United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR, Complainant, v. US CEILING CORP., Respondent.	OSHRC DOCKET NO. 20-0232

Appearances: Seema Nanda, Solicitor of Labor
Jeffrey S. Rogoff, Regional Solicitor
Allison L. Bowles, Senior Trial Attorney
Hollis V. Pfitsch, Trial Attorney
U.S. Department of Labor, Office of the Solicitor, New York, New York

For the Complainant

Daniel P. Adams, Jr., Esq.
Adams Leclair LLP, Rochester, New York

For the Respondent

Before: Keith E. Bell
Administrative Law Judge

DECISION AND ORDER

Respondent US Ceiling Corporation (USC) subcontracts with general contractor companies on new and renovation construction projects. The renovation project at issue in this

case was located at 447 Thurston Road, Webster, New York (worksite), and entailed the renovation of a three-story residential apartment building (447 Thurston) that was built circa 1925. (Ex. JX-3.) Respondent was tasked with building new walls and renovating existing walls for the apartments. (Tr. 61-62, 190); *see also* Ex. GX-29 at 18.

After receiving a complaint, the Occupational Safety and Health Administration (OSHA) initiated an inspection of the renovation project on July 23, 2019. As a result of the inspection of the worksite, OSHA issued to Respondent a Citation and Notification of Penalty (Citation) on January 17, 2020. The Citation alleged one serious two-item violation of OSHA's lead in construction standards found at 29 C.F.R. § 1926.62 promulgated pursuant to the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (OSH Act), and proposed a total penalty of $13,494.

Respondent filed a timely notice of contest, bringing this matter before the Occupational Safety and Health Review Commission (Commission). A virtual hearing was held on January 11, 2022. Both parties filed post-hearing briefs. As discussed below, the items are AFFIRMED as OTHER-THAN-SERIOUS and the penalty is AFFIRMED as proposed.

JURISDICTION AND COVERAGE

The Commission gains jurisdiction to adjudicate an alleged violation of the OSH Act by an employer if the employer is engaged in business affecting commerce within the meaning of section 3(5) of the OSH Act, and, if the employer timely contests the citation. 29 U.S.C. §§ 652(5), 659(c). The record establishes that Respondent, as of the date of the alleged violation, was an employer engaged in business affecting commerce within the meaning of section 3(5) of the OSH Act. 29 U.S.C. § 652(5); Ex. JX-3 ¶¶ a, b (Stipulations). Respondent also timely filed

a notice of contest to the Citation in this case. The Court concludes that Respondent is covered under the Act and that the Commission has jurisdiction over this matter.

BACKGROUND

Project Overview

The 447 Thurston project was the renovation of a 1925 residential apartment building. The building was three stories tall, not including the basement, and each floor was U-shaped in that there were two parallel hallways and a third perpendicular hallway at one end. (Exs. GX-57 at 18, JX-2 at 62-64.) There were approximately ten apartments per floor and the entrances to each apartment were located off the three hallways. (Ex. GX-55 at 16-17.) Each apartment had a kitchen and bathroom areas as well as living spaces. It is relevant to this case that the general contractor of the project, Home Leasing, hired subcontractor Rock Environmental for demolition work inside the apartment building. (Tr. 39-40, 164.)

In February 2019, Home Leasing received a previously commissioned "Limited Pre-Renovation Regulated Building Materials Inspection" by LaBella Associates, D.P.C. (LaBella survey), which indicated the presence of asbestos and lead-based paint, among other hazards, inside the worksite. (Ex. JX-2.) The presence of lead was determined by XRF[1] testing of the paint inside the apartment building. *Id.* In this limited survey, the lead-based paint was located primarily in the kitchen and bathroom areas of the apartments. The record indicates that Rock Environmental was also responsible for abating the asbestos and lead hazards, although the timing of the abatement work is not clear on this record. (Tr. 39-40, 205-206, 243.)

Also in February 2019, subcontractor Respondent submitted a bid to Home Leasing for drywall work inside 447 Thurston. (Ex. GX-28.) In preparation for the bid, Respondent toured

[1] According to the OSHA Compliance Officer who inspected this worksite, XRF testing utilizes "a gun that will read through multiple levels of paint and give you an instantaneous read of lead paint." (Tr. 63.)

the building with Home Leasing to be able to submit an appropriate bid. (Tr. 364-365.) During this time, Respondent asked Home Leasing directly about lead and asbestos hazards in the building - and Respondent was informed by Home Leasing that both lead and asbestos were in the building. (Tr. 364-365, 379-380); *see also* Resp't Br. 3. The record does not support a finding that Respondent reviewed the LaBella report at this time. (Tr. 369-370.)

After this conversation, Respondent submitted its bid on February 28, 2019, and the bid was accepted. (Tr. 364, 370.) Respondent received a copy of the executed contract at the end of May 2019. (Tr. 257-258, 364.) Respondent visited the worksite five times before beginning work inside 447 Thurston on June 4, 2019. (Tr. 360, 364, 371.)

It is undisputed that Respondent did not perform an initial lead exposure assessment of its employees before directing them into the worksite in early June 2019. It is also undisputed that Respondent did not inform these workers of the presence of lead and its potential hazards in this worksite before directing them to 447 Thurston in early June 2019.

US Ceiling Corporation

At the time of OSHA's inspection, Respondent employed approximately 50 workers and had been in business since 2001. (Ex. JX-3 ¶ e; Tr. 351.) Respondent, on average, had approximately 200 jobs per year, most of them new construction. (Tr. 357.) Five or 10 percent of its jobs, however, were renovations to buildings that were built before 1974, like the project at issue. (Tr. 357.) When Respondent began performing renovation work on older buildings sometime between 2002 and 2010, Respondent hired someone to train its workers on lead hazards. (Tr. 356-357.)

Ed Geska founded US Ceiling, and at the time of the relevant events in this matter, was the Chief Operating Officer. (Tr. 358.) His responsibilities included overseeing operations,

ordering supplies, supervising jobs and project managers, and educating USC workers on tasks such as how to apply insulation, drywall, metal stud faming, and wood framing. (Tr. 358-359.) Mr. Geska also did sales and estimating for US Ceiling. (Tr. 359-360.) Mr. Geska owned several businesses over the previous 40 years of his career, including Ed Geska Construction, Insulation Concepts, a gutter company, and a remodeling company. (Tr. 352-353.) He also worked in construction as a tradesman and carpenter for a union. (Tr. 353.) Over the course of his career, Mr. Geska received two or three trainings on lead, the first of which was for Insulation Concepts. (Tr. 354, 356.)

Mr. Geska was the point person regarding Respondent's bid on this residential project: he toured the worksite with Home Leasing and prepared and submitted the bid for project. (Tr. 360.) During this tour, Mr. Geska asked Home Leasing directly about lead and asbestos hazards in the building - and Home Leasing told Mr. Geska that both lead and asbestos were in the building. (Tr. 364-365, 379-380). Mr. Geska also toured the worksite five times before Respondent began working on the project. Mr. Geska testified that he received the direction from Home Leasing to proceed with the drywall work. (Tr. 372.) When asked whether Home Leasing told him that the apartment building was clear of lead hazards, Mr. Geska testified, "they said, we need you to start on this date, we want your people there. So that's what we did. We started on the date they asked us to start on, so I assumed it was all clear. Now that's it." (Tr. 372.) Mr. Geska testified that, "[w]e're not the abatement company. If there is lead, we're not touching the surface…what we're doing should have no bearing on our employees as far as a health hazard." (Tr. 380.)

Melissa Geska has been the President of US Ceiling since its founding. (Tr. 254-255.) Her responsibilities include oversight of operational management and estimating. (Tr. 255.) She

took the OSHA 10 course before OSHA's inspection for the project at issue, and that course included lead and asbestos hazards. (Tr. 256.) Ms. Geska testified that lead and asbestos hazards are also included in Respondent's safety manual. (Tr. 256.) Ms. Geska attended the initial walkthrough of the apartment building worksite with Home Leasing and Mr. Geska, and she testified that the purpose of the walkthrough was to review the scope of work. (Tr. 257-258.) Ms. Geska signed the contract on behalf of Respondent for the 447 Thurston Road project. (Tr. 258.) She also signed Home Leasing's onsite safety agreements on July 2, 2019. (Tr. 261.) Ms. Geska also was responsible for hiring Safety Checks, an outside safety consultant, and she testified that she did not recall any specific concerns about safety on this job until Respondent's workers brought up the asbestos concern with Rock Environmental in June 2019. (Tr. 206-207, 264; Ex. GX-36.)

Casey Johnson was Respondent's Safety Coordinator, having been hired around November 2018. (Tr. 188, 259-260.) At the time he was hired, Mr. Johnson had no background in construction and had not yet received the OSHA 10 or OSHA 30 training. (Tr. 188-189, 215.) He received those training classes in February 2019, and he worked on approximately 10-15 jobs before the 447 Thurston Road project began.

Mr. Johnson's responsibilities included drafting the site-specific safety plan and ensuring the overall health and safety of the crew in the field. (Tr. 189.) Mr. Johnson first arrived at the worksite about one to two weeks after Respondent's crew had begun working. (Tr. 191-193.) He testified that the proper time for the safety evaluation or assessment to be done for a worksite is before the workers are onsite. (Tr. 193.) He also testified that Respondent had not performed air monitoring for lead for the worksite before OSHA's visit in July 2019. (Tr. 194.)

As noted earlier, in addition to employing Safety Coordinator Johnson, Respondent also contracted with the outside safety consultant, Safety Checks, for safety issues. (Tr. 263-264.) With regard to 447 Thurston, Mr. Johnson testified that, because he was new to the job and did not have "enough knowledge," he "called in someone with more experience" from Safety Checks to do a walkthrough of the worksite and identify safety hazards with him. (Tr. 192-193, 207.) The record indicates that Respondent contacted Safety Checks on June 20, 2019, and Safety Checks performed an inspection of the worksite with Mr. Johnson the next day, June 21, 2019. (Ex. G-36.)

Mr. Johnson testified that Safety Checks discussed the potential issue of lead, among other hazards, with him during their walkthrough of the worksite on June 21, 2019. (Tr. 197-200.) During this walkthrough, Safety Checks indicated to Mr. Johnson that the presence of green paint could pose a potential hazard of lead. (Tr. 201.) Mr. Johnson also testified that Safety Checks notified him, during this walkthrough, that the type of job tasks Respondent's workers were doing – drilling through an existing wall – could implicate lead exposure to Respondent's workers. (Tr. 199-200.) Neither Mr. Johnson nor Safety Checks inquired into whether Home Leasing was abating the potential lead hazard during this walkthrough. (Tr. 203-204.) On July 2, 2019, Mr. Johnson drafted Respondent's specific safety plan for the apartment project in consultation with Melissa Geska, Ed Geska and Safety Checks. (Tr. 207-208; Ex. GX-32.) In this safety plan, Mr. Johnson indicated that the hazard of lead exposure was "N/A," or not applicable. (Tr. 208.)

Respondent's Work at 447 Thurston

Respondent began sending workers inside the apartment building on June 4, 2019, and as of June 21, 2019, workers for Respondent had been working inside the building for one to two

weeks. (Tr. 192-193, 278-280.) Foreman Adam Rotoli and his nephews, Nicholas Rotoli and Christian Rotoli initially performed the job tasks inside the building, and slowly over the course of 6 weeks as many as approximately 15-20 employees of Respondent worked inside the apartment building at one time. (Tr. 195; Exs. GX-55 at 24-25.) None of these workers received lead training from Respondent before starting work on the apartment building. (Exs. GX-55 at 20, GX-56 at 13-14, GX-57 at 14.) Foreman Rotoli testified that he assumed, based on how he usually receives his assignments, that Melissa Geska and Gary Black assigned him to work on the apartment building project. (Ex. GX-55 at 19.)

Foreman Rotoli was on the worksite six to seven days a week, 10 hours a day. (Ex. GX-55 at 19.) Nicholas Rotoli and Christian Rotoli were on the worksite 5 days per week, about 8 hours per day. (Exs. GX-56 at 11, GX-57 at 13-14.) Safety Coordinator Johnson was on the worksite 2-3 times per week. (Tr. 236.) Foreman Rotoli saw Mr. Geska a total of 3-4 times on the worksite. (Ex. GX-55 at 15-16.)

The job tasks at 447 Thurston included infilling, patching, framing, and sweeping. There were holes in some of the existing walls throughout the building. (Ex. GX-57 at 18-19.) Respondent's workers covered the holes with drywall – the drywall was cut to size so that when it filled the hole, the resulting patch was flush with the existing current wall. This task was termed "infilling" or "patching." (Tr. 190-191; Ex. GX-56 at 15.) The cut-out piece of drywall was either glued onto the existing hole or affixed to it using drywall screws. (Tr. 190-191.) Many times, the hole of the existing wall was jagged, and the workers smoothed out the edges of the hole using a hammer and chisel so that the new piece of drywall was patched flush with the existing hole. *See, e.g.*, Exs. GX-57 at 17-21 (Christian Rotoli describing infill process using Ex. GX-54). The workers also installed framing, which sometimes entailed drilling holes into the

existing walls, for the new sheets of laminate (drywall). *See, e.g.*, Ex. GX-55 at 17, 42-44, 80-85, 89-92 (Adam Rotoli discussing framing in Exs. 15, 22.) Some of the installations utilized a bracket in addition to drywall screws. *See, e.g.*, Exs. 55 at 98, 56 at 39-40, 57 at 55-57.

All of this work created dust and debris, which Respondent's workers swept up using a broom or vacuum. (Exs. GX-55 at 39, 67, 76-77; GX-56 at 23, 30, 40-41, 46; GX-57 at 21.) By the time OSHA arrived on July 23, 2019, Respondent's workers had been working all over the apartment building, including the first floor. (Exs. GX-55 at 106; GX-56 at 12, 54; GX-57 at 41-42.) None of the tools that Respondent's workers used were engineered to have the capability of controlling the dust to which the employees were exposed. (Tr. 109.)

OSHA Inspection

On July 23, 2019, after receiving a complaint against Rock Environmental for potential asbestos hazards, OSHA dispatched Compliance Officer Kimberly Mielonen[2] to investigate the project. (Tr. 37-40, 50.) At that time, Respondent had been working inside 447 Thurston for approximately six weeks. (Tr. 107-108.) Upon arrival at the worksite, CO Mielonen met with general contractor Home Leasing and subcontractor Rock Environmental. (Tr. 50, 81.) She determined that the project was a "gut rehab, so they were gutting the building of the apartments that had been there and then building new apartments" within the apartment building. (Tr. 50.) She had also been informed by her supervisor, before her inspection, that the building was built "prior to 1980," and that "during the course of my career with the agency, when we get into older buildings, we typically find that the buildings are loaded with lead-based paint, asbestos, and things like that." (Tr. 51.)

[2] CO Mielonen works out of the Buffalo area office and has been an OSHA compliance officer for 31 years and 11 months. She has an undergraduate degree in biology. She has worked on 801 investigations in her career, 10% of which have involved lead. (Tr. 37.) CO Mielonen has received on-the-job training as well as OSHA Training Institute training in lead, other types of materials, and hazard communication standards. (Tr. 38.)

CO Mielonen asked Home Leasing about whether a pre-demolition survey had been performed, and Home Leasing gave her the LaBella survey. (Tr. 54.) Upon walking through the worksite, CO Mielonen observed peeling layered paint on the walls, one of the layers being green – a characteristic she testified was indicative of the potential for lead-based paint. (Tr. 40, 84.) Additionally, CO Mielonen observed paint chips on the floor and drilled holes into existing walls which were covered in the layered paint. (Tr. 40-41.) CO Mielonen also observed concrete debris on the floor. (Tr. 41.) She further observed tools, staged materials, extension cords, bags of garbage, brooms, and debris on the floor – all of which evidenced work activity that disturbed the existing potential lead-based paint on the walls. (Tr. 65-66.) Based on these observations, CO Mielonen opened an inspection against Respondent because "they were the contractor that was drilling materials into the existing walls."[3] (Tr. 41.)

CO Mielonen explained that disturbing lead-based paint creates dust that could be inhaled by employees when performing their work activity. (Tr. 68.) She testified that being exposed and inhaling or ingesting airborne lead-based paint can cause reproductive and developmental issues, and it could affect the central nervous system, kidneys, and blood. (Tr. 68-69.) Workers can also bring the lead dust on their clothes home from work and expose their family members to the hazards associated with ingesting airborne lead. (Tr. 69-70.)

CO Mielonen returned to the worksite on July 25, 2019, and met with Respondent's Safety Coordinator Casey Johnson and Respondent's Safety Consultant, Safety Checks. (Tr. 81.) CO Mielonen took five bulk paint samples over the course of both days of her investigation and

[3] CO Mielonen testified that she was required to look for hazards "in plain view" beyond those indicated in the original complaint. (Tr. 40.) Ultimately, OSHA also issued citations to Home Leasing as the "controlling" employer on the worksite alleging violations of OSHA's lead in construction standards, as well as to Rock Environmental alleging violations under OSHA's asbestos and silica in construction standards. (Tr. 41-42.)

sent them to OSHA's laboratory in Salt Lake City for analysis.[4] (Tr. 70-80; Ex. GX-1). The samples taken were paint chips from the floor and one peeling paint piece from the wall. (Tr. 71-72.) Two of the five paint samples tested positive for lead. (Tr. 75.) The sample taken from "Apartment 105 – paint from window" was found to contain ".0409 percent" lead and the sample taken from "first floor – paint from wall" was found to contain ".55 percent" lead. (Tr. 76-78, 79-80; Ex. GX-1 at 1, 4.)

CO Mielonen took pictures of the worksite that accurately depicted conditions she observed during her site visit. (Tr. 81-104; Exs. GX-5, 6, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19.) The photographs depict peeling, layered paint on walls and paint chips on the floor, some of which contained a layer of green paint; debris on the floor, new hardware and drywall drilled into original existing walls, deteriorated conditions of the existing walls, and concrete debris on the floor. (*Id*.)

Relevant Post-Inspection Evidence

After OSHA's inspection, LaBella re-assessed the apartment building at the direction of Home Leasing by analyzing paint samples taken on July 25, 2019, and by visual observations and air sampling performed on August 12, 2019. (Tr. 113-121; Exs. GX-2, GX-3.) In a letter dated September 10, 2019, LaBella instructed Home Leasing that, due to historical XRF testing, the painted walls "should be assumed to contain some degree of lead-based paint." (Ex. GX-2.) LaBella further indicated that all laboratory results of air-samples were "below clearance criteria and OSHA Permissible Exposure limits." (Ex. GX-2.)

[4] CO Mielonen testified that she took the bulk samples with gloved hands, put them in separate vials, took notes regarding each sample and sent them to the OSHA lab in Salt Lake City, Utah. (Tr. 38, 71-72.)

Respondent also performed testing after OSHA's inspection. On July 26, 2019, Respondent sent all of its workers that worked at the apartment worksite for blood work testing. (Tr. 221-223; Exs. RX-2, RX-3, RX-4.) The laboratory results of those tested indicated that no worker had an elevated blood lead level.[5] Respondent sent its workers to "proper lead awareness training" on July 27, 22019,and fit tested its employees for respirators on August 2, 2019. (Tr. 225-226; Exs. R-9, R-13.)

DISCUSSION

The Citations are Affirmed

To prove a violation of an OSHA standard, the Secretary must establish that (1) the cited standard applies, (2) there was a failure to comply with the cited standard, (3) employees had access to the violative condition, and (4) the employer knew or could have known of the condition with the exercise of reasonable diligence. *Astra Pharma. Prods.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981) *aff'd in relevant part*, 681 F.2d 691 (D.C. Cir. 1980). "[L]long-standing Commission precedent hold[s] that an employer whose own employees are exposed to a hazard or violative condition—an 'exposing employer'—has a statutory duty to comply with a particular standard even where it did not create or control the hazard." *Anning-Johnson Co.*, 4 BNA OSHC 1193, 1198-99 (No. 3694, 1976) (consolidated).[6] A violation is "serious" if a

[5] Respondent also contracted with SGS Galson to perform air monitoring on August 15, 2019. (Tr. 218; Ex. RX-2.) According to Mr. Johnson, these results of air monitoring indicated lead presence "under permissible exposure levels." (Tr. 219.)

[6] Respondent raised the multi-employer worksite defense in its Answer but did not raise it in its post-hearing brief. *L&L Painting Co.,* 23 BNA OSHC 1986, 1989 n. 5 (No. 05-0055, 2012) (finding item not addressed in post-hearing briefs deemed abandoned); *Midwest Masonry Inc.,* 19 BNA OSHC 1540, 1543 n. 5 (No. 00-0322, 2001) (noting arguments not raised in post-hearing briefs generally deemed abandoned). In any event, the multi-employer worksite defense is not at issue in this case because, upon directing its workers into the 447 Thurston worksite to perform their job duties, Respondent itself exposed its workers to the lead-based hazards. Respondent had a duty to protect its own employees from hazards. *Capform, Inc.*, 16 BNA OSHC 2040, 2041-42 (No. 91-1613, 1994) ("The multi-employer worksite defense does not alter

substantial probability of death or serious physical harm could have resulted from the violative condition. 29 U.S.C. § 666(k).

Serious Citation 1, Item 1: Initial Exposure Assessment

Serious Citation 1, Item 1 alleges a violation of 29 C.F.R. § 1926.62(d)(1)(i), which provides that "[e]ach employer who has a workplace or operation covered by this standard shall initially determine if any employee may be exposed to lead at or above the action level." 29 C.F.R. § 1926.62(d)(1)(i). The Secretary alleges that Respondent violated 29 C.F.R. § 1926.62(d)(1)(i) when:

> a) Thurston Road, Rochester, NY – On or about and prior to 7/23/19, employees were working in an area where paint chips contained between 0.0409% - 0.5506% lead. The employer did not determine if any employee was exposed to lead at or above the action level of 30 micrograms per cubic meter of air (30ug/m3) calculated as an 8-hour time-weighted average (TWA).

(First Am. Compl. 11.) The Secretary proposed a $6,747 penalty for serious Citation 1, Item 1.

The Court finds that OSHA's construction standards apply to Respondent's worksite. Respondent was tasked to construct new walls and repair old walls within an apartment building. These tasks fit into the plain definition of construction work as defined by OSHA. *See* 29 C.F.R. § 1910.12(a) (construction industry standards prescribed in Part 1926 apply to "every employment and place of employment of every employee engaged in construction work."); 29 C.F.R. § 1910.12(b) ("construction work" as used in section 1910.12(a) "means work for construction, alteration, and/or repair, including painting and decorating."); *see also* Resp't Br. 10 (conceding that Respondent's work involved construction work).

Further, the cited lead-in-construction standard also applies to Respondent's worksite. The cited standard, 29 C.F.R. § 1926.62(d)(1)(i), "applies to all construction work where an

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the general rule that each employer is responsible for the safety of its own employees).

employee may be occupationally exposed to lead." 29 C.F.R. § 1926.62(a) ("Scope"). It is undisputed that lead was present inside the apartment building while Respondent's employees worked inside. All laboratory testing results in the record indicate a presence of lead within the paint of the building.

Respondent argues that its workers performed none of the tasks delineated in the non-exhaustive list of 29 CFR 1926.62(a). (Resp't Br. 9-10.) But these tasks are just examples of construction work – and, as discussed above, Respondent concedes that it was performing construction work. (Resp't Br. 10.) Importantly, the record establishes that all of the tasks Respondent's workers performed at the construction worksite – infilling, patching, framing – produced dust and debris due to disturbing the existing lead-paint covered walls. The workers then cleaned up the dust and debris using a push broom. During all of these tasks, the dust and debris were potential sources of airborne lead which the workers were exposed to without use of any personal protective equipment against lead overexposure. Because these tasks were part of the workers' job at the worksite, these tasks were "occupationally" related to the workers' potential exposure to lead during their workday.

Respondent argues that the cited standard "only applies where an employee 'may be' occupationally exposed to lead" and that "this means that regulation only applies where there is a 'significant risk' that there will be exposure to lead." (Resp't Br. 15-16.) Respondent then claims that the Secretary "wholly failed to prove, by a preponderance of evidence, that USC's employees were ever actually at significant risk of being exposed to lead." (Resp't Br. 13 citing *Pratt & Whitney Aircraft, Div. of United Techs. Corp. v. Sec'y of Labor*, 649 F.2d 96, 103 (2d Cir. 1981) (*Pratt & Whitney*). The Court disagrees with Respondent's arguments.

The section of *Pratt & Whitney* that Respondent relies on concerns a different standard about a different hazard (benzene), making it factually and legally distinguishable from this case. The legal issue that the Commission was concerned about in *Pratt & Whitney* – the word "may" in an interpretation of a benzene regulation – has been addressed by OSHA in its rulemaking for the subject lead-in-construction regulation (as opposed to the benzene standard). In Appendix B to the cited standard, 29 C.F.R. § 1926.62(d), OSHA specifically instructs that, "[i]f lead is present in your workplace *in any quantity*, your employer is required to make an initial determination of whether any employee's exposure to lead exceeds the action level (30 $\mu g/m^3$ averaged over an 8-hour day)." 29 C.F.R. § 1926.62 App. B (emphasis added); *see also S. Scrap Materials Co., Inc.*, 23 BNA OSHC 1596, 1618 (No. 94-3393, 2011) (following Appendix B to general industry lead standard to interpret the word "may" in similar initial exposure assessment requirement). The record establishes that lead was present in the workplace before, during and after Respondent's workers were inside the worksite, performing tasks that disturbed lead-based paint, which exposed Respondent's workers to airborne lead. The cited standard applies to Respondent in this case.

It is undisputed that Respondent did not perform the initial exposure assessment required by the cited standard. Up to 15-20 of its workers were performing tasks that disturbed lead-paint, which created dust and debris, and Respondent did not initially determine if any employee may be exposed to lead at or above the action level. The Court finds that the Secretary established that Respondent failed to comply with the cited standard and Respondent's workers were exposed to the hazardous condition.

Regarding knowledge, the Court finds that the Secretary has also established this element of proof. To establish knowledge, the Secretary must prove that the " 'employer knew or could

have known with the exercise of reasonable diligence of the conditions constituting the violation'." *Contour Erection & Siding Sys., Inc.*, 22 BNA OSHC 1072, 1073 (No. 06-0792, 2007) (citation omitted). The Court finds that the record supports a finding of at least constructive knowledge of the hazardous conditions at the 447 Thurston worksite. *N.Y. State Elec. & Gas Corp. v. Sec'y of Labor*, 88 F.3d 98, 105 (2d Cir. 1996) citing *Pride Oil Well Serv.*, 15 BNA OSHC 1809, 1814 (No. 87-692, 1992) ("Reasonable diligence involves several factors, including an employer's obligation to inspect the work area, to anticipate hazards to which employees may be exposed, and to take measures to prevent the occurrence") (internal citation omitted).

Mr. Geska, Ms. Geska and Safety Coordinator Johnson all knew, before the OSHA inspection, that the conditions inside 447 presented a potential lead hazard: Mr. Geska was told by Home Leasing that lead was in the building in February 2019, Ms. Geska had lead training before her tour of 447 Thurston in February 2019 with Home Leasing and Mr. Geska, and Safety Coordinator Johnson was informed by Safety Checks during their walkthrough on June 21, 2019.[7] Despite this awareness, at no time did any of these management personnel inquire into whether lead had been abated from 447 Thurston. Instead, Mr. Geska assumed that his workers would not disturb any lead-based paint, Ms. Geska assigned Foreman Rotoli to 447 Thurston without notifying him about the potential for lead in the building, and Safety Coordinator Johnson conceded that his walkthrough should have occurred before workers were even let into

[7] Respondent argues lack of knowledge because it did not receive the LaBella survey until after OSHA's inspection. (Resp't Br.14-15.) Respondent then claims that the Secretary "has no other basis to support USC's alleged knowledge of the existence of lead at the site." (Resp't Br. 15.) The Court rejects this argument as the record sufficiently establishes Respondent's knowledge of lead at the 447 Thurston worksite before OSHA's inspection even if Respondent did not receive the LaBella survey until after OSHA's inspection.

the building. Yet, even after this walkthrough with Safety Checks on June 21, work did not stop at 447 Thurston until OSHA arrived onsite a month later on July 23, 2019.

Furthermore, the Court finds that management personnel should have known that their workers job tasks necessarily disturbed lead-based paint on the existing walls of 447 Thurston. Mr. Geska and Safety Coordinator Johnson visited the worksite multiple times over the six weeks that Respondent's workers were at 447 Thurston before OSHA arrived. Upon her arrival at the worksite, the CO observed what Mr. Geska and Safety Coordinator Johnson could have observed and what the photographs in the record show: dust and debris beneath holes where workers were infilling, tools meant to disturb existing walls (hammers, chisels, etc.), and brooms onsite meant to clean up during the workers' workday. *Schuler-Haas Elec. Corp.*, 21 BNA OSHC 1489, 1493-1494 (No. 03-0322, 2006) (finding constructive knowledge of asbestos exposure based on employer's observations of disturbed "dusty material" and lack of appropriate training"). None of these workers were ever corrected or warned not to disturb the lead-based paint inside 447 Thurston, even after Mr. Johnson's June 21 walkthrough with Safety Checks. *N & N Contractors, Inc.*, 18 BNA OSHC 2121, 2124 (No. 96-0606, 2000) (finding constructive knowledge where evidence showed that company knew that its employees "regularly" engaged in violative conduct and employer "d[id] not contend otherwise"), *aff'd*, 255 F.3d 122 (4th Cir. 2001).

Based on this evidence, the Court finds that, at the least, Mr. Geska and Safety Coordinator Johnson had constructive knowledge that its employees were exposed to airborne lead during their job tasks at 447 Thurston. *Contour Erection & Siding Sys., Inc.*, 22 BNA OSHC at 1073 ("The actual or constructive knowledge of a supervisor or foreman ... can generally be imputed to the employer.").

This citation item is affirmed.

Serious Citation 1, Item 2: Lead Communication

Serious Citation 1, Item 2 alleges a violation of 29 C.F.R. § 1926.62(l)(1)(i), which provides that:

> *Hazard communication*. The employer shall include lead in the program established to comply with the Hazard Communication Standard (HCS) (§ 1910.1200). The employer shall ensure that each employee has access to labels on containers of lead and safety data sheets, and is trained in accordance with the provisions of HCS and paragraph (l) of this section. The employer shall ensure that at least the following hazards are addressed: (A) Reproductive/developmental toxicity; (B) central nervous system effects; (C) kidney effects; (D) blood effects; and (E) acute toxicity effects.

29 C.F.R. § 1926. 62(l)(1)(i). The Secretary alleges that Respondent violated 29 C.F.R. § 1926. 62(l)(1)(i) when:

> a) Thurston Road, Rochester, NY – On or about and prior to 7/30/19, employees working in an area where paint chips contained between 0.0409% - 0.5506% lead. The employer did not included lead in the program established to comply with the Hazard Communication Standard (HCS) (29 CFR 1910.1200): ensure that each employee had access to safety data sheets; was trained in accordance with the provisions of the Hazard Communication Standard and 29 CFR 1926.62(l); and ensure that all of the following hazards were addressed: reproductive/developmental toxicity; central nervous system effects; kidney effects; blood effects; and acute toxicity effects.

(First Am. Compl. 12.) The Secretary proposed a $6,747 penalty for serious Citation 1, Item 2.

The Secretary cited Respondent for a violation of this standard because Respondent's lead safety communications did not comply with 29 C.F.R. 1910.1200, as required by the cited standard. According to the Secretary, the requirements of section 1910.1200 (*Hazard Communication*) that are implicated in this case include:

> provid[ing] employees with effective information and training on" lead "in their work areas at the time of their initial assignment . . ." 29 C.F.R. § (h)(1). Employees "shall be informed of," *inter alia*, "[a]ny operations in their work area where" lead is "present" and how to recognize and mitigate any such hazards. *Id.* at §§ 1910.1200(h)(2) and (3). An employer must "at least" address five enumerated hazards. 29 C.F.R. § 1926.62(l)(1)(i)(A)-I (*i.e.*, reproductive/developmental toxicity; central nervous system effects; kidney effects; blood effects; and acute toxicity effects.).

(Sec'y Br. 38-39.)

With regard to applicability, Respondent argues that this standard does not apply to the 447 Thurston project because, as section 1910.1200 states, it "applies to any chemical which is **known to be present** in the workplace in such a manner that employees may be exposed under normal conditions of use or in a foreseeable emergency." (Resp't Br. 16 (emphasis in original) citing section 1910.100(b)(2)). Respondent claims it "was first made aware of the presence of lead at the worksite on or about July 26, 2019." (Resp't Br. 16.) As discussed in the knowledge section for citation item 1, this argument is rejected as the record amply supports a finding that Respondent knew or should have known about the lead paint presence in the 447 Thurston worksite well before July 26, 2019.

Respondent also argues that its own safety manual included references to the lead standard. (Resp't Br. 16; Ex. JX-1[8].) But, as the Secretary points out, the manual's provisions are not specific to the 447 Thurston worksite and do not include the minimum requirement of communicating five specific lead hazards: "reproductive/developmental toxicity; central nervous system effects; kidney effects; blood effects; and acute toxicity effects." (Sec'y Br. 40 citing 29 C.F.R. § 1926.62(l)(1)(i)(A)-(E)); *see also* Tr. 123-124 (CO Mielonen discussing deficiencies within USC's safety and health manual).

Respondent next argues that "the Secretary provided no evidence that any USC employee was ever exposed to lead at or above the action level or exposed to lead compounds causing skin or eye irritation." (Resp't Br. 17.) Respondent claims this evidence is required because section 1926.62(l)(1)(ii) (which is <u>not</u> at issue in this case) specifically requires it. (Resp't Br. 16-17.)

[8] Respondent seemed to mistakenly cite to USC's site-specific safety plan – Exhibit GX-32 – at this section of its brief. (Resp't Br. 16.) As noted above, Safety Coordinator Johnson developed USC's site-specific safety plan on July 2, 2019, and did not include lead as a potential hazard onsite. (Tr. 208.)

The Secretary, however, has argued that Respondent misreads the standard in this manner. (Sec'y Mem. of Law in Opp'n to USC's Mot. for Summ. J. 13-14.) The Secretary claims that the cited standard, section 1926.62(l)(1)(i), is the minimum requirement to communicate information about lead, whereas section 1926.62(l)(1)(ii) is the heightened training requirement, which is not alleged in this case. (Sec'y Mem. 14.) The Court agrees with the Secretary. The cited standard concerns "hazard communications" about lead, not a "training program," which is the subject of the standard relied on by Respondent.[9] 29 C.F.R. §§ 1926.62(l)(1)(i), (ii). The Court finds that the cited standard applies to Respondent in this case.

It is undisputed Respondent did not communicate the cited standard's required information regarding the lead in the 447 Thurston worksite to its workers until after OSHA arrived onsite. The workers performed tasks that disturbed lead-based paint inside the 447

[9] The Court notes that Appendix B to section 1926.62(l) addresses the *training program*, not the hazard communication:

> Your employer is required to provide *an information and training program* for all employees exposed to lead above the action level or who may suffer skin or eye irritation from lead compounds such as lead arsenate or lead azide. The *program* must train these employees regarding the specific hazards associated with their work environment, protective measures which can be taken, including the contents of any compliance plan in effect, the danger of lead to their bodies (including their reproductive systems), and their rights under the standard. All employees must be trained prior to initial assignment to areas where there is a possibility of exposure over the action level.
>
> This *training program* must also be provided at least annually thereafter unless further exposure above the action level will not occur.

29 C.F.R. 1926.62 App. B. at ¶ X (emphasis added); *see also* S. *Scrap Materials Co., Inc.*, 23 BNA OSHC at 1618 (following Appendix B to general industry lead standard to hold that provision is triggered by potential employee exposure to any quantity of airborne lead).

Thurston worksite, without this hazard communication, for up to six weeks. The Court finds that the Secretary has established the non-compliance and exposure elements of this citation item.

The Secretary has also established that Respondent had constructive knowledge of the violated standard's conditions. *Pressure Concrete Constr.*, 15 BNA OSHC 2011, 2018 (No. 90-2668, 1992) ("[t]he fact that [the company] failed to train [employees] in the recognition and avoidance of dangerous conditions establishes that it had at least constructive knowledge of the inadequacy of its training program."); *see also Am. Eng'g & Dev. Corp.*, 23 BNA OSHC 2093, 2095 (No. 10-0359, 2012) (knowledge is imputed to the employer "through its supervisory employee."). For all the reasons noted above in the knowledge section of citation 1, item 1, Respondent's management personnel should have known of the presence of lead on the worksite and therefore should have known of its responsibility to communicate the hazards of lead, in accordance with the cited standard, to its workers before they arrived onsite at the 447 Thurston worksite.

This citation item is affirmed.

Characterization

The Secretary characterized both citations in this matter as serious violations. A violation is "serious" if a substantial probability of death or serious physical harm could have resulted from the violative condition. *See* 29 U.S.C. § 666(k). The Secretary argues that the immediate and serious toxic effects to the exposure of lead were likely on this worksite and thus the citations warranted serious classifications. (Sec'y Br. 42) ("This does not mean that the violative condition must create a substantial probability of an accident occurring, but, rather, that serious injury is likely if an accident does occur.") Respondent argues:

> the Secretary provided no evidence that USC employees were ever exposed to lead in excess of the action level or the PEL, while USC provided evidence that

> the lead exposure was within the action level and the PEL, and that none of USC's employees had a lead blood content indicating any medical risk whatsoever.

(Resp't Br. 19.) Indeed, the post-inspection evidence provided by Respondent supports Respondent's arguments. After working for six weeks in 447 Thurston and being exposed to airborne lead from disturbing the lead-based paint on the existing walls, Respondent's laboratory evidence shows that none of its employees had elevated blood lead levels as of July 26, 2019.

The Secretary argues that this post-inspection evidence is questionable and claims that Respondent "proffered no witness" to explain the laboratory results and what reasonable conclusions can be drawn from them. (Sec'y Br. 49.) However, as CO Mielonan testified, OSHA itself has no evidence that Respondent's workers had elevated blood lead levels. (Tr. 150.) She further testified that she had no evidence indicating that Respondent's workers were working in an environment where lead was in excess of the permissible exposure limit. (Tr. 149-150.)

The Secretary further claims that Respondent's post-inspection evidence is irrelevant and argues that "USC cannot avoid sanctions for failing to take preventative measures simply by taking post-inspection measures." (Sec'y Br. 50.) But this argument misses the mark because the issue here is classification of the citation items, not the merits of the citation items – which have been affirmed. Furthermore, the Secretary has the burden of proof to establish the "substantial probability of death or serious physical harm" in this matter. *Consol. Freightways Corp.*, 15 BNA OSHC 1317, 1324, (No. 86–351, 1991) (relying on Secretary's evidence of injury in the record to characterize violation as serious).

Respondent relies on the silica dust case *Usery v. Hermitage Concrete Pipe Co.*, 584 F.2d 127, 134 (6th Cir. 1978), which raised the issue of needing sufficient proof to establish a serious characterization. *Id*. ("Here, without indicating our own view, we note that the Secretary could

have presented more complete proof from which the exact nature of the operation, its duration, the exposure of employees, the composition of the dust, and the other circumstances existing at the Hermitage plant could be more adequately determined.")

A review of Commission case law on this issue supports Respondent's argument that evidence from the Secretary is needed to establish whether an exposure to lead created a substantial probability that death or serious physical harm could result.[10] *See*, e.g., *Manganas Painting Co., Inc.*, 21 BNA OSHC 1964, 1981 (No. 94-0588, 2007) (affirming as "other-than-serious" when "evidence insufficient to establish that the employees' exposure to lead from sweeping the debris created a "substantial probability that death or serious physical harm could result"); *Thomas Indus. Coatings, Inc.*, 21 BNA OSHC 2283, 2288 (No. 97-1073, 2007) (affirming item as "unclassified" instead of addressing characterization when "exposures" shown in the case posed questionable probability of death or serious physical harm); *see also Foster-Wheeler Constructors, Inc.*, 16 BNA OSHC 1344, 1349-50 (No. 89-287, 1993) (acknowledging difficulty in resolving characterization issue where evidence of airborne asbestos fiber level was limited); *but see E. Smalis Painting Co., Inc.*, 22 BNA OSHC 1553, 1577 (No. 94-1979, 2009) ("We conclude, however, that this violation was serious because, as explained by the CO at the hearing, if employees utilize proper engineering controls and work practices, their work activities will likely result in lower lead exposure to themselves and their coworkers."); *Article II Gun Shop, Inc.*, 16 BNA OSHC 2035, 2038 (No. 91-2146, 1994 (consolidated) ("While lead is not volatile, it is well settled that persistent exposure to excessive levels of airborne lead is substantially likely to result in serious physical harm.").

[10] Any unreviewed administrative law judge decisions cited by the Secretary or Respondent are not binding precedent within this Commission and are not persuasive to this Court. *Leone Constr. Co*., 3 BNA OSHC 1979, 1981 (No. 4090, 1976) (An unreviewed administrative law judge decision is not binding precedent for the Commission.).

No evidence of lead exposure above any OSHA regulated level (such as an action level or permissible exposure limit) was produced during this trial. As the Secretary carries the burden here, the Court is persuaded by Respondent's arguments and post-inspection laboratory results that the Secretary has not established that the violations here created a substantial probability that death or serious physical harm could have resulted from the presence of lead at the 447 Thurston worksite.

These citation items are both characterized as Other-Than-Serious.

PENALTIES

"In assessing penalties, section 17(j) of the OSH Act, 29 U.S.C. § 666(j)[11], requires the Commission to give due consideration to the gravity of the violation and the employer's size, history of violation, and good faith." *Burkes Mech., Inc.*, 21 BNA OSHC 2136, 2142 (No. 04-0475, 2007). "Gravity is a principal factor in the penalty determination and is based on the number of employees exposed, duration of exposure, likelihood of injury, and precautions taken against injury." *Siemens Energy & Automation, Inc.*, 20 BNA OSHC 2196, 2201 (No. 00-1052, 2005) (citation omitted).

The calculation of the proposed penalty was the same for both violations – $6,747 each. (Tr. 126.) CO Mielonen testified to how the penalty for each citation item was calculated and proposed for this matter. (Tr. 126-137; Ex. JX-4.) In terms of gravity, CO Mielonen testified that while the severity of the resultant health effect was high, the probability was lesser because "we did not have any documented overexposure to lead," and thus OSHA determined an initial

[11] Respondent's argument that $7,000 is the maximum allowable fine is out of date. (Resp't Br. 17.) For violations that occurred after November 2, 2015, OSHA's statutory maximum penalties were increased pursuant to the Inflation Adjustment Act of 2015, Pub. Law 114-74 § 701, 129 Stat. 559-602 (2015). 81 Fed. Reg. 43430 (July 1, 2016). As the citation was issued on January 17, 2020, the penalty in the instant case was assessed after January 15, 2020, but on or before January 15, 2021, thus the statutory maximum of $13,494 applies for serious items and for non-serious items. 85 Fed. Reg. 2292, 2298-99 (Jan 15, 2020).

gravity-based penalty of $9,639. (Tr. 126, 133.) Respondent was then given a 30% reduction off the gravity-based penalty for the size of the company. (Tr. 126-127, 133.) With regard to history, CO Mielonen testified that a reduction for history was not applied because Respondent had received a prior serious citation on March 14, 2019.[12] (Tr. 137.) CO Mielonen also testified that no good faith reduction was applied to the penalties for either of the violations because Respondent's safety and health programs "were extremely deficient and [were not implemented] in the workplace." (Tr. 134.)

After consideration of the statutory factors, the Court agrees with the calculation of the penalty amounts proposed by the Secretary for each citation item. The Court notes that the proposed gravity-based penalty accounted for the "lesser probability" of lead-based health effects due to the lack of documentation of overexposure to lead in this case. The proposed penalty amounts are assessed for each affirmed citation item.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

All findings of fact and conclusions of law relevant and necessary to a determination of the contested issues have been made above. *See* Fed. R. Civ. P. 52(a). All proposed findings of fact and conclusions of law inconsistent with this decision are denied.

[12] The Secretary notes in his post-hearing brief that the citation issued on March 14, 2019, was withdrawn by the Secretary during the course of litigation after the hearing in this matter. (Sec'y Br. 51, n.22.) The Secretary maintains that the proposed penalty is still appropriate "in light of all the circumstances discussed above." (*Id*.) The Court agrees.

ORDER

Based upon the foregoing findings of fact and conclusions of law, it is ORDERED that:

1) Citation 1, Item 1, alleging a violation of 29 C.F.R. § 1926.62(d)(1)(i), is AFFIRMED as OTHER-THAN-SERIOUS and a penalty of $6,747 is ASSESSED.

2) Citation 1, Item 1, alleging a violation of 29 C.F.R. § 1926.62(l)(1)(i), is AFFIRMED as OTHER-THAN-SERIOUS and a penalty of $6,747 is ASSESSED.

SO ORDERED.

/s/ Keith E. Bell
Keith E. Bell
Judge, OSHRC

DATE: August 30, 2022
Washington, D.C.