SECRETARY OF LABOR, Complainant, v. OMAHA PAPER STOCK CO., Respondent.	OSHRC Docket No. 99-0353

DECISION

Before: ROGERS, Chairman, and EISENBREY, Commissioner.

BY THE COMMISSION:

At issue before us are eight citation items alleging that Omaha Paper Stock Co. ("OPSC") committed serious violations of various provisions of the "permit-required confined space" ("PRCS") standard, 29 C.F.R. § 1910.146, at its Cincinnati, Ohio paper recovery and recycling plant. Administrative Law Judge Nancy J. Spies affirmed all eight items, classified each violation as "serious," and assessed penalties of $2000 per item. For the reasons that follow, we affirm the eight items as serious and assess a total combined penalty of $12,000.

Background

OPSC's business involves the recovery and recycling of paper, ranging from corrugated cardboard to newspaper and white ledger paper. The recovered paper is compacted into bales, which weigh between 1100 and 1400 pounds, and sold to paper and pulp mills for re-use. The Lindemann baler used in these baling operations is 30 to 40 feet long and approximately 10 feet wide. The chamber, where the paper is compressed by the

baler's ram,[1] is six feet long and approximately five feet wide. Access to the chamber is provided through a 36-inch by 30-inch door that swings open on one side of the baler. Since the bottom of the door is approximately four feet above the floor, it is necessary for an employee to climb over the bottom portion of the baler and through the access door in order to use this primary route in or out of the baler chamber. The chamber can also be entered through the top of the machine or through the 10-foot-long discharge chute. Once inside the chamber, the employee is able to stand erect.

On September 18, 1998, OPSC employee Chris Tracy became trapped inside the Lindemann baler chamber when a large amount of jammed paper fell on top of him as he sought to eliminate the jam, knocked him down, and left him temporarily unable to use his legs.[2] The local fire department dug Tracy out from under the pile of paper, which was estimated to be from five to six feet deep and to weigh between 150 and 225 pounds. The rescue operation took 48 minutes from the time the fire department was notified. Following

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[1]When the baler is operating properly, the paper entering the hopper at the top of the machine falls down a chute into the chamber until the paper rises to the level of "the photo eyes," at which point the machine "cycles." After the ram compresses the paper, it "waits for the next amount of paper to come down the chute" and cycles again. This process, which takes a minimum of five cycles, continues until a bale is created.

[2]The paper being run at the time was coated book, which is a very heavy paper. During the running of certain grades of paper, including this coated book, a device known as a "fluffer" is placed inside the baler. The fluffer, which has a moving blade on top of it, is mounted on the access door and "pivots in and out" of the chamber. The air movement created by the fluffer causes the paper coming in through the hopper to be evenly distributed so that it lies "flat and consistently" in the bottom of the baler, thereby preventing jams. As was the case at the time of the September 18 incident, however, the fluffer itself can cause jams if paper begins to accumulate on top of it.

its investigation of this incident and its inspection of other conditions at the plant, the Occupational Safety and Health Administration ("OSHA") issued a 14-item citation that included alleged violations of both the PRCS standard and OSHA's lockout/tagout ("LOTO") standard at 29 C.F.R. § 1910.147. In her decision, the judge vacated both of the alleged violations of the LOTO standard, one on the ground that it had been the result of Tracy's "unpreventable employee misconduct,"[3] but she affirmed eight of the items alleging violations of the PRCS standard. It is those eight items that are now before us on review.[4]

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[3]Item 13 alleged a violation of the LOTO standard provision at 29 C.F.R. § 1910.147(d)(4)(i) based on Tracy's undisputed failure to lock out the baler prior to entering into the chamber on September 18, 1998. The judge concluded that OPSC had established its unpreventable employee misconduct defense to this alleged violation by proving, among other things, that "Tracy knew that he was prohibited from entering the baler chamber and did so anyway." Neither the judge's disposition of this citation item nor her underlying findings are at issue before us on review.

[4]The eight items, each of which relates to OPSC's Lindemann baler, allege violations of the following standards at 29 C.F.R.: Item 3, § 1910.146(c)(2), the baler's "chamber and ram section . . . was not labeled or identified as a confined space"; Item 4, § 1910.146(c)(4), "a written program on safe entry procedures was not developed and implemented"; Item 5, § 1910.146(d)(2), employee entry into the chamber "without first identifying or evaluating to determine its hazards, including . . . [exposure] to engulfment potentials"; Item 6, § 1910.146(d)(3), entry into the chamber "without the necessary procedures, practices, and safeguards being developed and implemented to ensure safe entry into a confined space"; Item 8, § 1910.146(d)(4)(viii), failure to "provide rescue or emergency equipment to employees accessing a confined space"; Item 9, § 1910.146(e)(1), failure to "document . . . measures required for safe entry . . . by preparing an entry permit, before . . . [entering into]

(continued...)

Applicability of the Cited Standards

To prove a violation of the cited standards, the Secretary must establish that the standards apply. *E.g.*, *Astra Pharmaceutical Prods., Inc.*, 9 BNA OSHC 2126, 2129, 1981 CCH OSHD ¶ 25,578, p. 31,899 (No. 78-6247, 1981), *aff'd in pertinent part*, 681 F.2d 69 (1st Cir. 1982).[5] The central issue on review is whether the Secretary has met that burden by showing that the bale chamber of OPSC's Lindemann baler is a "permit-required confined space." *See* 29 C.F.R. § 1910.146(a). The term "permit-required confined space" or "permit space" as used in section 1910.146:

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

29 C.F.R. § 1910.146(b)[6] (emphasis added).

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[4](...continued)
the chamber"; Item 10, § 1910.146(g)(1), failure to "provide Confined Space Entry Training to employees that entered the bale chamber"; and Item 11, § 1910.146(k)(3), failure to "utilize non entry rescue means during entry into the Lindemann baler."

[5]The Secretary must also establish noncompliance with the terms of the standards, employee access to the violative conditions, and actual or constructive employer knowledge of the violations. *Id.*, 1981 CCH OSHD at pp. 31,899-900. These other elements are discussed below.

[6]OPSC admits that the baler chamber is a "confined space" within the meaning of section 1910.146 because it is large enough and so configured that an employee can enter into it to perform assigned work, it has limited and restricted means of entry and exit, and it
(continued...)

We agree with the judge that the bale chamber of OPSC's Lindemann baler is a "permit-required confined space" within the meaning of alternative (4). As the judge correctly found, employees entering the chamber are potentially exposed to two "other recognized serious safety or health hazard[s]," *i.e.*, "the hazard of being struck and buried by overhead material (as was the case with Tracy), and of being struck by the baler ram in the event the baler started up unexpectedly."[7] OPSC's arguments to the contrary are without merit.

First, the judge considered OPSC's evidence relating to its written LOTO program and its procedures for removing overhead paper jams, but she rejected OPSC's argument that "no recognized hazard existed in the baler chamber because all hazards were eliminated through the use of its LOTO program." She rejected this argument on two grounds: (1) that it "does not address the hazard of being struck by material from the overhead chute" and (2) that "[i]t

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[6](...continued)
is not designed for continuous employee occupancy. *See* section 1910.146(b).

[7]For ease of reference, we refer to these two hazards as the "entrapment" hazard and the "unexpected activation" hazard. OPSC does not dispute that its baler chamber poses an "unexpected activation" hazard to any employee who enters it without first locking out and tagging the machine's energy source and that that hazard is both "recognized" and "serious" within the meaning of alternative (4) of the PRCS definition. With respect to the chamber's "entrapment" hazard, the judge cited a statement from an OSHA program directive indicating that a "determination of whether the resulting exposure to a hazard in a confined space will impair the employee's ability to perform self-rescue" is a key element in deciding whether the space contains an "other recognized serious safety or health hazard." Here, the judge found, "the hazard of being struck and buried by overhead material" that is present at times in the Lindemann baler chamber not only "present[ed] an immediate danger to life or health" but "could also impair the employee's ability to escape, as it did in Tracy's case."

also fails to address the hazards existing in the chamber when the baler is in an energized state." The judge also concluded that the baler chamber did not fall within the coverage of 29 C.F.R. § 1910.146(c)(7).[8] We agree with the judge's resolution of this issue, for the reasons she stated.

We also find no merit in OPSC's argument that its policies governing the removal of overhead paper jams eliminated the entrapment hazard from the baler chamber. OPSC claims that, before any employee is allowed to enter the baler chamber, a supervisor must evaluate any potential overhead paper danger and all overhead material must be removed from the

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[8]Under section 1910.146(c)(7)(i), "[a] space classified by the employer as a permit-required confined space may be reclassified as a non-permit confined space . . . [i]f the permit space poses no actual or potential atmospheric hazards and if all hazards within the space are eliminated without entry into the space . . . ." However, reclassification under these provisions is temporary, lasting only "for so long as the non-atmospheric hazards remain eliminated," and requires compliance with specified procedures. In her decision, the judge acknowledged the testimony of OSHA Assistant Area Director Collins that OPSC could have temporarily reclassified the baler chamber as a non-permit confined space "by assuring without entry that there was no potential for being struck by or covered by material and by eliminating hazards associated with the energy source of the machine itself by locking it out." Nevertheless, she concluded that OPSC's reliance on its LOTO program as a substitute for compliance with the PRCS standard was misplaced because "the use of a LOTO cannot serve permanently to reclassify to a non-PRCS status unless the baler is permanently locked out" and because OPSC had "never attempted to reclassify [its baler chamber] as a non-PRCS" by following the procedures established in section 1910.146(c)(7). Moreover, she also found that the LOTO program did not address the hazard of being struck by overhead material. Therefore, because OPSC did not assure that all hazards within the space were eliminated, the baler did not qualify for reclassification.

chamber using available tools.[9] We cannot find on this record, however, that OPSC had such a clearly-defined work rule governing the removal of overhead paper jams. Various descriptions of OPSC's purported "policy" appear in the testimony of OPSC Vice President Michael Mercer, in the testimony of its expert witness, safety and health consultant James Vaughan, and in the two briefs OPSC filed on review. There are numerous inconsistencies within and among these descriptions, relating to such matters as when employees are permitted to reach through the access door to pull paper off the fluffer, when they are required to contact a supervisor to evaluate the hazards created by overhead jams, and when they are required to use tools in unjamming the baler. Moreover, while such efforts might serve to control the entrapment hazard, they cannot completely eliminate it, as contemplated by the standard. Thus, the entrapment hazard, like the unexpected activation hazard, can be eliminated from the baler chamber only temporarily. Accordingly, the judge's observations concerning OPSC's misplaced reliance on its LOTO program as a substitute for compliance

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[9]Commissioner Eisenbrey notes that OPSC's policy regarding the evaluation of hazards inside the baler chamber directs employees to reach inside through the access door or (as shown by a videotaped demonstration entered into evidence) to lean inside and visually examine the overhead chute *before* any evaluation has been made about the extent of the overhead paper hazard. Each of these actions is itself an entry under the standard because, in each case, the employee breaks the plane of an opening into the confined space. 29 C.F.R. § 1910.146(b) defines "entry" to mean:

> the action by which a person passes through an opening into a permit-required confined space. Entry includes ensuing work activities in that space and is considered to have occurred as soon as any part of the entrant's body breaks the plane of an opening into the space.

Thus, following OPSC's policy, employees could not assure, without entry, that all recognized hazards were eliminated.

with the PRCS standard, *see supra* note 8, are equally applicable to OPSC's reliance on its purported overhead paper jam removal procedures.

Nor does the evidence show that any paper jam removal rule OPSC may have had was effectively communicated or enforced. Tracy testified at the hearing that he had no job duties relating to the operation of the baler; that his job was to work outside of the building where the baler was located, removing "contaminants" from the paper prior to placing it on the conveyor belt that went into the baler; and that he had been told repeatedly not to enter the baler under any circumstances. Yet, Tracy also testified that, prior to the entrapment incident, he had "climbed in[to]" the baler chamber on two other occasions. In addition, he had also reached through the access door into the baler chamber on at least two separate occasions to pull paper down off of the fluffer,[10] which OPSC does not claim violated any company policy.

Tracy also testified that employee Steve Newgate had been present on all or most of the occasions when Tracy had climbed or reached into the baler chamber, and that he had seen Newgate enter into the baler chamber on at least one occasion under circumstances that conflicted with OPSC's stated entry procedures. In addition, Tracy testified that, just prior

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[10]Tracy initially testified that, on the day of the entrapment incident and beginning about two hours prior to it, the blades of the fluffer had stopped periodically as the fluffer became overloaded. When this occurred, he stated, "[w]e [presumably referring to himself and his co-worker, Steve Newgate] were opening up the door, and I was sticking my hand in there to 'flip' the paper off of the fluffer arm." Later, the judge asked Tracy to clarify this earlier statement about reaching into the baler. At that point, Tracy testified that he had done so twice on the swing shift, while OPSC was running newspaper (as contrasted to the coated book paper that was being run at the time of the entrapment incident), and that he had informed Newgate or floor supervisor Yvette McKinnes prior to reaching into the baler to pull down that paper.

to his entrapment in the baler chamber, he had shown Newgate a large overhead paper jam in the baler and that Newgate had responded by telling him, "Well, you know, Killer, you need to get in there and pull that paper down. There's a lot more on there than what you think." On this record, we have little difficulty in rejecting OPSC's claim that it had an overhead paper jam removal policy that "eliminated" the entrapment hazard from its baler chamber.[11]

We also conclude that there is no conflict between the judge's findings: (1) that the baler chamber is a "permit-required confined space" because employees entering into the chamber are exposed to the "recognized serious safety . . . hazard[s]" of unexpected activation and entrapment; and (2) that Tracy's exposure to those two hazards at the time of his entrapment was the result of his own "unpreventable employee misconduct."[12] The eight violations of the PRCS standard that are before us, *see supra* note 4, are not based on any act or omission on Tracy's part, but rather on OPSC's failure to adequately protect all of its employees against the two hazards that the judge correctly found to be present on a continuing basis in the bale chamber of OPSC's Lindemann baler. The violations therefore stem not from Tracy's conduct at the time of his entrapment in the baler but, rather, from OPSC's failure to develop and implement a written PRCS program (based on its erroneous

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[11]Based on this same evidence, we also reject the argument made by OPSC in its reply brief that "Tracy's deliberate disregard of OPSC's rules on one occasion does not provide the requisite knowledge to OPSC that its employees were getting into its Baler chamber in Cincinnati without following OPSC's rules to sustain a 'serious' violation." Tracy's unrebutted testimony, as summarized above, clearly establishes that, with the exercise of reasonable diligence, OPSC could have known "that its employees were getting into its Baler chamber in Cincinnati without following OPSC's rules." See classification discussion, *infra*.

[12]This second finding was made in the context of vacating a LOTO allegation that is not before us. *See supra* note 3.

belief that its baler chamber was not a PRCS within the meaning of the standard). For example, OPSC failed to "[d]evelop and implement the means, procedures, and practices necessary for safe permit space entry operations," *e.g.*, by adopting written work rules governing the removal of overhead paper jams. See citation item 6, citing 29 C.F.R. § 1910.146(d)(3). OPSC also failed to educate its employees about the hazards associated with work in confined spaces and the means of protecting themselves against such hazards, *e.g.*, by providing sufficient warning on the sign posted on the baler chamber door. See citation item 3, citing 29 C.F.R. § 1910.146(c)(2), discussed in the next section. Thus, Tracy's "misconduct" does not establish an affirmative defense to the alleged PRCS violations that are before us on review. *See*, *e.g.*, *Capform, Inc.*, 19 BNA OSHC 1374, 1377-78, 2001 CCH OSHD ¶ 32,320, p. 49,478 (No. 99-0322, 2001), *petition for review filed*, No. 01-60417 (5th Cir. May 24, 2001) (unpreventable employee misconduct defense not available to employer when citation was for failure to adequately train the employee who assertedly engaged in the misconduct).

For the reasons above, we conclude that the standard applies.

Other Elements of the Violations

Having found that the eight cited provisions of the PRCS standard applied to the cited conditions, the judge went on to find that OPSC had stipulated at the hearing that it was not in compliance with those cited provisions. Therefore, the judge affirmed the eight citation items that are now before us.[13]

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[13]The judge also found that the Secretary had established employee access to the violative conditions and actual or constructive employer knowledge of the violations. *See supra* note 5. OPSC does not challenge the judge's finding of employee access, and its challenge to the judge's knowledge finding actually raises an issue of "fair notice" of the standard's requirements rather than OPSC's "knowledge" of the allegedly violative

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We note that OPSC has neither directly nor indirectly challenged the judge's reliance on the stipulation. We construe OPSC's stipulation as the judge did, *i.e.*, as an admission that, if the baler chamber was a PRCS, as alleged by the Secretary, then the cited standards were violated. OPSC nevertheless raises an issue on review relating to the merits of one of the eight citation items. Referring to the allegation contained in item 3, that OPSC violated 29 C.F.R. § 1910.146(c)(2) in that "the chamber and ram section of the Lindemann baler was not labeled or identified as a confined space," OPSC argues that it had posted a "prominent sign" on the access door of the baler that was "sufficient to meet the requirements of 1910.146(c)(2)."

We disagree. The cited standard required OPSC to "inform exposed employees, by posting danger signs or by any other equally effective means, of the existence and location of and *the danger posed by the permit space*[]" (emphasis added). Here, the sign posted by OPSC on the baler chamber access door, which read, "DANGER -- DO NOT OPEN WITH MACHINE RUNNING," did not inform its employees of either the hazard of unexpected activation or the hazard of falling overhead materials. Instead of meeting the cited standard's stated terms by informing exposed employees of "the danger posed by the permit space[]," the sign provided by OPSC is both confusing and misleading. It is confusing because the machine automatically stops operating once an employee opens the access door, which leads, according to Tracy, to employee reliance on opening the access door as the means of stopping the baler so that they can then reach into the machine to pull down jammed materials. The sign also suggests incorrectly that, once the machine stops, the danger has passed and the employee can safely enter.[14]

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[13](...continued)
conditions. *See infra.*

[14]A note to the cited standard, section 1910.146(c)(2), states that "[a] sign reading 'DANGER -- PERMIT-REQUIRED CONFINED SPACE, DO NOT ENTER' or using other
(continued...)

For the reasons above, we affirm the eight citation items that are now before us.

Classification of the Violations

Section 17(k), 29 U.S.C. § 666(k), of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act"), states that:

> a serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

The judge concluded that the Secretary had properly classified each of the eight PRCS violations at issue as "serious" within the meaning of section 17(k) because "[t]he likely result of an accident caused by Omaha's noncompliance with the PRCS sections would be death or serious physical harm"[15] and "Omaha knew that it was not in compliance with the

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[14](...continued)
similar language would satisfy the requirement for a sign." We conclude that the sign provided by OPSC did not meet even this minimum requirement since it prohibited only opening of the access door, and not entry into the chamber, and even this restriction was imposed only when the machine was operating.

[15]The Tracy entrapment incident provides strong support for this finding. Tracy became entrapped after entering the baler chamber without first having an authorized co-worker lock out and tag the baler's energy source, as was required under OPSC's written LOTO program. He also failed to turn off the key that activates the machine and to remove the key from the control panel. OPSC's Vice President Mercer admitted that, under these circumstances, if Tracy had not stuck his hand out through the access door after becoming entrapped in the baler, someone might have turned the machine on without "look[ing] to see he was in there," leading to serious or even fatal injuries from "compaction." As it turned
(continued...)

cited sections of the PRCS standard." We affirm the judge's resolution of this issue for the reasons she stated. OPSC's argument that the violations were not serious because it "lacked the requisite knowledge that OSHA would consider the Baler chamber a permit-required confined space" is incorrect as a matter of law. "The knowledge element of a violation does not require a showing that the employer was actually aware that it was in violation of an OSHA standard; rather it is established if the record shows that the employer knew or should have known of the conditions constituting a violation." *Peterson Bros. Steel Erection Co.*, 16 BNA OSHC 1196, 1199, 1993-95 CCH OSHD ¶ 30,052, p. 41,299 (No. 90-2304, 1993), *aff'd*, 26 F.3d 573 (5th Cir. 1994).[16] As the judge indicated, OPSC possessed the actual or

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[15](...continued)
out, although Tracy was rescued, his legs were numb from the waist down, and he was taken to the hospital. On his physician's advice, Tracy remained out of work for approximately three weeks, until it became clear that there was no permanent or long-term injury to his legs.

[16]In any event, we disagree with OPSC's assertion that it "lacked the requisite knowledge that OSHA would consider the Baler chamber a permit-required confined space." The PRCS standard provided OPSC with "fair notice" of its applicability to any confined space containing a hazard specified in the "permit space" definition, as quoted *supra*, even where that hazard can be eliminated prior to employee entry into the space. *See American Bridge Co.*, 17 BNA OSHC 1169, 1172, 1993-95 CCH OSHD ¶ 30,731, p. 42,667 (No. 92-0959, 1995) ("Constitutional due process requires only that the cited employer be given 'a fair and reasonable warning'; it 'does not demand that the employer be *actually aware* that the regulation is applicable to his conduct or that a hazardous condition exists' ") (citation omitted) (emphasis in original). An example of the fair notice given here is Appendix A to the PRCS standard, which sets forth a "decision flow chart" to assist employers in understanding their obligations. *See* Note to section 1910.146(c)(1). Appendix A clearly states that the determination of whether a "workplace contain[s] Permit-required Confined
(continued...)

constructive knowledge required under section 17(k) because it knew that, based on its classification of the baler chamber only as a "confined space" but not a "permit-required confined space," it had not implemented any of the measures required to comply with the provisions of the PRCS standard.

Penalties

The judge concluded, based on the statutory penalty factors, that a penalty of $2000 would be "appropriate[]" for each of the eight PRCS violations that are now before us.[17] Having independently reviewed the pertinent record evidence and considered those factors, we disagree with the judge only with respect to one of the four penalty criteria. The judge found that "[t]he gravity of the eight affirmed violations of the PRCS standard is moderate to high." We conclude, however, that the record evidence supports a finding that the gravity of the eight violations was moderate. We accordingly modify the judge's penalty assessment, assessing a total combined penalty of $12,000 for the eight affirmed PRCS violations.

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[16](...continued)
Spaces as defined by § 1910.146(b)" is separate from the determination of whether "the hazards [can] be eliminated." This appendix also clearly informs employers that at least some of the obligations of the PRCS standard, *e.g.*, the duty to "[i]nform employees as required by § 1910.146(c)(2)," are imposed simply by virtue of the presence of a PRCS in the workplace, even if the employer takes measures to eliminate the hazards from the confined space prior to allowing employee entry or to prevent altogether employee entry into the space.

[17]Section 17(j) of the Act, 29 U.S.C. § 666(j), states that:

> The Commission shall have authority to assess all civil penalties provided in this section, giving due consideration to the appropriateness of the penalty with respect 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.

Order

We affirm items 3 through 6 and 8 through 11 of citation 1 as serious violations of the Act. We assess a total combined penalty of $12,000 for these violations.

SO ORDERED.

/s/
Thomasina V. Rogers
Chairman

/s/
Ross Eisenbrey
Commissioner

Date: November 1, 2001

Secretary of Labor,
Complainant,

v. OSHRC Docket No. **99-0353**

Omaha Paper Stock Company,
Respondent.

Appearances:

Elizabeth R. Ashley, Esquire
U. S. Department of Labor
Office of the Solicitor
Cleveland, Ohio
For Complainant

Sandra L. Maass, Esquire
Abrahams, Kaslow & Cassman
Omaha, Nebraska
For Respondent

Before: Administrative Law Judge Nancy J. Spies

DECISION AND ORDER

Omaha Paper Stock Company (Omaha), is a paper recovery and recycling company. Omaha recovers paper from pre- and post-consumer use and recycles it into bales that it then sells to paper mills. On September 18, 1998, Omaha employee Christopher Tracy was injured when he entered the baler at Omaha's Cincinnati facility to clear a paper jam. The Occupational Safety and Health Administration (OSHA) investigated the incident on November 16 and 17, 1998. As a result of OSHA's investigation, the Secretary issued a fourteen-item citation to Omaha on February 2, 1999. Omaha contested the fourteen alleged violations and proposed penalties.

The undersigned held a hearing in this matter on August 18, 1999. Omaha does not dispute jurisdiction and coverage. At the hearing, the Secretary withdrew items 1 and 7 of the citation (Tr. 78). Left for determination are items 2 through 6 and 8 through 11, which allege violations of the confined space standard; items 12, 13, and 14, which allege violations of the lockout/tagout (LOTO) standard; and item 14, which deals with fire extinguishers. Omaha stipulated at the beginning of the hearing that the chamber of the baler in which Tracy was trapped was a confined space within the meaning of § 1910.146.

In its defense, Omaha argues that the chamber of the baler was not a permit-required confined space (PRCS), and thus was not subject to the cited sections of the § 1910.146 standard. Omaha also argues that any violations that were committed were the result of unpreventable employee misconduct on the part of Christopher Tracy.

Background

Omaha operates two plants: one in Omaha, Nebraska, and the one at issue here, located in Cincinnati, Ohio (Tr. 257). Omaha uses a Lindeman baler to bale the paper at its Cincinnati plant. The baler is 30 to 40-feet long (Exh. C-1; Tr. 12). Omaha recycles nineteen different kinds of paper, including corrugated cardboard, coated books, and newspapers (Tr. 7-8).

The baling process begins outside the facility where a lineman sorts through the paper to be baled and removes "contamination," such as plastic bottles, wire, and glass (Tr. 7). An employee then operates a bobcat and pushes the paper onto a conveyor belt that feeds into the baler. The conveyor belt moves the paper to the top of the baler where it falls through a chute to the baler chamber (Tr. 11-12).

Depending upon the type of material being fed into the baler, a fluffer may be placed inside the baler chamber. The fluffer is attached to the side of the baler and swings in and out on hinges. The fluffer has rotating blades that generate air to move the paper around inside the chamber (Tr. 14-15). After a sufficient amount of paper is placed inside the chamber, a bale is made. An Omaha employee then removes the bale with a forklift (Exh. C-1).

Christopher Tracy began working for Omaha on August 31, 1998, as a lineman (Tr. 6-7). Around the 9th or 10th of September, Tracy began working what he referred to at the hearing as the "second shift" (Tr. 64).[18] Tracy testified that his supervisor, Evette McKinnes, was having trouble

[18] Omaha vice-president of operations and finance Michael Mercer testified that Omaha does not have a second shift. Rather, the company had what Mercer referred to as a "split shift" that "was for a catch-up situation that we had for two to three days. There was no authorized second shift, *per se*" (Tr. 228). Regardless, Tracy volunteered to work extended hours from approximately September 9 or 10 until his accident on September 18, (continued...)

getting employees to work extended hours. Tracy stated that, as a new employee, "You know, I'm trying to make a good impression here so I volunteered for it" (Tr. 30).

On September 18, 1998, while working extended hours, Tracy heard the alarm sound that signals a jam in the baler. Another employee, Steve Newgate, told Tracy that he needed "to get in there and pull that paper down" (Tr. 22). Tracy went to the baler, opened the access door, and climbed inside the 6-foot by 6-foot chamber to clear the jam in the overhead chute (Tr. 23, 59). When Tracy pulled on the jammed paper he dislodged all of the overhead paper, which fell on him, knocking him to the floor of the chamber. The paper buried him up to his waist. Tracy was unable to dig himself out from the paper piled upon him. His legs were numb and he "panicked a little." Tracy believed that yelling for help would be futile because McKinnes was operating another baler and Steve Newgate was putting gas in the bobcat. They were the only other two employees working at that time and Tracy did not think they would hear him. Tracy was able to stick his hand out of the access door. After 15 to 20 minutes, McKinnes looked in through the access door and said, "Tracy, what [are] you doing in there?" (Tr. 26).

McKinnes notified the Village of Elmwood Place Fire Department. Firefighters were able to extricate Tracy from the chamber after approximately 48 minutes (Tr. 75). Paramedics took Tracy to the hospital. On his physician's advice, Tracy did not return to work at Omaha for approximately three weeks (Tr. 29).

The Citation

The Secretary has the burden of proving her case by a preponderance of the evidence.

> In order to establish a violation of an occupational safety or health standard, the Secretary has the burden of proving: (a) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, (c) employee access to the violative conditions, and (d) the employer's actual or constructive knowledge of the violation (*i.e.,* the employer either knew or, with the exercise of reasonable diligence could have known, of the violative conditions).

Atlantic Battery Co., 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

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[18](...continued)
1998.

In order to establish that a violation is "serious" under §17(k) of the Act, the Secretary must establish that there is a substantial probability of death or serious physical harm that could result from the cited condition. In determining substantial probability, the Secretary must show that an accident is possible and the result of the accident would likely be death or serious physical harm. The likelihood of the accident is not an issue. *Spancrete Northeast, Inc.,* 15 BNA OSHC 1020, 1024 (No. 86-521, 1991).

Item 2: Alleged Serious Violation of § 1910.146(c)(1)

The Secretary alleges that Omaha committed a serious violation of § 1910.146(c)(1), which provides:

> The employer shall evaluate the workplace to determine if any spaces are permit-required confined spaces.
>
> NOTE: Proper application of the decision flow chart in appendix A to § 1910.146 would facilitate compliance with this requirement.

The Secretary cites items 3 through 6 and 8 through 11 based on her belief that the chamber of the baler was a PRCS. Omaha denies that the baler's chamber was a PRCS, but concedes that if the undersigned determines that it was, in fact, a PRCS, then Omaha was not in compliance with the cited sections of the § 1910.146 PRCS standard (Tr. 171-172). The determination of whether the chamber was a PRCS is central to all of the items cited under § 1910.146 with the exception of item 2.

The present item alleges a violation of § 1910.146(c)(1), which requires only that the employer "evaluate the workplace to determine if any spaces are" PRCSs. The standard does not require that the employer make the correct determination; the employer may be in violation of other sections of the PRCS standard, but if it made a reasonable evaluation of the workplace, it is in compliance with § 1910.146(c)(1).

The Secretary alleges that Omaha failed to make a reasonable evaluation of its Cincinnati plant with regard to PRCSs. The Secretary's case appears to be based primarily on the fact that Omaha did not determine that the baler was a PRCS. She also questions Omaha vice-president Michael Mercer's competency to evaluate a workplace because at the opening conference he interchanged the phrases "confined space" and "permit-required confined space" (Tr. 105-106).

Mercer testified that he made an initial evaluation of the spaces in the Cincinnati plant when he first visited the plant in 1997, and that he continues to evaluate the spaces in the plant every time he goes there (Tr. 218). Mercer stated that he based his determination that the baler was not a PRCS on "[e]xperience, OSHA regs, professionals, experts" (Tr. 220). Omaha argues that it has a comprehensive LOTO program which eliminates any potential hazards inside the chamber (Tr. 185). The manufacturer's operating instructions for the baler do not address potential PRCS hazards (Exh. R-20; Tr. 192). Omaha contends that the only reason Tracy was exposed to a hazard inside the baler chamber was due to his violation of its LOTO program.

The requirements of § 1910.146(c)(1) are not stringent. The employer's evaluation of the workplace must be reasonable but the employer is not required to complete an extensive list of specific steps. In *Drexel Chemical Company,* 17 BNA OSHC 1908, 1910 (No. 94-1460, 1997), the Review Commission adopted the interpretation of the standard found in OSHA Instruction CPL 2.100 (entered into the record as Exhibit C-3), which provides that:

> the evaluation under § 1910.146(c)(1) does not need to be documented as long as the employer can explain how the evaluation was conducted and describe the results. The CPL also states that the initial evaluation does not necessarily require a specific physical survey of each space if the determination can be made through existing records and knowledge of the spaces in the workplace, provided that this information is adequate.

The Secretary has failed to establish a violation of § 1910.146(c)(1). Mercer's evaluation of the spaces in the Cincinnati plant was reasonable based on the records and knowledge that he had. Item 2 is vacated.

Items 3 Through 6 and 8 Through 11: Alleged Serious Violations of §§ 1910.146(c)(2), (c)(4), (d)(2), (d)(3), (d)(4)(viii), (e)(1), (g)(1), and (k)(3)

The Secretary alleges that Omaha committed serious violations of the following sections of the § 1910.146 PRCS standard:

> (c) *General requirements.*
>
> . . .
>
> (2) If the workplace contains permit spaces, the employer shall inform exposed employees, by posting danger signs or by any other equally effective means, of the existence and location of and the danger posed by the permit spaces.

. . .

(4) If the employer decides that its employees will enter permit spaces, the employer shall develop and implement a written permit space program that complies with this section. The written program shall be available for inspection by employees and their authorized representatives.

. . .

(d) *Permit-required confined space program* (permit space program). Under the permit space program required by paragraph (c)(4) of this section, the employer shall:

. . .

(2) Identify and evaluate the hazards of permit spaces before employees enter them;

(3) Develop and implement the means, procedures, and practices necessary for safe permit space entry operations, including, but not limited to, the following:

(i) Specifying acceptable entry conditions;
(ii) Isolating the permit space;
(iii) Purging, inerting, flushing, or ventilating the permit space as necessary to eliminate or control atmospheric hazards;
(iv) Providing pedestrian, vehicle, or other barriers as necessary to protect entrants from external hazards; and
(v) Verifying that conditions in the permit space are acceptable for entry throughout the duration of an authorized entry.

(4) Provide the following equipment (specified in paragraphs (d)(4)(ix) of this section) at no cost to employees, maintain that equipment properly, and ensure that employees use that equipment properly:

. .

(viii) Rescue and emergency equipment needed to comply with paragraph (d)(9) of this section, except to the extent that the equipment is provided by rescue services[.]

. . .

(e) *Permit system.* (1) Before entry is authorized, the employer shall document the completion of measures required by paragraph (d)(3) of this section by preparing the entry permit.

. . .

(g) Training. (1) The employer shall provide training so that all employees whose work is regulated by this section acquire the understanding, knowledge, and skills necessary for the safe performance of the duties assigned under this section.

. . .

(k) *Rescue and emergency services.*

. . .

(3) To facilitate non-entry rescue, retrieval systems or methods shall be used whenever an authorized entrant enters a permit space, unless the retrieval equipment would increase the overall risk of entry or would not contribute to the rescue of the entrant. . .

Is the Baler Chamber a Permit-Required Confined Space?

Section 1910.146(b) contains the following pertinent definitions:

Confined space means a space that:

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

. . .

Permit-required confined space (permit space) means a confined space that has one or more of the following characteristics:

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

. . .

Engulfment means the surrounding and effective capture of a person by a liquid or finely divided (flowable) solid substance that can be aspirated to cause death by filling or plugging the respirator system or that can exert enough force on the body to cause death by strangulation, constriction, or crushing.

At the time of the hearing, one of the theories of the Secretary's case was that the baler chamber contained an engulfment hazard. The engulfment hazard was supposedly created by the potential of the paper to crush an employee to death (Tr. 134-136). In her brief the Secretary abandons this position, focusing instead on the catch-all characteristic (4) of the PRCS definition ("Contains any other recognized serious safety or health hazard"). The Secretary is correct to set aside the engulfment theory. "Engulfment" refers to a substance that is either liquid or is a "finely

divided (flowable) solid." The definition contemplates solid substances such as grains or gravel that can be poured. Paper does not flow in the manner specified in the definition.

In May 1995, the Directorate of Compliance Programs for OSHA published CPL 2.100 ("Application of the Permit-Required Confined Space (PRCS) Standard, 29 CFR 1910.146"). The CPL addresses the circumstances under which a confined space may be classified as a PRCS because of "recognized serious safety or health hazards." While OSHA's CPLs and other directives generally are not binding on the Commission, the Commission has adopted the reasoning of CPL 2.100, as noted in *Drexel,* 17 BNA OSHC at 1910, footnote 3. The CPL is organized in question and answer form. The pertinent section is number 10, which provides (Exh. C-3, p. 27, boldface in original):

> **The definition of permit-required confined space contains the phrase "any recognized serious safety and health hazard" as one of its hazard characteristics which would result in a confined space being classified as a permit space. The "Types of Hazards" listing in the Confined Space Hazards section of OSHA's Confined Space Entry Course No. 226 identifies hazards. Does the mere presence of a non-specific hazards [sic] such as physical hazards (e. g. grinding, agitators, steam, mulching, falling/tripping, other moving parts); corrosive chemical hazards; biological hazards; and other hazards (i. e. electrical, rodents, snakes, spiders, poor visibility, wind, weather, or insecure footing), which do not pose an immediate danger to life or health or impairment of an employee's ability to escape from the space constitute a hazard which would invoke this characteristic?**
>
> When a hazard in a confined space is immediately dangerous to life or health, the "permit space" classification is triggered. The list referenced above is only illustrative of the general range of confined space hazards which could, but not necessarily always, constitute a hazard which would present an immediate danger to life or health, such that "permit space" protection would be required. **The determination of whether the resulting exposure to a hazard in a confined space will impair the employee's ability to perform self-rescue is the aspect that must be addressed by the employer.**
>
> In order for [a] **"serious safety and health hazard"** to be **recognized** as being an impairment to escape, its severity potential for resulting physical harm to an employee must be considered.

Dennis Collins, OSHA's assistant area director, testified that the recognized hazard created when an employee enters the baler chamber to clear an overhead paper jam is that the material could dislodge and fall on the employee. The weight of the material on the employee could impair his or

her ability to escape the chamber (Tr. 95-96). Omaha vice-president Mercer conceded that if McKinnes had not noticed Tracy's hand sticking out of the access door, he could have been compacted during the baling process (Tr. 262-263).

Omaha argues that no recognized hazard existed in the baler chamber because all hazards were eliminated through the use of its LOTO program. Under certain conditions § 1910.146(c)(7)(i) allows for PRCSs to be reclassified for a specific length of time. That section provides:

> A space classified by the employer as a permit-required confined space may be classified as a non-permit confined space under the following procedures:
>
> (i) If the permit space poses no actual or potential atmospheric hazards and if all hazards within the space are eliminated without entry into the space, the permit space may be reclassified as a non-permit confined space for as long as the non-atmospheric hazards remain eliminated.

The preamble to the PRCS standard states, "OSHA expects that this provision will apply primarily to spaces containing hazardous energy sources or containing engulfment hazards. The control of hazardous energy sources is addressed by existing § 1910.147, *The control of hazardous energy sources (lockout/tagout).*" 58 Fed. Reg. 4491 (1993) (Exhibit C-4).

Collins testified that the baler chamber could potentially be reclassified as a non-PRCS under § 1910.146(c)(7)(i) (Tr. 99). Collins stated that the reclassification could be made "by assuring without entry that there was no potential for being struck by or covered by material and by eliminating hazards associated with the energy source of the machine itself by locking it out" (Tr. 102). Omaha contends that it has already eliminated all hazards because of its LOTO program (Tr. 204-205). The Secretary argues, however, that the use of a LOTO cannot serve permanently to reclassify a PRCS to non-PRCS status unless the baler is permanently locked out. The Secretary's argument is persuasive. There are two recognized hazards to which employees in the baler chamber are potentially exposed: the hazard of being struck and buried by overhead material (as was the case with Tracy), and of being struck by the baler ram in the event the baler started up unexpectedly. Omaha's argument regarding its LOTO program does not address the hazard of being struck by material from the overhead chute. It also fails to address the hazards existing in the chamber when the baler is in an energized state.

Furthermore, Omaha failed to take any of the steps necessary to certify that it had reclassified the baler to a non-PRCS in accordance with § 1910.146(c)(7). Section 1910.147(c)(7)(iii) provides:

> The employer shall document the basis for determining that all hazards in a permit space have been eliminated, through a certification that contains the date, the location of the space, and the signature of the person making the determination. The certification shall be made available to each employee entering the space.

Since Omaha never considered the baler chamber to be a PRCS, it never attempted to reclassify it as a non-PRCS.

The Secretary has established that the baler chamber was a PRCS within the meaning of § 1910.146. Employees entering the chamber were exposed to the recognized hazards of being struck and buried by overhead material and of being compacted in the event the baler unexpectedly energized. The hazard of being struck by overhead material could also impair the employee's ability to escape, as it did in Tracy's case.

Disposition of the Items Cited under § 1910.146

Having found that the baler chamber was a PRCS, the undersigned now finds that the cited sections of the § 1910.146 standard apply to the cited conditions. Omaha has stipulated that it was in noncompliance with the cited sections of the PRCS standard (Tr. 171-172). One employee was exposed to the hazards created by Omaha's noncompliance. Omaha knew that it was not in compliance with the cited sections of the PRCS standard.

The Secretary has established that Omaha violated the cited sections. The likely result of an accident caused by Omaha's noncompliance with the PRCS sections would be death or serious physical harm. Items 3, 4, 5, 6, 8, 9, 10, and 11 are affirmed as serious.

Item 12: Alleged Serious Violation of § 1910.147(c)(7)(i)

The Secretary alleges that Omaha committed a serious violation of § 1910.147(c)(7)(i), which provides:

> The employer shall provide training to ensure that the purpose and function of the energy control program are understood by employees and that the knowledge and skills required for the safe application, usage, and removal of the energy controls are acquired by employees. The training shall include the following:
>
> (A) Each authorized employee shall receive training in the recognition of applicable hazardous energy sources, the type and magnitude of the

energy available in the workplace, and the methods and means necessary for energy isolation and control.

(B) Each affected employee shall be instructed in the purpose and use of the energy control procedure.

(C) All other employees whose work operations are in or may be in an area where energy control procedures may be utilized, shall be instructed about the procedure, and about the prohibition relating to attempts to restart or reenergize machines or equipment which are locked out or tagged out.

Section 1910.147(c)(7)(i) requires different levels of training for different employees, depending upon their job assignments. Authorized employees are employees who actually perform the lockout, and they are required to receive more extensive training than those employees who do not lockout the equipment. Tracy was an affected, not an authorized, employee. The standard required Omaha to instruct Tracy, in accordance with § 1910.147(c)(7)(i)(B), "in the purpose and use of the energy control procedure."

Collins testified that when OSHA interviewed Tracy following his accident, Tracy "indicated he had not received any lockout training. . . .We asked Mr. Tracy what training he had received with respect to lockout of equipment, and he stated that he had received no training with respect to that" (Tr. 118). Collins stated that he asked Tracy if he knew the meaning of "lockout/tagout." Tracy replied that "he did not have any familiarity with [the baler's main power] disconnect or with locking it, he had no lock. He had never been issued a lock" (Tr. 119).

Likewise at the hearing, Tracy testified that he had not heard the term "lockout/tagout" prior to his accident (Tr. 55). The Secretary asserts that this is evidence that Omaha did not provide any LOTO training to Tracy. Omaha argues that the standard does not require that employees know that the terminology for an energy control procedure is "lockout/tagout." Omaha contends that even though Tracy was not familiar with the terminology, he had been trained in Omaha's LOTO procedure.

Tracy testified as follows to his training:

> I was to inform Evette anytime that there was a jam. But, again, you also have to realize, I was a lineman. I worked outside. The baler wasn't my thing. I was a new employee. They asked, they said they needed a volunteer for second shift. . .

(Tr. 30).

> Evette told me, "Do not go into the baler." But, she also told me that I would not be involved with any of that because of my position of being outside. . .
> [Evette said,] "Don't go in the baler. . . . Under any circumstances, don't." . . . I mean, it wasn't no big long, drawn out thing. It was just, "Don't go in the baler. It's not your job. You just stay outside." That's basically what was said to me.

(Tr. 31).

> [My instructions in the event of a jam were:] Turn the machine off, find someone in management, find Evette, inform her, go outside and do my job. . . .Turn the key, yes. Then, I'm supposed to remove it, and hand it to her, you know, "here you go," and then I'm supposed to go outside and finish what I was doing.

(Tr. 32).

The Secretary has failed to establish a violation of § 1910.147(c)(7)(i). Tracy did not know the terminology of the LOTO procedure, but he did understand what he was supposed to do as an affected employee to follow the LOTO procedure. The Secretary argues that Tracy was not provided with a lock to lockout the baler. Tracy was not an authorized employee to lockout the equipment. Omaha was not required to provide him with a lock. Tracy admitted that he failed to do any of the things he was instructed to do before entering the baler chamber (Tr. 57).

Item 12 is vacated.

Item 13: Alleged Serious Violation of § 1910.147(d)(4)(i)

Section 1910.147(d)(4)(i) provides:

> Lockout or tagout devices shall be affixed to each energy isolating device by authorized employees.

The Secretary alleges that Omaha violated this section of the LOTO standard when Tracy entered the baler chamber without locking out the machine. Section 1910.147(d)(4)(i) applies to authorized employees. As noted in the previous section, Tracy was not an authorized employee.

Omaha contends that an authorized employee did not lockout the baler only because no authorized employee knew that Tracy was entering the chamber. Omaha argues that Tracy's entrapment in the baler chamber was the result of unpreventable employee misconduct.

In order to establish the affirmative defense of unpreventable employee misconduct, an employer is required to prove (1) that it has established work rules designed to prevent the violation, (2) that it has adequately communicated these rules to its employees, (3) that it has taken steps to discover violations, and (4) that it has effectively enforced the rules when violations are discovered. *Precast Services, Inc.,* 17 BNA OSHC 1454, 1455 (No. 93-2971, 1995), *aff'd without published opinion,* 106 F. 3d 401 (6th Cir. 1997).

In the present case, Omaha has proven that it had an established work rule designed to prevent violation of § 1910.147(d)(4)(i), and that it adequately communicated this rule to Tracy. Tracy testified repeatedly that he had been told not to enter the baler chamber. In the event of a jam, Tracy was to turn the key on the control panel to shut off the machine and then to find his supervisor. Tracy characterized his own behavior in entering the chamber as "a stupid move" and "a rookie mistake" (Tr. 22).

Because entering the chamber constituted a momentary activity, and was not an ongoing condition, it was difficult for Omaha to take steps to discover the violation. However, having discovered that Tracy violated its rule, Omaha issued a clarification of its LOTO procedure to Tracy (Exh. C-2)[19] and verbally reprimanded Steve Newgate. Evette McKinnes was reprimanded and demoted (Exh. R-21; Tr. 245-246).

Omaha has established that Tracy committed unpreventable employee misconduct. Tracy knew that he was prohibited from entering the baler chamber and did so anyway. Omaha disciplined the two employees other than Tracy who were working at the time of his accident. Tracy was not an authorized employee to lockout the baler. There was no evidence that Omaha's authorized employees failed to lockout the baler when they knew that a lockout situation existed.

Item 13 is vacated.

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[19] Omaha did not otherwise discipline Tracy. Tracy attributed this to his being hospitalized immediately after the accident (Tr. 29).

Item 14: Alleged Serious Violation of § 1910.157(g)(1)

Section 1910.157(g)(1) provides:

> Where the employer has provided portable fire extinguishers for employee use in the workplace, the employer shall also provide an educational program to familiarize employees with the general principles of fire extinguisher use and the hazards involved with incipient stage fire fighting.

Omaha provided fire extinguishers at its Cincinnati facility. Prior to his accident, Tracy was not trained in the use of fire extinguishers (Tr. 125). On one occasion, Tracy had taken a fire extinguisher down from the wall where it was stored and was prepared to use it (Tr. 39).

The company claims that the cited standard does not apply to it because only authorized employees who were trained in the use of fire extinguishers were allowed to use them. Section 1910.157(a) provides:

> Where extinguishers are provided but not intended for employee use and the employer has an emergency action plan and a fire prevention plan which meets the requirements of § 1910.38, then only the requirements of paragraphs (e) and (f) of this section apply.

Omaha's claim is not supported by the record. Omaha's Employee Handbook states (Exh. R-1, p. 20): "In case of fire use the fire extinguishers located throughout the building." Tracy, who was quite forthcoming regarding his failure to follow Omaha's other work rules, stated that no one at Omaha had ever instructed him not to use fire extinguishers prior to his accident (Tr. 9).

The Secretary has established a violation of § 1910.157(g)(1). The Secretary did not present evidence at the hearing or make an argument in her brief that supports the position that Omaha's violation of § 1910.157(g)(1) could result in death or serious physical harm. Absent such evidence, the undersigned finds that Omaha's violation of this standard is other-than-serious.

Penalty Determination

The Commission is the final arbiter of penalties in all contested cases. Under § 17(j) of the Act, in determining the appropriate penalty, the Commission is required to find and give "due consideration" to (1) the size of the employer's business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the history of previous violations. The gravity of the violation is the principal factor to be considered.

Omaha employed 48 to 50 employees (Tr. 258). Omaha has a history of previous violations (Tr. 164). No evidence of bad faith was adduced.

The gravity of the eight affirmed violations of the PRCS standard is moderate to high. By failing to recognize the baler chamber as a PRCS, Omaha neglected to implement several procedures that could have acted as a check in preventing Tracy or any other employee from entering the chamber. Failure to designate the chamber as a PRCS exposed Tracy and others to the hazards of being struck by falling paper and of being injured if the baler suddenly energized. The gravity of the violations is mitigated somewhat by the implementation of Omaha's LOTO procedure. However, the LOTO procedure was not foolproof, as this case established.

Accordingly, it is determined that the appropriate penalty for the violations of §§ 1910.146(c)(2) (item 3); 146(c)(4) (item 4); 146(d)(2) (item 5); 146(d)(3) (item 6); 146(d)(4)(viii) (item 8); 146(e)(1) (item 9); and 146(g)(1) (item 11) is $2,000.00 each. The penalty for the other-than-serious violation of § 1910.157(g)(1) is $100.00.

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 that:

1. Item 1, § 1910.38(b)(4)(ii), is withdrawn by the Secretary, and is vacated;

2. Item 2, § 1910.146(c)(1), is vacated, and no penalty is assessed;

3. Item 3, § 1910.146(c)(2), is affirmed, and a penalty of $2,000.00 is assessed;

4. Item 4, § 1910.146(c)(4), is affirmed, and a penalty of $2,000.00 is assessed;

5. Item 5, § 1910.146(d)(2), is affirmed, and a penalty of $2,000.00 is assessed;

6. Item 6, § 1910.146(d)(3), is affirmed, and a penalty of $2,000.00 is assessed;

7. Item 7, § 1910.146(d)(4)(i), is withdrawn by the Secretary, and is vacated;

8. Item 8, § 1910.146(d)(4)(viii), is affirmed, and a penalty of $2,000.00 is assessed;

9. Item 9, § 1910.146(e)(1), is affirmed, and a penalty of $2,000.00 is assessed;

10. Item 10, § 1910.146(g)(1), is affirmed, and a penalty of $2,000.00 is assessed;

11. Item 11, § 1910.146(k)(3), is affirmed, and a penalty of $2,000.00 is assessed;

12. Item 12, § 1910.147(c)(7)(i), is vacated, and no penalty is assessed;

13. Item 13, § 1910.147(d)(4)(i), is vacated, and no penalty is assessed; and

14. Item 14, § 1910.157(g)(1), is affirmed as other-than-serious, and a penalty of $100.00 is assessed.

/s/
NANCY J. SPIES
Judge

Date: December 24, 1999