurred.

Respondent raises the multiemployer worksite affirmative defense, pointing out that it did not control the open panels, that it warned its employees, and that it repeatedly complained to PHA to abate the hazard. *Anning-Johnson Co.*, 4 BNA OSHC 1193, 1198 (Nos. 3694, 4409, 1976). Respondent's actions were insufficient in this instance to absolve itself of liability for the exposure of its employees. The significant point is that when Respondent's complaints to PHA did not result in an abatement of the hazard, Respondent did not take action to abate the hazard itself. Respondent could have easily done so by placing some temporary barrier between the electrical panels and the employees.[20] Thus, under the holding in *Lee Roy Westbrook Construction Co.*, 13 BNA OSHC 2101, 2103-04 (No. 84-9, 1989), Respondent did control the hazard.

Respondent argues that, even if violations of the cited standards are found, they are not willful violations. In order to support a willful violation, the Secretary must show that the employer acted "'with intentional, knowing or voluntary disregard for the requirements of the Act or with plain indifference to employee safety.'"[21]

The findings reflect that there was no disregard of or indifference to the requirements of the standard. On the contrary, Respondent actively sought to get the panel covers replaced and instructed its employees to avoid the panels. Mr. Wright believed that he had done everything he could to abate the hazard posed by the

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[20]In view of the abatement methods suggested by the Secretary (see Tr. 88-89), Respondent's assertions that this was not practical or feasible are not credible.

[21]*Secretary v. Williams Enterprises Inc.*, 13 BNA OSHC 1249, 1256 (Rev. Comm. 1987), quoting from *Secretary v. Asbestos Textile Co.*, 12 BNA OSHC 1062, 1063 (1984). *Cf. Secretary v. R & R Builders, Inc.*, 15 BNA OSHC 1383, 1392 (Rev. Comm. 1991).

panels.[22] The fact that he was mistaken in that belief does not operate to make these violations willful. I conclude that these violations are properly classified as serious under the Act.

Mr. Holloway calculated a gravity-based penalty of $5000 reduced by 20% because of Respondent's size.[23] I conclude that this is an appropriate penalty and accordingly affirm a $4000 penalty for Citation 2, Items 1 and 3.

E. Citation 2, Item 5

Citation 2, Item 5 cites 29 C.F.R. § 1926.1052(c)(12) which provides in part that

> Unprotected sides and edges of stairway landings shall be provided with guardrail systems.[24]

Upon opening the door leading from the outside to the basement mechanical room of Building No. 1, CSHOs Holloway and McDonough observed a small landing with stairs leading down to the basement floor. The landing previously had a pipe railing which had been removed to allow equipment to be delivered to the basement floor. This hazard had existed for approximately 30 days. The removal of the railing created a fall hazard of 15 feet to a concrete floor below.

The Secretary maintains that the landing was very small and that employees passed within three feet of the unguarded side of the landing entering and exiting the basement and as they opened and locked the double doors.[25] Discounting Mr. Wright's

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[22]Tr. 376 (Wright).

[23]Tr. 87-88.

[24]These systems must meet the criteria contained in Subpart M of 29 C.F.R. §1926.

[25]Respondent's employees passed by this hazard several times each day because this landing provided their only access to the basement.

testimony that he had installed a temporary guard in the form of a chain, the Secretary maintains that Respondent could have chained or roped off the edge to at least alert employees to the open sides and to provide some modicum of protection in case of a slip, loss of balance, or jostling when employees were entering or exiting the basement.

Thus the Secretary argues that the violation is not only serious, but willful because Respondent created the hazard, allowed it to exist for 30 days, knew of the daily exposure of its employees, and could easily have abated or ameliorated the hazard.

Respondent argues that, as a practical matter, there was no access or exposure because:

First, the door, which had a swing from right to left[26] toward the unguarded side of the landing, blocked access to the unguarded edge, thus making it impossible for anyone entering the door and proceeding to the stairway to have access to the unguarded area; and

Second, only if an employee remained on the platform after closing the door and walked beyond the stairway would the employee have access to the unguarded area.

While Respondent's arguments concerning the configuration of the landing are correct, I must conclude that employees had access to the hazard. It is not unreasonable to suppose that several employees entering or leaving together might create the necessity for one or more to stand next to the unguarded edge. While I find that a violation of the cited standard occurred when Respondent removed the guardrail, I also find that Respondent replaced it with a temporary guardrail. Respondent's placement of a

[26]Or, as illustrated in Exhibit R-5, from three o'clock on the right to twelve o'clock.

temporary guardrail establishes that the violation was not willful.[27] Consequently, a penalty of $4000, rather than $28,000, is appropriate.

F. Citation 3, Item 1

Citation 3, Item 1 alleges that three fire extinguishers in Respondent's office failed to comply with 29 C.F.R. § 1926.150(c)(1)(viii) which provides that:

> Portable fire extinguishers shall be inspected periodically in accordance with Maintenance and Use of Portable Fire Extinguishers N.F.P.A. No. 10A-1970.

Respondent argues that because the extinguishers in question were awaiting return to the shop and because other extinguishers which had been inspected were present, this citation should be vacated. However, the Commission has held that so long as a fire extinguisher is present at a worksite, it must meet the requirements of the standard.[28] Consequently, this citation is affirmed with a penalty of $00.

III. FINDINGS OF FACT

A. General

1. Respondent is a corporation with its principal address in Philadelphia, Pennsylvania. (Answer).

2. Respondent is engaged in interstate commerce using tools, equipment, machinery, materials, goods and supplies from outside the State of Pennsylvania and is an employer covered by the Act. (Answer). At the time it was

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[27]Mr. Holloway acknowledged that the use of a chain would have offered some protection against falls, although it would not have met the standard. See Tr. 72-73.

[28]*Secretary v. George J. Igel & Company*, 6 BNA OSHC 1642, 1643 (Rev. Com. 1978).

inspected, Respondent employed approximately 200 employees as defined by the Act, including 11 at the worksite (Answer).

3. Respondent is engaged in construction activities, specifically mechanical contracting (Answer). Respondent entered into a contract with the Philadelphia Housing Authority (PHA) to upgrade the heating and domestic water service systems in four high-rise buildings and a community center comprising the Martin Luther King Complex. The project involved work in nine mechanical spaces --- primarily removal of pipe, valves and pumps and reinstallation of new ones --- as well as the removal of an underground oil tank and installation of a replacement tank. The oil tank was near the community center and in between various high rise buildings.[29]

4. The worksite presented special difficulties because of crime and the hostility of the residents. Objects thrown from buildings were a hazard. Drive-by and other shootings were not uncommon. Respondent eventually hired armed guards to escort its workers while they were outside, required that no worker travel outside alone, and provided radio communication to those who were outside.[30]

5. Compliance Officers Hiliary Holloway, Harold Williams and Robert McDonough inspected Respondent's worksite at the Martin Luther King Complex on July 10, 11 and September 30, 1991 (Tr. 15).

6. Mr. Holloway is an experienced Compliance Officer with over ten years as an inspector, over six hundred inspections performed and extensive training and

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[29]Tr. at 309 (Henderson), 347-48 (Wright) 17, 120-21 (Holloway); Exhibit F-1.

[30]Tr. 348-53 (Wright), 16 (Holloway).

experience with soils and excavations (Tr. 11-14). Compliance Officers Robert McDonough and Harold Williams are inspectors with experience in performing safety and health inspections and have received training from OSHA (Tr. 279-280, 287-289).

B. Citation 1, Item 1

1. On September 30, 1991, CSHOs Holloway and McDonough observed four oxygen, five acetylene, and two nitrogen cylinders stored together without separation by a fire barrier in Respondent's field office trailer. These cylinders, which were in an upright position, were unsecured and therefore subject to being knocked over by accidental contact. The trailer was frequented by Respondent's employees and used daily by Respondent's foreman.

2. Respondent admitted the above facts in its answer, but contests the penalty. Respondent had a policy of keeping the cylinders tied. The cylinders in question had been returned to the office awaiting return to the shop. Materials were brought into the office quickly and sorted later to avoid exposing Respondent's employees to objects thrown down from the building. Tr. 390 (Wright).

3. The cylinders could inflict serious injury if knocked over and ruptured. Storing the oxygen cylinders with the fuel gas cylinders increased the fire hazard. (Tr. 113-16).

C. Citation 1, Items 2a, 2b, and 3

1. On September 30, 1991, CSHOs Holloway and McDonough observed the area where employees were working in the basement of building one. They noted that Respondent did not utilize an assured equipment grounding program or

ground fault circuit interrupters (Item 2a), that the work area was strewn with one orange and one yellow extension cord (Item 2b), and that the yellow extension cord was plugged into a two-prong wall receptacle using a so-called "cheater plug" (Item 3) (Tr. 90-102 (Holloway); GX 8, 9, 10).

2. The yellow cord that was plugged into the "cheater" plug went to a drop light. This was the only plug that was plugged in. Tr. 239, 248 (Holloway), 394 (Wright). The droplight was double-insulated. Tr. 393 (Wright),

3. Mr. Wright supervised the employees and was aware of their use of electrical equipment and conditions in the basement (Tr. 91,96, 99, 103). Although Fluidics had ground fault circuit interrupters on the jobsite, Mr. Wright did not believe he could use them on the outlets in the basement. Tr. 391 (Wright).

4. The basement floor was wet increasing the shock hazard (Tr. 96, 98). Serious injuries could result to exposed employees (Tr. 96,97, 100, 103).

D. Citation 1, Items 4 through 8; Citation 2, Item 4

1. Respondent subcontracted the excavation of a heating oil tank to Philadelphia Construction Equipment, Inc. ("PCE") (Tr. 423-24 (Dowling); RX 11). Fluidics entered into a written subcontract with PCE for the Project dated May 24, 1991.

(a) Under the heading "Description of the Work" the subcontract requires that PCE provide, inter alia, "shoring as required."

(b) Article XIII provides, inter alia:

> Subcontractor shall have a competent foreman or superintendent satisfactory to Fluidics on the site at all times during progress of the Subcontractor's work.

(c) Additional Article 6 provides:

Subcontractor must comply with current OSHA regulations.

Exhibit F-11, Tr. 426 (Dowling).

2. Fluidics intended to subcontract total excavation responsibility to PCE. Tr. 423-24 (Dowling). Prior to July 11, 1991, Mr. Wright relied on PCE to perform the excavation work safely and properly, Tr. 358-59 (Wright), and was relying on what he believed to be PCE's expertise. Tr. 126-27, 140, 181 (Holloway).

3. Prior to commencement of excavation work, Fluidics had an eight foot high cyclone fence erected around the excavation area. Tr. 357 (Wright), 326 (Henderson). All of PCE's work was within the fenced area. Tr. 125-26 (Holloway), 357 (Wright).

4. Thereafter, the only persons permitted to be within the fenced area without specific direction by Mr. Wright were PCE employees, with all other employees on the site required to stay outside the fence. Tr. 358-59 (Wright). Mr. Wright permitted other employees within the fenced area only on two occasions: first, to cut the straps from and disconnect the existing tank; and second, after the excavation had been completed and shored, to install the new tank. Tr. 358 (Wright).

5. Prior to allowing PCE to start work, Mr. Wright spoke with PCE's Outside Superintendent, Richard Reitz, and discussed Mr. Reitz's understanding of PCE's obligations under the subcontract. Based on that discussion, Mr. Wright was satisfied that Mr. Reitz was a competent person with respect to excavation and that PCE was competent to perform its work properly and safely. Tr. 359, 401 (Wright).

6. In addition to its outside superintendent, Mr. Reitz, PCE provided a foreman for the excavation work who was present at the excavation whenever PCE worked. Tr. 399-400 (Wright).

7. Mr. Wright totally relied on PCE to perform the excavation work and to perform it safely. Tr. 358 (Wright). Mr. Wright did not control PCE's operations at the Project:

a. Except for telling when PCE was to first come to the Project, Mr. Wright did not control PCE's schedule. Tr. 360 (Wright), 141 (Holloway);

b. Mr. Wright did not plan or become involved with PCE's plan as to how to execute its work;. Tr. 360, 400 (Wright);

c. Mr. Wright did not direct or become involved with how PCE executed its work. Tr. 416 (Wright);

8. On July 9, 1991, the Philadelphia Regional Office of OSHA received an anonymous telephone call reporting two men allegedly working in an unshored excavation at the project. OSHA deemed the situation reported to constitute imminent danger. Tr 15, 129, 254-55 (Holloway).

9. On July 11, 1991, the Secretary dispatched CSHO Hiliary Holloway, Jr. and CSHO Harold Williams to the project. Tr. 15 (Holloway). Messrs. Holloway and Williams returned to the project the following day, July 12th, and Mr. Holloway returned again on September 30, 1991, this time with CSHO Robert McDonough. Id.

10. When Messrs. Holloway and Williams arrived at the excavation on July 11th, no work was being performed, and PCE was not on the site. Tr. 16-17, 138 (Holloway).

11. The excavation was approximately 25 feet square and 20 feet deep and was dug in type "C" soil, the least stable classification of soil. Tr. 18 (Holloway). Soil was sloughing from the walls of the trench. Tr. 21-22 (Holloway).

12. No ladder or other safe means of egress from the excavation was present. Tr. 38 (Holloway).

13. No protective shoring, sloping or other protective systems were in use. Tr. 25 (Holloway).

14. A concrete pavement overhang was left unsupported over a portion of the excavation. Tr. 50-52 (Holloway).

15. A tracked excavator was parked within 2 to 3 feet of the edge of the excavation. Tr. 20 (Holloway); GX 3.

16. A spoil bank was piled up to the edge of the excavation. Tr. 20 (Holloway); GX 4.

17. Water and oil had accumulated in the bottom of the trench. Tr. 22-23 (Holloway).

18. Superimposed loads (excavator, spoil bank) on the edge of the unshored excavation, the presence of water and oil in the excavation, and an unsupported concrete overhang all contributed to the risk that the walls of the excavation might collapse. Tr. 19-25 (Holloway); GX 3, 4, 5, 6, and 7.

19. The condition of the excavation was obvious and Mr. Wright was aware of the hazards posed. Tr. 29-30, 32-33, 35 (Holloway).

20. Respondent did not discuss the hazard posed by the excavation with Mr. Reitz of PCE prior to the inspection. Tr. 403 (Wright).

21. Potential injuries to employees caught in the excavation include suffocation and death. Tr. 39-40 (Holloway).

22. At no time did any OSHA inspector see anyone in the excavation. Tr. 27, 30, 128-29, 155, 168 (Holloway). At no time did any OSHA inspector see any Fluidics employee inside the fenced area around the excavation. Tr. 125 (Holloway).

E. Citation 2, Item 1 and 3

1. On September 30, 1993 CSHOs Holloway and McDonough observed open, unguarded, live electrical panels in the basement mechanical room and the penthouse mechanical room of building no. 1 at the worksite (Tr. 75-76, 291-293; GX 11-15).

2. Mr. Wright was aware of the unguarded panels (Tr. 64, 289-90). Mr. Wright advised all Fluidics employees working in the mechanical rooms to stay away from the uncovered panels. Tr. 375 (Wright), 330 (Bell). Mr. Wright believed that his employees followed that instruction and had no reason to believe there was any lack of compliance. Tr. 375-76 (Wright).

3. In the basement mechanical room, Respondent had a tripod next to the panels (Tr. 77-80).

4. Respondent's employees passed by and worked in the area of the electrical panels (Tr. 77-79).

5. Respondent's employees worked in the penthouse and passed within 3 to 4 feet of the electrical panels (Tr. 83).

6. Potential injuries to employees coming into contact with the panels include electrocution (Tr. 84, 109).

7. The hazard was heightened by the wet floor in the basement (Tr. 75).

8. Richard Henderson, PHA's Director of Combustion Engineering (Tr. 308-09), testified that PHA personnel would remove panel covers to gain access to the panel and fail to replace them. He indicated that keeping the electrical panels covered was a constant battle (Tr. 311 Henderson). Fluidics did not create and had no control over the situation (Tr. 189 Holloway, Tr. 374 Wright).

9. Mr. Wright frequently reminded Mr. Henderson and the Maintenance Superintendent on site of the problem with the missing panel covers (Tr. 374-75 Wright). Fluidics wrote three letters to the Housing Authority advising that the panel covers were constantly being removed and asking that the situation be corrected (Exhibits F-8, F-9 & F-10; Tr. 311-12 Henderson). Mr. Henderson believed that Fluidics was concerned about getting the panels put on and kept on. Tr. 312 (Henderson). Mr. Holloway was advised of these efforts (Tr. 186-87 Holloway).

10. Eventually, as a result of Respondent's repeated requests, PHA had panel covers fabricated out of quarter inch metal plate and tack welded these onto the

panel boxes (Tr. 319-20, 316 Henderson). Prior to that time, when Respondent's employees were able to find panel covers at the project, Respondent would have these reinstalled (Tr. 376 Wright). Respondent did not otherwise attempt to guard the panels (Tr. 86 Holloway).

F. Citation 2, Item 5

1. Access to the Building No. 1 basement mechanical room was by way a door leading to a landing and stairway. Tr. 69, 227-28 (Holloway).

2. On September 30, 1991, CSHOs Holloway and McDonough observed that this landing was unguarded (Tr. 60-66). Fluidics had removed a railing at the left side of the platform to lower equipment into the basement. Tr. 384 (Wright).

3. Mr. Wright stated that his plumbers had removed the railing to move material to the basement but had not replaced it (Tr. 69, 72). Fluidics had placed a temporary guardrail in the form of a chain tied with wire across the top and a rope across the midsection. Tr. 385, 388 (Wright).

4. Respondent's employees each used this entrance several times a day as it was the only access to the basement mechanical room (Tr. 337-338).

5. Employees had to pass within 3 feet of the unguarded edges of the landing (Tr. 68).

6. The landing was 15 feet above the basement floor (Tr. 66).

7. Potential injuries to employees who fell from the landing would be serious and could include death (Tr. 71).

G. Citation 3, Item 1

1. On September 30, 1991 CSHOs Holloway and McDonough observed three fire extinguishers in Respondent's office trailer at the worksite which had not been inspected within the preceding 12 months (Tr. 110-112).

2. These fire extinguishers had been returned to the office and were awaiting return to Fluidics' shop. Tr. 390-91 (Wright). There were other fire extinguishers that Mr. Holloway did not determine to be in violation. Tr. 391 (Wright).

IV. CONCLUSIONS OF LAW

A. Respondent was, at all times pertinent hereto, an employer within the meaning of § 3(5) of the Act.

B. The Occupational Safety and Health Review Commission has jurisdiction over the parties and the subject matter.

C. Respondent was in violation of § 5(a)(2) of the Act in that it failed to comply the standards at 29 C.F.R. §§ 1926.350(a)(9) and 1926.350(j) as alleged in Citation 1, Item 1. A penalty of $1,600 is appropriate.

D. Respondent was in violation of § 5(a)(2) of the Act in that it failed to comply the standards at 29 C.F.R. § 1926.404(b)(1)(i) as alleged in Citation 1, Item 2a. A penalty of $4,000 is appropriate.

E. Respondent was in violation of § 5(a)(2) of the Act in that it failed to comply the standards at 29 C.F.R. § 1926.416(b)(2) as alleged in Citation 1, Item 2b. A penalty of $00 is appropriate.

F. Respondent was not in violation of § 5(a)(2) of the Act in that it failed to comply the standards at 29 C.F.R. § 1926.404(f)(6) as alleged in Citation 1, Item 3.

G. Citation 1, Items 4 through 8, and Citation 2, Item 4, are barred by the six-month limitation period found in § 9(c) of the Act.

H. Respondent was in violation of § 5(a)(2) of the Act in that it failed to comply the standards at 29 C.F.R. §§ 1910.335(a)(2)(ii) and 1926.403(i)(2)(i) as alleged in Citation 2, Items 1 and 3. These violations are grouped; a penalty of $4,000 is appropriate.

I. Respondent was in violation of § 5(a)(2) of the Act in that it failed to comply the standards at 29 C.F.R. § 1926.1052(c)(12) as alleged in Citation 2, Item 5. A penalty of $4000 is appropriate.

J. Respondent was in violation of § 5(a)(2) of the Act in that it failed to comply the standards at 29 C.F.R. § 1926.150(c)(1)(viii) as alleged in Citation 3, Item 1. A penalty of $00 is appropriate.

V. ORDER

A. Citation 1, Items 1 and 2a, and Citation 2, Items 1, 3, and 5 are affirmed as a serious violations of the Act.

B. Citation 1, Item 2b, and Citation 3, Item 1, are affirmed as other-than-serious violations of the Act.

C. A total civil penalty of $13,600 is assessed.

JOHN H FRYE, III
Judge, OSHRC

DATED: APR 0 8 1993
Washington, D.C.