

**THIS CASE IS NOT A FINAL ORDER OF THE REVIEW COMMISSION AS IT IS PENDING
COMMISSION REVIEW**



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.
L&L Painting Co., Inc.
Respondent.

OSHRC DOCKET NO. 05-0055

Before: Chief Judge Irving Sommer

DECISION AND ORDER ON REMAND

This matter is before me as a result of the Commission's remand order dated September 29, 2008. The issue to determine is whether Respondent has proved that it met the historical monitoring exception to OSHA's lead in construction standard, such that it was not required to monitor employee exposure to lead at its work site. I find that Respondent has not met its burden of proof.

Procedural Background

My decision in this case was issued on May 4, 2006. That decision addressed numerous citation items issued to Respondent, L & L Painting Co., Inc. ("L&L"), stemming from its work on a project involving the removal of lead paint from the towers on the New York side of the George Washington Bridge.¹ At the hearing in this matter, L&L attempted to introduce the results

¹OSHA issued a separate citation to L&L for its paint-removal work from the towers on the New Jersey side of the bridge. My decision in that case, Docket No. 05-0050, was issued on May 4, 2006. The Commission also issued a remand order in that case, on September 29, 2008. That case has since settled.

of air monitoring for employee exposure to lead that it had conducted on the New Jersey side of the bridge. L&L sought to introduce the results as relevant to establishing a defense of several of the violations alleged under OSHA's lead in construction standard, relating to the New York side of the bridge. I declined to admit the results, finding them irrelevant to the cited conditions on the New York side of the bridge. All of the citation items were affirmed. The Commission disagreed with my decision to not admit the monitoring results and remanded this matter to me.

In its remand order, the Commission found the New Jersey results were relevant to L&L's claim that it could have established the "historical monitoring" exception to the initial monitoring requirement of the standard. The Commission stated that if L&L had had the opportunity to present evidence as to why it met the "historical monitoring" exception, it would have had the burden to show that the "processes, type of material, control methods, work practices, and environmental conditions" used on the New Jersey side "closely resemble[d]" those on the New York side. *See Bianchi Trison Corp. v. Chao*, 409 F.3d 196, 207 (3d Cir. 2005). The Commission accordingly remanded this matter to me to admit the air monitoring results and to "allow the parties to introduce any additional evidence regarding the exception to the initial monitoring requirement at issue here." The Commission also remanded this matter to "allow the parties to make any further arguments regarding those citation items alleged under the [standard] that are specifically affected by the results of the New Jersey air monitoring in terms of L&L's knowledge of the cited conditions."

Upon receiving the remand, I issued an order on October 2, 2008, and admitted the New Jersey monitoring results. I advised the parties that they would be allowed to submit further evidence regarding the above-noted exception and to make further arguments as to the citations issued under the standard that were specifically affected by the monitoring results. I also directed the parties to inform me of any evidence and arguments they wished to submit and if they required a hearing to present additional evidence. On February, 10, 2009, after receiving the parties' filings, I issued another order, stating that this matter would proceed upon written submissions without a hearing. On April 30, 2009, L&L submitted its brief on remand, which included, among other things, the New Jersey monitoring results, affidavits of L&L's safety supervisor and site supervisor, and the cover page of L&L's contract in regard to the lead-

removal project. On May 14, 2009, the Secretary submitted her brief in this matter.² On June 12, 2009, L&L filed a reply.

The OSHA Inspection

As set out in my initial decision, Reagan Branch, the OSHA industrial hygienist (“IH”) who inspected the site, went to the site on July 7, 2004. She testified that each side of the bridge had two towers that had to be repainted, that there was scaffolding around the towers on the New York side of the bridge, and that the towers were covered with tarp for the blasting work. She also testified that there was a decontamination unit at the site, as well as an equipment trailer and a machine that supplied compressed air to the workers on the bridge, and that there was more equipment up on the bridge. Upon arriving, IH Branch met with Declan Farrington, L&L’s site supervisor, John Lawson, L&L’s site foreman, and William LePage, a consultant with C&E Ventures and L&L’s safety supervisor at the site. The IH conducted a walk-around inspection on July 7, 2004, with Messrs. Farrington, Lawson and LePage, and she saw conditions that violated the lead standard and L&L’s own lead program. In particular, the IH saw that there were no lockers on the dirty side of the decontamination unit and that it appeared employees were putting their contaminated work clothes and equipment in the lockers on the clean side along with their street clothes. She took wipe samples of a locker handle and the inside of a locker, and the analysis results of her samples showed the presence of 1400 and 1700 µgs of lead, respectively. The IH also saw planks up on the bridge platform, and Mr. Farrington indicated employees sat on the planks to eat their lunch; the IH took a wipe sample of one of the planks, where lunch containers were being stored, and the analysis of that sample showed the presence of 1400 µgs of lead. After her initial visit, IH Branch requested employee sampling or monitoring results from L&L, to determine the lead exposures of employees at the site. She was told no sampling had been done at the New York site, but L&L later sent her sampling results from the New Jersey site. (Tr. 16-17, 21-26, 49, 65-74, 83-92, 166-69).

²The Secretary’s brief is the same one filed with the Commission on November 16, 2007.

On September 21, 2004, IH Branch returned to the New York site to do her own employee sampling.³ By that time, work on the south tower at the site was completed and five employees were breaking down the containment and vacuuming up debris in that area. Another employee was vacuuming up debris outside the north tower containment and in between the two containment areas. The north tower containment was still active, with abrasive blasting going on. The employees doing the vacuuming and cleanup work were using portable vacuums that were not equipped with HEPA filters.⁴ They emptied the vacuum contents into 5-gallon containers, which they then emptied into a larger pile; the larger pile was cleaned up by a containment vacuum, which had greater suction.⁵ The IH noted there was no wetting down of surfaces and that the work created clouds of dust. She sampled the employee who was vacuuming outside the active containment, and the analysis results of that sampling revealed his exposure to lead was over three times the PEL.⁶ She also sampled three employees who were working inside the north tower containment; two were doing blasting work, one was doing vacuuming, and their expo-

³The IH said that only Mr. Lawson was with her on September 21. She also said that she conducted her sampling by attaching sampling pumps to four different employees; she then sent the sampling filters to OSHA's Salt Lake City Technical Center for analysis. (Tr. 28-32, 131).

⁴The IH initially testified that the vacuums in use were not to be used for lead. She later testified that it was possible they could have been used as HEPA vacuums, but she was adamant the filter she saw being used for the vacuuming outside the active containment was not a HEPA filter. She said that that filter and the vacuum were shown in C-12. (Tr. 75-80, 179-90, 194).

⁵C-3, page 2, is the IH's sketch of the platform where she observed the vacuuming and cleanup work. The sketch shows the north and south tower areas as well as the areas where the employees were emptying the vacuum contents into piles; it also shows a hand-washing station, a "shanty," and, in the center, the area where employees stored and ate their lunch. (Tr. 17-20).

⁶The IH noted that this employee was shown in C-12 and that he did vacuuming work for almost 4.5 hours; the sampling results for this employee, shown in C-4, state that he wore a half-face respirator for his work. The IH also noted that the employees doing the same work in the south tower area were of concern due to the nature of the work, the fact that not all of them wore respirators, and the fact that some of them had facial hair, which interferes with the face-to-respirator seal and negates the respirator's protection. The employees working in the south tower area were also of concern as two of them had been medically removed for having elevated blood lead levels; these two employees were supposed to be doing work that would not expose them to additional lead. (Tr. 29, 33-34, 49-59, 75-79, 95, 98, 190-92).

sures were 287, 224 and 170 times the PEL, respectively.⁷ The IH testified that the vacuuming being done in the south tower area and outside of the north tower containment was of concern as the New Jersey sampling results did not indicate that L&L had done any sampling or monitoring of such work. (Tr. 18-19, 29-34, 49-59, 75-79, 190-92).

The IH saw other conditions on September 21 that violated the lead standard. For example, she saw visibly dirty respirators and respirators being improperly stored. She also saw employees wearing regular clothes instead of protective coveralls, employees leaving the site without going into the decontamination unit, and employees leaving the active containment and not washing up properly before smoking or having lunch. The IH held a closing conference on September 22, 2004, at which time she discussed with L&L the violations she had seen. (Tr. 36-46, 58-60, 81-83, 95-101).

The Initial Decision

My initial decision addressed in detail all of the citation items issued in this case. Items 1 through 12 of the citation alleged violations of the lead in construction standard, while Items 13 through 15 alleged violations of OSHA's fire extinguisher, flexible cord and hazard communication requirements. All 15 items were affirmed, based on the evidence adduced at the hearing and my credibility findings in regard to the witnesses who testified. My credibility findings were based on observing the demeanor of the witnesses as they testified and on certain statements of specific witnesses who were determined to be not credible in light of other evidence in the record. In particular, I found IH Branch to be a sincere and believable witness and Messrs. Lawson and LePage to be less than reliable. I thus credited her testimony over that of Messrs. Lawson and LePage.

The Standard Requiring Exposure Monitoring and the Exception to the Standard

(d) *Exposure assessment*—(1) *General*. (i) Each 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. (ii) For the purposes of paragraph (d) of this section, employee exposure is that exposure which would occur if the employee were not wearing a respirator. (iii) With the exception of monitoring

⁷The analysis results for these employees are shown in C-5, C-6 and C-7; these workers wore blasting hoods and other protective equipment for their work. (Tr. 29-33; C-5-7).

under paragraph (d)(3), where monitoring is required under this section, the employer shall collect personal samples representative of a full shift including at least one sample for each job classification in each work area either for each shift or for the shift with the highest exposure level. (iv) Full shift personal samples shall be representative of the monitored employee's regular, daily exposure to lead.

(d)(3)(iii) Where the employer has previously monitored for lead exposures, and the data were obtained within the past 12 months during work operations conducted under workplace conditions closely resembling the processes, type of material, control methods, work practices, and environmental conditions used and prevailing in the employer's current operations, the employer may rely on such earlier monitoring results to satisfy the requirements of paragraphs (d)(3)(i) and (d)(6) of this section if the sampling and analytical methods meet the accuracy and confidence levels of paragraph (d)(10) of this section.

The Parties' Positions

There is no dispute that L&L did not conduct sampling or monitoring of employee exposure to lead on the New York side of the project. There is likewise no dispute that the citation items affected by the now-admitted sampling results from the New Jersey side of the project are Items 2, 3, 8, 10 and 11. Respondent contends the New Jersey sampling results, together with other evidence it has submitted, such as the affidavits of Mr. Farrington and Mr. LePage, establish that it meets the "historical monitoring" exception to the exposure assessment requirement of the lead standard. The Secretary contends the New Jersey results change nothing, as they did not include monitoring of work or conditions closely resembling those on the New York side of the bridge. The Secretary also indicates that Respondent's reliance on the affidavits it has submitted is misplaced, as the credibility of the affiants, who testified at the hearing, has already been determined.

The Affidavits

As noted above, Mr. Farrington was L&L's supervisor at the site, and Mr. LePage, a consultant with C&E Ventures, was L&L's safety supervisor at the site. The affidavits of Messrs. Farrington and LePage set out their qualifications, training and experience. They also contain

much of the same information.⁸ In summary, and taken together, the affidavits state that the New Jersey and New York sites were simply two parts of the same project, as indicated on the cover page of the contract with the Port Authority of New York and New Jersey. The sites were two-thirds of a mile apart, and the same lead-removal and painting work was done at both sites and in the same way; the same tools and equipment and many of the same employees were utilized at both sites, and the work site conditions, tasks, practices and training were also the same. The affidavits further state that Messrs. Farrington and LePage worked at both sites throughout the project and were present at one site or the other on most workdays. Mr. LePage oversaw all safety and health aspects of the work, utilizing L&L's safety and health program and his own expertise, and he and Mr. Farrington, who oversaw the entire project and supervised all aspects of the job, worked closely together and consulted with each other often as to safety and health on the job. Mr. LePage also worked closely with Port Authority representatives, who likewise monitored and supervised the job.

As to the actual work on the project, the paint removal and painting was done on the New Jersey side first. That work was completed around mid-2004, after which work began on the New York side. On each side, before any removal work began, a subcontractor constructed containment support systems around the towers and provided platforms for those systems and protective shielding for the roadway. L&L itself put up containment areas around the parts of the towers to be painted. L&L's containment/cleanup crew ("cleanup crew") did this work, using plywood, tarps and fasteners. Once the containment areas were finished, L&L employees performed abrasive blasting inside the containment areas, where mechanical ventilation systems were in place. Once the blasting was finished in a containment, L&L blasters and vacuumers cleaned the area of debris and dust so that paint could be applied. After the area was painted, Mr. LePage and a Port Authority representative inspected the area to ensure it was safe so that the containment could be taken apart and removed. L&L's cleanup crew then took apart the containment and did

⁸The affidavit of Mr. LePage states at various points that he (Mr. LePage) agrees with specific paragraphs of Mr. Farrington's affidavit. *See* LePage Affidavit, pages 7-12.

residual cleaning. As this work occurred, blasting would be going on in another containment but not in the same vicinity.

The affidavits indicate there were two categories of L&L employees, *i.e.*, those that worked in or near an active containment and those that worked in the cleanup crew. Those that worked inside an active containment included blasters, vacuumers and sprayers. Blastors and vacuumers had the highest lead exposures as they worked in close proximity to pulverized lead and were not in the open air. Blastors and vacuumers were required to wear abrasive blasting hoods, which provide the highest level of respiratory protection. Sprayers also had to wear respiratory protection, but as their work was done after blasting and cleaning was performed, they were not required to wear the blasting hoods. Vacuumers worked almost entirely inside the active containment. They vacuumed up the used abrasive as the paint was blasted off the tower surfaces, and, on this project, they used large long-range 3-inch corrugated hoses that connected through piping to a very large vacuum that sat at the base of the bridge. The abrasive was sucked through the hoses and collected at the bottom of the towers, in sealed lead-waste containers. On rare occasions a vacuumer might step outside of an active containment and use a 3-inch hose to clean the area just outside the containment.

The second category of employees, the cleanup crew, worked only at the site of a dormant containment, after the blasting and painting were completed, and their work was done almost entirely in the open air. The cleanup crew were required to wear half-face negative pressure respirators with protection for up to 500 $\mu\text{g}/\text{m}^3$ of lead, due to the residual dust and debris that resulted when the containment was broken down. The cleanup crew used small hand-held HEPA vacuums to clean up this residue. The vacuuming work was a minor aspect of the overall work of the crew and was done on an intermittent basis and for short durations. The crew's work did not involve large piles of lead-containing debris, and L&L had no position dedicated to vacuuming outside of a containment.⁹

Mr. LePage was responsible for ensuring that L&L's lead health and safety program was implemented at the site. That program covered, among other things, monitoring employee

⁹Mr. Farrington's affidavit states that he "would not expect a member of this crew to vacuum in the aggregate for more than one hour." *See* Farrington Affidavit, p. 10, ¶ 49.

exposure to lead and ensuring the use of proper protective clothing and equipment and proper personal hygiene practices. The monitoring program applied to both sides of the project, and Mr. LePage considered the monitoring results from the New Jersey side representative of the exposures on the New York side since the work and conditions on both sides were virtually identical.¹⁰ Mr. LePage administered the exposure sampling himself and sent all the sampling materials to the same accredited laboratory. When the results were received, he reviewed them and then prepared the reports that went to L&L. The reports included the job and location of the work, engineering controls used, respirator type required with maximum exposure limits, and the duration of the sampling and the exposure results (both actual and as an eight-hour time-weighted average (“TWA”)). When IH Branch asked for monitoring results during her inspection, the results from the New Jersey side were provided to her.

Mr. LePage was also responsible for identifying the work described in the “job classification” space on the reports; he chose the terms used not to describe all aspects of the work but as descriptive of the major aspect of the work. For example, full-shift sampling done of cleanup crew work was described as “removing contaminated tarps” but included other tasks performed, such as vacuuming. Testing of this work from May to August 2004 at the New Jersey site showed worker exposure to lead to be below the PEL based on an eight-hour TWA. In particular, test results for five employees performing this work ranged from 20.8 to 28 $\mu\text{g}/\text{m}^3$ of lead.¹¹ Sampling of work performed inside the containment areas showed much higher lead exposure levels, as expected. Specifically, test results for four employees doing blasting and vacuuming inside a containment on the New Jersey side from March to May 2004 were all well over the PEL, ranging from 383 to 1,186 $\mu\text{g}/\text{m}^3$ of lead based on an eight-hour TWA. Mr. LePage intended this monitoring to be relied upon for employees working in the same job and perform-

¹⁰The affiants believe the paint removed at the two sites was the original paint due to the presence of “mill scale” on the towers’ surfaces; they also believe the original paint on all four towers was most likely the same paint. Farrington Affidavit, pp. 6-7; LePage Affidavit, pp. 8-9.

¹¹All of L&L’s test results from the New Jersey side, except one, are contained in Exhibit A to L&L’s brief; the additional test result is Exhibit A to Mr. LePage’s affidavit.

ing generally the same tasks during the course of the project, including when the work moved from New Jersey to New York.

As an example of a circumstance where testing was done because a task had changed, a member of the cleanup crew performed vacuuming for a full day on May 27, 2004. The reason was a flood situation that had caused lead-containing debris to collect at the base of one of the New Jersey towers; the debris became disturbed, mixed with water and then dried. The cleanup crew member performed the job of vacuuming and removing the accumulated debris, which had become matted down. His exposure results were very low, that is, 1.1 $\mu\text{g}/\text{m}^3$ of lead.

The affiants state that paint removal work on the south tower on the New York side began in July 2004 and that on September 21, 2004, when the IH returned to the site, work on the south tower was completed and the cleanup crew's work was in progress there. The north tower was active, with abrasive blasting going on at that time. The affiants also state that "J.G.," the employee the IH claimed she saw vacuuming outside the active containment, was performing the ordinary tasks at the south tower that the cleanup crew did whenever they broke down a dormant containment. According to the affiants, there was no plausible reason for J.G. to have been working at the north tower, since cleanup crew members do not work near an active containment. The affiants claim that the IH's description of what J.G. was doing, that is, vacuuming up dust and debris, emptying the contents into a 5-gallon bucket and then emptying the bucket into a pile to be collected with the containment vacuum, do not comport with the tasks of anyone on the job. They also claim that there were no circumstances where J.G. would have worked at or near a "pile" of debris or in "clouds" of dust. The affiants note that Photograph 13 of C-12, which the IH testified depicted the area of J.G.'s work, shows a pile of dust and the 3-inch corrugated hoses. They also note that the photo cannot be of J.G.'s work area as he was working at the dormant south tower that day. The affiants conclude the photo actually depicts the inside of the north tower's active containment since it shows unpainted and rusted surfaces (which would be the condition of an active containment and not the south tower, which was newly painted) and a large pile of debris (which would be in an active containment but not in an inactive one). Farrington Affidavit, pp. 3, 13-15; LePage Affidavit, p. 12.

Both affiants state that they were with the IH on September 21, 2004. They recall that, upon approaching the active containment at the north tower, the IH wanted to enter it. Both affiants advised her not to do so because, without wearing the necessary protection, it was dangerous. The IH, however, disregarded their warnings and entered the active containment. The IH was in the containment for a short time, after which she rejoined the affiants outside. The affiants conclude that the IH's observations more closely resemble the work of a vacuumer than that of a member of the cleanup crew. Farrington Affidavit, p.15; LePage Affidavit, p. 12.

Discussion

It is clear from the affidavits that a significant number of the statements of Mr. Farrington and Mr. LePage conflict with the IH's testimony. In my initial decision, as noted above, I credited the testimony of the IH over that of Mr. Lawson and Mr. LePage. My credibility findings were based on observing the demeanor of these witnesses, including their facial expressions and body language, and on certain statements of Mr. Lawson and Mr. LePage that were determined to be not credible in light of other evidence in the record. *See, e.g.*, Decision, pp. 5, 7-8, 11, 16-19, 21-22. In its reply, L&L disputes my credibility findings, especially as to Mr. LePage.¹² I have reviewed the credibility findings in my decision and conclude that they are adequate and well supported. I have considered L&L's assertions in this regard, but I do not find them persuasive. The credibility findings set out in the initial decision are, therefore, affirmed.

Even assuming for the sake of argument that my credibility findings were somehow inadequate or incorrect, there is one overriding reason to find that both of the affiants here are not believable. That reason is the one appearing on the last page of each affidavit, where the affiants both describe being with the IH on September 21, 2004, when she decided to enter the active containment against their advice. Farrington Affidavit, p. 15, ¶ 71; LePage Affidavit, p. 12, ¶ 53. I find it incredible that IH Branch, an OSHA industrial hygienist with extensive education, training and experience, would enter an active containment, where abrasive blasting work was

¹²L&L asserts that no credibility findings were made as to Mr. Farrington. L&L is correct.

taking place, without any protective equipment.¹³ That the affiants would make such a statement convinces me of the unreliability of Mr. Farrington and Mr. LePage. Also, the IH specifically testified that only Mr. Lawson was with her on September 21, 2004, which is further evidence of the unreliability of the affiants. (Tr. 131). For this reason, and because of the credibility findings in my initial decision, I credit the testimony of IH Branch over the statements of Mr. Farrington and Mr. LePage in their affidavits, to the extent there are conflicts between her testimony and their statements.¹⁴

Based on the foregoing, I credit all of the testimony of IH Branch set out on pages 3 through 5 of this decision. In light of the testimony concerning what the IH observed on September 21, 2004, I find that J.G., the cleanup crew member the IH sampled, was performing work that L&L had not monitored previously. In particular, J.G. was vacuuming up debris outside the north tower containment, where abrasive blasting was going on, and in between the south and north tower containment areas. Five other employees were breaking down the south tower containment and vacuuming up debris in that area. All six employees doing the vacuuming and cleanup work were using portable vacuums that were not equipped with HEPA filters. They emptied the vacuum contents into 5-gallon containers, which they then emptied into a larger pile; the larger pile was cleaned up by a containment vacuum, which had greater suction. There was no wetting down of surfaces, and the work created clouds of dust. The IH sampled J.G., the employee who was vacuuming outside of the active containment, and the analysis results of that sampling revealed his exposure to lead was over three times the PEL. Although the IH did not sample the five employees working in the south tower area, she found them to also be of concern because they were doing the same vacuuming and cleanup work that J.G. was performing.¹⁵

¹³The IH described her education, training and experience at the hearing. (Tr. 8-13). In addition, Exhibit C-1 documents the IH's training and credentials in industrial hygiene matters.

¹⁴In this regard, I do not credit the affiants' statements indicating that the IH's photos in C-12 were taken inside the active containment and that the work she saw was more like that of a vacuumer than a cleanup crew member. Farrington Affidavit, p. 15; LePage Affidavit, p. 12.

¹⁵Footnote 6, *supra*, sets out the IH's other reasons for finding those employees to be of concern. It also sets out the fact that J.G. did vacuuming work for almost 4.5 hours.

Given that L&L had not previously monitored this work, which exposed an employee to three times the PEL for lead, L&L has not met its burden of proving that it satisfied the “historical monitoring” exception to the standard.

Item 2

This item alleged a violation 29 C.F.R. 1926.62(d)(1), which is set out above. The foregoing discussion establishes that L&L violated this standard by not monitoring J.G., the cleanup crew employee the IH sampled and determined was exposed to lead over three times the PEL. It also establishes that this employee did vacuuming work for nearly 4.5 hours. The other five cleanup crew employees were doing the same vacuuming and cleanup work in the south tower area. Based on the evidence of record, L&L knew or should have known that employees were doing work that had not been previously monitored and that they could have been exposed to lead over the action level of the standard.¹⁶ This is true in light of the affiants’ statements that they oversaw the project and were on the job most workdays. It is also true since Mr. LePage was responsible for implementing L&L’s lead health and safety program at the site. Farrington Affidavit, ¶¶ 4-5; LePage Affidavit, ¶¶ 8-15. The Secretary proves knowledge by showing the employer either knew or could have known with the exercise of reasonable diligence of the cited condition. *Astra Pharmaceutical Prod., Inc.*, 9 BNA OSHC 2126, 2129 (No. 78-6248, 1981). I find the Secretary has met her burden of proving L&L’s knowledge of this citation item. For this reason and those set out in my initial decision, this item is affirmed as a serious violation, and the proposed penalty of \$2,000.00 is assessed.

Item 3

This item alleged a violation of 29 C.F.R. 1926.62(g)(1)(i), which requires the employer, when an employee is exposed to lead over the PEL, to provide coveralls or similar full-body work clothing. The foregoing discussion shows that J.G. was exposed to lead over the PEL, and my initial decision, on pages 11 and 12, establishes that J.G. and the other employees doing the same work in the south tower area wore regular clothing such as jeans and shirts rather than coveralls. My initial decision and the discussion relating to Item 2, *supra*, demonstrates that L&L

¹⁶The action level is 30 µg/m³. The PEL, or permissible exposure limit, is 50 µg/m³.

knew or could have known with the exercise of reasonable diligence of the violative condition. Item 3 is affirmed as a serious violation, and the proposed penalty of \$2,000.00 is assessed.

Item 8

Item 8 alleged a violation of 29 C.F.R. 1926.62(i)(4)(i), which requires the employer to provide lunchroom facilities or eating areas for employees exposed to lead above the PEL. My initial decision, on pages 16 and 17, establishes employees stored their lunch containers and ate lunch on planks located in between the north and south containment areas where work was taking place on September 21, 2004. It also establishes that the IH took a sample from one of the planks and that the sampling results showed the presence of 1400 µg of lead. L&L asserts that the IH never identified which employees she saw having lunch or showed that they were exposed to lead above the PEL. L&L's Brief, p. 23. I disagree. Footnote 5, *supra*, sets out the IH's testimony about C-3, page 2, her sketch of the platform where the cleanup and vacuuming work was taking place on September 21, 2004; the IH indicated that the area where the employees ate lunch was in between the north and south tower areas. The record, as set out above, shows that J.G. was exposed to lead over the PEL, as were the employees who were working in the active north tower. These employees, and those working in the south tower area, presumably all had lunch in the area the IH saw, even though she did not specifically identify those she saw eating lunch. L&L's assertion is rejected. For the reasons in my initial decision and those set out above, I find that L&L knew or could have known with the exercise of reasonable diligence of the cited condition. This item is affirmed as a serious violation, and the proposed penalty of \$2,000.00 is assessed.

Item 10

Item 10 alleged a violation of 29 C.F.R. 1926.62(i)(3)(ii), which requires the employer to assure, where shower facilities are available, that employees shower at the end of the work shift and to provide an adequate supply of cleansing agents and towels for affected employee use.¹⁷ My initial decision, on pages 18 and 19, shows that the five employees who were working in the south tower area left the site without going into the decontamination unit. L&L asserts that since

¹⁷Affected employees are those who airborne exposure to lead is above the PEL. *See* 29 C.F.R. 1926.62(i)(3)(i).

the IH did not identify the five employees, and did not show they were exposed to lead above the PEL, the alleged violation has not been established. L&L's Brief, p. 23. I disagree. Footnote 24, on page 18 of my initial decision, demonstrates the IH was referring to the five employees who were working in the south tower area, and she named those employees, except one, in the evidence set out on page 7 of my initial decision. Also, even though the IH did not sample those employees, it is clear from her testimony, and I find, that those employees were more than likely exposed to lead above the PEL because they were doing the same vacuuming and cleanup work that J.G. was doing. L&L's assertion is rejected. For the reasons in my initial decision and those set out above as to knowledge, I find that L&L knew or with the exercise of reasonable diligence could have known of the cited condition. Item 10 is affirmed as a serious violation, and the proposed penalty of \$2,000.00 is assessed.

Item 11

This item alleged a violation of 29 C.F.R. 1926.62(i)(4)(iii), which requires the employer to assure that employees exposed to lead above the PEL wash their hands and faces before eating, drinking or smoking. My initial decision establishes, on pages 19 and 20, that employees leaving both the south tower and north tower containment areas washed their hands but not their faces before having lunch. The IH testified that there was visible dust on the employees' faces, which exposed them to lead ingestion upon eating. L&L asserts the IH did not identify the employees or show they were exposed to lead above the PEL. L&L's Brief, p. 24. I disagree. The record in this case clearly shows that the employees working in the north tower containment were exposed to lead above the PEL, as was J.G.¹⁸ It also shows that the five employees working in the south tower area were more than likely exposed to lead above the PEL, as found in Item 10, *supra*. L&L's assertion is rejected. For the reasons in my initial decision, and for those relating to knowledge set out above, I find that L&L knew or could have known with the exercise of reasonable diligence of the cited condition. Item 11 is affirmed as a serious violation, and the proposed penalty of \$2,000.00 is assessed.

¹⁸The IH identified all four employees she sampled, as set out on pages 6 and 7 of my initial decision, and where they were working; all four were exposed to lead above the PEL.

ORDER

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

1. Items 2, 3, 8, 10 and 11 of Serious Citation 1 are AFFIRMED, and a penalty of \$2,000.00 is assessed for each of these items.

/s/
Irving Sommer
Chief Judge

Date: November 23, 2009
Washington, D.C.