



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.

OSHRC Docket No. 05-0055

L & L PAINTING COMPANY, INC.,

Respondent.

APPEARANCES:

John Shortall, Attorney; Daniel J. Mick, Counsel for Regional Trial Litigation; Michael P. Doyle, Counsel for Appellate Litigation; Joseph M. Woodward, Associate Solicitor; Howard M. Radzely, Solicitor; U.S. Department of Labor, Washington, DC
For the Complainant

Nancy B. Schess, Esq., and Khristan A. Heagle, Esq.; Klein, Zelman, Rothermel & Dichter, L.L.P., New York, NY
For the Respondent

REMAND ORDER

Before: THOMPSON, Chairman; ROGERS, Commissioner.

BY THE COMMISSION:

Before the Commission on review is a decision of the Chief Administrative Law Judge.¹ In that decision, the judge affirmed numerous citation items issued to L & L Painting Company, Inc. ("L&L") and assessed a \$33,500 penalty for violations of the Occupational Safety and Health Act, 29 U.S.C. §§ 651-678, stemming from L&L's work on a project involving the removal of lead paint from the tower on the New York side of the George Washington Bridge.²

¹ Because the Chief Administrative Law Judge discusses the medical condition of employees in his decision, we have redacted the names of these employees from that decision out of consideration for their privacy.

² An inspection of the New Jersey side of the bridge conducted by the New Jersey Area Office of the Occupational Safety and Health Administration resulted in the issuance of a separate citation to L&L, which the company also contested. That case, also decided by the Chief Judge, was directed

A threshold issue in this case concerns the admissibility of the results of air monitoring for employee exposure to lead conducted by L&L during the removal of lead paint from the tower on the New Jersey side of the bridge. At the hearing, L&L's non-attorney representative attempted to introduce the New Jersey air monitoring results as relevant to establishing a defense for several of the violations alleged under the Lead in Construction Standard, 29 C.F.R. § 1926.62, regarding conditions on the New York side of the bridge. The judge declined to admit the New Jersey air monitoring results, largely because he considered the New Jersey data to be irrelevant to the cited conditions at issue on the New York side of the bridge. However, we conclude the New Jersey air monitoring results are relevant to L&L's claim that it could have established the "historical monitoring" exception to the initial monitoring requirement of the Lead in Construction Standard, as well as to L&L's claim that it lacked knowledge of other specific conditions cited under the Lead in Construction Standard on the New York side of the bridge, and thus the judge erred.³

In order to consider the effect of the New Jersey air monitoring results on the New York case, we had previously issued a supplemental briefing notice asking L&L to submit the New Jersey air monitoring results to us. The Commission had anticipated that it could determine from the information and arguments submitted in response to the supplemental briefing notice whether the judge's failure to admit the air monitoring results was harmless error. However, upon review of the submitted information and the arguments of the parties, we have concluded that we are not in a position to determine the ultimate effect of the submitted information. Had L&L been given the opportunity below to present its evidentiary case as to why it met the "historical monitoring"

for review and is being remanded by the Commission today. *L & L Painting Co., Inc.*, OSHRC Docket No. 05-0050.

³ The exception to the initial monitoring requirement is set forth at 29 C.F.R. § 1926.62(d)(3)(iii), which provides:

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.

See also 29 C.F.R. § 1926.62(d)(4)(ii).



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L & L PAINTING CO., INC.,

Respondent.

OSHRC DOCKET NO. 05-0055

Appearances:

Margaret A. Temple, Esquire
U.S. Department of Labor
New York, New York
For the Complainant.

William F. Campbell¹
C&E Ventures
Brookhaven, New York
For the Respondent.

Before: Irving Sommer
Chief Judge

DECISION AND ORDER

This matter is before the Occupational Safety and Health Review Commission (the Commission[®]) pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. ' 651 *et seq.* (the Act[®]). On June 22, 2004, the New Jersey Department of Health notified the Occupational Safety and Health Administration (AOSHA[®]) that employees of L & L Painting Company who were working on the George Washington Bridge had blood lead levels (ABLL[®]) of greater than 40 µg/dl. On July 7, 2004, the Manhattan, New York OSHA Area Office began an

¹Mr. Campbell represented Respondent at the hearing. After the hearing, Nancy B. Schess and Khristan A. Heagle, with the law firm Klein, Zelman, Rothermel & Dichter, L.L.P., located in New York, New York, filed an appearance as counsel for Respondent for the purpose of filing a post-hearing brief, as well as a motion, discussed *infra*, in this matter.

inspection of the New York side of the bridge; as a result, OSHA issued a 15-item serious citation to Respondent, L & L Painting Company (ARespondent@ or AL&L@).² The citation was issued on December 8, 2004, and the majority of the items alleged violations of OSHA's lead in construction standard. L&L filed a timely notice of contest, and the hearing in this matter was held on November 15 and 16, 2005, in New York, New York.³ Both parties have filed post-hearing briefs.

The OSHA Inspection

Reagan Branch, the OSHA industrial hygienist (AIH@) who inspected the site, testified that each side of the bridge had two towers that had to be repainted; there was scaffolding around the towers on the New York side, and the towers were covered with tarp for the blasting work. 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 there was more equipment up on the bridge itself. After her arrival at the site on July 7, 2004, the IH met with several L&L supervisors, including Declan Farrington, the site supervisor, John Lawson, the site foreman, and William LePage, a consultant with C&E Ventures who was L&L's safety supervisor at the site. During the inspection that followed, the IH found a number of conditions she considered violations, most of which had to do with OSHA's lead in construction standard, and she discussed the violations she found with L&L during the inspection and at the closing conference held on September 22, 2004.⁴ (Tr. 16-131).

²The George Washington Bridge connects New Jersey to New York, and, as L&L was also working on the New Jersey side, the Hasbrouck Heights, New Jersey OSHA Area Office inspected L&L on that side of the bridge. That inspection resulted in a citation, and the decision in that case, Docket No. 05-0050, is being issued on the same date as the decision in this case.

³Prior to the hearing, the Secretary filed a motion to amend her complaint, and the motion was granted. Item 3 was amended to allege a violation of 29 C.F.R. 1926.62(g)(1)(i), rather than 1926.63(g)(1)(i). Items 1 through 4, 6 and 7, and 10 through 15 were amended to change the date the violations were observed from July 7, 2004, to September 21, 2004. Item 5 was amended to add a second instance, 5b, for a violation observed on September 21, 2004.

⁴The IH conducted a walk-around inspection on July 7, 2004 and returned on September 21, 2004 to do sampling or monitoring of employee lead exposure; Mr. Lawson and Mr. LePage both accompanied the IH on July 7, but only Mr. Lawson accompanied the IH on September 21. (Tr. 23, 28-29, 96, 130-31).

Respondent's Motion for Reconsideration and to Reopen the Record

With its brief, L&L also filed a motion for reconsideration and to reopen the record. In the motion, L&L asserts that it attempted to introduce lead monitoring results of the New Jersey side of the project, that the Secretary objected, and that the results were excluded; L&L contends this ruling unfairly prejudiced it and seeks reconsideration of the ruling. L&L also asserts it was precluded from introducing evidence to show it maintained a chemical inventory list at its main office in Fort Lee, New Jersey, and it seeks reopening of the record to allow the admission of this evidence. Finally, L&L seeks reopening of the record to allow (1) the admission of further evidence as to employees' facial hair, and (2) the admission of additional evidence as to its policy requiring employees to wash before eating, drinking or smoking. The Secretary has filed an opposition to the motion that consists of a declaration of her counsel (Adeclaration@).

Both parties cite to *Oscar Renda Contracting, Inc.*, 17 BNA OSHC 1883 (No. 93-1886, 1997), in support of their respective positions. In that case, the Commission applied the federal courts' test of fairness and substantial justice⁴ in light of all the surrounding circumstances⁴ to determine if the reopening of the record was appropriate *Id.* at 1885. (Citations omitted). In this regard, and as the Secretary points out, L&L's motion was not filed for over 100 days after the hearing, even though L&L retained counsel in mid-December of 2005.⁵ As the Secretary also points out, L&L designated Mr. Campbell as its representative on May 24, 2005, and, while her counsel contacted Mr. Campbell on numerous occasions to discuss settlement, Mr. Campbell repeatedly stated that L&L wanted its day in court.⁶ Finally, the Secretary points out that at the hearing, Ross Levine, L&L's vice-president, reiterated on the record that Mr. Campbell was the authorized representative of L&L in this matter. *See* Declaration, §§ 6-10, 13-17.

As to L&L's first assertion, with respect to the lead monitoring results, there was a discussion about the results on the record, and the Secretary indicated her objections to the results. However, Mr. Campbell never actually offered the results as an exhibit, and there was no ruling excluding the results from evidence. (Tr. 154-62). Mr. Campbell is not an attorney, and the record shows he lacked familiarity with the proper procedure for offering exhibits into evidence; yet,

⁵According to the Declaration, L&L's counsel did not advise the Secretary's counsel that Respondent intended to file the subject motion until February 14, 2006.

⁶Mr. Campbell is with C&E Ventures, the company that provided health and safety consulting services to L&L at the site. (Tr. 5, 23, 237).

despite that lack of familiarity, he offered a number of exhibits before and after the lead monitoring results that were received in evidence. (Tr. 142, 149-50, 152-53, 164-65, 172-74, 180, 189). Regardless, L&L chose Mr. Campbell to be its representative at the hearing, and it is bound by the acts of its representative. The Commission addressed this issue in *Byrd Produce Company*, 16 BNA OSHC 1268, 1269 (Nos. 91-0823 & 91-0824, 1993), and cited to the Supreme Court's decision in *Link v. Wabash R.R.*, 370 U.S. 626, 633-34 (1962), which states as follows:

There is certainly no merit to the contention that dismissal of petitioner's claim because of his counsel's unexcused conduct imposes an unjust penalty on the client. Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent....

Even if the lead monitoring results had been admitted, I find they would not have assisted L&L in its defense of this matter. In Item 2 of the citation, OSHA cited L&L pursuant to 29 C.F.R. 1926.62(d)(1) for failing to conduct initial monitoring of an employee, who was vacuuming lead-containing debris outside an active containment, to determine his exposure to lead. 29 C.F.R. 1926.62(d)(3)(iii) provides an exception to the monitoring requirement, as follows:

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 record shows that L&L had conducted no monitoring on the New York side of the project but had done monitoring on the New Jersey side. (Tr. 49). L&L contends that its monitoring results from the New Jersey side showed no overexposure to lead and would have established it was not in violation of the cited standard because the work and conditions on the New York side were identical to those on the New Jersey side; in that regard, William LePage, the C&E Ventures consultant who oversaw safety and health on the entire project for L&L, testified that initial monitoring was done for all tasks on the project and that all monitoring results were under the permissible exposure level (PEL^o). (Tr. 23, 207, 237-38). However, Reagan Branch, the OSHA IH who inspected the New York side of the project, testified that while she received the monitoring

results from the New Jersey side, they did not show any monitoring of work like that set out in Item 2, that is, vacuuming lead-containing debris outside an active containment. IH Branch further testified that she conducted her own monitoring of the employee doing that work and that his exposure, as shown in C-4, was three times over the PEL. (Tr. 30-31, 49-50).

I observed the demeanors of Mr. LePage and IH Branch as they testified, including their facial expressions and body language, and I found IH Branch to be a sincere and credible witness; Mr. LePage, on the other hand, was found to be a less than reliable witness.⁷ I therefore credit the testimony of IH Branch over that of Mr. LePage, and I find as fact that the New Jersey monitoring results did not include monitoring of work like that set out in Item 2 of the citation. Accordingly, L&L suffered no prejudice as a result of the monitoring results not becoming part of the record.

As to L&L's second assertion, in regard to the chemical inventory list, Respondent's motion contains no transcript cites in support of its claim that a chemical inventory list was offered as an exhibit and excluded from evidence.⁸ Moreover, I have reviewed the transcript in its entirety, and, while L&L's failure to have a chemical inventory list at the site was discussed, there is nothing in the record to indicate that such a list was ever offered as an exhibit. (Tr. 114-19, 177B79). There is therefore no basis for L&L's assertion that the chemical inventory list was excluded.

L&L's third assertion, noted above, is that the record should be reopened (1) to admit further evidence concerning employees' facial hair, and (2) to admit additional evidence of the company's policy requiring employees to wash before eating, drinking or smoking.⁹ L&L indicates that its

⁷Mr. LePage testified, for example, that no employees on the project had developed elevated BLL's. He explained there were employees who had developed elevated BLL's on the New Jersey side who were then moved to the New York side but that none of those workers had developed further elevated BLL's from their work on the New York side. (Tr. 198-200, 239-46). However, L&L employee [REDACTED], who was moved from the New Jersey side to the New York side due to an elevated BLL, testified his BLL increased after he moved to the New York side. (Tr. 257-59). In fact, the record in Docket No. 05-0050 shows that his BLL went from 76 µg/dl to over 100 µg/dl after working a week on the New York side.

⁸The alleged violation relating to the list is set out in Item 15b of the citation.

⁹The alleged violations as to these matters are set out in Items 1a and 11, respectively.

failure to present sufficient evidence as to these matters, particularly the one relating to facial hair, was due to the fact that it was not represented by counsel. However, as discussed *supra*, L&L chose its representative and is bound by the acts of that representative. Moreover, as the Secretary points out, L&L had ample opportunity at the hearing to put in whatever evidence it believed was relevant. The Secretary also points out that reopening the record would delay abatement of the alleged violations. She notes that L&L seeks a further hearing to present additional evidence and testimony, after which the parties would have to file briefs to address the new evidence; she also notes that the cited work activities were still in progress at the time of the hearing in November 2005 and that employee exposure to lead could well be ongoing at the present time.

For all of the foregoing reasons, I agree with the Secretary that the interests of fairness and substantial justice do not require the reopening of the record in this matter. L&L's motion for reconsideration and to reopen the record is accordingly denied.

Citation 1, Items 1a through 1d

Items 1a through 1d allege respiratory protection violations. Item 1a alleges a violation of 29 C.F.R. 1910.134(g)(1)(i)(A), as follows:

The employer shall not permit respirators with tight-fitting facepieces to be worn by employees who have: (A) Facial hair that comes between the sealing surface of the facepiece and the face or that interferes with valve function....

IH Branch testified she did sampling of the lead exposure of four employees at the site on September 21, 2004; she did so by attaching sampling pumps to the employees and then sending the sampling filters to OSHA's Salt Lake City Technical Center for analysis.¹⁰ Two employees, [REDACTED] and [REDACTED], were cleaning and vacuuming; [REDACTED] was working outside the active containment, and his exposure was three times the PEL, and [REDACTED] was working inside the active containment, and his exposure was 170 times the PEL.¹¹ The other two, [REDACTED] and [REDACTED], were blasting inside the active containment; their exposures were 224 and 287

¹⁰ Hereinafter, unless otherwise indicated, all dates will refer to the year 2004.

¹¹ By September 21, the south tower was inactive, as the blasting work there was done; however, the north tower was still active, with blasting work taking place. (Tr. 18-19).

times the PEL, respectively. All four employees wore respirators to do their work.¹² (Tr. 28-32, C-4-7).

IH Branch further testified that as she was preparing to do her sampling, she noticed five workers with facial hair who were wearing tight-fitting half-face respirators; one had a goatee, another had a full beard, and the rest had stubble beards. The IH noted that having facial hair when using such respirators interferes with the face-to-respirator seal and negates the protection of the respirator. She identified the five workers as ██████████, ██████████, ██████████, ██████████ and ██████████, and she said that all of them except ██████████ were doing cleanup and vacuuming work in the inactive south tower, where blasting was completed; ██████████ was doing blasting work in the north tower containment, which was still active. She also said the cleanup work was the same as ██████████, whose exposure was three times the PEL, and that ██████████ and ██████████ had been medically removed as they had BLLs of over 40 µg/dl. The IH stated that the respiratory protection of all five employees was compromised due to their facial hair; she further stated that the facial hair of the employees was obvious and that when she pointed it out to Mr. Lawson, L&L's site foreman, nothing was done about it. (Tr. 29, 33-34, 190-92; C-13).

Both Mr. LePage and Mr. Lawson testified that IH Branch did not point out any workers during the inspection who were unshaven. (Tr. 201, 253). Mr. LePage also testified that L&L's policy is that if an employee is not clean shaven, that employee does not work; he stated that there is a shaving kit in the decontamination unit for employees who need to shave and that he has taken workers off the job once or twice for refusing to shave. (Tr. 201).

As set out *supra*, I have found IH Branch to be a credible witness and Mr. LePage a less than reliable witness. I also found Mr. Lawson to be an unreliable witness, based on my observing his demeanor, including his facial expressions and body language, on the stand. In addition, I note that, despite the IH's testimony that she pointed out to him a number of the conditions she observed, he testified that the only things she mentioned to him were extension cords that had tape on them and a fire extinguisher that did not have a gauge on it. (Tr. 33, 44, 59, 63, 81, 86, 96, 99, 248-53). In view of the record and my credibility determinations, the testimony of IH Branch is credited over

¹²█████████ wore a half-face respirator, while the other individuals wore supplied-air blasting helmets with hoods. *See* C-4 through C-7.

that of Mr. LePage and Mr. Lawson. Based on the IH's testimony, the Secretary has proved the alleged violation, including the element of employer knowledge.¹³

Item 1b alleges a violation of 29 C.F.R. 1910.134(h)(1), which states that:

The employer shall provide each respirator user with a respirator that is clean, sanitary, and in good working order. The employer shall ensure that respirators are cleaned and disinfected using the procedures in Appendix B-2 of this section, or procedures recommended by the respirator manufacturer, provided that such procedures are of equivalent effectiveness....

The IH testified that before doing her sampling, she inspected the respirators the employees had on. She observed that they were visibly dirty and that their cartridges were also dirty. She took wipe samples of the insides of three of the respirators and sent the samples to the OSHA Technical Center. C-8, the results, revealed that two of the respirators, which were worn by employees working inside the active containment, had 122 and 140 micrograms of lead, respectively; the third, worn by an apprentice, had 76 micrograms of lead. The IH stated that the results should have been as close to zero as possible, because the respirators were worn close to the breathing zones of the employees. She also stated that the respirators should have been cleaned at the end of the work day or at the beginning of the work shift; she saw one worker at the site who used a wipe to clean his respirator. The IH indicated the respirators' condition was apparent. (Tr. 36-39, 136-37, 146).

Mr. LePage testified that L&L's policy is for employees to clean their respirators right before donning them and that the policy's purpose is to remove any contaminants that might be on the respirators. He also testified that the IH took her wipe samples at the beginning of the shift, before employees went up on the bridge, where they cleaned their respirators. (Tr. 203-04, 231-32). However, L&L itself admits that its written policy states that respirators will be cleaned at the end of the workday. *See* R. Brief, p. 12, footnote 11. Moreover, I credit the testimony of the IH, which is supported by the wipe sample results, and I find that it shows that employees were not cleaning their respirators as required and that L&L knew or should have known of the condition.

Item 1c alleges a violation of 29 C.F.R. 1910.134(h)(2)(i), which states as follows:

¹³To demonstrate a violation of a specific standard, the Secretary must prove that the cited standard applies, that its terms were not met, that employees were exposed to the condition, and that the employer knew of the condition or could have known of it in the exercise of reasonable diligence. *Astra Pharmaceutical Prod.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981).

All respirators shall be stored to protect them from damage, contamination, dust, sunlight, extreme temperatures, excessive moisture, and damaging chemicals, and they shall be packed or stored to prevent deformation of the facepiece and exhalation valve.

IH Branch testified that she observed workers remove their respirators when they did not need them and that rather than storing them properly they hung them from scaffolding or their belts; she said some workers had them off for up to 45 minutes, for lunch breaks, and that she saw one worker take his off and leave it for about an hour after hanging it improperly. IH Branch further testified that the respirators should have been placed in plastic bags or other containers when removed to prevent dust from accumulating in them and sunlight from deforming the face pieces or the rubber valves, which are very thin. She noted that not storing the respirators properly sabotaged their effectiveness and exposed the workers to unnecessary lead exposure. She also noted that she pointed out the condition to Mr. Lawson. (Tr. 40-46, 143-46; C-9-10).

L&L contends that there is no support for the IH's opinion that respirators not in use for 30 to 45 minutes require storage. However, as I read the standard, it does in fact require respirators to be stored to protect them from damage, contamination, dust, sunlight, etc. Moreover, the IH testified she saw respirators left for 45 minutes to an hour and that such treatment could result in their being contaminated with lead dust or deformed by the sunlight. Based on the language of the standard and the IH's testimony, which L&L did not rebut, I conclude the Secretary has established the alleged violation and that L&L knew or could have known of the cited condition.

Item 1d alleges a violation of 29 C.F.R. 1926.62(f)(2)(i), which provides that:

The employer must implement a respiratory protection program in accordance with 29 CFR 1910.134 (b) through (d) (except (d)(1)(iii)), and (f) through (m).

The IH testified that although L&L had a written respiratory protection program, there were deficiencies in implementing the program based on what she saw at the site. She identified C-11 as L&L's lead health and safety program for the project, which L&L gave her, and she noted that in light of Items 1a through 1c, L&L had not implemented the program's requirements.¹⁴ (Tr. 46-48).

In view of the testimony of the IH and my findings above that L&L was in violation of the respiratory protection standards cited in Items 1a, 1b and 1c, L&L was also in violation of the

¹⁴The respiratory protection part of the program appears on pages 14-16 of C-11.

standard cited in Item 1d, for failing to implement a respiratory protection program as required. The Secretary has demonstrated the alleged violation and employer knowledge of the condition.

The IH testified that the violations set out in Item 1 were serious as they exposed employees to lead, which can cause serious illness, and she noted that some employees at the site already had elevated BLLs. (Tr. 34, 39, 46-48, 55-56; C-13). The IH also testified that the proposed penalty of \$3,500.00 for Item 1 was based on the gravity of the violations and the employer's size, which was around 400 employees; she said no credit for history or good faith was given, due to prior inspections L&L had had and the deficiencies in its lead and other programs.¹⁵ (Tr. 35, 39, 46-49, 121-23, C-25).

Based on the foregoing, Items 1a through 1d are affirmed as serious violations. I find the total proposed penalty of \$3,500.00 for these items appropriate, and it is accordingly assessed.

Citation 1, Item 2

Item 2 alleges a violation of 29 C.F.R. 1926.62(d)(1), which states that:

(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 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.

On page 5 of this decision, I found, on the basis of the record and my credibility determinations, that L&L had not conducted initial monitoring of an employee who was vacuuming lead-containing debris outside an active containment to determine his exposure to lead, as alleged in Item 2 of the citation.¹⁶ The Secretary has therefore shown that L&L was in violation of the cited standard, including the knowledge element, in that the employer knew or could have known of the cited condition. The IH testified that the violation was serious, as lead exposure can cause lead poisoning and serious illness. (Tr. 56-58). Item 2 of the citation is consequently affirmed as a

¹⁵These same factors apply to all of the other penalties assessed in this case.

¹⁶The record shows that this employee was [REDACTED], discussed in Item 1a, *supra*, whose exposure to lead was over three times the PEL. (Tr. 30-31, 34, 49-50; C-4).

serious violation. I conclude that the proposed penalty of \$2,000.00 appropriate, and it is therefore assessed.

Citation 1, Item 3

This item alleges a violation of 29 C.F.R. 1926.62(g)(1)(i), which provides as follows: Where an employee is exposed to lead above the PEL without regard to the use of respirators ... the employer shall provide at no cost to the employee and assure that the employee uses appropriate protective work clothing and equipment that prevents contamination of the employee and the employee's garments such as, but not limited to: (i) Coveralls or similar full-body work clothing....

IH Branch testified that [REDACTED], the employee who was vacuuming lead-containing debris outside the active containment, was wearing jeans and a shirt rather than coveralls; there were other employees doing the same work in the inactive south tower area, and they were also wearing clothes such as jeans and shirts. The IH brought the situation to the attention of Mr. Lawson and Mr. LePage, and Mr. LePage indicated that employees not exposed above the PEL were not provided with coveralls. The IH testified, however, that L&L had not conducted monitoring of this particular work and had not determined the exposure of these employees. (Tr. 30, 34, 49-51, 58-60, 190-92).

Mr. LePage testified that to his knowledge, employees doing vacuuming were not exposed above the PEL and therefore did not require coveralls. (Tr. 207-08). However, Item 1a and Item 2, set out above, show that L&L had not monitored the vacuuming work at the subject site and that [REDACTED] was in fact exposed above the PEL as he did such work. In addition, while Mr. LePage also testified that any employees requesting coveralls were given them, [REDACTED], an L&L employee who was moved from the New Jersey site to the New York site, testified that he was told that coveralls were only for the employees doing blasting work. (Tr. 234, 261). On the basis of the record, the Secretary has established the alleged violation, including the knowledge element.

The IH considered this item to be serious as workers were leaving the site without showering, which meant not only further lead exposure for them but also lead exposure for their families; in addition, two workers doing the vacuuming work already had elevated BLL's.¹⁷ (Tr. 59-62). In view of the record, this item is affirmed as a serious violation. I find the proposed penalty of \$2,000.00 to be appropriate, and the proposed penalty is accordingly assessed.

¹⁷Item 10, *infra*, addresses the fact that workers were leaving the site without showering, and Item 1a, *supra*, discusses the employees who had elevated BLL's at the site.

Citation 1, Item 4

This item alleges a violation of 29 C.F.R. 1926.62(g)(2)(viii), which provides that:

The employer shall prohibit the removal of lead from protective clothing or equipment by blowing, shaking, or any other means which disperses lead into the air.

IH Branch testified that upon interviewing employees who worked in the active containment, she learned that they used compressed air to blow off the excess dust that had settled on their clothes; in addition, Mr. Lawson admitted to her that this was the case. The IH said that the employees' practice was contrary to C-11, L&L's lead health and safety program, which on page 17 requires contaminated work clothes to be vacuumed with a HEPA vacuum.¹⁸ (Tr. 62-64).

Mr. LePage testified that L&L employees do use compressed air to remove lead dust from their clothing and that the practice is acceptable as long as the employees are within the containment and the mechanical dust-collection/ventilation system is operating. (Tr. 208-09).

L&L contends the cited practice is permitted by 29 C.F.R. 1926.62(h)(5), which states that:

Compressed air shall not be used to remove lead from any surface unless the compressed air is used in conjunction with a ventilation system designed to capture the airborne dust created by the compressed air.

However, the foregoing standard applies to housekeeping, while the cited standard applies to the cleaning and replacement of protective clothing. I find that the cited standard applies to the situation in issue. I further find that the Secretary has met her burden of demonstrating the alleged violation, including the employer knowledge element.

The IH testified that approximately 15 employees were exposed to the cited condition. She also testified that the condition was serious because the compressed air would simply aerosolize the lead dust and put it within the employees' breathing zones, resulting in further exposure to lead dust. (Tr. 63-64). Based on the testimony of the IH, this item is affirmed as a serious violation. I find the proposed penalty of \$3,500.00 to be appropriate. A penalty of \$3,500.00 is therefore assessed.

Citation 1, Item 5

Item 5 alleges a violation of 29 C.F.R. 1926.62(h)(1), which provides as follows:

¹⁸A HEPA vacuum is one approved for vacuuming lead dust and debris. (Tr. 75-77).

All surfaces shall be maintained as free as practicable of accumulations of lead.

The IH testified that on July 7, she 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 into the lockers on the clean side along with their street clothes. She took one wipe sample of a locker handle and one of the inside of a locker, and the results showed 1400 and 1700 µgs of lead, respectively. She also took wipe samples from the outside of a water cooler, the outside of a rag bag employees accessed after washing their hands, and the surface of a plank up on the bridge platform where employees sat to have their lunch; the results of these samples showed 130, 150 and 1400 µgs of lead, respectively. Mr. LePage was present when the IH took her wipe samples, and he conceded there was a housekeeping issue in the locker room, especially as to the lead debris in the lockers. The IH further testified she took more wipe samples in the locker area on September 21, including from a locker handle, the inside of a locker, and a bench surface; those results revealed 24, 680 and 233 µgs of lead, respectively. The IH said the wipe samples should have been as close to zero as possible and that the 24 µgs result was an improvement; however, the other results showed that there was still a problem with housekeeping at the site. (Tr. 65-73, C-14-17).

Mr. LePage testified that housekeeping is always an issue on lead removal sites and that it is something that has to be done daily; he said one worker is assigned to clean the subject site daily, from top to bottom, by mopping and wiping down surfaces. Mr. LePage further testified that the IH did not follow proper procedures when she took her wipe samples; she did not measure the areas from which she took her samples, she used the same wipe to wipe the outside and inside of a locker, and she failed to change gloves in between samples on one occasion. He noted that L&L obtains its own wipe samples from the site at least every other month. (Tr. 211-13, 234-35).

L&L contends that the IH's sampling results are flawed because the samples did not measure the concentration of lead in a specified area. It notes, for example, that R-2, an excerpt from OSHA's Technical Manual, states as follows:

Depending on the purpose of the sample, it may be useful to determine the concentration of contamination (e.g., in micrograms of agent per area). For these samples, it is necessary to record the area of the surface wiped (e.g., 100 cm²). *This would normally not be necessary for samples taken to simply show the presence of the contaminant.* (Emphasis added).

The highlighted sentence is contrary to L&L's argument and consistent with the IH's testimony, which was that she was sampling only for the presence of lead and that she was not required to measure the surface areas she sampled. (Tr. 135-36, 142). L&L also notes an excerpt from OSHA Instruction CPL-02-02-058, dated December 13, 1993, which provides guidance as to inspection and compliance procedures for the lead standard.¹⁹ That excerpt states as follows:

In determining whether an employer has maintained surfaces of hygiene facilities free from contamination, OSHA recommends the use of HUD's recommended level for acceptable decontamination of *200 µg/ft² for floors* in evaluating cleanliness of change areas, storage facilities, and lunchrooms/eating areas. OSHA would not expect that surfaces should be any cleaner than this level. (Emphasis added).

As I read the above excerpt, it refers to the cleanliness of floors and not all surface areas. Moreover, while R-3, L&L's dust wipe sampling results from the subject site, show that the method used for that sampling was for lead concentrations rather than merely the presence of lead, that is no basis for finding the IH was required to do her sampling in that manner. Finally, in view of my credibility determinations in this case, I do not credit Mr. LePage's testimony that the IH's sampling procedures were improper. L&L's contentions are rejected, and I conclude that the Secretary has established the alleged violation, including the employer knowledge element.

IH Branch testified that the cited condition was a serious hazard because lead-contaminated surfaces contribute significantly to elevated BLL's; employees touch the surfaces and then can ingest lead as a result. (Tr. 74). This item is affirmed as a serious violation. The proposed penalty of \$3,500.00 is appropriate and is consequently assessed.

Citation 1, Item 6

Item 6 alleges a violation of 29 C.F.R. 1926.62(h)(4), which provides that:

Where vacuuming methods are selected, the vacuums shall be equipped with HEPA filters and used and emptied in a manner which minimizes the reentry of lead into the workplace.

IH Branch testified that when she observed [REDACTED] vacuuming debris outside the active containment, she noticed the vacuum was a wet/dry vacuum that used a drop-in cloth filter; she also noticed the vacuum had a sticker on it showing APb,[®] the symbol for lead, with a circle around the

¹⁹L&L did not offer the OSHA CPL as an exhibit at the hearing, but, rather, discusses the CPL in its brief; the CPL, however, is readily available on OSHA's web site, at www.osha.gov.

symbol and a cross through it, indicating the vacuum was not to be used for lead. The IH further testified the vacuums employees were using in the inactive containment were also wet/dry vacuums and not HEPA vacuums. She identified C-12 as a photo of ██████████ holding the top part of the vacuum and the filter and C-18 as a photo of the vacuum with the sticker, although the sticker is partially obscured by a piece of duct tape. The IH said the problem with the vacuum was that its filter would allow small lead particles to become aerosolized again, putting more lead into the air, while a HEPA vacuum filter captures and traps the smaller lead particles. She also said that she took the vacuum's specifications and went to the manufacturer's website; C-19, three pages from the website, shows the vacuum as simply a wet/dry vacuum and not a HEPA vacuum. (Tr. 75-80).

On cross-examination, IH Branch was shown R-7, a specification sheet from the same manufacturer depicting a vacuum very similar to the one she saw at the site; however, R-7 indicates that vacuum is adaptable for several usages, including as a HEPA vacuum, and one of the vacuums depicted has the same sticker on it the IH described, *i.e.*, a circled lead symbol with a cross through it.²⁰ The IH testified it was possible that the vacuum she saw at the site could have been used as a HEPA vacuum, but she was adamant that the filter she saw was not a HEPA filter; she noted that a HEPA filter has several layers, that is, it has a large container that collects the larger debris plus smaller filters that collect the smaller debris. (Tr. 179-90, 194).

Mr. LePage testified the vacuum shown in C-12 and C-18 was the same as that shown in R-7 and that the sticker the IH saw meant it was a lead buster, a vacuum to be used on lead projects. He further testified, however, that he could not tell from C-12 if the filter was a HEPA filter. (Tr. 214-16). Based on my credibility determinations in this case, and on the fact that Mr. LePage said he could not tell from C-12 whether the filter was a HEPA filter, I credit the IH's testimony that the filter ██████████ was using was not a HEPA filter; the IH also testified that ██████████ use of a non-HEPA filter was contrary to page 20 of C-11, L&L's lead program.

²⁰It would appear that R-7 does not show the exact same model as the vacuum at the site; those shown in R-7 are Model 45 vacuums, while the one the IH researched, after getting the specifications from the vacuum at the site, was a Model 45-10P vacuum, as depicted in C-19. (Tr. 182). I also note that C-19 goes on to show some HEPA vacuums, and those that are similar to the subject vacuum are called A45HEPA-D and A45HEPA-WD vacuums.

In view of the above, I find the Secretary has demonstrated the alleged violation, including the knowledge element. The violation is affirmed as serious, based on the IH's testimony that the use of a non-HEPA filter could cause further exposure to lead and an increased risk of elevated BLL's. (Tr. 80). The proposed penalty of \$2,000.00 is appropriate and is therefore assessed.

Citation 1, Item 7

This item alleges a violation of 29 C.F.R. 1926.62(i)(1), which states as follows:

The employer shall assure that in areas where employees are exposed to lead above the PEL without regard to the use of respirators, food or beverage is not present or consumed, tobacco products are not present or used, and cosmetics are not applied.

The IH testified that she saw an employee leave the south tower containment area with a lit cigarette in his mouth. She pointed out the condition to Mr. Lawson, who told the employee to wash his hands, after which the employee put the cigarette down, washed his hands, and then put the lit cigarette back in his mouth. The IH said the employee's behavior contributed to his exposure to lead, both because he had not washed his hands before smoking and because he put the lit cigarette down on a contaminated surface and then picked it back up and resumed smoking. (Tr. 81-83,166).

Mr. Lawson and Mr. LePage testified that the IH did not point out anyone smoking without having washed his hands; they also testified that L&L's policy is for workers who leave containment areas to wash their hands and faces before eating, smoking or drinking, and Mr. LePage said workers violating the policy are disciplined and dismissed after three infractions. (Tr. 218-20, 247).

The IH's testimony is credited over that of Mr. Lawson and Mr. LePage, based on my credibility determinations set out *supra*, and I conclude that the Secretary has shown the alleged violation, including the knowledge element. The IH testified the violation was serious, as it increased employee exposure to lead. (Tr. 82). This item is thus affirmed as a serious violation. The proposed penalty of \$2,000.00 is found to be appropriate, and a penalty of \$2,000.00 is therefore assessed.

Citation 1, Item 8

This item alleges a violation of 29 C.F.R. 1926.62(i)(4)(i), which provides as follows:

The employer shall provide lunchroom facilities or eating areas for employees whose airborne exposure to lead is above the PEL, without regard to the use of respirators.

IH Branch testified that Declan Farrington, L&L's site supervisor, told her during the walk-around inspection that employees had their lunch while sitting on planks up on the bridge platform.

The IH took a wipe sample from one of the planks Mr. Farrington indicated, where lunch containers were also stored, and C-14, the sampling results, showed the presence of 1400 µg of lead. The IH also saw employees sitting on the sampled plank having lunch on September 21. She said there was no set area for employees to have lunch and that they sat on planks or on the platform itself to eat, even though C-11, L&L's lead program, stated on page 20 that there should be a clean area for them, away from all sources of contamination, to have lunch. She also said Mr. Lawson was present when she pointed out the problem with where employees were eating. (Tr. 83-86; C-10, C-17).

Mr. LePage testified that there is a make-shift table with planks to sit on for employees to have lunch; he also testified the area is cleaned daily.²¹ (Tr. 220). This testimony is not believable, in light of the testimony of the IH, who has been found to be a sincere and credible witness. Based on her testimony, I find the Secretary has proved the alleged violation, including the knowledge element. The IH testified that this item was serious due to the potential for lead ingestion, which can cause elevated BLL's. (Tr. 86). This item is affirmed as a serious violation. The proposed penalty of \$2,000.00 is appropriate, and a penalty of \$2,000.00 is accordingly assessed.

Citation 1, Item 9

Item 9 alleges a violation of 29 C.F.R. 1926.62(i)(2)(ii), which states that:

The employer shall assure that change areas are equipped with separate storage facilities for protective work clothing and equipment and for street clothes which prevent cross-contamination.

IH Branch testified that when she toured the decontamination unit at the site, she saw both the dirty side and the clean side; she noted there were no lockers on the dirty side and that employees were placing their dirty clothing and their clean clothing in the lockers on the clean side.²² The IH also testified her wipe sample of the inside of a locker revealed the presence of 1700 µg of lead, as shown in C-14, her sampling results. She said the condition of the unit caused cross-contamination of work and street clothing. She also said the condition violated C-11, L&L's lead program, which on page 19 requires separate storage areas for work and street clothing. (Tr. 87-92, 166-69).

²¹Mr. LePage later testified that there are two tables, each one from 5 to 7 feet in length, where employees have their lunch. (Tr. 235).

²²She identified C-16 as photos of the lockers on the clean side and C-20 through C-22 as photos of the decontamination unit, the dirty side of the unit, and the shower area. (Tr. 88-90).

Mr. LePage testified that dirty clothing is stored on the dirty side of the decontamination unit and that there is a garbage container where employees place dirty coveralls; he also testified he has never seen workers put dirty clothes and clean clothes into the same locker, that workers are trained in decontamination procedures, and that they are disciplined for not obeying the rules. (Tr. 222-23).

The testimony of IH Branch is credited over that of Mr. LePage, based on my credibility determinations in this matter, and I conclude that the Secretary has shown the alleged violation, including the employer knowledge element. IH Branch testified that this item was serious because employees were re-contaminating themselves after having showered, causing further exposure to lead. (Tr. 92). This item is affirmed as a serious violation. I find the proposed penalty of \$2,000.00 appropriate, and the proposed penalty is therefore assessed.

Citation 1, Item 10

Item 10 alleges a violation of 29 C.F.R. 1926.62(i)(3)(ii), which provides that:

The employer shall assure, where shower facilities are available, that employees shower at the end of the work shift and shall provide an adequate supply of cleansing agents and towels for use by affected employees.

The IH testified that at the end of the workday on September 21, she saw five employees who had been working in the south tower containment leave the site without going into the decontamination unit.²³ She also testified that the workers she saw had been doing cleanup and vacuuming work, the same as [REDACTED] work, and, according to her monitoring, [REDACTED] was exposed to lead three times above the PEL.²⁴ She discussed the workers with Mr. Lawson, who told her they went to the New Jersey site for decontamination; the IH found this implausible as there was a decontamination unit at the subject site and the workers would have had to drive 30 minutes to reach the New Jersey site. The IH also discussed the workers with Mr. LePage the next day, and

²³The IH noted she was up on the tower at the time and that she was able to see the dirty side of the decontamination unit and that the employees did not enter it. (Tr. 95).

²⁴Although the IH did not name the employees she saw, it is clear from her testimony that she was referring to the employees noted in Item 1a, *supra*, plus one more employee who was not identified. Four of the five employees noted in Item 1a were doing cleanup and vacuuming work in the south containment, and two had been medically removed because of elevated BLL-s, and the IH-s testimony as to this item alludes to five employees, two of whom had been medically removed, who were doing the same work in the same location. (Tr. 95-98).

he told her they did not have to shower because they were not exposed above the PEL. IH Branch said the condition violated C-11, L&L's lead program, which on page 21 requires employees exposed above the PEL to shower before leaving the job site each day. (Tr. 95-98, 169, 190-93).

Mr. LePage testified the employees the IH saw were carpenters who were breaking down the containment and that he knew they were not exposed to lead above the PEL because he sampled the employees quarterly. (Tr. 223-24). Mr. LePage's testimony is not credited, based on that of the IH; it is also not credited in view of the conflicting information he and Mr. Lawson provided the IH at the time of the inspection. L&L contends there is no proof the employees were exposed to lead above the PEL because the IH did not sample them. However, I credit the IH's testimony that the workers were in fact exposed above the PEL because they were doing the same cleanup and vacuuming work that ██████████ was doing, who was exposed three times over the PEL. I find that the Secretary has established the alleged violation, including the knowledge element. The violation was serious, in that the failure to shower before leaving work could result in elevated BLL's. (Tr. 98). I find the proposed penalty of \$2,000.00 appropriate, and that penalty is consequently assessed.

Citation 1, Item 11

This item alleges a violation of 29 C.F.R. 1926.62(i)(4)(iii), which provides as follows:

The employer shall assure that employees whose airborne exposure to lead is above the PEL, without regard to the use of a respirator, wash their hands and face prior to eating, drinking, smoking or applying cosmetics.

The IH testified that employees, upon leaving both the north and the south containments at the site, washed their hands but did not wash their faces before eating lunch. She said that there was visible dust on the employees' faces, which exposed them to lead ingestion upon eating, and that she saw only one employee who washed his hands and his face as required. She also said that the employees were exposed to lead above the PEL, based on her monitoring results set out in C-4 through C-7. The IH noted that the condition violated page 21 of C-11, L&L's lead program, and that she pointed out the condition to Mr. Lawson. (Tr. 98-101).

Mr. LePage testified that the IH did not point out this particular violation to him. (Tr. 226). This testimony does not rebut that of the IH, and, in any case, her testimony is credited. I conclude that the Secretary has proved the alleged violation; she has also proved that the violation was serious, in light of the IH's testimony that lead ingestion can cause elevated BLL's. (Tr. 99). The proposed penalty of \$2,000.00 is appropriate, and a penalty of \$2,000.00 is therefore assessed.

Citation 1, Item 12

This item alleges a violation of 29 C.F.R. 1926.62(l)(2)(iii), which states as follows:

The employer shall assure that each employee is trained in the following: ... (iii) The purpose, proper selection, fitting, use, and limitations of respirators....

IH Branch testified this item was issued due to the respiratory protection violations she saw at the site, including the failure to clean and store respirators properly and employees with facial hair wearing tight-fitting respirators, and because L&L apparently was not training its employees in respiratory protection.²⁵ (Tr. 101-04). Mr. LePage, on the other hand, testified employees receive yearly training that includes the use and care of respirators and a written test; he also testified that every employee is Afit tested® and has medical clearance to use a respirator. (Tr. 226-27).

At the hearing, L&L presented documentation showing employees had attended annual safety meetings in March of 2004 and 2005; the documentation shows Alead awareness® as a topic but does not specifically mention respirator training. (Tr. 172-74; R-5). Moreover, the IH indicated she had seen training documentation but had seen nothing showing employees were trained in respirators. (Tr. 102-03). Finally, ██████████, when asked if L&L had given him respirator training, testified L&L had a yearly meeting that covered hearing and other safety issues. (Tr. 261-62). Regardless, even if L&L did provide respirator training, I find that it was inadequate in light of the respiratory protection violations set out in Item 1, *supra*. I conclude that the Secretary has shown the alleged violation, including the employer knowledge element. This item is affirmed as a serious violation, based on the IH's testimony that improper respirator use can cause elevated BLL's. (Tr. 103). I find the proposed penalty of \$2,000.00 to be appropriate, and that penalty is therefore assessed.

Citation 1, Item 13

Item 13 alleges a violation of 29 C.F.R. 1926.150(c)(1)(viii), which provides that:

Portable fire extinguishers shall be inspected periodically and maintained in accordance with Maintenance and Use of Portable Fire Extinguishers, NFPA No. 10A-1970.

²⁵The IH noted that the respiratory protection program is on pages 14 through 16 of C-11, L&L's lead program, and that the training requirement is on page 15. (Tr. 47-48, 103-04).

IH Branch testified she saw several hundred gallons of paint and flammable solvents, which were stored up on the bridge platform, that L&L employees were using on the job. She also testified that on September 21, she observed a fire extinguisher up on the platform; the extinguisher had no inspection sticker and also had no gauge to indicate whether it was charged or not. The IH asked Mr. Lawson if the extinguisher belonged to L&L, and he said he did not know. The next day, during the closing conference, Mr. LePage admitted to the IH that the extinguisher up on the platform belonged to L&L. The IH identified C-18 as a photo of the extinguisher, and she noted that C-11, L&L's lead program, requires on page 38 weekly inspections of fire extinguishers. (Tr. 104-09, 175-76).

Mr. Lawson testified that when the IH noticed the cited extinguisher, he told her it belonged to another contractor; he further testified that he showed her another extinguisher, about 2 feet away, and told her that that extinguisher belonged to L&L. (Tr. 248). Mr. LePage also testified there were two extinguishers up on the platform, one with a gauge indicating it was fully charged, and another with no gauge; he further testified that when the IH discussed the cited extinguisher with him, at the closing conference, he told her it belonged to another contractor at the site. (Tr. 202-03, 227-28).

IH Branch specifically testified that she saw only one extinguisher up on the platform, that Mr. Lawson told her he did not know whose it was, and that Mr. LePage told her it belonged to L&L. (Tr. 175-76). Based on her testimony, and on my credibility determinations set out *supra*, I credit the testimony of IH Branch and find that the Secretary has proved the alleged violation, including the employer knowledge element. (Tr. 107-08).

The IH testified the cited condition was a serious hazard because, in the event of a fire, an employee might attempt to put out the fire with the extinguisher and sustain serious burn injuries if the extinguisher was not charged. (Tr. 106-09). This item is affirmed as a serious violation. I find the proposed penalty of \$1,500.00 appropriate, and the proposed penalty is assessed.

Citation 1, Item 14

Item 14 alleges a violation of 29 C.F.R. 1926.405(g)(2)(iii), which states that:

Flexible cords shall be used only in continuous lengths without splice or tap. Hard service flexible cords No. 12 or larger may be repaired if spliced so that the splice retains the insulation, outer sheath properties, and usage characteristics of the cord being spliced.

The IH testified that when she touched the vacuum cleaner cited in Item 6, she received an electrical shock; she checked the extension cord connected to the vacuum cleaner and saw that the insulation was damaged and covered with duct tape, and when she brought it to the attention of Mr. Lawson he took it out of service. The IH further testified that she saw another extension cord an employee was using with a power tool; that cord also had damaged insulation and had duct tape on it. IH Branch identified C-23 as photos of the damaged cords, and she noted that page 34 of C-11, L&L's lead program, requires daily inspections of electrical equipment. (Tr. 109-12).

Mr. Lawson testified the IH pointed out the cord to him and told him such cords should not be spliced; she did not unwrap the tape and look at the cord, but he removed it from service based on what she said. Mr. Lawson also testified he looked at the cord later and saw that, while there was tape on it, there was nothing wrong with the cord. He said workers sometimes roll up cords and tape them to carry them and that they also sometimes put tape on cords to number them. (Tr. 249-52).

The IH specifically testified that the tape was worn away on one of the cords, such that she could see the damage, and that she unwrapped the tape from the other cord and saw it was damaged. (Tr. 193-96). The testimony of the IH is credited, based on my credibility determinations in this matter, and I find that the Secretary has established the alleged violation, including the knowledge element. IH Branch testified the condition was serious, in that water could have gotten inside the tape and caused a fire or even electrocution. (Tr. 110-13). This item is affirmed as a serious violation. The proposed penalty of \$2,000.00 is appropriate, and that penalty is accordingly assessed.

Citation 1, Items 15a through 15c

Items 15a through 15c allege three violations of OSHA's hazard communication (HAZCOM) standard. The cited standards state as follows:

Item 15a B 29 C.F.R. 1910.1200(e)(1) B Employers shall develop, implement, and maintain at each workplace, a written hazard communication program which at least describes how the criteria specified in paragraphs (f), (g), and (h) of this section for labels and other forms of warning, material safety data sheets, and employee information and training will be met, and which also includes the following:

Item 15b B 29 C.F.R. 1910.1200(e)(1)(i) B A list of the hazardous chemicals known to be present using an identity that is referenced on the appropriate material safety data sheet (the list may be compiled for the workplace as a whole or for individual work areas)....

Item 15c B 29 C.F.R. 1910.1200(g)(1) B Chemical manufacturers and importers shall obtain or develop a material safety data sheet for each hazardous chemical they produce or import. Employers shall have a material safety data sheet in the workplace for each hazardous chemical which they use.

The IH testified she received C-24, a HAZCOM program, from L&L during her inspection. She noted that L&L did not have the material safety data sheets (MSDS-s) for three chemicals, one of which was flammable and two of which were combustible; L&L obtained the MSDS-s for the chemicals from the New Jersey side of the project and sent them to her the following day. She also noted that L&L did not have a chemical inventory list, which is a reference list of all of the chemicals kept at a job site, and that one was never provided to her. (Tr. 113-20, 177-79).

Mr. LePage testified that the MSDS-s for the chemicals L&L uses are kept on both the New Jersey and the New York sites; he further testified that three MSDS-s were missing on the New York site, that L&L sent them to the IH the next day, and that while he offered to get them to her that same day she said the next day would be fine. (Tr. 229-30, 238, 244-45). IH Branch specifically denied this latter part of Mr. LePage-s testimony, and she pointed out that because the New York site did not have a fax machine, the only way to get the missing MSDS-s was to drive to the New Jersey site. She further pointed out that the hazard of the cited conditions is not having the necessary information at hand for a first responder in case of an accident or emergency; the chemical inventory list provides a quick reference to all the chemicals at the site, while the MSDS provides detailed information about the hazards and health effects of the particular chemical. (Tr. 116-21, 245).

Based on the foregoing, the Secretary has shown all three of the alleged violations; L&L was missing MSDS-s at the site and did not have a chemical inventory list, and, consequently, it had not implemented its HAZCOM program as required. Moreover, the employer knew or could have known of the conditions with the exercise of reasonable diligence. Item 15 is affirmed as a serious violation, in view of the IH-s testimony about the hazards of the cited conditions. I find the proposed penalty of \$1,500.00 appropriate, and a total penalty of \$1,500.00 for Item 15 is assessed.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Items 1 through 15 of Serious Citation 1 are AFFIRMED as serious violations, and a total penalty of \$33,500.00 is assessed for these items. The cited standards and the individual penalties assessed for these items are set out in the body of this decision.

/s/


Irving Sommer
Chief Judge

Dated: May 4, 2006
Washington, D.C.