

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.

ALLSTATE SERVICES, LTD. dba A&R
DEMOLITION,

Respondent.

OSHRC Docket No. 09-0035

ORDER

This case was directed for review on December 16, 2009. On January 6, 2010, the Commission issued a Briefing Notice asking the parties to brief certain issues that were solely related to Citation 1, Item 2, which alleged a serious violation of 29 C.F.R. § 1926.62(d)(2)(v). The Briefing Notice did not ask the parties to brief any issues regarding Citation 1, Item 1, which alleged a serious violation of 29 C.F.R. § 1926.62(d)(1)(i).¹ Consequently, in the Briefing Notice, the Commission limited the scope of its review to Citation 1, Item 2. *Bay State Refining Co.*, 15 BNA OSHC 1471, 1476, 1992 CCH OSHD ¶ 29,579, p. 40,025 (No. 88-1731, 1992) (“[T]he Commission ... has [the] discretion to limit the scope of its review.”)

On March 8, 2010, the Secretary notified the Commission of her decision to withdraw Citation 1, Item 2. Pursuant to the Briefing Notice, this withdrawal resolves the only item selected for review. *See Cuyahoga Valley Ry. Co. v. United Transp. Union*, 474 U.S. 3, 6 (1985) (holding Secretary has unreviewable discretion to withdraw citation). Accordingly, Respondent’s motion dated March 11, 2010, requesting that the Commission enter judgment in Respondent’s favor on both citation items or, alternatively, issue a decision regarding Citation 1, Item 1, without complete briefing, is denied.²

¹

Both citation items were affirmed by Judge James R. Rucker in his decision issued on November 23, 2009.

²

Therefore, the Commission sets aside the judge's Decision and Order to the extent that it is inconsistent with the Secretary's notice of withdrawal and accords the remainder of his decision the status of an unreviewed judge's decision. *Leone Constr. Co.*, 3 BNA OSHC 1979, 1981, 1975-76 CCH OSHD ¶ 20,387, p. 24,322 (No. 4090, 1976) (unreviewed part of judge's decision does not constitute binding Commission precedent).

SO ORDERED.

BY DIRECTION OF THE COMMISSION

Dated: 3/29/2010

/s/

Ray H. Darling, Jr.
Executive Secretary

**UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

Secretary of Labor, Complainant, v. Allstate Services, Ltd. dba A&R Demolition Respondent.

OSHRC DOCKET NO. 09-0035

Appearances:

In view of the disposition of this case, the Respondent's request for oral argument is moot.

Brian L. Hurt, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas,
Texas

For Complainant

Joseph A. Kral, Esq., Houston, Texas

For Respondent

Before: Administrative Law Judge James R. Rucker, Jr.

AMENDED DECISION AND ORDER

Procedural History

This proceeding is before the Occupational Safety and Health Review Commission (“the Commission”) pursuant to Section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §651 *et seq.* (“the Act”). The Occupational Safety and Health Administration (“OSHA”) conducted an inspection of an Allstate Services, Ltd. dba A&R Demolition (“Respondent”) worksite in Vanderbilt, Texas on September 17, 2008. As a result of the inspection, OSHA issued a *Citation and Notification of Penalty* to Respondent alleging three violations of the Act. Citation 1 Item 1 alleges a serious violation of 29 C.F.R. §1926.62(d)(1)(i). Citation 1 Item 2 alleges a serious violation of 29 C.F.R. §1926.62(d)(2)(v). Citation 1 Item 3 alleges a serious violation of 29 C.F.R. §1926.62(l)(1)(i). The Secretary proposes a penalty of \$1,250.00 each for Citation 1 Items 1 and 2, and a \$750.00 penalty for Citation 1 Item 3. Respondent timely contested the citation and an administrative trial was held on June 25, 2009 in Austin, Texas. Both parties filed post-trial briefs and the case is ready for disposition.

Jurisdiction

Jurisdiction of this action is conferred upon the Occupational Safety and Health Review Commission pursuant to Section 10(c) of the Act. The record establishes that at all times relevant to this action, Respondent was an employer

engaged in a business affecting interstate commerce within the meaning of Section 3(5) of the Act, 29 U.S.C. §652(5). (*Complaint and Answer*).

Factual Findings

This OSHA inspection resulted from a referral made by an OSHA Compliance Safety and Health Officer (“CSHO”) who was conducting an unrelated investigation of an explosion at a gas plant in Vanderbilt, Texas (“Vanderbilt plant”). (Tr. 69-70). CSHO Michael Morris was assigned to conduct this inspection and first traveled to the jobsite on July 7, 2008, where he learned that Respondent’s crew was not working that day. (Tr. 71). He returned the next day but Respondent’s employees were still not present. (Tr. 73). Finally, when CSHO Morris traveled to the jobsite a third time, on September 17, 2008, Respondent’s employees were present and working at the location. (Tr. 73). Respondent’s crew was engaged in the demolition and removal of “old pipes” from the Vanderbilt plant between August 2008 and April 2009. (Tr. 21-23). Respondent had five employees present at the site: John Sample, Superintendent; Vernon Carr, Safety Director; Daniel Stimson, truck driver; Daniel Mojica, Bobcat operator/laborer; and Antonio Avila, excavator operator. (Respondent’s Brief, p. 2). CSHO Morris told Safety Director Carr that he was concerned about the

presence of lead on the pipes being demolished. (Tr. 135). Safety Director Carr acknowledged during the inspection that there was a possibility of lead-based paint on some of the pipes. (Tr. 136).

Superintendent Sample, who supervised employees and directed their work, conceded at trial that this project consisted of “demolishing materials that contained lead-based paint.” (Tr. 20-21, 38). He believed there was lead on the pipes being removed because this particular plant was constructed in the 1970’s and “most of the paint back then had lead base in it.” (Tr. 31-32). In an attempt to address this hazard, prior to the OSHA inspection, Respondent decided to use a hydraulic shear attachment fitted on an excavator to remove the pipe. (Tr. 21-22). Respondent believed that shearing the pipe would eliminate the possibility of dust, thereby preventing any lead from becoming airborne. (Tr. 31, 133). The shear attachment consisted of two blades which closed around the pipe to separate it into pieces. (Tr. 39, Ex. C-2). Superintendent Sample described the process as “tearing the metal in half.” (Tr. 22). The sheared pipe pieces were then piled-up and moved by a Bobcat front-end loader onto a truck to be transported to another location. (Tr. 22-24).

While Superintendent Sample testified that he did not observe any dust being created during the pipe removal process, he conceded that he does not know whether shearing pipe could cause lead to become airborne. (Tr. 39, 63). It is important to note that despite his assertions that shearing the pipe created no dust, he testified that employees on this jobsite were required to wear *dust* masks. (Tr. 41, 134). Safety Director Carr contradicted Superintendent Sample by testifying employees were *not* required to use any type of respiratory protection on this site. (Tr. 134). Safety Director

Carr also conceded that he has never done any testing to conclusively determine whether shearing pipe could cause lead to become airborne. (Tr. 133-134).

Prior to the OSHA inspection, Respondent prepared and distributed an employee handout entitled "Lead Safety in the Workplace." (Tr. 128; Ex. R-9). The handout was specifically used to train the two employees conducting the pipe removal at this site on lead hazards in the workplace. (Tr. 128-130; Ex. R-4). Superintendent Sample also discussed lead exposure and precautions for working around lead during daily "tailgate safety talks" at this site. (Tr. 43-44). He instructed the two equipment operators who performed the pipe removal, with regard to lead hazards at this location, to "keep an eye on each other as far as their attitude and as far as their -- if there was anything that they felt was wrong with them. If they noticed anything that was not normal for their attitude or behavior, I was to be notified immediately." (Tr. 54-55). Superintendent Sample and Safety Director Carr also advised employees not to ingest or inhale lead while working at the Vanderbilt plant. (Tr. 55, 132).

Despite Respondent's belief that lead was present on the pipes being removed, its acknowledgement that lead is a hazardous substance, and its communications to employees while on this site regarding lead hazards, Respondent failed to conduct any type of actual employee exposure assessment for lead at this location. (Tr. 30-31, 63, 132). Respondent did not take any samples of paint or pipe-coating to determine lead content. (Tr. 31). Respondent did not perform any type of air monitoring to determine employee exposure to lead while performing their demolition work. (Tr. 32, 39-40). Respondent did not provide any cleaning/laundrying of employee clothing, no employee changing area, no employee showering area, no lead warning signs, and no medical

surveillance of employees. (Tr. 42-43, 65-66, 135).

The employee operating the open-cab Bobcat came within 5-10 feet of cut pipe while stacking and moving it around the site. (Tr. 63). The employee operating the shear-equipped excavator came within 15-20 feet of the pipe while it was being removed. (Tr. 48). Superintendent Sample also occasionally acted as a “spotter”, standing as close as 25 feet from the pipes while they were being sheared. (Tr. 27-28).

The most disputed issue at trial was whether or not “shearing” pipe is the same as “cutting” pipe. Respondent maintains that “shearing” is distinguishable from “cutting”, as well as all of the other activities for which interim lead protection is required under the cited regulations. (Tr. 38). *See* 29 C.F.R. §1926.62(d)(2)(iv)(C) & (d)(2)(v). Superintendent Sample attempted to distinguish “shearing” from “cutting” by explaining that “cutting makes stuff snap. Shearing is like ripping paper.” (Tr. 38-39).

Complainant’s position is that “shearing” is a type of “cutting”, and therefore, the interim lead protection regulations apply pursuant to 29 C.F.R. §1926.62(d)(2)(iv). Complainant offers the *American Heritage Dictionary of the English Language* (Fourth Edition, 2000) definition of “shearing” as “to remove by cutting or clipping.” The *Merriam-Webster Dictionary* (2009) defines “shear” as “to cut with something sharp.” Complainant also points to the fact that Respondent’s Safety Director, in documenting his tailgate safety talks with employees, wrote that one of the crews’ tasks on this jobsite was to “cut metal.” (Tr. 132; Ex. R-1). Even Superintendent Sample treated the terms “shearing” and “cutting” synonymously during his testimony: “...shearing the metal off, cutting it up into small pieces.” (Tr. 21).

During the OSHA inspection, Respondent’s employees were not using the hydraulic shear attachment. (Tr. 77). Therefore, CSHO Morris did not personally observe the actual shearing process. During his testimony about the alleged training

violation, Citation 1 Item 3, CSHO Morris acknowledged that Respondent's lead hazard training program complied "in part" with regulatory requirements but that the written program was deficient because it did not overtly state that death could result from lead overexposure. (Tr. 110, 117). This was the only deficiency CSHO Morris identified in Respondent's lead hazard training program. (Tr. 117).

CSHO Morris characterized all three lead-related citation items as serious violations of the Act because lead is poisonous and can negatively affect reproductive systems, nervous systems, kidney function, liver function, and brain function. (Tr. 113). In calculating the proposed penalties for each alleged violation, CSHO Morris concluded and considered that employees were exposed to the cited conditions for at least two weeks (although the project lasted approximately nine months), that no alternative methods of protection were used, and that there was a low likelihood of an actual accident occurring. (Tr. 23, 95). He reduced the penalty calculations because Respondent is a "small company" with no history of OSHA violations within the past three years. (Tr. 96-97). He declined to further reduce the penalties for "good faith" because he believes Respondent failed to follow the provisions of its own lead protection program. (Tr. 97; Ex. R-9).

Discussion

To establish a *prima facie* violation of the Act, the Secretary must prove by a preponderance of the evidence that: (1) the cited standard applies to the condition; (2) the terms of the standard were violated; (3) one or more of the employees had access to the cited condition; and (4) the employer knew, or with the exercise of reasonable diligence could have known, of the violative condition. *Astra Pharmaceutical Prod.*, 9 BNA OSHC 2126, 1981 CCH OSHD ¶25,578 (No. 78-6247, 1981).

Citation 1 Item 1

The Secretary alleged in Citation 1 Item 1 that:

29 CFR 1926.62(d)(1)(i): Each employer who has a workplace covered by this standard did not initially determine if any employee may be exposed to lead at or above the action level: On or about September 17, 2008, and times prior thereto, at this location, employees performing metal shearing operations and removing protective coatings from piping for cutting operations were exposed to lead from lead-based paint, containing 29% lead, and the employer did not initially determine if the employees performing the task were exposed to lead.

The cited regulation applies to all construction work, including demolition, at which employees *may* be occupationally exposed to lead. 29 C.F.R. §1926.62(a). The standard requires employers with workplaces covered by the lead construction standard to “initially determine *if* any employee *may* be exposed to lead at or above the action level” (emphasis added). Initial determinations of lead exposure levels are generally required to be performed through air monitoring. 29 C.F.R. §1926.62(d)(3). In this instance, the record clearly establishes that Respondent believed lead was present on this site, trained employees specifically working on this site about lead hazards, and instructed employees working on this site to watch each other for unusual symptoms and behaviors that might be attributable to lead overexposure. Despite these beliefs and actions concerning the presence of lead, Respondent failed to conduct any type of actual monitoring to determine whether their suspicions regarding lead content were correct and to what extent employees might be actually exposed.

Therefore, although Complainant failed to present admissible evidence regarding the actual amounts of lead on the piping, the court concludes that Respondent’s clear

belief that the pipe contained lead, as well as its lead-related training and instructions to employees, evidenced an obligation under the cited regulation to conduct an assessment of actual lead exposure levels as described at 29 C.F.R. §§1926.62(d)(1)(i) & (d)(3). Respondent's argument that its decision to shear the pipe and provide employee training constituted an adequate "initial determination" is rejected. An acceptable "initial determination" requires consideration of actual employee exposure monitoring results and several other relevant factors. *See* 29 C.F.R. §1926.62(d)(3).

An employer who believes and acts as if he is exposing his employees to lead cannot then implement the "ostrich approach," affirmatively choosing to *not* evaluate actual employee exposure levels. *See E. Smalis Painting Co.*, 22 BNA OSHC 1553 (No. 94-1979, 2009). It is undisputed that Respondent conducted no actual monitoring of employee exposure to lead at this site. The cited standard applies to these working conditions and Respondent failed to comply with its terms.

To prove employee exposure to a violative condition, Complainant must establish that Respondent's employees were either actually exposed or that it was "reasonably predictable either by operational necessity or otherwise (including inadvertence), that employees have been, are, or will be in the zone of danger." *Fabricated Metal Prods.*, 18 BNA OSHC 1072, 1995-1997 CCH OSHD ¶31,463 (No. 93-1853, 1997). The record establishes that at least three of Respondent's employees were operating equipment or standing between five and twenty-five feet from the pipe while it was being cut, piled-up, and transported. Complainant established employee exposure to the violative condition.

Superintendent Sample and Safety Director Carr both clearly had knowledge that an employee lead exposure assessment was never conducted. Their knowledge of this violative condition is imputable to the Respondent. *A.P. O'Horo Co.*, 14 BNA OSHC 2004, 1991 CCH OSHD ¶29,223 (No. 85-0369, 1991).

CSHO Morris provided undisputed testimony about various systems of the human body that can be seriously and adversely affected by overexposure to lead. In this instance, it is not the specific lead level which is relevant to the characterization of the violation. Rather, it is the fact that Respondent believed and acted as if this demolition work involved potential employee exposure to lead and still directed employees to perform their work without bothering to monitor actual exposure levels. Safety Director Carr even conceded that without actually conducting air monitoring, Respondent would not know whether the air at the site had a high lead content. (Tr. 134). Citation 1 Item 1 was properly characterized as a serious violation.

In calculating an appropriate penalty for this violation, Section 17(j) of the Act requires the Commission to give due consideration to four criteria: (1) the size of the employer's business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the employer's prior history of violations. 29 U.S.C. '666(j). Gravity is the

primary consideration and is determined by the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood of an actual injury. *J.A. Jones Construction Co.*, 15 BNA OSHC 2201, 1993 CCH OSHD &29,964 (No. 87-2059, 1993). Considering the totality of the circumstances, the proposed penalty of \$1,250.00 for Citation 1 Item 1 is appropriate.

Citation 1 Item 2

The Secretary alleged in Citation 1 Item 2 that:

29 CFR 1926.62(d)(2)(v): Until the employer performed an employee exposure assessment as required under paragraph (d) of this section and determined actual employee exposure, the employer did not provide to the employees performing the tasks described in paragraph (d)(2)(i), (d)(2)(ii), (d)(2)(iii), (d)(2)(iv) of this section with interim protection as described in Sub item 1, (A) through (F): On or about September 17, 2008, and times prior thereto, at this location, employees involved in a demolition operation were metal shearing and removing protective coatings from piping for torch cutting and were exposed to lead from paint containing 29% lead. The employer did not provide appropriate respiratory protection, protective clothing, change areas, monitoring, and training until the extent of exposure was determined.

Pursuant to the cited regulation, once the requirement to conduct a lead exposure assessment has been triggered, employers are required to provide various interim employee protective measures (respiratory protection, appropriate personal protective clothing and equipment, changing areas, hand washing facilities, biological monitoring, and training) if certain work activities are performed, until actual exposure levels are determined. The standard clearly applies to the cited condition and the court has already concluded above that Respondent had a regulatory obligation to determine whether its employees were being exposed to lead at or above the action level on this jobsite.

It is undisputed that Respondent failed to provide most of the interim protection measures listed in the standard. Therefore, the primary issue to determine compliance with the standard is whether or not Respondent's employees were engaged in one of the work activities listed in paragraphs (d)(2)(i), (d)(2)(ii), (d)(2)(iii), or (d)(2)(iv). More specifically, the question is whether "shearing" qualifies as "cutting" as set out in 29 C.F.R. §1926.62(d)(2)(iv)(C).

In *Secretary v. Bianchi Trison Corp.*, 20 BNA OSHC 1801 (Nos. 01-1367 & 1368, 2004), a Review Commission Administrative Law Judge, analyzing similar violations of OSHA's lead in construction standard, treated the terms "shearing" and "cutting" synonymously: "...sections were cut up by mechanical shears..." and "...excavators with shear attachments were cutting the steel..." Although the Third Circuit did not focus on employee exposure during the mechanical shearing process, it did comment in its rejection of a petition for review that "...mechanical shears could be used to cut most of the steel..." *Bianchi Trison Corp.*, 409 F.3d 196 (3rd Cir. 2005). When the language of the *Bianchi Trison* trial and appellate decisions is considered in conjunction with the dictionary definition of "shearing," and the fact that Respondent's own supervisors used the term "cutting" to describe their work at this site, the court finds that Respondent's employees were "cutting" pipe pursuant to 29 C.F.R. §1926.62(d)(2)(iv)(C). "Until an employer completes and documents a valid initial exposure assessment, it must treat certain employees as if they were exposed to lead in excess of the personal exposure level and provide to these employees interim precautions." *Techno Coatings*, 177 Fed.Appx. 659, 660 (9th Cir. 2006). Respondent failed to do so. The terms of the standard were violated.

The same findings of employer knowledge, employee exposure, and seriousness of the violation addressed in Citation 1 Item 1 above also apply here. Respondent had knowledge of its own failure to implement interim protective measures. Respondent's two equipment operators, as well as Superintendent Sample while acting as a "spotter", were exposed to the violative condition. Respondent's failure to provide interim protection until lead exposure was actually determined could have resulted in serious physical harm or death. The proposed penalty of \$1,250.00 for Citation 1 Item 2 is appropriate.

Citation 1 Item 3

The Secretary alleged in Citation 1 Item 3 that:

29 CFR 1926.62(l)(1)(i): The employer did not communicate information concerning lead hazards according to the requirements of OSHA's Hazard Communication Standard for the construction industry, 29 CFR 1926.59, including, but not limited to, the requirements concerning warning signs and labels, material safety data sheets (MSDS), and employee information and training: On or about September 17, 2008, and times prior thereto, at this location, employees involved in a demolition operation performing metal shearing were exposed to lead from lead-based paint containing 29% lead and the employer did not communicate the health hazards of lead to employees performing the task.

The cited standard requires employers to “communicate information concerning lead hazards to employees” consistent with the requirements of 29 C.F.R. §1926.59. An employer who references 29 C.F.R. §1926.59 is subsequently referred to 29 C.F.R. §1910.1200. The minimum requirements for providing information and training to employees on hazardous substances are found at 29 C.F.R. §1910.1200(h). Complainant failed to establish with any clarity or persuasiveness that Respondent’s communications to employees with regard to lead hazards was non-compliant. The only deficiency articulated by CSHO Morris with regard to Respondent’s lead hazard training program was the omission of the word “death.” However, a review of Respondent’s “Lead Safety in the Workplace” handout clearly states “...lead is very toxic if absorbed in *lethal* quantities through inhalation or ingestion” (emphasis added). (Ex. R-9, p.1). Therefore, based on the content of Respondent’s “Lead Safety in the Workplace” handout, as well as testimony regarding employee training, certification, and “tailgate safety talks” concerning lead hazards, the court finds that Complainant failed to establish by a preponderance of the evidence that Respondent did not adequately communicate lead hazards to its employees. Accordingly, Citation 1 Item 3 must be VACATED.

Affirmative Defenses

Respondent did not argue any affirmative defenses in its post-hearing brief. Any pled affirmative defenses are therefore deemed abandoned.

ORDER

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

1. Citation 1 Item 1 is AFFIRMED and a penalty of \$1,250.00 is ASSESSED;
2. Citation 1 Item 2 is AFFIRMED and a penalty of \$1,250.00 is ASSESSED;

3. Citation 1 Item 3 is VACATED.

Date: November 23, 2009
Denver, Colorado

/s/
JAMES R. RUCKER, JR.
Judge, OSHRC