



UNITED STATES OF AMERICA
 OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
 1825 K STREET N.W.
 4TH FLOOR
 WASHINGTON D.C. 20006-1246

FAX:
 COM (202) 634-4008
 FTS 634-4008

SECRETARY OF LABOR,

Complainant,

v.

JOHNSON CONTROLS, INC.,

Respondent.

OSHRC Docket No. 89-2614

DECISION

BEFORE: FOULKE, Chairman; WISEMAN and MONTOYA, Commissioners.

BY THE COMMISSION:

This case is before the Commission pursuant to 29 C.F.R. § 2200.92(a) and 29 U.S.C. § 661(i), section 12(j) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-78 ("the Act"). Chairman Foulke directed review after the employer, Johnson Controls, Inc. ("Johnson" or "the Company"), filed a petition for discretionary review of a decision, issued on August 21, 1990, by an administrative law judge of the Commission, Judge James H. Barkley.

I. Introduction

Johnson operates a battery manufacturing plant in Milwaukee, Wisconsin. In July 1989, the Occupational Safety and Health Administration ("OSHA"), of the United States Department of Labor ("DOL"), conducted an inspection of Johnson's plant and issued a nonserious citation alleging that the Company failed to comply with a recordkeeping standard, 29 C.F.R. § 1904.2(a).¹ According to the citation, the Company's "log and

¹29 C.F.R. § 1904.2(a) requires employers to log "recordable occupational injuries and illnesses." It states, in pertinent part:

(continued...)

summary of occupational injuries and illnesses (OSHA form No. 200 or its equivalent) was not completed in the detail provided in the form and [in] the instructions contained ther[e]in,” in that, as stated in the complaint later filed by the Secretary of Labor (“the Secretary”), “an elevated blood lead level in excess of 50 micrograms per 100 grams of whole blood . . . was not recorded as an illness.” Johnson contested the citation and, in the ensuing adjudicatory proceedings, raised two issues concerning whether the Secretary had properly cited a violation of the standard. The following is our phrasing of the issues:

(1) Whether section 9(c) of the Act, which provides that “[n]o citation may be issued . . . after the expiration of six months following the occurrence of any violation,” barred the Secretary from issuing the citation in this case; and,

(2) Whether the cited standard’s requirement that employers record “occupational injuries and illnesses” can be interpreted, within the meaning of the Act, to require an employer to record an “abnormal condition” such as an elevated blood lead level, as specified in the instructions on the OSHA form 200 and as specified in a publication issued in 1986 by the DOL’s Bureau of Labor Statistics.

The administrative law judge upheld the citation after consideration of the two issues as argued by the parties in their cross-motions for summary judgment. On review, the parties have filed extensive briefs and there has been oral argument.

For the reasons that follow, we conclude that the citation was timely issued pursuant to section 9(c) of the Act and that the Secretary’s interpretation of the cited recordkeeping regulation effectuates the intent of Congress as expressed in the Act. Accordingly, we affirm the citation.

¹(...continued)

Each employer shall . . . (1) maintain . . . a log and summary of all recordable occupational injuries and illnesses . . . and (2) enter each recordable injury and illness on the log and summary For this purpose form OSHA No. 200 or an equivalent . . . shall be used. The log and summary shall be completed in the detail provided in the form and instructions on form OSHA No. 200.

A related definitional regulation, 29 C.F.R. § 1904.12(c), defines “recordable occupational injuries or illnesses” as “[n]onfatal cases without lost workdays which result in transfer to another job” and “any diagnosed occupational illnesses which are reported to the employer but are not classified as fatalities or lost workday cases.”

II. The Facts

The essential facts are undisputed. Our recitation of them comes from the Judge's decision:

On September 14, 1988, as part of Johnson's regular medical surveillance program, Mae Seif, an operator of Johnson's small battery assembly line[,] supplied a blood sample which showed a blood lead level of 60 $\mu\text{g}/100\text{g}$ of whole blood. On September 29, 1988, Ms. Seif's blood lead level was 65 $\mu\text{g}/100\text{g}$ of whole blood. Johnson's medical personnel determined that Ms. Seif's position on the small assembly line exposed her to lead in excess of OSHA's "action level" of 30 $\mu\text{g}/\text{m}^3$ of air. Ms. Seif was, therefore, transferred off the assembly line on October 11, 1988[,] pursuant to OSHA medical removal protection procedures [against excessive exposure to lead]. At no time did Ms. Seif demonstrate any sign of decreased heme synthesis or other physiological symptoms of lead-related illness aside from her elevated blood lead level. Normal blood levels for individuals with no occupational exposure to lead generally range from 7 $\mu\text{g}/100\text{g}$ of whole blood to 15 $\mu\text{g}/100\text{g}$ of whole blood.

[Ms.] Seif's removal was noted on Johnson's OSHA [f]orm 200 by Eileen Zarling, [the Company]'s Occupational Health Nurse, but the notation was later removed [*i.e.*, lined out] when Nurse Zarling determined that [Ms.] Seif had been removed for prophylactic reasons and had never shown any physiological changes evidencing occupational illness. There [is] no dispute that [Ms.] Seif's name was removed from [*i.e.*, lined out upon] the OSHA [f]orm 200 more than six (6) months prior to the OSHA investigation.

OSHA first discovered the failure to record Ms. Seif's condition during its July 1989 investigation when Compliance Officer (CO) Dembrowski was provided with a copy of [the Company]'s medical records and the OSHA 200 [f]orm for 1989.

(Record citations omitted). The citation was issued within six months after the inspection. The problem, however, as the parties agree, is that the inspection itself occurred, and thus the citation was issued, more than six months after Johnson measured Ms. Seif's elevated blood lead levels and decided to delete the record of them from the OSHA form 200.

III. Whether the Statute of Limitation Barred the Citation

The overall purpose of the recordkeeping duty involved in this case is stated in 29 C.F.R. § 1904.1: "[F]or enforcement of the [A]ct, for developing information regarding the causes and prevention of occupational accidents and illnesses, and for maintaining a program

of collection, compilation, and analysis of occupational safety and health statistics.” At oral argument in this case, the Secretary summarized the overall purpose as follows: “To record in a coherent, easily comparable way occupational illness and injury.” The Secretary emphasized that the OSHA form 200’s “informational” content was utilized by the DOL and by “medical researchers,” as well as “the purpose for the employer to know what’s been going on in his plant from year to year.” The Secretary further noted that “employees themselves can derive a lot of information from the OSHA 200 Log in any individual plant and nationwide in the form of employee representatives comparing information.” Even the company admitted at oral argument that: “[I]t is to allow employees [or] union[s] to know the state of health in the plant, to know what the situation is, when there are injuries, when there are illnesses[,] and to act on them.”

Throughout the proceedings in this case, both parties have recognized that inaccuracies in employers’ records of occupational injuries and illnesses must be minimized, so as not to compromise the important goals that the records serve, and that the Secretary therefore must have a reasonable period of time in which to discover and cite any apparent recordkeeping violation. Johnson maintains, however, that the Secretary did not act promptly enough in this case to discover the alleged inaccuracy in the Company’s records cited here.

A. Johnson’s Argument That the Citation Was Barred by the Statute of Limitation

Johnson argues that the six-month limitation period begins to run at the original “occurrence” of an alleged recordkeeping violation. In general, Johnson indicates, the original “occurrence” would consist of an employer’s failure to record an illness after becoming aware of it. In this case, according to Johnson, the original “occurrence” took place in the autumn of 1988, when the Company’s doctor determined that Ms. Seif’s condition was not an illness and instructed the Company’s nurse to delete it from the OSHA form 200. This failure to record was a “discrete event,” as Johnson phrases it, that did not recur or continue to be enacted. Therefore, Johnson argues, there was no other “occurrence” of the alleged noncompliance within the six months of the citation, as required by section 9(c) of the Act. Johnson emphasizes that there must be an act of violation within the limitation period, not merely a continuation of a past “occurrence.” Johnson refers to a portion of the Commission’s opinion in *Sun Ship, Inc.*, 12 BNA OSHC 1185, 1984-85 CCH OSHD ¶ 27,175

(No. 80-3192, 1985) (“*Sun Ship*”), in which the Commission indicated that refusals to comply with a union representative’s requests for records were “alleged violations [that] occurred at specific times.” 12 BNA OSHC at 1186, 1984-85 CCH OSHD at p. 35,078.

Johnson acknowledges that, if an employer has taken measures to conceal an occurrence of a violation or has otherwise prevented the Secretary from discovering it, there may be a basis for suspending the commencement of the limitation period until the Secretary actually makes an inspection and discovers that a violation had occurred. Johnson refers to *Yelvington Welding Serv.*, 6 BNA OSHC 2013, 1978 CCH OSHD ¶ 23,092 (No. 15958, 1978) (“*Yelvington*”), a Commission decision upholding a citation for an employer’s failure to report a fatality to OSHA within 48 hours of its occurrence. Johnson points out that, unlike the employer in that case, it did nothing to conceal or prevent discovery of its deletion of the elevated blood lead level from the OSHA form 200. Johnson therefore believes that, in this case, there is no basis for suspending the commencement of the limitation period. It contends that the Secretary could have made an inspection at any time within six months of Johnson’s decision to delete the record of the elevated blood lead level, could have discovered the deleted record in due time, and could have issued a timely citation. In Johnson’s view, the Secretary should be held to a duty to make such inspections, if he wants to discover and enforce recordkeeping violations. Otherwise, Johnson argues:

[T]he policy of ‘giving stability to human affairs and [sparing] a person the burden of preparing a defense after evidence has been lost, memories have faded, or witnesses have departed or died’ sought to be fostered by the six-month limitation period, *Yelvington*, 6 BNA OSHC at 2016, [1978 CCH OSHD at p. 27,907,] is postponed indefinitely and ultimately held hostage to [the Secretary’s] discretion as to the allocation of resources to enforce the Act.

Therefore, Johnson rejects the view of the Commission in *Sun Ship* that section 9(c) “does not begin to run until OSHA discovers or reasonably should have discovered a violation.” *Sun Ship*, 12 BNA OSHC at 1186, 1984-85 CCH OSHD at p. 35,078; *see also Kaspar Wire Works, Inc.*, 13 BNA OSHC 1261, 1262, 1986-87 CCH OSHD ¶ 27,882, p. 36,554 (No. 85-1060, 1987) (“*Kaspar*”) (remand on whether a citation for failure to report machine injuries was timely under the discovery rule of *Sun Ship*). This discovery rule, Johnson asserts, cannot possibly be applied literally and without regard to whether the employer attempted

to conceal a violation, or section 9(c) will have no force whatsoever: "Presumably, violations occurring (and perhaps corrected) years earlier would still be subject to citation as long as the citation is issued within six months of OSHA's inspection."

B. The Secretary's Argument That the Citation Was Not Barred

The Secretary, relying on *Sun Ship* and *Kaspar*, maintains that his citation was timely because it was issued within six months of his reasonable discovery of the violation. The Secretary also infers this proposition from OSHA's recordkeeping regulations. He construes the requirement of the cited standard, 29 C.F.R. § 1904.2(a), that employers must "enter each recordable injury and illness on the log and summary as early as practicable but no later than 6 working days after receiving information that a recordable injury and illness has occurred," to mean that employers are required to correct inaccuracies in the records. In addition, the Secretary refers to 29 C.F.R. § 1904.7 and 29 U.S.C. § 657(c), both of which provide employees with access to records, and to 29 C.F.R. § 1904.6, which requires employers to retain the records for five years.² From these provisions, the Secretary reasons that Johnson's failure to record Ms. Seif's elevated blood lead level continued to exist as an unabated condition, violative of the cited regulation and contrary to the employer's overall duty to maintain accurate records available for examination. Therefore, the Secretary claims that Johnson may be cited for failure to record between the time it first decided to omit the recordkeeping entry and the time that the Secretary discovered the violation. In the Secretary's view, this case is similar to *Yelvington*, on which the Secretary placed considerable reliance at oral argument. The Secretary expresses particular concern that the employees who refer to their employer's OSHA form 200's not "receive a distorted picture of the risks they face" and that "their ability to take steps to protect themselves [not] be hindered." The Secretary emphasizes that these detriments would occur, and employers and medical researchers could receive a distorted view of occupational conditions, if he had no authority to require an employer to correct inaccuracies in records that have become more than six months old.

²29 C.F.R. § 1904.6, entitled "Retention of records," states that "[r]ecords provided for in §§ 1904.2, 1904.4, and 1904.5 (including form OSHA No. 200 and its predecessor forms OSHA No. 100 and OSHA No. 102) shall be retained in each establishment for 5 years following the end of the year to which they relate."

C. Analysis

The Commission has generally upheld the Secretary's authority to issue a citation for an unsafe condition that an OSHA compliance officer first discovers during an inspection made more than six months after the unsafe condition's creation or "occurrence." In a case of poor housekeeping, covered by an occupational safety and health standard in 29 C.F.R. Part 1910, the Commission rejected the employer's argument that a violation "occurs" at the time -- and only at the time -- that the unsafe conditions first come into existence. *Central of Georgia R.R.*, 5 BNA OSHC 1209, 1211, 1977-78 CCH OSHD ¶ 21,688, at p. 26,035 (No. 11742, 1977). The employer had argued that, inasmuch as "the conditions forming the basis of the citation . . . were admittedly in existence for *more* than six months prior to the issuance of the citation, the citation is unenforceable." The Commission replied:

For section 9(c) purposes, a violation of section 5(a)(2) of the Act "occurs" whenever an applicable occupational safety and health standard is not complied with and an employee has access to the resulting zone of danger. Therefore, it is of no moment that a violation *first* occurred more than six months before the issuance of a citation, so long as the instances of noncompliance and employee access providing the basis for the contested citation[] occurred within six months of the citation's issuance.

Just as a condition that does not comply with a standard issued under the Act violates the Act until it is abated, an inaccurate entry on an OSHA form 200 violates the Act until it is corrected, or until the 5-year retention requirement of section 1904.6 expires. Thus, a failure to record an occupational injury or illness as required by the Secretary's recordkeeping regulations set forth in 29 C.F.R. Part 1904 and promulgated pursuant to section 8 of the Act, 29 U.S.C. § 657, does not differ in substance from any other condition that must be abated pursuant to the occupational safety and health standards in 29 C.F.R. Part 1910 and promulgated pursuant to section 6 of the Act, 29 U.S.C. § 655. We therefore conclude that an uncorrected error or omission in an employer's OSHA-required injury records may be cited six months from the time the Secretary does discover, or reasonably should have discovered, the facts necessary to issue a citation.³

³As the parties argue, the Commission has already considered these issues in a recordkeeping context. The most recent case -- *Kaspar* -- concerned a reporting requirement set forth in an entirely different body of (continued...)

In the case now before us, the compliance officer duly discovered an instance of alleged noncompliance with an existing recordkeeping regulation, and OSHA duly issued the citation within six months of the discovery. The citation was, therefore, timely under section 9(c) of the Act.

IV. The Secretary's Interpretation of Illnesses

The cited regulation, 29 C.F.R. § 1904.2(a), *see supra* note 1, designates the matters that employers must record on the OSHA form 200 as “occupational injuries and illnesses.” The phrase is based on the Act, and the word “illnesses” is actually taken from the Act. Section 8(c)(1), 29 U.S.C. § 657(c)(1), one of the provisions of the Act pursuant to which the cited regulation was promulgated,⁴ states (in pertinent part): “Each employer shall make . . . such records regarding his activities relating to this Act as the Secretary . . . may prescribe by regulation as necessary or appropriate for the enforcement of this Act or for developing information regarding the causes and prevention of occupational accidents and *illnesses*.” (Emphasis added). Section 8(c)(2), 29 U.S.C. § 657(c)(2), another important source of the cited regulation, *see supra* note 4, states (in pertinent part): “The Secretary . . . shall prescribe regulations requiring employers to maintain accurate records of . . . work-related deaths, injuries and *illnesses* . . .” (Emphasis added). The meaning and scope of “illnesses” is the issue in this case.

The Secretary has formulated an interpretation of the word, and has issued the interpretation to employers. On the back of the OSHA form 200, where there are detailed

³(...continued)

standards, 29 C.F.R. Subpart O, governing machine guarding and requiring that employers report to OSHA any injuries caused by mechanical power presses. The two earlier cases -- *Yelvington* and *Sun Ship* -- concerned reporting issues arising out of the recordkeeping regulations involved in the case now before us, *i.e.*, those pertaining to “Reporting and Recording Occupational Injuries and Illnesses” in general. *Yelvington* was like *Kaspar*, involving a failure to present a report of a fatality as required by 29 C.F.R. § 1904.8. *Sun Ship* involved failures to disclose employee names and to produce the OSHA form 200 logs and summaries requested by a union pursuant to 29 C.F.R. § 1904.7. The evidence in *Sun Ship* revealed that the Secretary had not issued his citation within the six-month period after discovering the failures to disclose, which was why the Commission held the citation untimely in that one case.

⁴The Secretary’s recordkeeping regulations were promulgated pursuant to and “implement sections 8(c)(1), (2), 8(g)(2), and 24(a) and (e) of the Occupational Safety and Health Act of 1970.” 29 C.F.R. § 1904.1.

instructions (to which the cited standard refers, *see supra* note 1), the Secretary has defined "occupational illness" as "any abnormal condition or disorder" caused by work.⁵ The same definition appears in a publication created and disseminated in 1986 for OSHA by the DOL's Bureau of Labor Statistics ("BLS"), the "Recordkeeping Guidelines for Occupational Injuries and Illnesses" ("the BLS Guidelines").⁶ The BLS Guidelines further define an "abnormal condition or disorder" as an "atypical condition of the employee which may be of either a chemical, physical, or psychological nature." 1986 BLS Guidelines at 40. The OSHA form 200's instructions indicate that the duty to record an occupational illness arises when an illness is "diagnosed or recognized." The BLS Guidelines similarly state that "[o]ccupational illnesses must be diagnosed to be recordable." 1986 BLS Guidelines at 39. The BLS Guidelines further inform employers, in a question-and-answer format:

E-7. Q. What are the reporting requirements for test results which indicate an elevated blood-lead level?

A. Employers are required to conduct surveillance and monitoring tests for employees working with hazardous substances, such as lead. However, test results showing elevated blood-lead levels are not recordable unless the elevated blood-lead levels exceed 50 micrograms per 100 grams of whole blood.

⁵In full, the definition is as follows: "OCCUPATIONAL ILLNESS of an employee is any abnormal condition or disorder, other than one resulting from an occupational injury, caused by exposure to environmental factors associated with employment. It includes acute and chronic illnesses or diseases which may be caused by inhalation, absorption, ingestion, or direct contact."

⁶The edition that was in use when this case arose was issued in September 1986. The definition of "occupational illness" which we have quoted in this decision appears on pages 37 and 38 of that publication. Centered on the cover of the 1986 publication is the following notice:

ATTENTION: OSHA RECORDKEEPER

IMPORTANT: DO NOT DISCARD. This booklet contains guidelines for keeping the occupational injury and illness records necessary to fulfill your recordkeeping obligation under the Occupational Safety and Health Act of 1970 (29 USC 651) and 29 CFR 1904, or equivalent State law.

There is no evidence establishing that Johnson was aware of the 1986 BLS Guidelines prior to the citation in this case. On the face of the OSHA form 200 there is mention of the BLS, but not of the BLS Guidelines. Johnson does not, however, make any argument suggesting that the Company lacked notice of the guidelines. We infer, therefore, as we discuss later in this opinion, that Johnson was familiar with the 1986 BLS Guidelines.

On the other hand, employers are still required to record cases where the worker: (1) Has symptoms of lead poisoning, such as colic, nerve, or renal damage, anemia, and gum problems; or (2) [R]eceives medical treatment for lead poisoning or to lower blood-lead levels.

Employers may want to reference the OSHA lead standard 29 CFR § 1910.1025 for additional information.

1986 BLS Guidelines at 40-41. In sum, the Secretary argues that he has interpreted the statutory term “illnesses” to include “any abnormal condition” such as an elevated blood lead level.

A. Johnson’s Argument That Employers Need Not Record Elevated Blood Lead Levels

Johnson’s argument is two-fold. Its main thrust is that the meaning of “illnesses” is plain, and plainly different from what the Secretary argues is his interpretation. The secondary thrust of Johnson’s argument is that, assuming “illnesses” is an ambiguous term, the Secretary’s interpretation of it is unreasonable and not entitled to deference. In sum, Johnson finds no basis for accepting the Secretary’s interpretation.

Johnson’s argument that the meaning of “illnesses” is plain is founded on a belief that the term never denotes a mere “abnormal condition.” In Johnson’s opinion, an illness does not arise until an abnormal condition, such as an elevated blood lead level, actually causes such additional physiological change that a doctor would diagnose an illness. Johnson relies on the evidentiary record in this case showing, without dispute, that the Company’s doctor did not regard a lone elevated blood lead level as an illness. Johnson further relies on two Commission decisions: *Amoco Chem. Corp.*, 12 BNA OSHC 1849, 1853-54, 1986-87 CCH OSHD ¶ 27,621, p. 35,903 (No. 78-250, 1986) (“*Amoco*”) (employers are not required to record “conditions” that are not “illnesses”); *Schuylkill Metals Corp.*, 13 BNA OSHC 2174, 2177-78, 1987-90 CCH OSHD ¶ 28,520, p. 37,846 (No. 81-856, 1989) (an elevated blood lead level is a “medical condition,” or “an abnormal physiological change, that does not rise to the level of an illness” for the purposes of the medical removal provisions of the lead standard). Johnson also asserts that doctor-by-doctor, employer-by-employer determinations are mandated by the Secretary’s own statement that “illnesses” must be diagnosed, and that, in any enforcement proceeding against an employer for having failed to record an illness,

the Secretary has the burden to establish, with diagnostic evidence acceptable to physicians, that the employee in question was suffering from a diagnosed illness.

Johnson recognizes that, as a general proposition, the Secretary's interpretations of his own regulations can be entitled to deference in enforcement proceedings. *Martin v. OSHRC (C.F. & I. Steel Corp.)*, 111 S.Ct. 1171, 1179 (1991) ("*Martin*"). But Johnson distinguishes *Martin* on the basis that regulatory, not statutory, language is the issue there. Emphasizing that statutory language is involved here, Johnson asserts that "it is not [the Secretary] but the *Commission*, exercising its *judicial* role, which is empowered to render authoritative interpretations of the Act." (Emphasis in the original text.) Johnson recognizes that an interpretation is authoritative if it implements either the statute's plain meaning or, as Johnson puts it, "the *one* interpretation of the statute intended by Congress." See, e.g., *Sullivan v. Everhart*, 110 S.Ct. 960, 964 (1990); *Public Employees Retirement Sys. v. Betts*, 109 S.Ct. 2854, 2862-63 (1989); *Southern Community College v. Davis*, 442 U.S. 397, 411 (1979). However, Johnson believes that the Secretary's interpretation of "illnesses" not only deviates from the Act's plain meaning, but also usurps the authority that Congress gave the Commission to hear the diagnostic evidence and decide whether there are "illnesses" within the meaning of the Act. According to Johnson, the Secretary has no authority to eliminate the diagnosis requirement by decreeing that "any abnormal condition," including an elevated blood lead level, is an illness. In Johnson's view, Congress' choice of "illnesses" necessarily implies an individualized diagnosis from facts. Johnson therefore asks the Commission to exercise its authority to decide issues of fact and to refuse to defer to an interpretation that is not based on "any clinical manifestation of occupational illness."

Johnson next argues that, assuming the term "illnesses" is ambiguous, the Secretary's interpretation of it as "any abnormal condition," including an elevated blood lead level, is unreasonable and not entitled to deference, mainly because it is inconsistent with other pronouncements by the Secretary. Johnson points to some passages in the 1986 BLS Guidelines. One passage indicates that a job transfer resulting from several elevated readings is not required to be recorded. Johnson also points to language stating that a recordable illness is one that has been diagnosed as an illness. Johnson further claims that

it is being cited for violating a regulation whose language has not changed and that a failure to record an elevated blood lead level would not have been a violation under the Secretary's own interpretation ten years ago. In Johnson's view, "It can't be a reasonable interpretation if it changes over time."

Moreover, Johnson asserts, the interpretation is inconsistent with the lead standard, which does not make a lone elevated blood lead level a trigger for a job transfer. Instead, the lead standard requires an employer to "remove an employee from work having an exposure to lead at or above the action level on each occasion that the average of the last *three* blood sampling tests conducted pursuant to this section (or the average of all blood sampling tests conducted *over the previous six (6) months*, whichever is longer) indicates that the employee's blood lead level is at, or above[,] 50 $\mu\text{g}/100\text{ g}$ of whole blood" 29 C.F.R. § 1910.1025(k)(1)(i)(D) (emphasis added). Johnson infers from this language that the lead standard does not treat a lone elevated blood lead level as an illness, and argues that the lead standard's requirement for a job transfer after an averaged elevated blood lead level was intended to *prevent* the onset of occupational illness. See 43 Fed. Reg. 52976, 52977; see also 1986 BLS Guidelines at 30. Therefore, according to Johnson, the Secretary's recording requirement "simply cannot be the product of a reasoned medical analysis."

In addition, Johnson refers to an OSHA compliance program letter, issued in June 1980, that instructed OSHA compliance personnel that the lead standard does not specify a blood lead level limit for recording on the OSHA form 200.⁷ Johnson further objects that

⁷The full quotation from the compliance program letter that Johnson provides in the review brief is as follows:

The recordkeeping requirements for recording cases of (a) employees removed from exposure to lead due to elevated blood lead levels and (b) employees removed because they have symptoms of lead poisoning are separate from the OSHA occupational injury and illness recordkeeping system (OSHA 200 log) requirements. The Lead Standard does not specify a blood lead level limit for recording on the OSHA 200 Log. Medical removal cases of employees with symptoms of lead poisoning such as anemia and renal complications, or blood lead levels which the physician diagnosed as indicating illness continue to be entered in the OSHA 200 log. Only removals for prophylactic reasons continue to be not required to be entered in the OSHA 200 log.

In 1984, this instruction was canceled. See CCH Employment Safety & Health Guide, 1983-84 Transfer Binder, ¶ 8238. Furthermore, the instruction did not appear in OSHA's *Field Operations Manual* ("FOM") when it was revised for the 1989 edition.

the choice of 50 $\mu\text{g}/100\text{g}$ as the point at which there is an “abnormal condition” is irrational because any level that exceeds 15 $\mu\text{g}/100\text{g}$ is regarded by physicians as abnormal.

B. The Secretary’s Argument That Her Interpretation is Reasonable and Deserves Deference

The Secretary denies that “illnesses” has a plain meaning in the context of the Act. In fact, he contends that, in light of the multi-faceted and complex purposes of the Act, what constitutes a recordable illness is so complex an issue that the term requires careful definition by the DOL, the agency charged by Congress with the administration of the Act. The Secretary emphasizes that his definition of illness as “any abnormal condition” has remained substantially unchanged since he promulgated his recordkeeping requirements in 1973. He also points out that the BLS is an agency of the DOL having expertise in gathering statistics and that, as OSHA gained expertise in regulating hazardous substances to which employees are exposed, the BLS logically developed the requirement to record elevated blood lead levels. A 1978 BLS Publication (Report 412-3) to record elevated blood levels because there was no health standard at that time that required all employers to measure employee blood lead levels. Thus, complete and uniform statistics were not yet achievable. The Secretary points out that after he implemented the lead standard requiring employers to measure employee blood lead levels, he altered the BLS Publication, in 1986, to require the recording of elevated blood lead levels. Therefore, as the Secretary stated at oral argument, the two versions of the BLS Publication are “not inconsistent. One is an outgrowth of the other and was forecast by the other.”

The Secretary rejects Johnson’s view that whether an employer must record an elevated blood lead level depends on whether a physician diagnoses an associated illness; the Secretary asserts that he has authority to eliminate physician-by-physician variations in the statistics. He relies in particular on section 24(a) of the Act, 29 U.S.C. § 673(a), *see supra* note 4, which requires him to “develop and maintain an effective program of collection, compilation, and analysis of occupational safety and health statistics,” and to “compile accurate statistics on work injuries and illnesses, which shall include all disabling, serious, or significant injuries and illnesses” He also relies on section 8(c)(1) of the Act, which requires him to “prescribe by regulation systems for developing information regarding the causes and prevention of occupational accidents and illnesses.”

Therefore, addressing Johnson's arguments that a physiological change is not recordable unless a doctor diagnoses an illness, the Secretary counters that he has authority from the Act to specify what physiological conditions are recordable, as long as his definitions fall within a reasonable interpretation of "illnesses" as it is used in the Act. Pointing to a portion of the Act's legislative history that calls for "an effective[] statistical program to provide an accurate picture . . . of industrial injuries and illnesses," H.R. Rep. No. 1460, 91st Cong., 2d Sess. 20 (1970), *reprinted in* Senate Comm. on Labor and Public Welfare, 92d Cong., 1st Sess., *Legislative History of the Occupational Safety and Health Act of 1970*, at 996 (1971), the Secretary asserts that the term "illnesses" must not be construed so narrowly as to limit its application entirely to the later stages of illness. He contends that such a narrow construction would hinder or even defeat the Act's goal of generating complete and accurate statistics about the causes and stages of occupational illness. This goal is best served, the Secretary asserts, by permitting him to set uniform requirements for recordability. Once he has done so, the recordability of a physiological condition that is defined as abnormal is no longer subject to dispute -- an employer's evidence of a doctor's differing opinion is no longer relevant. As the Secretary put it during oral argument, given the "variety of nomenclature" that can be attached to the physiological effects of lead absorption, "[h]ow much simpler it is, and how much more sense it makes for an information-gathering program to say [that,] once there is an objective benchmark, 50 micrograms, you write it down and we can find out about it, and track it."

Turning to *Amoco* and *Schuylkill*, on which Johnson relies, the Secretary asks that they be reexamined in light of *Martin*. He contends that since the Supreme Court has held that the Secretary's reasonable interpretations deserve deference, Commission cases not looking to such interpretations are no longer reliable. In oral argument, the Secretary's attorney maintained that "the deference owing to the Secretary's interpretation is of the highest level," whether the interpretation concerns the Act or the regulations promulgated pursuant to it. See *Udall v. Tallman*, 380 U.S. 1, 16 (1965) ("*Tallman*").

C. *Analysis Based on the Act*

Where the particular language and the overall design and wording of a statute plainly express an intent of Congress, the regulations and interpretations that implement the statute must give effect to that plain intent. *See e.g., Sullivan v. Everhart*, 110 S.Ct. 960, 964 (1990) (citing cases). Also, respect is “due when the administrative practice at stake involves a contemporaneous construction of a statute by the [agency personnel] charged with the responsibility of setting its machinery in motion; of making its parts work efficiently and smoothly while they are yet untried and new.” *Power Reactor Development Co. v. Intl. Union of Electricians*, 367 U.S. 396, 408 (1960) (internal quotation marks omitted); *see also Tallman*, 380 U.S. at 16.

1. *The Meaning of “Illnesses”*

The Act makes use of the term “illnesses” without defining it, and neither party in this case has pointed to an authoritative source of definition. Authoritative dictionary definitions are, however, helpful for a start; from them we learn that, although the word generally denotes sickness or disease, it can encompass abnormal physiological conditions. The word “illness” denotes the “state of being ill; indisposition; sickness.” *The Random House Dictionary of the English Language, The Unabridged Edition*, 710 (1971). An “indisposition” includes “a slight illness,” and to indispose means “to put out of the proper condition for something; [to] make unfit,” or “to make ill, esp[ecially] slightly.” *Id.* at 725. And an “ill” is a “harm” or an “injury,” as well as a “disease” or an “ailment.” *Id.* at 709. To be “ill” is to be “of unsound physical or mental health.” *Id.* To be “ill” is to be not “in good health,” or “not up to an accepted standard.” *Webster’s Third New International Dictionary, Unabridged* 1126 (1986) (“*Webster’s*”).

In the Act, the various contexts in which the word “illnesses” is used provide guidance concerning the word’s scope. We discover that Congress was intent on “developing information regarding the causes and prevention of occupational accidents and illnesses.” 29 U.S.C. § 657(c)(1). Congress wanted the Secretary “to develop and maintain an effective program of collection, compilation, and analysis of occupational safety and health statistics. . . . on work injuries and illnesses which shall include all disabling, serious, or significant injuries and

illnesses 29 U.S.C. § 673(a). The records of “illnesses” must be “accurate.” 29 U.S.C. § 657(c)(2); 29 U.S.C. § 673(a). Congress intended that the records compiled pursuant to the Act be used in effective medical research to improve the safety and health of employees. 29 U.S.C. § 673(b); *see also*, 29 U.S.C. § 651(b)(5), (6) & (7); 29 U.S.C. § 657(c)(1) & (2). Congress sought to have researchers develop “innovative methods, techniques, and approaches for dealing with occupational safety and health problems,” along with “ways to discover latent diseases . . . [and the] causal connections between diseases and work in environmental conditions,” as well as “medical criteria which will assure insofar as practicable that no employee will suffer diminished health, functional capacity, or life expectancy as a result of his work experience[.]” 29 U.S.C. § 651(b)(5), (6) & (7). Thus, we glean from these statutory statements that Congress contemplated that the records to be compiled under the Act may include data necessary and useful for “innovative” research revealing “latent diseases” and their “causal connections” to exposures in the workplace.

The legislative history also corroborates the broad construction put forward by the Secretary. *See General Motors Corp., Inland Div.*, 8 BNA OSHC 2036, 2039-40, 1980 CCH OSHD ¶ 24,743, pp. 30,469-70 (No. 76-5033, 1980) (“[e]xamination of the legislative history . . . shows a clear congressional intent that this reporting requirement be interpreted broadly in order to develop information for future scientific use”). The Senate and the House both expressed the view that “full and accurate information is a fundamental precondition for” a worthwhile occupational safety and health program, to assure adequate “information on the incidence, nature, or causes of occupational . . . illnesses.” S. Rep. No. 1282, 91st Cong., 2nd Sess. 16-17 (1970), *Leg. Hist., supra*, at 156-57; H. Rep. No. 1291, 91st Cong., 2nd Sess. 30-31 (1970), *Leg. Hist., supra*, at 860-61. Both legislative bodies wanted to preclude “under-reporting”:

[S]ome work-related injuries or ailments may involve only a minimal loss of work time or perhaps none at all, and may not be of sufficient significance to the Government to require their being recorded or reported. However, the committee was also unwilling to adopt statutory language which in practice might result in under-reporting.

Id. Both legislative bodies also wanted the Secretary to “obtain complete data regarding the occurrence of illnesses . . . resulting from occupational exposure which may not be manifested until after the termination of such exposure.” *Id.*

We therefore must conclude that the Secretary can appropriately construe the word “illnesses,” as he did on the OSHA form 200 and the 1986 BLS Guidelines, to mean “any abnormal condition or disorder . . . caused by exposure to environmental factors.” This definition effectuates the intent of Congress that is implicit in the Act and explicit in the legislative history. The Secretary first articulated his definition when he began administering the Act, and the definition has never varied; inadequate notice to employers is not an issue. The Secretary’s interpretation is therefore reasonable.

As Johnson points out, the Commission has previously expressed the view that occupationally-related conditions are not “illnesses.” *Amoco*, 12 BNA OSHC at 1853-54, 1986-87 CCH OSHD ¶ 27,621, p. 35,903; *Schuylkill*, 13 BNA OSHC at 2177-78, 1987-90 CCH OSHD at p. 37,846. However, *Amoco* is distinguishable on the basis that it involved occupationally-related conditions that neither the employer, through its trained personnel, nor the Secretary, through interpretation, had recognized as “illnesses” within the meaning of sections 8(c)(1) and (2) of the Act. *Schuylkill* is distinguishable on the basis that it involved a standard, 29 C.F.R. § 1910.1025(k)(2)(ii), that does not require proof of a diagnosed illness. Of course, if *Amoco* and *Schuylkill* had articulated grounds for rejecting a broad interpretation of “abnormal condition” as inconsistent with the Act, or as unenforceably obscure or unreasonable in light of the Act, we could employ their reasoning. However, neither *Amoco* nor *Schuylkill* does so; in fact, from these decisions it appears that the parties in those cases did not present the Commission with any of the relevant interpretative documents, the references to the Act and the Act’s legislative history, and the informative arguments that we have in the case now before us. The Commission therefore did not have occasion to give full consideration to the meaning of “illnesses” as used by Congress in the Act. We therefore decline to apply *Amoco* and *Schuylkill* in this case.

At oral argument, Johnson agreed that the Secretary has authority to enact-- pursuant to the grant of authority contained in sections 8(c)(1) and (2) of the Act, referring

to “illnesses” -- a more detailed recordkeeping regulation relating to the OSHA form 200 that would specify the recording of elevated blood lead levels:

If the Secretary wants to gather information of every employee who has blood levels in excess of 50, the Secretary can do so. The records are required to be maintained by employers under the OSHA Lead Standard. The Secretary could adopt a new recordkeeping requirement saying [to] record elevated blood leads, but the Secretary hasn't done that here. The only standard adopted by the Secretary is the standard that says [to] record occupational illnesses.

Evidently, then, Johnson's sole objection to the Secretary's enforcement action relying on the existing regulation is that, somehow, *its* use of the general term “illnesses” operates to exclude elevated blood lead levels. As Johnson put it, during oral argument, employers should not be required to label as “illnesses” those physiological conditions -- such as elevated blood lead levels -- that physicians have not diagnosed as illnesses, because such labeling could unduly distort statistics on illnesses and unnecessarily alarm employees who refer to their employers' OSHA form 200's. We believe, however, that this argument ignores even the dictionary definition of “illnesses” and that Johnson has agreed that “illnesses” as used in the Act itself would authorize a regulation requiring the recording of abnormal conditions as “illnesses.”

2. Elevated Blood Lead Levels as Illnesses

Up to this point, we have not dealt with the Secretary's specific interpretation that elevated blood lead levels, at or above 50 $\mu\text{g}/100\text{g}$ of whole blood, constitute “illnesses” that employers must record on the OSHA form 200. This interpretation was published in the 1986 BLS Guidelines, which has on its cover a notice to employers that “this booklet contains guidelines for keeping the occupational injury and illness records necessary to fulfill your recordkeeping obligation under the Occupational Safety and Health Act of 1970.” *See supra* note 6. Evidently, Johnson had notice of the BLS Guidelines; Johnson has not argued otherwise, even though *Martin* explicitly makes deficient notice a factor in whether an agency's interpretation is unreasonable. 111 S.Ct. at 1178-79. Johnson effectively concedes, also, that an elevated blood lead level from occupational exposure constitutes an “abnormal condition.” However, Johnson believes that these particular abnormal conditions -- elevated

blood lead levels -- are not "illnesses," because each single elevated level is, by itself, no sure indicator of what Johnson regards as an illness. Instead, in Johnson's view, an illness must be diagnosed from the various symptoms that may have come into existence after the increase in blood lead. Johnson does not dispute that an elevated blood lead level can be a harbinger of disease, and Johnson agrees that it may be "a measure of the *potential* for contracting some lead-related illness," (emphasis in the original) but Johnson's position is that until a physician can or would diagnose a disease, there exists no illness to be recorded. Moreover, Johnson argues, several inconsistencies in the Secretary's interpretative materials pertaining to his lead standard and his recordkeeping regulation reveal that Johnson's analysis of the tenuous relationship of elevated blood lead levels to disease is correct, that the Secretary has recognized the tenuous relationship, and that the Secretary's interpretation given in the 1986 BLS Guidelines and in this case is unreasonable.

We turn therefore to what Johnson sees as inconsistencies. The principal inconsistency concerns job transfers -- the 1986 BLS Guidelines' omission of a requirement to record job transfers caused by a series of elevated blood lead levels, a prophylactic measure which the lead standard explicitly instituted to prevent illnesses. Johnson questions why the single elevated level at issue here can possibly be recordable as an illness when a job transfer resulting from lengthier lead exposure is not. We think that this question does not, however, take into account that medical researchers, individual employers and the industry as a whole, individual employees and their unions, as well as OSHA itself, could need to know each single elevated blood lead level, without needing to know about job transfers. A job transfer protects against illness in its later stages: "[I]ncapacitating illness and death represent one extreme of the spectrum of responses," according to the preamble to the lead standard, as the Secretary indicated during oral argument. 43 Fed. Reg. 52952, 52954 (1978). But lesser "physiological changes are precursors or sentinels of disease which should be prevented," and "physiological change of uncertain significance" and "pathophysiological change" are phases of the overall "disease process," which goes from "normal" through "physiological change of uncertain significance," "pathophysiological change," and "overt symptoms (morbidity)," to "mortality." *Id.*

Boundaries between categories overlap due to the variation of individual susceptibilities and exposures in the working population. OSHA believes that the standard adopted must prevent pathophysiologic changes from exposure to lead. Pathophysiologic changes indicate the occurrence of important health effects. Rather than revealing the beginnings of illness the standard must be selected to prevent an earlier point of measurable change in the state of health which is the first significant indicator of possibly more severe ill health in the future.

Id. See also 43 Fed. Reg. at 52,963 (effects of lead exposure that are irreversible are preceded by milder and apparently reversible effects). Furthermore, “the complex relationship between lead exposure and human response is still imperfectly understood,” *id.*, and the early symptoms of disease can be overlooked because many of the early symptoms are subjective and similar to symptoms of other health problems. See 43 Fed. Reg. at 52,955-57. Therefore, to enhance medical knowledge about the indisputable connection between elevated blood lead levels in the workplace and the onset of serious lead disease, the Secretary can assert his authority to gather those statistics that his expertise leads him to believe are reasonable and important, including each elevated blood lead level, but not job transfers. We therefore reject Johnson’s arguments that the way job transfers are treated in the lead standard and in the recordkeeping regulation reveals an inconsistency of interpretation regarding what exactly are “illnesses.”

We similarly reject Johnson’s arguments that OSHA’s earlier decision to direct employers to omit elevated blood lead levels from the OSHA form 200 is inconsistent with OSHA’s later decision to include the information. The 1978 BLS Report 412-3 did, in reality, plainly indicate that elevated blood lead levels could be recordable if the Secretary were to conclude that such records would be valuable:

[There is a] growing practice by employers to conduct surveillance and monitoring tests for employees working with hazardous substances, such as lead. . . . However, such tests do not now cover all exposed workers, so including their results would give a partial and confusing addition to present records. Therefore, cases identified only by test results should not now be included in the records. If testing becomes universal, possibly because of new regulations, it may be necessary to modify recordkeeping rules to include specified test results.

1978 BLS Report 412-3 at 118. This is not at all inconsistent with the 1986 BLS Guidelines that do actually “modify recordkeeping rules to include specified test results.”

Johnson also errs in relying on the compliance program letter (“CPL”) that OSHA issued on June 24, 1980, concerning the lead standard’s relationship to the recordkeeping requirements. *See supra* note 7 (and associated text). The lead standard had previously become effective on March 1, 1979, but the standard gave employers 180 days, until September 1, 1979, to come into compliance with the *initial* requirements for biological monitoring and medical examinations. *See* 29 C.F.R. § 1910.1025(p) & (r)(3) (referring to 29 C.F.R. § 1910.1025(j)). Also, on the date that the standard became effective -- March 1, 1979-- the United States Court of Appeals for the District of Columbia Circuit stayed portions of it, including the biological and medical provisions to which the 180-day grace period applied. *See United Steelworkers of America v. Marshall*, 647 F.2d 1189 (D.C. Cir. 1980), *cert. denied*, 453 U.S. 913, 1202 n.2, 1311 (1981). Therefore, when OSHA issued the CPL, the stay was in effect, the 180-day grace period had not even begun to run, and the covered employers were not yet required to begin testing for elevated blood lead levels. OSHA thus had to assume that industry-wide tests results were still unavailable and that only some employers were performing tests. In other words, in the language of 1978 BLS Report 412-13 which we quoted in the preceding paragraph, “including their results [on the OSHA form 200] would give a partial and confusing addition to present records.” It was accordingly appropriate for the 1980 CPL to direct the OSHA compliance personnel to take a position consistent with the 1978 BLS Report 412-3 (which was still in effect), and not require the recording of an elevated blood level.

The stay remained effective for some employers until July 1989. *See American Iron and Steel Inst. v. OSHA*, 939 F.2d 975, 978-79 (D.C. Cir. 1991). Thus, in 1986 when the Secretary revised the BLS Publications to include a recording requirement for elevated blood lead levels, OSHA had made considerable progress toward achieving uniform testing of elevated blood lead levels among the employers covered by the lead standard. We therefore see no inconsistency in OSHA’s approach or interpretation reflected in its 1984 cancellation of the 1980 CPL or in its deletion of the CPL from the edition of the FOM issued after the

1986 BLS Guidelines. *See supra* note 7. In sum, we see no inconsistency in OSHA's approach or interpretation.⁸

Johnson also questions how a flat requirement to record specified blood lead levels as "illnesses" can possibly square with the 1986 BLS Guidelines' instruction that "illnesses" are to be "diagnosed." We think, however, that Johnson is focusing excessively on the necessarily subjective element of some diagnoses, and thereby is failing to perceive the legitimate, overall point of the 1986 BLS Guidelines' instruction. There, it is stated:

Occupational illnesses must be diagnosed to be recordable. However, they do not necessarily have to be diagnosed by a physician or other medical personnel. Diagnosis may be by a physician, registered nurse, or a person who by training or experience is capable to make such a determination. Employers, employees, and others may be able to detect some illnesses, such as skin diseases or disorders, without the benefit of specialized medical training. However, a case more difficult to diagnose, such as silicosis, would require evaluation by properly trained medical personnel.

1986 BLS Guidelines at 39. Clearly, not all diagnoses made for the purposes of the 1986 BLS Guidelines will be so complex as to require a physician's judgment; some diagnoses will be relatively simple and straightforward, capable of being made after a brief examination. After all, as we have determined, "illnesses" can include "any abnormal condition." Moreover, a "diagnosis" is "the art or act of identifying a disease from its signs and symptoms." *Webster's* at 622. This certainly includes the act of discerning an employee's blood lead level by taking a blood sample and performing the appropriate analysis. A physician is not needed to perform these functions.


Also, as the Secretary particularly pointed out at oral argument, his choice of 50 $\mu\text{g}/100\text{g}$ as the threshold level for the recordability of elevated blood lead levels is reasonable in view of his findings for the lead standard. The Secretary found that 50 $\mu\text{g}/100\text{g}$ represents the level at which large percentages of the lead-exposed working population having

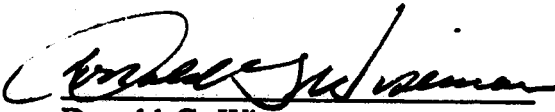
⁸Moreover, even if there were an inconsistency, we would assign it little weight where, as here, the employer is aware of OSHA's interpretation from the interpretive materials intended for employers. The *FOM* can certainly provide evidence for an interpretation, *see Davis Metal Stamping, Inc.*, 10 BNA OSHC 1741, 1744-45, 1982 CCH OSHD ¶ 26,134, pp. 32,898-99 (No. 78-5775, 1982), *aff'd on other grounds*, 800 F.2d 1351 (5th Cir. 1986), but the *FOM* does not ordinarily create rights or defenses for employers, *see, e.g., Consolidated Freightways Corp.*, 15 BNA OSHC 1317, 1323 n.10, 1991 CCH OSHD ¶ 29,500, p. 39,812 n.10 (No. 86-351, 1991), inasmuch as OSHA compiled the *FOM* as a guide for OSHA compliance personnel.

abnormal blood lead levels begin to exhibit the symptoms of detriment that can evolve into full-blown illness. These may include certain biochemical changes that are evidence of the body's extraordinary attempts to maintain stable heme synthesis before losing that stability. See 43 Fed. Reg. at 52,954-55, 52,963-67; see also 43 Fed. Reg. at 52957-60 (regarding neurological and reproductive effects). The Secretary asserts and, in light of the Act's provisions on statistics and recordkeeping, we are constrained to agree that he has authority to set explicit and comprehensive recording requirements designed to obtain accurate and beneficial statistics regarding the causes of occupational disease. As the Secretary states in his brief on review: "The broad applicability of the term 'illness' adopted in the BLS Guidelines serves this purpose by including health-related conditions which may not look like, or may not yet be, treatable illnesses." Accordingly, for the purposes of the Secretary's recordkeeping regulations promulgated pursuant to sections 8(c)(1) and (2) of the Act, we accept the Secretary's interpretation of "illnesses" that includes blood lead levels at or above 50 $\mu\text{g}/100\text{g}$.

V. Order

For the reasons set forth above, we affirm the judge's decision affirming the nonserious citation.


Edwin G. Foulke, Jr.
Chairman


Donald G. Wiseman
Commissioner

Dated: February 3, 1993

MONTOYA, Commissioner, concurring:

I join with the majority with respect to all issues except for the issue of the statute of limitations. With regard to that issue I concur, expressing the same reservations with respect to the discovery rule that I stated in my separate opinion in *General Dynamics Corp., Electric Boat Div., Quonset Point Facility*, No. 87-1195 (February 3, 1993).


Velma Montoya
Commissioner

Dated: February 3, 1993



UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1825 K STREET NW
4TH FLOOR
WASHINGTON, DC 20006-1246

FAX:
COM (202) 634-4008
FTS (202) 634-4008

SECRETARY OF LABOR,

Complainant,

v.

JOHNSON CONTROLS, INC.,

Respondent.

Docket No. 89-2614

NOTICE OF COMMISSION DECISION

The attached decision by the Occupational Safety and Health Review Commission was issued on **February 3, 1993**. **ANY PERSON ADVERSELY AFFECTED OR AGGRIEVED WHO WISHES TO OBTAIN REVIEW OF THIS DECISION MUST FILE A NOTICE OF APPEAL WITH THE APPROPRIATE FEDERAL COURT OF APPEALS WITHIN 60 DAYS OF THE DATE OF THIS DECISION.** See Section 11 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 660.

FOR THE COMMISSION

February 3, 1993
Date

Ray H. Darling, Jr.
Ray H. Darling, Jr.
Executive Secretary

Docket No. 89-2614

NOTICE IS GIVEN TO THE FOLLOWING:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, U.S. DOL
Room S4004
200 Constitution Ave., N.W.
Washington, D.C. 20210

John H. Secaras, Esq.
Regional Solicitor
Office of the Solicitor, U.S. DOL
Room 844
230 South Dearborn St.
Chicago, IL 60604

Stanley S. Jaspan, Esq.
Karl A. Dahlen, Esq.
Foley & Lardner
777 East Wisconsin Ave.
Milwaukee, WI 53202

James Barkley
Administrative Law Judge
Occupational Safety and Health
Review Commission
Room 250
1244 North Speer Boulevard
Denver, CO 80204-3582



UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1825 K STREET, N.W.
4TH FLOOR
WASHINGTON, D.C. 20006-1246
FAX 8/ (202) 634-4008
August 31, 1990

IN REFERENCE TO SECRETARY OF LABOR v.

Johnson Controls, Inc.

OSHRC
DOCKET NO. 89-2614

NOTICE IS GIVEN TO THOSE LISTED BELOW:

NOTICE OF DOCKETING

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, USDOL
200 Constitution Ave., N. W., Room S-4004
Washington, D. C. 20210

John H. Secaras, Regional Solicitor
Office of the Solicitor, USDOL
230 South Dearborn Street
Chicago, IL 60604

Stanley S. Jaspan, Esq.
Karl A. Dahlen, Esq.
Foley & Lardner
777 East Wisconsin Avenue
Milwaukee, WI 53202

Judge James H. Barkley
OSHRC
1244 N. Speer Blvd.
Room 250
Denver, CO 80204

Notice is given that the above case was docketed with the Commission on August 31, 1990. The decision of the Judge will become a final order of the Commission on October 1, 1990 unless a Commission member directs review of the decision on or before that date.

Petitions for discretionary review should be received on or before September 20, 1990 in order to permit sufficient time for their review. See Commission Rule 91, 29 C.F.R. sec. 2200.91. Under Rule 91(h) petitioning corporations must also file a declaration of parents, subsidiaries, and affiliates.

All pleadings or other documents that may be filed shall be addresses as follows:

Executive Secretary
Occupational Safety and Health
Review Commission
1825 K St., N.W., Room 401
Washington, D. C. 20006-1246

A copy of any petition for discretionary review must be served on the Counsel for Regional Trial Litigation, Office of the Solicitor, USDOL, 200 Constitution Ave., N.W., Room S4004, Washington, D. C. 20210. If a Direction for Review is filed the Counsel for Regional Trial Litigation will represent the Department of Labor.

FOR THE COMMISSION

Ray H. Darling, Jr.

Ray H. Darling, Jr.
Executive Secretary

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR,

Complainant,

v.

JOHNSON CONTROLS, INC.,

Respondent.

OSHRC DOCKET
NO. 89-2614

DECISION AND ORDER

Barkley, Judge:

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C. Section 651 et seq.; hereafter called the "Act").

Respondent, Johnson Controls, Inc., is an employer with a place of business at 900 Keefe Ave., Milwaukee, Wisconsin, where it is engaged in battery manufacturing.

Respondent admits it is engaged in a business affecting commerce and is an employer subject to the Act's requirements (Answer ¶2).

On July 12, 1989, the Occupational Safety and Health Administration (OSHA) commenced an inspection of respondent's (referred to variously as Johnson or respondent) workplace (Affidavit of Terrence Dembrowski). On July 27, 1989 respondent was issued an Other than serious citation without penalty

pursuant to the Act. By filing a timely notice of contest respondent brought this proceeding before the Occupational Safety and Health Review Commission (Commission) contesting the citation.

The parties have submitted cross-motions for Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. As there are no disputed issues of material fact, this matter is ready for decision.

Alleged Violation

Other than serious citation 1, item 1 states:

29 CFR 1904.2(a): The log and summary of occupational injuries and illnesses, (OSHA Form No. 200 or its equivalent), was not completed in the detail provided in the form and the instructions contained therein:

(a) Employee illness cases resulting from blood lead and results that exceed the criteria for medical removal are not recorded in the 200 log.

29 C.F.R. 1904.2(a) provides:

§1904.2 Log and summary of occupational injuries and illnesses.

(a) Each employer shall, except as provided in paragraph (b) of this section, (1) maintain in each establishment a log and summary of all recordable occupational injuries and illnesses for that establishment; and (2) enter each recordable injury and illness on the log and summary as early as practicable but no later than 6 working days after receiving information that a recordable injury or illness has occurred. For this purpose form OSHA No. 200 or an equivalent which is as readable and comprehensible to a person not familiar with it shall be used. The log and summary shall be completed in the detail provided in the form and instructions on form OSHA No. 200.

Facts

On September 14, 1988, as part of Johnson's regular medical surveillance program, Mae Seif, an operator on Johnson's small battery assembly line, supplied a blood sample which showed a blood lead level of 60 ug/100g of whole blood. On September 29, 1988, Ms. Seif's blood lead level was 65 ug/100g of whole blood. Johnson's medical personnel determined that Ms. Seif's position on the small assembly line exposed her to lead in excess of OSHA's "action level" of 30 ug/m³ of air. Ms. Seif was, therefore, transferred off the assembly line on October 11, 1988 pursuant to OSHA medical removal protection procedures at 29 C.F.R. §1910.1025. At no time did Ms. Seif demonstrate any sign of decreased heme synthesis or other physiological symptoms of lead-related illness aside from her elevated blood lead level. Normal blood levels for individuals with no occupational exposure to lead generally range from 7 ug/100g of whole blood to 15 ug/100g of whole blood (Affidavit of Dr. Charles W. Fishburn).

Seif's removal was noted on Johnson's OSHA Form 200 by Eileen Zarling, respondent's Occupational Health Nurse, but the notation was later removed when Nurse Zarling determined that Seif had been removed for prophylactic reasons and had never shown any physiological changes evidencing occupational illness. (Affidavit of Eileen E. Zarling). There appears to be no dispute that Seif's name was removed from the OSHA Form 200 more than six (6) months prior to the OSHA investigation.

OSHA first discovered the failure to record Ms. Seif's condition during its July 1989 investigation when Compliance Officer (CO) Dembrowski was provided with a copy of respondent's medical records and the OSHA 200 Form for 1989. (Affidavit of Terrance Dembrowski).

Issues

- I. Whether the citation is barred by the six month limitation period contained in §9(c) of the Act?
- II. Whether an elevated blood lead level of 50 ug/100g of whole blood constitutes a recordable occupational illness for purposes of OSHA Form 200?

Discussion

I. Respondent argues that since review of Johnson's medical records at any time after October, 1988 would have disclosed all the facts which support the July 27, 1989 citation, the §9(c) limitation period began to run at that point. Such a rule would, in effect, require the Secretary to review injury and illness records every 6 months to ensure compliance with the recording regulations or allow violations to fall by the wayside.

The Commission has refused to adopt such a requirement, holding instead that the limitation period begins to run only when OSHA discovers or reasonably should have discovered a violation. Kaspar Wire Works Inc., 13 BNA OSHC 1261, 1262 (No. 85-1060, 1987); Sun Ship, Inc., 12 BNA OSHC 1185, 1186 (No. 80-3192, 1985). As there were no earlier inspections

during which OSHA could have examined the records at issue, this judge finds that the 9(c) limitation period began to run upon the CO's receipt of Johnson's records.

The citation in this matter was timely issued and is not barred by §9(c) of the Act.

II. Respondent argues that Ms. Seif showed no symptoms of lead poisoning, other than an elevated blood lead level, and that in itself does not rise to the level of an "occupational illness."

The Secretary relies on the Bureau of Labor Statistics (BLS) 1986 Recordkeeping Guidelines for Occupational Injuries and Illnesses (Ex. D), which defines "occupational illness" as:

. . .any abnormal condition or disorder, other than one resulting from an occupational injury, caused by exposure to environmental factors associated with employment. It includes acute and chronic illnesses or diseases which may be caused by inhalation, absorption, ingestion, or direct contact.

The following question and answer portion from the same guidelines includes the instruction:

- E-7 Q. What are the reporting requirements for test results which indicate an elevated blood lead level?
- A. Employers are required to conduct surveillance and monitoring tests for employees working with hazardous substances, such as lead. However, test results showing elevated blood-lead levels are not recordable unless the elevated blood-lead levels exceed 50 micrograms per 100 grams of whole blood. . . . (p. 40-41)

The BLS Guidelines were issued pursuant to a grant of authority from the Secretary of Labor and constitute OSHA's official interpretation of the recordkeeping requirements of

§1904.2. See 36 Fed. Reg. 8754 (May 12, 1971); Preface to the BLS Guidelines. The interpretation of a standard by the promulgating agency is controlling unless "clearly erroneous or inconsistent with the regulation itself." Udall v. Tallman, 380 U.S. 1, at 16, 87 S.Ct. 792, at 801 (1965). The scope and purpose section of the recordkeeping regulations, §1904.1 states that records will be kept for "developing information regarding the causes and prevention of occupational accidents and illnesses, and for maintaining a program of collection, compilation, and analysis of occupational safety and health statistics." The Commission has found that the legislative history of the recordkeeping regulations show a clear congressional intent that the reporting requirements "be interpreted broadly in order to develop information for future scientific use." General Motors Corporation, Inland Division, 8 BNA OSHC 2036, 2040 (No. 76-5033, 1980).

This judge finds that the requirement that blood lead levels exceeding 50ug/100g of whole blood be recorded is not inconsistent with the stated purpose of the cited regulation. Tracking individuals with a common trait, i.e. high blood lead levels, is a valuable and recognized scientific technique which allows observation of later clinical developments. Moreover the 50ug/100g of whole blood level was adopted by the Secretary for removal purposes "based on evidence that exposure to lead must be maintained below this level to prevent material impairment of health or functional capacity to exposed employees."

43 FR 52952 (Nov. 14, 1978). The Secretary specifically found there, inter alia, that a significant portion of the population so exposed exhibited an inhibition of the enzymes delta aminolevulinic dehydrogenase (ALAD) and ferrochelatase, which leads to depressed heme synthesis. Id. It is only reasonable that the Secretary would select as a trigger point for recording the blood lead level that point found to be medically significant in the lead standard. It is clear that a blood lead level of 50ug/100g is an "abnormal condition caused by exposure to environmental factors associated with employment" and so meets the Secretary's definition of occupational illness.

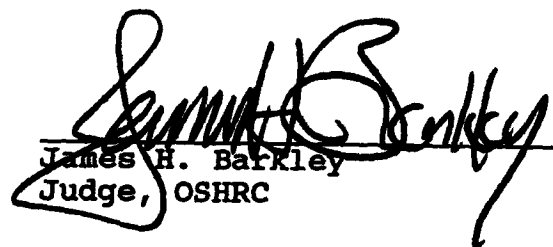
Findings of Fact and Conclusions of Law

All findings of fact and conclusions of law relevant and necessary to a determination of the contested issues have been found specially and appear in the decision above.

ORDER

Based upon the findings of fact and conclusions of law set forth herein it is ORDERED:

1. Other than serious Citation 1, item 1, is AFFIRMED without penalty.


James H. Barkley
Judge, OSHRC

Dated: August 21, 1990