CONFINED SPACES AND THE CONSTRUCTION INDUSTRY

Many contractors mistakenly believe that they do not have to comply with OSHA's confined spaces standard. For the most part, this belief stems from a misunderstanding of 29 CFR 1910.1469(a), the standard's "scope and application" paragraph, which clearly states that "this section does not apply to agriculture, to construction or shipyard employment."

What some contractors do not seem to understand is that, while they may consider themselves part of the construction industry, much of the work they perform is not really construction, but maintenance and repair. Furthermore, OSHA has made it abundantly clear that maintenance and repair activities are covered by the general industry standard.

As a practical matter, it does not really make any difference whether contractors are legally covered by OSHA's permit-required confined space regulation, since they still need to take a variety of precautions when entering permit-required confined spaces.

Specifically, the agency's enforcement policy stipulates that contractors who are not covered by the general industry regulations outlined in 29 CFR 1910.146 must comply with American National Standards Institute (ANSI) Standard Z-117.1, *Safety Requirements for Confined Spaces*. Not surprisingly, ANSI's requirements closely parallel those in 29 CFR 1910.146.

CONSTRUCTION VS. MAINTENANCE

Whenever OSHA issues a new regulation, it drafts a directive for its compliance officers that explains how they are to enforce the new rule. In the case of OSHA's confined space standard, that directive is CPL 2.100. If you are interested in reading the directive in its entirety, you can find a copy on OSHA's website at www.osha.gov.

The OSHA enforcement directive is quite clear, and explains that refurbishing of existing equipment in a confined space is considered maintenance. On the other hand, reconfiguration of a space or installation of substantially new equipment is considered construction.

CPL 2.100 specifically states "…permit-required confined spaces that are undergoing maintenance or modifications which do not involve construction are subject to the general industry standards." On the other hand, a confined space created during, or as a result of, construction activity or entered to perform construction activity would usually fall within the scope of the 29 CFR 1926 standards until the space is turned over for general industry operations.

For example, a new petroleum storage tank, chemical reactor or process vessel that is being built from scratch is covered by the construction standards until the entity for which it is being built takes possession. At that point, further entry into the spaces is covered by the general industry regulations.

The following examples, which are drawn directly from CPL 2.100, clearly illustrate the differences between construction and maintenance:

- Lining a tank that is in need of restoration, either to prevent the structural part of the tank from deteriorating or to prevent the product from being contaminated by the material making up the tank structure. In either case, the partial patching or total removal of existing lining and replacement is maintenance.
- Relining of a furnace with new refractory material is maintenance.
- Tuck pointing and individual brick replacement in a manhole is maintenance.
- Relining of a sewer line using a sleeve, which is pushed through a section of the existing system, is maintenance.
- Repainting, which is part of a scheduled program to maintain a system or prevent its deterioration, is maintenance.

In light of these examples from the CPL, it should be obvious that installing a new sewer or storm water system is construction; grouting, relining or patching holes in an existing system is not. Applying a preservative coating to the walls of a newly fabricated storage tank is construction; removing damaged material and repainting is not. Assembling a new chemical reactor is construction; replacing a broken agitator, level gauge or thermocouple inside an existing reactor is not.

The important thing to realize is that is that it is the nature of the work, not the nature of the employer that determines coverage under the standard. For example, a welder whose principal business is building new petroleum storage is not exempt from coverage

under 29 CFR 1910.146 merely because he is a construction industry employer. If one of his employees enters an existing tank to weld a broken part, that employee is being employed to make a repair, not to do construction.

Note that 29 CFR 1910.146(a) does not say that the construction industry is exempt from coverage it says that the standard does not apply to construction employment.

GENERAL DUTY OBLIGATIONS

Further evidence of the need for construction employers to take precautions when entering confined spaces is provided by formal letters of interpretation issued by OSHA's national office.

One such letter had its genesis just two weeks after the new permit-required standard that was published in the *Federal Register* on January 14, 1993. According to OSHA records, on February 9, 1993, Bruce Smith, training manager of Speed Shore Corp. of Houston, Texas, wrote to Roy F. Gurnham, OSHA's Director of Construction and Maritime Compliance Assistance, asking for a formal interpretation as to how the construction industry would be affected by the new confined space rule.

Almost a year later, Gurnham finally replied to Smith's inquiry. In his letter dated January 27, 1994, he explained: "OSHA's enforcement policy with regard to confined spaces at construction sites has not changed with the promulgation of the general industry regulation. In those instances where a hazard is addressed by an existing part 1926 standard, OSHA will continue to cite the specific standard. In those cases where a hazard is observed that is not addressed by an existing specific construction standard but it is addressed in the ANSI (American National Standards Institute) Z117.1 consensus standard, OSHA will continue to cite under 5(a)(1) of the Act, provided the conditions for citing the general duty clause are present.

General Duty Obligation

For those of you not familiar with section 5(a)(1) of the Act that Gurnham mentions, this paragraph is often referred to as the "general duty clause." In short, it stipulates that every employer has a general duty to provide "…each of their employees with employment and a place of employment which is free from recognized hazards that are causing or are likely to cause death or serious physical harm…"

OSHA Review Commission decisions and court precedents have established that the following four elements are necessary to prove a violation of the general duty clause:

- The employer failed to keep the workplace free of a hazard to which employees of that employer were exposed.
- The hazard was recognized.
- The hazard was causing, or was likely to cause, death or serious physical harm.
- There was a feasible and useful method for correcting the hazard.

Anyone who is even modestly familiar with confined spaces knows that the hazards associated with entry are well recognized, that exposure to those hazards can cause death or serious physical harm, and that there are a variety of methods available for controlling confined space hazards.

In this light, it is obvious that OSHA would have no trouble making a case for a general duty clause violation relative to confined space entry.

Requirements of ANSI Z-117

Safety Requirements for Confined Spaces, ANSI Z-117.1 first appeared in 1977. The standard was revised in 1989, and the most recent edition was published in 1995. ANSI Z-117.1 addresses many of the same issues as the OSHA standard and includes specific requirements for:

- Identifying permit-required confined spaces and warning employees about the hazards posed by unauthorized entry.
- Identifying and controlling hazards associated with entry into permit-required confined spaces.
- Developing a comprehensive written confined space entry program.
- Completing a written confined space permit before entry.
- Ensuring atmospheric monitoring, isolation and ventilation.
- Designating employees who play an active role in the entry such as entrants, attendants and those supervising entry operations.
- Developing an emergency response plan.
- Informing contractors of hazards posed by entry.
- Ensuring that those involved in confined space entry are trained and qualified.

As a practical matter, the differences between ANSI Z-117.1 and 29 CFR 1910.146 are so subtle that you almost need a magnifying glass to see them. Admittedly, the OSHA standard is a little more rigorous in its technical approach, but in principle both standards essentially address the same concerns.

Nevertheless, employers often seek professional advice because they are immobilized by indecision. When confronted with having to decide whether they should follow OSHA 29 CFR 1910.146 or ANSI Z-117.1, they simply cannot make up their minds.

Unfortunately, many employers are so hung up on what they perceive to be their "legal obligation" that they fail to use good technical judgement with respect to taking appropriate action. When asked what they believe is reasonable and prudent, they often respond, "The OSHA standard seems to be pretty good. I really think we should follow that, but we do not know if that is what OSHA wants."

Sadly, the time that these people spent obsessing over which standard to follow could have been used far more productively to protect their employees from death or serious physical harm. Having worked for the agency's Maryland program for almost 20 years, I can say with a high degree of certainty that the likelihood of being chastised, reprimanded or cited by OSHA for following 29 CFR 1910.146 instead of ANSI Z-117.1 is about the same as being hit by a meteor.

Tragically, some construction employers seem to be so concerned about making the wrong decision that they make a worse decision of none.

TRENCHES AND TUNNELS

Some people who attend my confined spaces seminars around the country are also under the mistaken belief that trenches and tunnels are permit confined spaces, and, as such, are covered by 29 CFR 1910.146. In fact, some OSHA compliance officers I've spoken to are stunned to learn that the confined space rule does not apply to trenching, excavating, and tunneling operations.

Again, this is not a simple matter of my opinion. The distinction is spelled out quite clearly by 29 CFR 1926.20 (d)(1), which states that "if a particular standard is specifically applicable to a condition, practice, means, method, operation or process, it shall prevail over any different general standard which might otherwise be applicable to the same a condition, practice, means, method, operation or process."

For those of you not familiar with OSHA's trenching and tunneling standards, I will mention that 29 CFR1926.651 (trenching and excavation) and 29 CFR 1926.800 (tunneling) include provisions for such things as atmospheric testing, ventilation, emergency planning and retrieval. Curiously, these precautions look strikingly similar to those taken for confined space entry.

SUMMARY

Although OSHA's general industry confined spaces regulations do not apply to construction employment, many jobs performed by contractors are actually maintenance and repair tasks, which are covered by the general industry standard. Contrary to what some contractors may believe, exacting precautions must be taken before entering confined spaces on construction sites. Take your pick: it is either 29 CFR 1910.146 or ANSI Z-117.1. Regardless which you choose, the precautions are essentially the same.

ABOUT THE AUTHOR

John Rekus is an independent safety consultant and author of the National Safety Council's Complete Confined Spaces Handbook. With more than 20 years of OSHA regulatory experience, he specializes in conducting OSHA compliance surveys and providing safety seminars for workers and managers. He resides near Baltimore and may be reached at 410-583-7954 or via his website at http://www.jfrekus.com.