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. THOMAS INDUSTRIAL COATINGS, INC., Respondent.	OSHRC Docket No. 97-1073

APPEARANCES:

Laura V. Fargas, Attorney; Daniel J. Mick, Counsel for Regional Trial Litigation; Donald G. Shalhoub, Deputy Associate Solicitor; Joseph M. Woodward, Associate Solicitor; Judith E. Kramer, Deputy Solicitor; U.S. Department of Labor, Washington, DC

For the Complainant

Julie A. Emmerich, Esq.; Pellegrini & Emmerich, P.C., St. Louis, MO

For the Respondent

DECISION

Before: THOMPSON, Chairman; ROGERS, Commissioner.

BY THE COMMISSION:

STATEMENT OF THE CASE

In May 1997, the Occupational Safety and Health Administration ("OSHA") issued a six-item citation to Thomas Industrial Coatings, Inc. ("Thomas") alleging that Thomas had violated the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act"), during a lead abatement project on a bridge in Arcola, Illinois. After a hearing, Administrative Law Judge Nancy J. Spies affirmed four citation items and vacated two citation items. Thomas sought review of the four affirmed citation items. For the reasons that follow, we affirm one item and vacate three items.

ISSUES

Under the four citation items before the Commission—Serious Citation 1, Items 1a, 1b, 2a and 2b—the Secretary alleges that Thomas violated the hygiene and medical surveillance provisions of the Lead in Construction Standard, 29 C.F.R. § 1926.62, by failing to provide adequate hand-washing facilities and initial medical surveillance to the two crew members assigned to the lead abatement project. The judge affirmed two of these items under the "interim protection" provisions of the lead standard (Items 1a and 2a), which are triggered by the type of work being performed in advance of an initial exposure assessment, and two items under the "general protection" provisions of the standard (Items 1b and 2b), which impose essentially the same obligations, but are triggered generally by air monitoring that shows employees are exposed to airborne concentrations of lead in excess of the standard's action level of 30 $\mu g/m^3$ averaged over an 8-hour period ("AL"). *See* 29 C.F.R. § 1926.62(d)(2), (j), (i).

The issues on review are whether the judge properly affirmed two separate violations for each cited condition (one under the interim protection provisions and one under the general provisions); whether Thomas provided a compliant hand-washing facility; and whether Thomas complied with its obligation to make timely biological monitoring available to its employees. For the following reasons, the judge erred in affirming two separate violations for each cited condition because at the time of the inspection the crew members were covered by the "interim protection" provisions, but not by the general provisions, of the lead standard. In addition, we affirm the judge's conclusion that Thomas failed to provide an adequate hand-washing facility. Finally, we reverse the judge's conclusion that Thomas failed to make biological monitoring available in a timely fashion.

FINDINGS OF FACT

Thomas is a lead paint removal company that annually works on approximately two dozen paint removal jobs overseen by the Illinois Department of Transportation. Thomas maintains a lead-protection program under which, according to Thomas, it makes biological monitoring for blood lead levels ("BLLs") and zinc protoporphyrin ("ZPP") levels available to all employees when initially hired and, at a minimum, every two months thereafter, unless more frequent tests are required because an employee's BLL has become elevated. According to Thomas, it notifies its employees orally and in writing when biological monitoring should be conducted, makes the monitoring available during working hours, and underwrites the expense.

Thomas maintains three portable hand-washing trailers for hygiene purposes, which it normally transports to jobs where its employees may be exposed to airborne concentrations of lead.

In April 1997, Thomas was retained by a construction contractor to remove lead paint from a bridge on Interstate Highway 57 in Illinois. Thomas assigned a two-man crew to the job, which began on April 7, 1997, and concluded two days later on April 9, 1997. To remove the lead paint, the crew members used angle grinders and pneumatic needle guns with dust collection systems. For protection, the crew members wore half-face respirators for which they had been fit-tested, and full-body Tyvek suits. At the time Thomas sent its crew to the worksite, none of its three hand-washing trailers was available. Instead, Thomas provided the crew with an "Igloo" water cooler. Moistened towellettes were also available at the site. There is no evidence that soap was provided.

During the course of the job, Thomas conducted air monitoring by sampling the exposures of both crew members on all three days. Results from the sampling, which Thomas did not receive until after the inspection, indicate that on April 7, 1997, one employee was exposed to airborne concentrations of lead in excess of the lead standard's permissible exposure limit of 50 $\mu g/m^3$ averaged over a time-weighted average ("PEL"), and on April 8, 1997, the other employee was exposed to airborne concentrations of lead in excess of the AL. In addition, one crew member underwent BLL testing on April 9, 2007. The other crew member underwent testing for BLL on April 11, 2007.

I. COVERAGE OF THE INTERIM PROTECTION PROVISIONS CITATION 1, ITEMS 1b AND 2b

PRINCIPLES OF LAW

The Lead in Construction standard provides for several different situations where the substantive protections of the lead standard are required, two of which concern us here. In the first situation, the standard requires that, "where lead containing coatings or paint are present," employers whose employees perform certain high-risk tasks—such as power tool cleaning with dust collection systems—are required to provide specific interim protection measures until the employer performs an employee exposure assessment and documents that the employees are not exposed to airborne concentrations of lead in excess of the PEL. *See* 29 C.F.R. § 1926.62(d)(2); *see also Bianchi Trison v. Chao*, 409 F.3d 196, 207 (3d Cir. 2005) (noting Lead in Construction Standard creates presumption that certain activities involve exposures to airborne concentrations

of lead in excess of the AL). In the second situation, the standard requires employers to make a number of protective measures available to employees exposed on any day to airborne concentrations of lead in excess of the AL. These measures include, but are not limited to, making available medical surveillance consisting of biological monitoring for BLLs and ZPP levels, and providing washing facilities to allow employees to remove contaminants. *See* 29 C.F.R. § 1926.62(j)(1)(i), (i)(5)(i); *Occupational Safety and Health Administration, Lead Exposure in Construction: Interim Final Rule*, 58 Fed. Reg. 26,590, 26,596 (May 4, 1993) ("Preamble").

ANALYSIS

We find that the two-man crew working on Thomas's lead abatement project was covered only by the interim provisions of the Lead in Construction Standard. At the time of the inspection, the crew members were using power tools—specifically, angle grinders and pneumatic needle guns—with dust collection systems to clean lead-content paint from the bridge. This activity triggered Thomas's obligation to comply with the interim protection provisions in advance of an initial exposure assessment. *See* 29 C.F.R. § 1926.62(d)(2). Because Thomas was still conducting air sampling and those results were not yet available, compliance with the general protection provisions was not required. The crew members were therefore covered by the interim protection provisions of the Lead in Construction Standard, but not the general protection provisions. Accordingly, we vacate Citation 1, Items 1b and 2b. We turn next to the interim hygiene allegation.

II. THE ALLEGED HYGIENE VIOLATION
CITATION 1, ITEM 1a

PRINCIPLES OF LAW

Under 29 C.F.R. § 1926.62(d)(2)(v)(D), an employer is required to provide "[h]and washing facilities in accordance with paragraph (i)(5) of this section." Paragraph (i)(5) of § 1926.62 in turn, requires employers to provide "adequate handwashing facilities for use by employees exposed to lead in accordance with 29 CFR 1926.51(f)." Paragraph (f)(1) of § 1926.51 provides:

> (f) *Washing facilities*. (1) The employer shall provide adequate washing facilities for employees engaged in the application of paints, coating, herbicides, or insecticides, or in other operations where contaminants may be harmful to the

> employees. Such facilities shall be in near proximity to the worksite and shall be so equipped as to enable employees to remove such substances.

29 C.F.R. § 1926.51(f)(1). Other provisions under 29 C.F.R. § 1926.51(f) contain specific requirements for certain types of washing facilities. One provision, applicable to "lavatories," provides:

> (3) *Lavatories.* (i) Lavatories shall be made available in all places of employment. The requirements of this subdivision do not apply to mobile crews or to normally unattended work locations if employees working at these locations have transportation readily available to nearby washing facilities which meet the other requirements of this paragraph.
>
> (ii) Each lavatory shall be provided with hot and cold running water, or tepid running water.
>
> (iii) Hand soap or similar cleansing agents shall be provided.
>
> (iv) Individual hand towels or sections thereof, of cloth or paper, warm air blowers or clean individual sections of continuous cloth toweling, convenient to the lavatories, shall be provided.

29 C.F.R. § 1926.51(f)(3).

Performance standards such as the provision contained in paragraph (f)(1) differ from the specification standard contained in paragraph (f)(3). Such standards require an employer to identify the hazards peculiar to its own workplace and determine the steps necessary to abate them. *See Lowe Constr. Co.*, 13 BNA OSHC 2182, 1987-1990 CCH OSHD ¶ 28,509 (No. 85-1388, 1989) (discussing differences between performance and specification standards); *see also Diebold, Inc*., 3 BNA OSHC 1897, 1975-1976 CCH OSHD ¶ 20,333 (Nos. 6767, 7721 & 9496, 1976), *rev'd on other grounds*, 585 F.2d 1327 (6th Cir. 1978). Because performance standards, such as § 1926.51(f)(1), do not identify specific obligations, they are interpreted in light of what is reasonable. *See, e.g.*, *Siemens Energy & Automation Inc*., 20 BNA OSHC 2197, 2198, 2005 CCH OSHD ¶ 32,880, p. 53,229 (No. 00-1052, 2005) (citing *W.G. Fairfield Co. v.* OSHRC, 285 F.3d 499, 507 (6th Cir. 2002) ("[G]eneral regulations are not . . . infirm . . . so long as a reasonableness requirement is read into them.")); *see also McGraw Constr. Co*., 15 BNA OSHC 2144, 2148, 1991-1993 CCH OSHD ¶ 29,947, p. 40,948 (No. 89-2220, 1993) (applying reasonable person test). An employer cannot, however, be held in violation of the Act if it fails to receive prior notice of what is required. *Miami Indus., Inc.*, 15 BNA OSHC 1258, 1261-62, 1991-1993 CCH OSHD ¶ 29,465, p. 39,741 (No. 88-671, 1991), *aff'd in part, set aside in part*, 983 F.2d 1067 (6th Cir. 1993) (table).

ANALYSIS

Applicability of 29 C.F.R. § 1926.51(f)(3)

The Secretary alleges a violation of § 1926.62(d)(2)(v)(D) based on her claim that the cooler Thomas provided its crew did not meet the specific requirements for lavatories set forth in 29 C.F.R. § 1926.51(f)(3). However, § 1926.62(d)(2)(v)(D) requires interim protection in accord with § 1926.62(i)(5) which, in turn, refers only generally to paragraph (f) of § 1926.51. Paragraph (f)(1) of § 1926.51, which addresses projects involving potential exposures to harmful contaminants, is the provision OSHA has consistently identified as applying to non-permanent construction worksites, such as the worksite at issue here, that are covered by the Lead in Construction Standard. *See* OSHA Instruction CPL 2-2.58—*29 CFR 1926.62*, *Lead Exposure in Construction; Interim Final Rule—Inspection and Compliance Procedures* (Dec. 13, 1993) (quoting the performance-based language of paragraph (f)(1) of § 1926.51 for the purpose of determining whether a violation under the Lead in Construction Standard exists); *see also* Standard Interpretations 02/10/1994—*Application of 29 CFR § 1926.51(f)*, U.S. Dep't of Labor (Feb. 10, 1994) (stating that "paragraphs 1926.51(f)(2) through 1926.51(f)(4) only apply to permanent places of employment" and that "[t]he general scope statement [1910.131(a)(1)] limiting the application of these [hygiene] provisions was inadvertently omitted in the . . . Federal Register publication.").[1]

Given OSHA's pronouncements on the matter, we find that Thomas could not have been sufficiently apprised that its duty to comply with § 1926.51(i)(5)(i) required compliance with the lavatory provisions of § 1926.51(f)(3).[2] *See Oberdorfer Indus., Inc.*, 20 BNA OSHC 1321, 1328-29, 2002-2004 CCH OSHD ¶ 32,697, pp. 51,643-44 (Nos. 97-0469 & 97-0470, 2003) (finding employer lacked fair notice of its obligations where the Secretary's interpretation was inconsistent with prior clarification letters). We therefore consider whether the hand-washing facilities at issue were adequate under the performance language of § 1926.51(f)(1).

[1] We note that OSHA has reiterated this position in its most recent pronouncement on the matter. *See* Standard Interpretations 07/20/2005—*Requirements for Washing Facilities on Construction Jobsites Under 29 CFR 1926.51(f)(1)*, U.S. Dep't of Labor (July 20, 2005).

[2] Given this conclusion, we need not determine whether, absent lack of fair notice, paragraph (f)(3) would otherwise apply here.

Adequacy of Hand-washing Facilities Under 29 C.F.R. § 1926.51(f)(1)

The record is somewhat close regarding the adequacy of the hand-washing materials provided by Thomas to its crew at the worksite. The more reasonable inference from all the circumstances of the placement of the cooler in the back of the pickup truck, as depicted in exhibit C-5, is that employees washed their hands by dipping them into the cooler rather than pouring water from the cooler onto their hands. *See CF&T Available Concrete Pumping, Inc.*, 15 BNA OSHC 2195, 2198, 1991-1993 CCH OSHD ¶ 29,944, p. 40,938 (No. 90-329, 1993) (Commission may make findings based on reasonable inferences from evidence). Under the first, more likely, scenario, there would be a violation of the requirements of the standard that "facilities . . . shall be so equipped as to enable employees to remove" lead, due to the high risk of lead recontamination from *ad seriatim* dipping, as the OSHA compliance officer explained. The second scenario is less obviously violative, but is unlikely to be an adequate means of removing lead, given the limited capacity of the cooler and the probability of recontamination due to the apparent need to tip the cooler with unwashed hands to pour water. Indeed, Thomas failed to rebut the more likely inference of hand dipping when its safety manager testified he did not know how employees were using the cooler. However, he went on to concede that use of the cooler was "not the work procedures that we would want to do on an every-day basis." Given this concession, given the fact that Thomas's own safety program contemplated hand-washing facilities "equipped with running water, cleansing agents and towels," and given Thomas's own practice of providing portable hand-washing facilities that contain water-storage tanks, outlets, and holding tanks, a reasonable person in Thomas's position would not rely on the cooler as "adequate" under this performance standard. *See Siemens Energy & Automation Inc*., 20 BNA OSHC at 2198 n.5, 2005 CCH OSHD at p. 53,229 n.5 (evidence of efforts to protect employees corroborates testimony that employer's inspection procedures were not adequate). *See also Brock v. City Oil Well Serv. Co.*, 795 F.2d 507, 510 (5th Cir. 1986) ("We do not check our common sense at the courthouse door."); *Nat'l Indus. Constructors, Inc. v. OSHRC*, 583 F.2d 1048, 1055 (8th Cir. 1978) (regulations should be given reasonable, commonsense interpretation). Under these circumstances, we find that Thomas failed to provide hand-washing

facilities that were adequate for this job in accordance with § 1926.51(f)(1).[3] Accordingly, we affirm Citation 1, Item 1a.

Characterization and Penalty

Under longstanding Commission precedent, "a serious violation is established if an accident is possible and there is a substantial probability that death or serious physical harm could result from that accident." *Consol. Freightways Corp*., 15 BNA OSHC 1317, 1324, 1991-1993 CCH OSHD ¶ 29,500, p. 39,813 (No. 86-351, 1991) (citation omitted). The judge characterized the hand-washing item as serious because "Thomas's failure to provide adequate hand washing facilities exposed [the crew members] to the possible ingestion of lead," and "[l]ead is unquestionably a harmful substance which can cause life-threatening disease." In its brief, Thomas argues that the judge erred because the exposures shown in this case posed no substantial probability of death or serious physical harm.

We need not and do not resolve this dispute. Resolving the characterization of this item will not "affect the abatement requirements or penalty here, and none of the parties' rights will be adversely affected." *See Foster-Wheeler Constructors Inc*., 16 BNA OSHC 1344, 1349, 1993-1995 CCH OSHD ¶ 30,183, p. 41,526 (No. 89-287, 1993); *Gen. Motors Corp., Electro-Motive Div*., 14 BNA OSHC 2064, 2071, 1991-1993 CCH OSHD ¶ 29,240, p. 39,171 (Nos. 82-630, 84-781 & 84-816, 1991). We accordingly exercise our discretion not to decide whether Thomas's violation of § 1926.62(d)(2)(v)(D) was serious, and we instead affirm the item as an unclassified violation. The judge assessed a total penalty of $600 for this item. On review,

[3] In reaching this conclusion, we have given little credit to the opinion of Thomas's expert that the water cooler met the requirements of the hygiene standard because he failed to provide any detailed explanation of or support for his opinion, which was speculative and conclusory in nature.

Additionally, we note that the construction site had moist towellettes available, however, OSHA has previously expressed skepticism, in the context of the Field Sanitation rulemaking, about the ability of moist towellettes to remove toxic chemical residues. *Occupational Safety and Health Administration, Field Sanitation: Final Rule*, 52 Fed. Reg. 16,050, 16,091 (May 1, 1987). *See also* Standard Interpretations 07/20/2005—*Requirements for Washing Facilities on Construction Jobsites Under 29 CFR 1926.51(f)(1)*, U.S. Dep't of Labor (July 20, 2005), an interpretation letter subsequent to the inspection here, which cites the Field Sanitation preamble in concluding that washing facilities "would not be 'adequate' [for the purposes of 1926.51(f)(1)] unless they included soap and potable water."

neither party contests the penalty amount. Accordingly, we find that $600 is an appropriate penalty for the reasons stated in the judge's decision.

III. THE ALLEGED BIOLOGICAL MONITORING VIOLATION CITATION 1, ITEM 2a

PRINCIPLES OF LAW

The interim provisions of the Lead in Construction Standard require employers to make available initial medical surveillance, consisting of biological monitoring for BLLs and ZPP levels, to all employees performing certain jobs. Specifically, § 1926.62(d)(2)(v)(E) requires an employer to provide "[b]iological monitoring in accordance with paragraph (j)(1)(i) of this section, to consist of blood sampling and analysis for lead and zinc protoporphyrin levels." Section 1926.62(j)(1)(i) in turn provides:

> The employer shall make available initial medical surveillance to employees occupationally exposed on any day to lead at or above the action level. Initial medical surveillance consists of biological monitoring for lead in the form of blood sampling and analysis for lead and zinc protoporphyrin levels.

29 C.F.R. 1926.62(j)(1)(i). In its Directive on the Lead in Construction Standard, OSHA recommends that initial medical surveillance be provided prior to the commencement of the job, or "reasonably promptly" after an employee has had an exposure. OSHA Instruction CPL 2-2.58—*29 CFR 1926.62, Lead Exposure in Construction; Interim Final Rule—Inspection and Compliance Procedures* (Dec. 13, 1993). In identifying what it considers "reasonably promptly," OSHA has identified "48 hours [as] an appropriate measure." *Id*.

It is important to note that the use of the words "make available" in the cited provision, together with the standard's legislative history, make it clear that although an employer must pay for and make the testing available at a reasonable time and place, the employer cannot compel its employees to undergo testing. *See* Preamble, 58 Fed. Reg. at 26,603 (noting that an employer's obligation under the standard is satisfied by making the medical surveillance available under the supervision of a licensed physician, without cost to the employee, at a reasonable time and place). *See also* 29 C.F.R. § 1926.62 app. B, sec. VIII—Medical Surveillance—Paragraph (J) (informing employees that "[t]he standard does not require that [they] participate in any of the medical procedures, tests, etc., which [their] employer is required to make available.")

ANALYSIS

The Secretary argues that Thomas failed to make the required biological monitoring available in a timely fashion because blood sampling was not conducted either immediately prior to, or at the initiation of the job. However, because an employer is obligated only to "make" the tests "available," the absence of a blood sampling report under the circumstances here does not establish a violation of the cited provision.

The record shows that Thomas generally made medical surveillance available at the time each employee was hired and then, at a minimum, every two-months thereafter. Specifically, one crew member underwent blood sampling in November and the other underwent blood sampling in December, and the BLL notices Thomas delivered to these employees directed each to return for sampling on a certain schedule. One of the crew members was provided and underwent sampling on the last day of this three-day project, apparently within the 48-hour limit proposed by the Secretary. The other crew member was not actually tested until two days later. However, that employee had previously failed to respond to two earlier notices the previous November that he needed to be retested. Given that fact, given the fact that the testing was made available to the first employee in an apparently timely manner, given the lack of testimony from the second employee, and given that the record appears silent on when the testing was *made available* to that second employee, we cannot say from this record that the Secretary has proven that Thomas did not make the required testing available in a timely fashion.

CONCLUSION

Based on the above analysis, we conclude that the obligations of the interim protection provisions of the Lead in Construction Standard covered the cited conditions, and the Secretary established a violation of § 1926.62(d)(2)(v)(D) based on Thomas's failure to provide an adequate hand-washing facility. We affirm the hand-washing item as an unclassified violation, and affirm the $600 penalty assessed by the judge. Finally, we conclude that the Secretary failed to establish a violation of the interim medical surveillance provision of the lead standard.

ORDER

For all of the foregoing reasons, we vacate Citation 1, Items 1b, 2a, and 2b. We affirm Citation 1, Item 1a, as an unclassified violation, and assess a penalty of $600.

SO ORDERED.

_/s/_____
Horace A. Thompson III
Chairman

_/s/_____
Thomasina V. Rogers
Commissioner

Dated: November 1, 2007

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Secretary of Labor, *
Complainant, *
*
v. * OSHRC Docket No. **97-1073**
*
Thomas Industrial Coatings, Inc., *
Respondent. *
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Appearances:

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For Respondent

Before: Administrative Law Judge Nancy J. Spies

DECISION AND ORDER

Thomas Industrial Coatings, Inc., contests a citation issued to it by the Secretary on May 30, 1997. The citation contains items 1 through 3b, which allege six separate violations of the lead standard, § 1926.62. The Secretary issued the citation upon the recommendation of Occupational Safety and Health Administration (OSHA) compliance officer Howard Edwards, who conducted an inspection of Thomas's worksite on a highway overpass near Arcola, Illinois, on April 8, 1997. The citation alleges that Thomas failed to comply with sections of the lead standard pertaining to hand washing facilities, biological monitoring, and medical surveillance. Thomas contests the citation and proposed penalties. Thomas raised the affirmative defense of unpreventable employee misconduct prior to the December 1, 1997, hearing in this matter, but did not address that defense at the hearing or in its post-hearing brief. The defense is deemed abandoned.

Background

The Illinois Department of Transportation (IDOT) hired Halverson Construction Company to raise the Galton Road overpass bridge approximately 8 inches. In order to elevate the bridge, Halverson was required to cut through the 28 bearings supporting the overpass (Tr. 29). Halverson took paint samples from the bridge and had them analyzed. The lab report of the analysis of the paint samples indicated that the paint on the overpass bridge contained 31 per cent

lead (Exh. C-1).

Halverson hired Thomas to remove the leaded paint from the areas on the bearings where Halverson was planning to make the cuts. Pursuant to a settlement agreement that Halverson had entered into previously with the Secretary, Halverson notified the Secretary on March 27, 1997, that it was beginning a project which had the potential to expose its employees to lead (Exh. C-1; Tr. 24-25). OSHA assigned Edwards to inspect the worksite.

Thomas began the paint removal on April 7, 1997, using pneumatic needle guns and angle grinders. Edwards arrived at the site on April 8 and observed two Thomas employees, foreman James Bingham and Nathan Bradshaw, on a scaffold removing paint from the bearings (Tr. 29, 35). The employees were wearing Tyvek coveralls and half-mask cartridge respirators (Tr. 29). Edwards held an opening conference with Bingham, videotaped the worksite, and interviewed the employees.

The Citation

Item 1a: Alleged Serious Violation of § 1926.62(d)(2)(v)(D)

The Secretary alleges that Thomas failed to have adequate hand washing facilities at the worksite, in violation of § 1926.62(d)(2)(v)(D). That section provides:

> (v) Until the employer performs an employee exposure assessment as required under paragraph (d) of this section and determines actual employee exposure, the employer shall provide to employees performing the tasks described in paragraphs (d)(2)(i), (d)(2)(ii), (d)(2)(iii), and (d)(2)(iv) of this section with interim protection as follows:
> . . .
> (D) Hand washing facilities in accordance with paragraph (i)(5) of this section.

It initially must be determined whether §1926.62(d)(2)(v) applies to the cited conditions. Applicability of the cited standard is the first element of the Secretary's burden of proof, along with noncompliance, employee exposure, and employer knowledge. *Atlantic Battery Co.,* 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

The lead standard applies to "all construction work where an employee may be occupationally exposed to lead," including "[r]emoval or encapsulation of materials containing lead." § 1926.62(a)(2). Thomas does not dispute that its work on the Galton Road overpass is covered by the lead standard. Thomas also does not dispute that its employees were performing tasks described in paragraph (d)(2)(i)(A), which covers tasks:

> Where lead containing coatings or paint are present: Manual demolition of structures (e.g., dry wall), manual scraping, manual sanding, heat gun applications, and power tool cleaning with dust collection systems.

Paragraph (d) of the lead standard addresses "Exposure assessment," and requires the employer to determine if any employee is exposed to lead above the action level without regard to the use of a respirator. In making this determination, § 1926.62(d)(3)(iii) allows the employer to rely on data "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 lead standard requires hand washing facilities as an interim measure until the employee exposure assessment is complete. Thomas contends that it had completed its employee exposure assessment prior to beginning work on the Galton Road overpass. Thomas relied on data obtained from three prior projects whose conditions Thomas claims closely resembled those of the overpass (Exhs. C-11, R-3).

The testimony of Thomas's two witnesses, however, failed to establish that the workplace conditions of its previous projects closely resembled those of the Galton Road overpass. Adam Neier is Thomas's safety and environmental manager (Tr. 166). Neier testified that he had visited the previous projects, which involved lead paint removal from overpasses for IDOT. In each instance, Thomas used vacuum shrouded power tools to remove the paint (Tr. 178). There was no proof that the paint that was removed on the various projects was of the same type or that it contained the same concentrations of lead. Neier assumed that the paint on all of the projects was the same because he assumed that IDOT always used the same paint (Tr. 178-180). Neier could give no basis for this assumption, however, and Thomas provided no evidence that this was so.

When asked if the procedures to remove the paint were the same on each of the projects, John Jurgiel, an industrial hygiene consultant, responded, "I presume so" (Tr. 241). When asked if the work practices and procedures on the projects were similar, Jurgiel replied, "They should have been" (Tr. 242). Neither Jurgiel nor Neier knew whether the environmental conditions were similar on the various projects (Tr. 182-183, 243-244).

The record does not establish that Thomas had made an initial determination of employee

exposure using previously obtained data. Thomas's witnesses relied on speculation and conjecture when describing the conditions on the previous projects. The workplace conditions of the previous projects were not shown to closely resemble the conditions of the Galton Bridge overpass.

Section 1926.62(d)(2)(v)(D) thus requires Thomas to provide its employees with interim protection, including "hand washing facilities in accordance with paragraph (i)(5) of this section." That section requires employers to "provide adequate handwashing facilities for use by the employees exposed to lead in accordance with 29 CFR 1926.51(f)." Section 1926.51(f) provides in pertinent part:

> (3)(i) Lavatories shall be made available in all places of employment. The requirements of this subdivision do not apply to mobile crews or to normally unattended work locations if employees working at these locations have transportation readily available to nearby washing facilities which meet the other requirements of this paragraph.
>
> (ii) Each lavatory shall be provided with hot and cold running water, or tepid running water.

"Lavatory" is defined in the *American Heritage Dictionary* (Second College Ed.) as "A basin or bowl, esp. one permanently installed with running water for washing."

Thomas states that it provided a water cooler for its employees at the site to use as a hand washing facility (Exh. C-5; Tr. 43-44). Neier, Thomas's safety manager, testified that Thomas had three portable hand washing facilities in use at other worksites at the time that Bingham and Bradshaw were provided with the water cooler (Exh. C-8). Neier stated that the use of the water cooler as a hand washing facility "was a fix to a very short-term project that [Thomas] had little notice on" (Tr. 186). Neier conceded that the use of the water cooler is "not the work procedures that we would want to do on an every-day basis" (Tr. 205), but he believed that the use of the cooler met the requirements of the standard (Tr. 187-188).

Thomas is incorrect. Section 1926.51(f)(3) specifies that the hand washing facility must be a lavatory with running water. Thomas attempted to argue that the water would be "running water" within the meaning of the standard if the water from the cooler was poured over the employee's hands. Running water does not mean water poured from a container. The use of the word "lavatory" demonstrates that the standard intends that a sink or basin be available, and the

standard also requires running water. If the cooler is used as a basin in which employees dip their hands, there is no running water. (And the water would be contaminated after the first hand washing of the day.) If the water is poured over their hands, there is no basin. Thomas failed to meet the terms of § 1926.62(d)(2)(v)(D).

Thomas also contends that its work at the Galton Bridge overpass met the exception in § 1926.51(f)(3) which states that the standard does not apply to "mobile crews or to normally unattended work locations if employees working at these locations have transportation readily available to nearby washing facilities." Thomas argues that the employees had a vehicle at their disposal and that the employees could have used it to drive to a "nearby washing facility," presumably a rest room in a gas station or restaurant. Again, this is speculation. It is Thomas's burden to prove that it meets an exception to the application of the standard. "A party seeking the benefit of an exception to a legal requirement has the burden of proof to show that it qualifies for that exception." *C.J. Hughes Construction, Inc.,* 17 BNA OSHC 1753, 1756 (No. 93-3177, 1996). The record does not establish the distance to the closest washing facility. Without this information, no determination can be made of whether the facility is "nearby."

Neier admitted that he knew of and approved the use of the water cooler as a hand washing facility (Tr. 198). Bingham, the foreman on the site, was aware of its use, and showed Edwards the cooler when Edwards asked about hand washing facilities. The Secretary has established that Thomas violated § 1926.62(d)(2)(v)(D). Thomas's failure to provide adequate hand washing facilities exposed Bingham and Bradshaw to the possible ingestion of lead (Tr. 85). The violation was serious.

Item 1b: Alleged Serious Violation of § 1926.62(i)(5)(i)

The Secretary charged Thomas with failing to provide adequate hand washing facilities, apart from their necessity as interim protection. Section 1926.51(f), which is referenced in the cited standard, requires that the hand washing facilities be provided where employees are engaged in operations "where contaminants may be harmful to the employees," and that the facilities be "so equipped as to enable employees to remove such substances."

Thomas contends that the cited standard does not apply because the Secretary did not establish that Thomas's employees were exposed above the permissible exposure limit (PEL) for lead at the site, and thus there was no potential for harmful exposure to the employees. The

standard does not require the contaminants to be at a certain level, only that they "may be harmful." *See McGraw Construction Co.,* 15 BNA OSHC 2144 (No. 89-2220, 1993). Lead is unquestionably a harmful substance which can cause life-threatening diseases.

The Secretary has established that Thomas was in serious violation of § 1926.62(i)(5)(i).

Item 2a: Alleged Serious Violation of § 1926.62(d)(2)(v)(E)

The Secretary alleges that Thomas violated § 1926.62(d)(2)(v)(E), which requires interim protection in the form of "[b]iological monitoring in accordance with paragraph (j)(1)(i) of this section, to consist of blood sampling and analysis for lead and zinc protoporphyrin levels." Section (j)(1)(i) provides:

> The employer shall make available initial medical surveillance to employees occupationally exposed on any day to lead at or above the action level. Initial medical surveillance consists of biological monitoring in the form of blood sampling and analysis for lead and zinc protoporphyrin levels.

Edwards testified that Thomas had not completed the exposure assessment on April 8 and that Thomas did not make available blood sampling analysis for lead and zinc protoporphyrin (ZPP) levels (Tr. 96-97). Thomas does not dispute that it had not made available blood sampling analysis at the time of Edwards's inspection, but argues that the standard does not require that biological monitoring be done while the employees are on the worksite. According to Thomas, the standard requires only that biological monitoring take place at some point prior to the completion of the employee exposure assessment.

Thomas's employees worked at the Galton Road site for three days (Tr. 186). The employee exposure assessment was not completed before the paint removal project was. Under Thomas's interpretation of the standard, Thomas had no duty under the standard to provide blood sampling while its employees were actually on the job. This approach offers no interim protection to the employees. Thomas's argument is rejected.

The Secretary has established that Thomas failed to make available initial medical surveillance for lead and ZPP levels in the blood. Thomas is in serious violation of § 1926.62(d)(2)(v)(E).

Item 2b: Alleged Serious Violation of § 1926.62(j)(1)(i)

The Secretary alleges that Thomas committed a serious violation of § 1926.62(j)(1)(i) by

failing to make available initial medical surveillance to its employees, apart from its necessity as interim protection.

The action level for lead is 30 micrograms per cubic meter, averaged over an 8-hour day (Tr. 99). Air sampling done by KTA/SET Environmental for Thomas on April 7, 1997, resulted in a reading above the action level for lead. Either Bingham or Bradshaw (it is unknown which one) showed an 8-hour time-weighted-average (TWA) for lead exposure of 54.17 micrograms per cubic meter (Exh. C-12; Tr. 98-99).

Thomas first argues that it was not required to make initial medical surveillance available to Bingham and Bradshaw because they had a history of prior biological monitoring. This argument is rejected. The plain meaning of the cited standard does not give rise to such an interpretation.

Thomas next argues that it did not know that one of its employees was exposed to lead above the action level until it received the sampling results, after the project was already completed. Once again, Thomas's interpretation would effectively negate the requirements of the standard for any job that required less time to complete than it takes to get sampling results. Thomas is experienced in the removal of leaded paint. Thirty per cent of its projects involve the removal of leaded paint (Tr. 168). Thomas anticipated that its employees would be exposed to lead on the Galton Road overpass project (Tr. 177). Thomas is aware that there is some delay in getting the results for air sampling. The company cannot evade the requirements of the standard on short-term projects by failing to make available initial medical surveillance and then hope that the air sampling results come back below the action level for lead.

The Secretary has established a serious violation of § 1926.62(j)(1)(i).

Items 3a and 3b: Alleged Serious Violations of § 1926.62(j)(2)(i) and (j)(2)(i)(C)

The Secretary alleges that Thomas violated § 1926.26(j)(2)(i) and (j)(2)(i)(C), which provide:

> The employer shall make available biological monitoring in the form of blood sampling and analysis for lead and zinc protoporphyrin levels to each employee covered under paragraphs (j)(1)(i) and (ii) of this section on the following schedule:
> . . .
> (C) For each employee who is removed from exposure to lead due

> to an elevated blood lead level at least monthly during the removal period.

Thomas sent its employees to Deaconess Medical Center in St. Louis, Missouri, on November 7, 1996, and April 9 and 11, 1997, for blood tests (Exh. C-9; Tr. 109-112, 193). Their blood samples were analyzed for lead but not for ZPP (Tr. 109). In October 1996, and then again in November 1996, Bingham had recorded a blood lead level of 61 micrograms per deciliter. A blood lead level over 50 micrograms per deciliter triggers a retest, and then removal if the retest is still above 50 micrograms per deciliter. Bingham did not have the monthly test during his removal period (Tr. 113-114).

The Secretary asserts that the missing ZPP tests (item 3a) and Bingham's missing monthly test (item 3b) establish violations of the cited standards. Section 1926.62(j)(2)(i) does not require that the employer *provide* the tests; it requires that the employer *make available* the tests. As discussed below, the Secretary did not show that Thomas failed to make these tests available.

With regard to item 3a, Thomas had made arrangements with several medical facilities in St. Louis, including Deaconess Medical Center, where employees could go and request a blood test. Neier estimated that Thomas makes available 300 blood tests a year (Tr. 206-207). Thomas routinely requests and receives the results of the ZPP tests. Neier stated, "There are probably a half dozen different sites underneath the Deaconess occupational health network the we utilize based on what geographical location we happen to be in" (Tr. 206). Thomas has a standardized form with which it notifies the employees of the test results. The form has spaces for both the blood lead level and the ZPP (Exh. C-9).

No one at the hearing had an explanation for why the ZPP results were missing on three of the many blood test results. Neier speculated that the blood tests may have been taken at a medical facility not familiar with Thomas's requirements (Tr. 207). The record establishes that Thomas did make the required biological monitoring available to its employees. The cited standard requires that the monitoring be made available. Thomas did this, through its arrangements with the St. Louis area medical facilities. The omission of the ZPP results for three blood tests through oversight or misunderstanding does not place Thomas in noncompliance with the standard.

Under item 3b, the Secretary charges that Thomas violated § 1926.62(j)(2)(i)(C) because Bingham did not have a monthly blood test while on medical removal. Thomas provides written notices to employees informing them of the need for lead and ZPP analysis (Exh. R-5; Tr. 192-195). Thomas also contacts employees by telephone to inform them of their need for testing (Tr. 192). Thomas's written lead program provides that employees on medical removal receive monitoring for lead at least once a month (Exh. C-10, p. 25). Thomas notified Bingham that he needed to be retested (Exh. C-9).

Bingham did not testify at the hearing. It is unknown why he did not have his blood tested within the month after his medical removal. The record does establish that Thomas made the biological monitoring available to him and notified Bingham of its availability. Nothing else is required under the standard.

Penalty Determination

The Commission is the final arbiter of penalties in all contested cases. Under § 17(j) of the Act, in determining the appropriate penalty, the Commission is required to find and give "due consideration" to (1) the size of the employer's business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the history of previous violations. The gravity of the violation is the principal factor to be considered.

Thomas employed approximately 75 employees at the time of the inspection (Tr. 258). It had been cited previously for violations of the Act (Tr. 95). Thomas demonstrated good faith by having a good written safety program and by taking measures to provide protection to its employees (Tr. 94).

The gravity of items 1a and 1b, the violations relating to hand washing facilities, is moderate. Edwards stated that the ill health effects from exposure to lead "can be reversed with proper medical treatment" (Tr. 93). Thomas had adequate hand washing facilities that it usually provided at its worksites. The water cooler was a make-shift hand washing facility that Thomas provided as a misguided substitution for its usual facility. A penalty of $600.00 is assessed for items 1a and 1b.

The gravity of items 2a and 2b, the violations relating to biological monitoring, is moderate. Thomas provided its employees with "a number of protective measures, such as appropriate respiratory protection [and] Tyvek clothing" (Tr. 107). A total penalty of $900.00 is

assessed for items 2a and 2b.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Federal Rule of Civil Procedure 52(a).

ORDER

Based upon the foregoing decision, it is hereby ORDERED that:

1. Items 1a and 1b, alleging violations of §§ 1926.62(d)(2)(v)(D) and (i)(5)(i) respectively, are affirmed a total penalty of $600.00 is assessed;
2. Items 2a and 2b, alleging violations of §§ 1926.62(d)(2)(v)(E) and (j)(1)(i) respectively, are affirmed and a total penalty of $900.00 is assessed; and
3. Items 3a and 3b, alleging violations of §§1926.62(j)(2)(i) and (j)(2)(i)(C) respectively, are vacated and no penalty is assessed.

/s/
NANCY J. SPIES
Judge

Date: June 15, 1998