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. FEDERAL CONSTRUCTION GROUP, Respondent.	OSHRC Docket No. 12-0097

APPEARANCES:

Melanie L. Paul, Attorney; Stanley E. Keen, Regional Solicitor; Christopher D. Helms, Counsel; M. Patricia Smith, Solicitor of Labor; U.S. Department of Labor, Atlanta, GA
For the Complainant

David J. Garrett, Nexsen Pruet, PLLC, Raleigh, NC; Glenn Boone, Federal Construction Group, Spring Lake, NC[1]
For the Respondent

REMAND AND ORDER

Before: ROGERS, Chairman; ATTWOOD, Commissioner.

BY THE COMMISSION:

On August 27, 2012, Administrative Law Judge Keith E. Bell issued a Decision and Order affirming a citation issued by the Occupational Safety and Health Administration ("OSHA") to Federal Construction Group ("FCG"). FCG filed a Petition for Discretionary Review challenging that decision on several grounds, including that the judge allegedly engaged

[1] Mr. Garrett filed an entry of appearance as Respondent's counsel and has not withdrawn that entry as of this date. *See* Commission Rule 23, 29 C.F.R. § 2200.23. Respondent's most recent filing with the Commission, however, was submitted by the company's owner, Mr. Boone, who states that he is now appearing *pro se*, "cannot sustain the cost of legal representation," and all future correspondence from the Commission in this matter "needs to be communicated" to him.

in a "private conversation" over lunch on the first day of the hearing with the OSHA compliance officer who conducted the inspection on which the citation was based and also testified at the hearing. FCG claims that this conversation constitutes an ex parte communication in violation of Commission Rule 105(a), 29 C.F.R. § 2200.105(a).[2] *See* 5 U.S.C. § 551(14) (definition of ex parte communication under Administrative Procedure Act); § 557(d)(1) (identifying prohibited ex parte communications). For the following reasons, we remand the case to the judge for further proceedings.

The Commission has a procedure under Commission Rule 68(b), 29 C.F.R. § 2200.68(b), for raising claims of this nature, and that procedure—which FCG did not follow here—requires a party seeking the disqualification of a judge to promptly file an affidavit detailing the grounds for its request with the judge before a decision is filed.[3] *See* 5 U.S.C. § 556(b) (filing of timely and sufficient affidavit for disqualification); *Nova Group/Tutor-Saliba*, 23 BNA OSHC 1933, 1935 n.3, 2012 CCH OSHD ¶ 33,225, p. 55,998 n.3 (No. 10-0264, 2012). Because FCG's petition asserting its claim was filed after the judge's decision was docketed with the Commission, the judge had no opportunity to address the company's allegation while the case was still before him and determine what relief, if any, may be appropriate.

Here, we construe the ex parte communication allegation in FCG's petition as a motion for disqualification under Rule 68 and remand this case to the judge for a ruling on the motion. *See In re Certain Underwriter*, 294 F.3d 297, 302 (2d Cir. 2002) ("The discretion to consider

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[2] Rule 105(a) provides:

> Except as permitted by § 2200.120 or as otherwise authorized by law, there shall be no ex parte communication with respect to the merits of any case not concluded, between any Commissioner, Judge, employee, or agent of the Commission who is employed in the decisional process and any of the parties or intervenors, representatives or other interested persons.

29 C.F.R. § 2200.105(a).

[3] Rule 68(b) provides:

> *Request for withdrawal.* Any party may request the Judge, at any time following his designation and before the filing of his decision, to withdraw on ground of personal bias or disqualification, by filing with him promptly upon the discovery of the alleged facts an affidavit setting forth in detail the matters alleged to constitute grounds for disqualification.

29 C.F.R. § 2200.68(b).

disqualification rests with the district judge in the first instance. The reasons for this are plain. The judge presiding over a case is in the best position to appreciate the implications of those matters alleged in a recusal motion. A judge considering recusal must balance the need for public confidence in the judiciary against the possibility that those questioning [her] impartiality might be seeking to avoid the adverse consequences of [her] presiding over their case.") (internal quotations and citations omitted). We also order FCG to submit an affidavit to the judge in accordance with the requirements of Rule 68(b) within 14 days of the date of this order. After receipt of the affidavit, the judge should provide the Secretary with an opportunity to respond. He may also obtain additional affidavits, as necessary, to fully develop a record upon which he can base his ruling.

If, upon consideration of this record, the judge determines that FCG's motion for disqualification should be granted, he should issue an order withdrawing his August 27, 2012 opinion, recusing himself from the case, and transferring the matter to the Chief Judge for reassignment. *See* Commission Rule 68(c), 29 C.F.R. § 2200.68(c). If the judge determines that FCG's motion for disqualification should be denied, he should set forth the reasons for his ruling in an order that also states he is reissuing his opinion and submitting it to the Executive Secretary for redocketing. *See* Commission Rule 68(d), 29 C.F.R. § 2200.68(d). At that time, FCG may file a petition for discretionary review in which it may seek review of the judge's ruling on its disqualification motion, as well as renew its request for review of the reissued Decision and Order.

SO ORDERED.

/s/
Thomasina V. Rogers
Chairman

/s/
Cynthia L. Attwood
Commissioner

Dated: October 11, 2012

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR,	:	
	:	
Complainant,	:	
	:	
v.	:	
	:	OSHRC DOCKET NO. 12-0097
FEDERAL CONSTRUCTION GROUP,	:	
	:	
Respondent.	:	

Appearances:

Melanie Paul, Esquire, U.S. Department of Labor, Office of the Solicitor, Atlanta, Georgia

For the Complainant.

David J. Garret, Esquire, Nexsen, Pruet, Raleigh, North Carolina

For the Respondent.

Before: Keith E. Bell, Administrative Law Judge

DECISION AND ORDER

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. § 451 *et seq.* ("the Act"). The Occupational Safety and Health Administration ("OSHA") conducted an inspection of a worksite located on the Fort Bragg military base in Fayetteville, North Carolina, on October 14, 2011 and October 19, 2011. As a result, OSHA issued a Citation and Notification of Penalty ("Citation") to Federal Construction Group ("Respondent" or "FCG"), alleging violations of the Act. The Citation alleges that Respondent violated provisions of the hazard communication ("HazCom") standard and the lead standard. Specifically, Citation 1, Items 1a and 1b, allege that Respondent violated 29 C.F.R. §§ 1910.1200(e)(1) and (e)(2), respectively; a single penalty of $ 3,000.00 is proposed for these grouped items. Citation 1, Item 2, alleges a violation of 29 C.F.R. § 1926.62(e)(2)(i) and proposes a penalty of $ 3,000.00. Respondent timely contested the Citation. The hearing in this matter was held on June 6, 2012, in Raleigh, North Carolina, and on June 20, 2012, in Durham, North Carolina. For the reasons discussed below, the Citation is AFFIRMED and the proposed penalties are assessed.

Jurisdiction

The parties have stipulated to the Commission's jurisdiction over this proceeding and coverage under the Act. (Tr. 12-13). Further, I find that the Act applies and the Commission has jurisdiction over this proceeding pursuant to section 10(c) of the Act, 29 U.S.C. § 659(c). The record establishes that at all times relevant to this case, Respondent was an "employer" engaged in a "business affecting commerce" within the meaning of section 3(5) of the Act, 29 U.S.C. § 652(5).

Background[4]

OSHA initiated an inspection of FCG's worksite after receiving a complaint from a tenant of Building 2-1105 Stack B ("Stack B") regarding renovation work being performed.in the basement of the building; the complaint alleged that subcontractors were removing asbestos.[5] FCG was a subcontractor to B&H Contracting Company ("B&H") for the renovation project in the basement of Stack B, but it acted in the capacity of the "general contractor" for the work at the site. The project at issue was project number FA-11023-9P/contract number W91247-11-0034 (hereafter the "Statement of Work"); the project called for the repair and upgrade of Stacks B and C in Building 2-1105, located in Ft. Bragg at the corner of Riley Road and McComb Street. The Statement of Work indicated that there was lead-based paint that required removal on the basement walls, ceiling and floor. It also indicated that the removal of the lead-based paint in the basement would require sandblasting. (Tr. 14).

B&H had no representatives on the site who were involved with the sandblasting of the lead-based paint. FCG had done work at Fort Bragg for at least 15 years, as both a contractor and a subcontractor. Army regulation 385-10, Chapter 4, Contracting Safety Policy 4-2, requires that contractors comply with OSHA regulations and states that they are responsible for the safety and health of their employees. On September 16, 2011, FCG sent paint chips from Stack B to SMSL Analytical, Inc. ("SMSL") to test for the presence of lead. Those test results were sent to Glenn Boone, FCG's vice-president and owner. The test results indicated that there were lead concentrations from seven samples that ranged from .010 percent to 7.9 percent. (Tr. 14-15).

OSHA Industrial Hygienist ("IH") David McLemore field tested the paint or paint dust from three locations within Stack B. All tested positive for lead. He also took a bulk sample from the lead dust on

[4] Through a series of stipulations, the parties have agreed to the following facts in this matter.

[5] The work actually involved removing lead-based paint by sandblasting in the basement and did not involve asbestos. Further, there was no persuasive evidence in the record that any tenants in the building were exposed to the lead and silica sand that resulted from the renovation.

October 20, 2011. That sample was sent to OSHA's Salt Lake City Technical Center for testing. The results showed the presence of lead at .2418 percent.[6] (Tr. 15-16).

Discussion

To prove a violation of an OSHA standard, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies, (2) there was noncompliance with its terms, (3) employees had access to the violative conditions, and (4) the cited employer had actual or

constructive knowledge of those conditions. *E.g., George Campbell Painting Corp.*, 18 BNA OSHC 1929, 1932 (No. 94-3121, 1999).[7]

Witness Credibility

As a preliminary matter, I make the following findings concerning the credibility of the key witnesses in this case.

Robert Aumock

Mr. Aumock is Fort Bragg's construction control representative. His duties included responsibility for quality control and safety throughout the course of this project. (Tr. 252-55). I observed Mr. Aumock's demeanor as he testified, including his facial expressions and his body language.[8] My observations lead me to conclude that Mr. Aumock was less than candid. For example, he made little, if any, direct eye contact with the undersigned during his testimony. Further, his responses to direct questions indicated

[6] The parties stipulated to the authenticity and admissibility of the Salt Lake City laboratory report and the SMSL test results; they also agreed that it was not necessary for any laboratory witnesses to testify.

[7] Respondent attempted, mid-trial, to assert an affirmative defense known as the "Sasser" defense. However, no such defense was raised in accordance with § 2200.207(b) of the Commission's Rules of Procedure. Additionally, Respondent denied having any affirmative defenses at the start of the hearing. (Tr. 17, 336-337). Even if such a defense had been timely raised, the Commission has specifically held that an employer cannot contract away its responsibilities under the Act. *Pride Oil Well Serv.*, 15 BNA OSHC 1809 (No. 87-692, 1992).

[8] This statement applies equally to all of the witnesses who testified in this case.

an uncertainty about facts that should have been within the scope of his knowledge about this project. For example:

Q. And who is the appointed project manager or superintendent for [FCG] on this project?

A. That was Bob Probstfield. Bob was a superintendent. I ***think*** Mr. Boone was listed as the project manager. (Tr. 279). [emphasis supplied].

Q. Okay, but you yourself have not seen any hazard analysis form completed in this case?

A. I don't ***think*** so, no. (Tr. 280). [emphasis supplied].

Mr. Aumock conceded that Fort Bragg was cited for FCG's non-compliance with the standards at issue in this case and that Fort Bragg accepted those citations. Nevertheless, he maintained that he provided the OSHA representatives with copies of FCG's lead compliance and HazCom plans and that they were impressed with the speed with which he and Mr. Boone provided these documents. (Tr. 283-286). Based on the foregoing, I find that Mr. Aumock's testimony lacks credibility and that his assertions of FCG's compliance are undermined by the reliable evidence of record in this case.

Jerry Peterson

Mr. Peterson is an employee of FCG whose duties included estimating the cost of this project. He testified that he witnessed Mr. Aumock providing copies of the quality control and safety plans for this project to OSHA Compliance Officer ("CO") Clarence Moore. However, he stated that he did not actually see more than the cover pages of those documents. (Tr. 316). He also stated that Mr. Boone was the one who provided the OSHA representatives with copies of FCG's HazCom plan, lead protection plan, respiratory protection plan and safety plan. (Tr. 288, 297, 316, 319). On cross-examination, Mr. Peterson conceded that he only observed the cover pages of the documents he claims Mr. Boone provided to OSHA. (Tr. 320). I find that Mr. Peterson's testimony asserting that OSHA was provided

copies of FCG's HazCom and lead compliance plans is less than credible due to the tentative nature of his answers about what he observed. Further, I find that his testimony was biased, in light of his employment relationship with Respondent, and that his testimony is simply not supported by the credible evidence in this case.

William Fields

Mr. Fields is the owner of Contractor Services Group ("CSG"), whose company worked on the renovation project at issue in this case. (Tr. 322, 325). When asked about his personal knowledge concerning FCG providing documents to OSHA, Mr. Fields testified as follows:

Q. Do you happen to know what those documents were?

A. I ***think*** it was also the HazCom plan, the MSDS sheets. I ***think*** Glenn had been given a listing of what to provide, as well as us, and whatever documents. ***I'm not sure*** of the complete list of the documents he was asked to provide. (Tr. 341-342). [emphasis supplied].

I find Mr. Field's testimony concerning the issue of whether OSHA was provided copies of FCG's HazCom plan to be less than credible based on his tentative answers suggesting that he was less than certain.

Raymond Glenn Boone

Mr. Boone is FCG's vice-president of operations. (Tr. 360). He testified that "all of [the] documents were in the company truck when Clarence Moore and I were on site on October 14th and he never asked us for them." (Tr. 367). He further testified that he saw Mr. Aumock give a copy of the documents at issue to OSHA CO Moore on October 14th. (Tr. 407). Mr. Boone went on to testify that he received an email on October 18th indicating that OSHA was returning to the site on October 19th and wanted him to bring copies of the HazCom and lead protection plans. According to Mr. Boone, he brought copies of

those plans on October 19th and gave them to CO Moore, who looked at them and handed them back. (Tr. 368). On cross-examination, Mr. Boone testified that "OSHA did not ask me for those documents. All they had to do was ask and I would have emailed them to them." (Tr. 439).

I find that Mr. Boone's testimony in regard to whether OSHA was provided copies of FCG's HazCom and lead compliance plans was inconsistent. On the one hand, he asserted that CO Moore requested the documents and received them and then handed them back. He then asserted that OSHA did not ask for the documents. I further find that Mr. Boone's answers during his testimony were often evasive and not responsive to the questions asked. Moreover, Mr. Boone's credibility is undermined by his admission that he recorded the meeting with OSHA on October 19th despite being told that recording would not be permitted. (Tr. 143, 417).

Clarence Moore

Mr. Moore is the OSHA CO who was assigned to investigate the complaint in this case. Although he has only been with OSHA since 2010, CO Moore has a degree in occupational safety and health. He testified that during his initial visit to the site on October 14, 2011, he was only given a copy of FCG's quality management and quality control plan. Moreover, he testified that he was only provided two pages of that document and then later received a complete copy from Mr. Aumock. (Tr. 56-59, 66-67, 138; GX-4).[9] During his testimony, CO Moore's demeanor was calm and confident. He frequently made eye contact with the undersigned while testifying. His acknowledgement of receipt of some documents, *i.e.*, FCG's quality control plan and sampling results, made his testimony more credible. (Tr. 66-67, 138).

David McLemore

Mr. McLemore is an OSHA IH with 17 years of experience. He received a referral in this case from CO Moore, and he performed the above-noted testing for lead at the site. (Tr. 141-142). IH McLemore's demeanor while testifying was calm and confident. Like CO Moore, he often made eye contact with the undersigned while testifying. He also helped the undersigned to understand some of the more technical aspects of this case, making his testimony highly probative and very credible.

Adverse Inferences

"When it would be natural under the circumstances **for a party to call a particular witness**, or to take the stand as a witness in a civil case, **or to produce documents or other objects in his or her possession** as evidence and the party fails to do so, this failure may serve as the basis for invoking an adverse inference." 2 McCormick on Evidence § 264 (Kenneth S. Broun, ed., 2006) (emphasis added). The Commission has recognized the existence and application of the common law principle of "adverse

[9] "GX" refers to a Government's exhibit, while "RX" refers to a Respondent's exhibit.

inference." *See Capeway Roofing Sys., Inc.,* 20 BNA OSHC 1331 (No. 00-1968, 2003). In the instant case, I find FCG's failure to provide OSHA with copies of its HazCom and lead compliance plans to be indicia of the fact that it had no such plans in place for this project at the time of the inspection. These documents would have been in FCG's possession and under its control. Therefore, it is reasonable to conclude that if such documents had existed at the time of the inspection, Respondent would have averted the issuance of the Citation, and these proceedings, by simply providing OSHA with copies of the documents requested. I further find Respondent's failure to call Robert Probstfield to be an indication that, if called, his testimony would support the government's allegations of violations of the cited standards. Although the record is unclear about what his exact position with FCG was, it is clear that he held a position of authority over this project and was on site frequently. (Tr. 279, 300, 312, 429). Given Mr. Probstfield's responsibility with respect to the worksite and project, it seems that his testimony could have easily established FCG's contention that it was in compliance with the cited standards. Finally, Respondent provided no explanation for its failure to call Mr. Probstfield to testify. (Tr. 282).

Multi-employer Worksite Doctrine

The Commission's test of employer liability, holds an employer " responsible for the violations of other employers 'where it could reasonably be expected to prevent or detect and abate the violations due to its supervisory authority and control over the worksite."' *McDevitt St. Bovis, Inc.*, 19 BNA OSHC 1108, 1109 (No. 97-1918, 2000) (internal citation omitted); *Grossman Steel & Aluminum Corp.*, 4 BNA OSHC 1185, 1188 (No. 12775, 1975) (noting that general contractors are "well situated to obtain abatement of hazards," and thus it is "reasonable to expect the general contractor to assure compliance with the standards insofar as all employees on the site are affected"). In holding non-exposing employers responsible for noncompliance with the Act at multi-employer sites, the Commission's test also reflects the Act's remedial purpose: "to assure so far as possible every working man and woman in

the Nation safe and healthful working conditions." Section 2(b) of the Act, 29 U.S.C. § 651(b); *see also Access Equip Sys.*, 18 BNA OSHC 1718, 1723 (No. 95-1449, 1999) (noting that courts of appeals "have found support for the doctrine in the broad, remedial purpose of the Act"). The worksite at issue here involved multiple companies contracted to perform various parts of the renovation.

Upon OSHA's initial entry onto the worksite on October 14, 2011, Respondent FCG was identified as the "controlling" entity or "prime." (Tr. 37, 62). FCG, through its vice-president for operations, Mr. Boone, conceded that in its capacity as "general contractor" for the project, "we [sic] manage the work." FCG hired the subcontractor, CSG, to manage the sandblasting operation. (Tr. 434-435). CSG then contracted with Gainey Sandblasting ("Gainey") to do the actual sandblasting. (Tr. 326). FCG also conceded that it "coordinated" the work involving the sandblasting of the lead-based paint. (Tr. 436). Despite Respondent's insistence on "splitting hairs" over the nature of its relationship to the subcontractors, I find that, at all times relevant to this case, it acted in a manner consistent with its title of "general contractor." Therefore, I find that Respondent was the "controlling employer" and, as such, it was in the best position to control conditions at the worksite, including assuring compliance with OSHA standards.

Alleged Violations of 29 C.F.R. § 1910.1200

Citation 1, Item 1a alleges a violation of 29 C.F.R. § 1910.1200(e)(1) which requires that:

> Employers shall develop, implement, and maintain at each workplace, a written hazard communication program which at least describes how the criteria specified in paragraphs (f), (g), and (h) of this section for labels, and other forms of warning, material safety data sheets, and employee information and training will be met….

Specifically, Item 1a alleged that Respondent did not have a written HazCom program to address hazards associated with employee exposure to lead and silica dust. (GX-1).

Citation 1, Item 1b alleges a violation of 29 C.F.R. § 1910.1200(e)(2) which requires that:

> Multi-employer workplaces. Employers who produce, use, or store hazardous chemicals at a workplace in such a way that the employees of other employer(s) may be exposed … shall additionally ensure that the hazard communication programs developed and implemented under this paragraph (e) include the following:
>
> (i) The methods the employer will use to provide the other employer(s) on-site access to material safety data sheets for each hazardous chemical the other employer(s)' employees may be exposed to while working;
> (ii) The methods the employer will use to inform the other employer(s) of any precautionary measures that need to be taken to protect employees during the workplace's normal operating conditions and in foreseeable emergencies; and
>
> (iii) The methods the employer will use to inform the other employer(s) of the labeling system used in the workplace.

Item 1b alleged that Respondent failed to ensure that "employees engaged in project oversight and employees of other employers were made aware of the silica and lead paint dust hazards being generated throughout the building as a result of the sandblasting operations in the basement" of Stack B in the subject building.

The HazCom standard requires "employers to provide information to their employees about the hazardous chemicals to which they are exposed, by means of a [HazCom] program…." 29 C.F.R. § 1910.1200(b)(1). The Statement of Work for this project called for the removal of "lead based paint" by way of "sandblasting operations." (GX-9). Respondent's own testing of the paint revealed the presence of lead. (Tr. 146; RX-7). Gainey was using sand or "crystalline silica" to remove the paint. (Tr. 83; GX-6e/f). I credit the testimony of IH McLemore, who testified that "lead is toxic to the system [and] to the bloodstream. It can damage your kidneys, have [sic] memory loss, brain damage." (Tr. 159). He further

testified that silica "is a respiratory hazard that [sic] inhalation could lead to silicosis which is a cancer." *Id.* When asked where silica comes from, he testified that it is "[t]he crystal form of sand." (Tr. 160). I find, accordingly, that the cited standards apply.

The thrust of the Secretary's argument concerning this item is not the sufficiency of FCG's written HazCom program, but, rather, that FCG did not have one in place at the time of the inspection. This position was outlined by IH McLemore, who testified as follows:

> A. Well, if there was a program in place, we never got it, and if there was training being conducted, we didn't receive any proof of that, and so since I didn't have any other documentation that said otherwise, I recommended that the Citation be issued, just in light of the lead and silica hazard present on site. (Tr. 167).

The evidence concerning whether FCG had a written HazCom program for this project is in dispute. The resolution of this dispute rests on the credibility of the witnesses. For the reasons stated *supra*, I credit the testimony of IH McLemore over that of Respondent's witnesses and find that FCG did not have a HazCom program in place for this project at the time of the inspection.[10] I further find that the absence of a HazCom program is explained by the testimony that this project had been "fast tracked," thereby allowing Mr. Boone only a few days to pull everything together. (Tr. 94, 274, 448). Moreover, as indicated above, it is reasonable to infer that, if a HazCom program had existed at the time of the inspection, Respondent would have provided it to OSHA to avoid being cited. As also indicated above, the testimony that a copy of the program was provided to CO Moore, who looked at it and then

[10] Based on this finding, there is no need to address the adequacy of the HazCom and lead compliance programs FCP produced during discovery and presented at the hearing as part of its "Accident Prevention Plan" and "Safety Program". (RX-3 & 4).

returned it, was not believable. (Tr. 368). Based on the credible evidence of record, the Secretary has established that FCG was in violation of the terms of both of the cited standards.[11]

FCG asserts that none of its employees entered the containment area where the sandblasting occurred. Regardless, the record shows that employees of Gainey were exposed to lead and silica in that Gainey performed the paint removal. (Tr. 326; GX-6e, 6f). The record further shows that employees of CSG were also exposed to lead and silica. (Tr. 325-326, 333, 435-436). In particular, CSG employees were exposed to "flicks of paint" and "layers of dust" resulting from the sandblasting operation. (Tr. 72). Applying the multi-employer worksite doctrine, I find that FCG is responsible as the "controlling employer" for not adequately protecting employees of CSG and Gainey from the hazards associated with exposure to lead and silica. That Respondent had the ability to direct and control the project is demonstrated by the fact that all of the subcontractors operated under FCG's quality control plan. (Tr. 431-33). When asked about its ability to control the subcontractors on the project, Mr. Boone stated: "If we see that they're doing something unsafe, we would [sic] stop it." (Tr. 433). Respondent's ability to stop an unsafe practice is a further indication of its ability to control the worksite. The evidence of record demonstrates that employees were exposed to the hazards of the lead and silica present at the site.

FCG contends that it never actually entered the containment area until the day of the inspection. (Tr. 435). Nevertheless, Respondent should have known it was required to have HazCom and lead programs

[11] The fact that FCG did not have the required program is supported since Ft. Bragg was also cited under the same standards for FCG's failure to have HazCom and lead compliance programs in place. (GX-3, Tr. 168, 284-285). When asked about the existence of FCG's HazCom program, Fort Bragg's safety risk program manager replied, "I haven't seen it but I was told they have one." (Tr. 45-46). Interestingly, CSG did provide copies of its HazCom and respiratory protection programs to OSHA and was not cited for failing to have programs in place. (Tr. 342-343) However, CSG and Gainey were cited under similar standards (Tr. 168). CSG admittedly did not do any air monitoring to determine the exposure level of employees working in the containment area. (Tr. 346). CSG constructed the containment area in the basement and utilized some protective equipment (i.e. negative air machines), to perform its work. (Tr. 325). However, CO Moore determined that the barrier for the containment area was not effective. (Tr. 73).

in view of the terms of the Statement of Work and its own testing for lead. In any case, even if Respondent itself never entered the containment area, it was required to exercise reasonable diligence to determine if CSG and Gainey employees were exposed to any hazardous substances and to develop any necessary programs in that regard. As the Commission stated in *Automatic Sprinkler Corp. of America*, 8 BNA OSHC 1384, 1387 (No. 76-5089, 1980), an employer "must make a reasonable effort to anticipate the particular hazards to which its employees may be exposed in the course of their scheduled work."

Based on the foregoing, I find that the Secretary has met her burden of proving that FCG was in violation of 29 C.F.R. §§ 1910.1200(e)(1) and (e)(2).

Alleged Violation of 29 C.F.R. § 1926.62(e)(2)(i)

Citation 1, Item 2 alleges a violation of 29 C.F.R. § 1926.62(e)(2)(i), which requires that:

> Prior to commencement of the job each employer shall establish and implement a written compliance program to achieve compliance with paragraph(c) of this section.

Specifically, the Citation alleged deficiencies under paragraph (c) of the lead standard, which addresses the "permissible exposure limit" for lead. The Citation alleged as follows:

> Where employees were exposed to lead dust, the employer did not ensure a written compliance lead plan was developed prior to the start of sandblasting operations. In addition to ensuring a competent person makes frequent and regular inspections of the job site, materials and equipment, a written compliance plan must include at least the following provisions:
>
> A. A description of each activity in which lead is emitted; e.g. equipment used, material involved, controls in place, crew size, employee job responsibilities, operating procedures and maintenance practices;
> B. A description of the specific means that will be employed to achieve compliance and, where engineering controls are required engineering plans

and studies used to determine methods selected for controlling exposure to lead;

C. A report of the technology considered in meeting the PEL;
D. Air monitoring data which documents the source of lead emissions;
E. A detailed schedule for implementation of the program, including documentation such as copies of purchase orders for equipment, construction contracts, etc.;
F. A work practice program which includes items required under paragraphs (g), (h) and (i) of this section and incorporates other relevant work practices such as those specified in paragraph (e)(5) of this section;
G. An administrative control schedule required by paragraph (e)(4) of this section, if applicable;
H. A description of arrangements made among contractors on multi-contractor sites with respect to informing affected employees of potential exposure to lead and with respect to responsibility for compliance with this section as set forth in 1926.16.
I. Other relevant information.

The cited standard required Respondent to develop and implement a written lead compliance program prior to the commencement of the job. The parties stipulated to the presence of lead at the worksite. Moreover, FCG's own testing revealed the presence of lead. (RX-7). For the reasons already stated, I credit the testimony of CO Moore and IH McLemore over the testimony of Respondent's witnesses and find that no lead compliance program was in place at the time of the inspection.[12] Further, for the reasons articulated in the discussion as to Items 1a and 1b, I find that employees of CSG and Gainey were exposed to lead during the paint removal work. I also find that Respondent knew or should have known that it was required to develop and implement a written lead compliance program; this is particularly so in view of the Statement of Work and the test results from its own testing for lead. Finally, despite its contention that none of its employees entered the containment area, Respondent, with reasonable diligence, could have determined the conditions in the containment area and learned that employees were exposed to lead.

[12] In view of this finding, there is no need to address the adequacy of the HazCom and lead compliance programs FCP produced during discovery and presented at the hearing as part of its "Accident Prevention Plan" and "Safety Program". (RX-3 & 4).

For all of the foregoing reasons, I find that the Secretary has shown that the standard applies, that its terms were not met, that employees were exposed to the cited condition, and that Respondent had knowledge of the condition. The Secretary has therefore met her burden of establishing that FCG was in violation of 29 C.F.R. § 1926(e)(2)(i).

Serious Classification

To prove a violation was "serious" under section 17(d) of the Act, 29 U.S.C. § 666(d)**,** the Secretary must show there was a substantial probability that death or serious physical harm could have resulted from the cited condition and that the employer knew or should have known of the condition; the likelihood of an accident occurring is not required. *Spancrete Northeast, Inc.*, 15 BNA OSHC 1020, 1024 (No. 86-521, 1991).

IH McLemore credibly testified about the health effects of exposure to lead and silica and that such exposure creates a "substantial probability that death or serious physical harm could result." (Tr. 159). The IH also credibly testified that with appropriate HazCom and lead programs, FCG could have communicated to the employees at the worksite the nature of the hazardous materials present through the use of signs and labels. (Tr. 169). Additionally, with the proper programs in place, FCG would have known it was required to conduct air monitoring to determine: (1) the exposure of the employees to lead and silica, and (2) the appropriate personal protective equipment to be used. (Tr. 175).

Respondent was on notice, through the Statement of Work, that the project involved lead-based paint removal. Its own testing revealed the presence of lead. (Tr. 146). Further, as the general contractor, Respondent knew or should have known that silica would also be present at the worksite; in particular, the Statement of Work specified that sandblasting would be used for the paint removal. (GX-9). And, as the general contractor, and in view of FCG's contract with Fort Bragg, Respondent was

charged with the overall responsibility for compliance with OSHA regulations. Here, the specific OSHA standards required FCG to have HazCom and lead compliance programs for the project once it became aware that the work involved removing lead-based paint by means of sandblasting. I conclude that the cited standards are properly classified as serious. The cited standards are therefore affirmed as serious violations.

Penalty Determination

The Commission, as the final arbiter of penalties, must give due consideration to the gravity of the violation and to the employer's size, history and good faith. *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2213-14 (No. 87-2059, 1993). These factors are not necessarily accorded equal weight, and gravity is generally the most important factor. *Trinity Indus., Inc.*, 15 BNA OSHC 1481, 1483 (No. 88-2691, 1992). The gravity of a violation depends upon such matters as the number of employees exposed, duration of exposure, precautions taken against injury, and the likelihood that an injury would result. *J.A. Jones*, 15 BNA OSHC at 2213-14.

In this case, I find that OSHA appropriately evaluated the severity of each violation as high, given the likelihood of blood poisoning or silicosis resulting from exposure to lead and/or silica. (Tr. 174). Additionally, I find that OSHA correctly determined the probability of each violation to be lower or lesser because the project had only been ongoing for a short period of time and some personal protective equipment was being worn. (Tr. 174-75). The gravity-based penalty for the items was determined to be $5,000.00. Because FCG had less than 25 employees, it was given a 40 percent reduction for size, resulting in a proposed penalty of $3,000.00 each for Items 1b and 1b and Item 2. (Tr. 176). I find the proposed penalties appropriate. A penalty of $3,000.00 is assessed for grouped Items 1a and 1b, and a penalty of $3,000.00 is assessed for Item 1.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

ORDER

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

1. Items 1a and 1b of Serious Citation 1, alleging violations 29 C.F.R. §§ 1910.1200(e)(1) and 1910.1200(e)(2), are AFFIRMED, and a total penalty of $3,000.00 is assessed.
2. Item 2 of Serious Citation 1, alleging a violation of 29 C.F.R. § 1926.62(e)(2)(i), is AFFIRMED, and total penalty of $3,000.00 is assessed.

/s/

Keith E. Bell

Judge, OSHRC

Dated: August 27, 2012

Washington, D.C.