



UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR
Complainant,

v.

ASARCO, INC.,
Respondent,

UNITED STEELWORKERS OF AMERICA,
AFL-CIO-CLC, LOCAL NO. 461
Authorized Employee
Representative.

OSHRC DOCKET
NO. 93-2657

NOTICE OF DOCKETING
OF ADMINISTRATIVE LAW JUDGE'S DECISION

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on January 5, 1995. The decision of the Judge will become a final order of the Commission on February 6, 1995 unless a Commission member directs review of the decision on or before that date. **ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW.** Any such petition should be received by the Executive Secretary on or before January 25, 1995 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary
Occupational Safety and Health
Review Commission
1120 20th St. N.W., Suite 980
Washington, D.C. 20036-3419

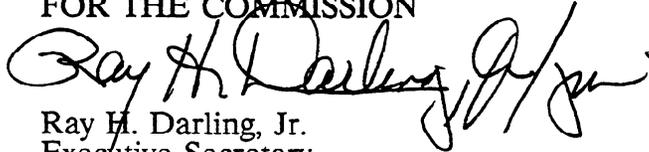
Petitioning parties shall also mail a copy to:

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

DOCKET NO. 93-2657

If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 606-5400.

FOR THE COMMISSION

A handwritten signature in cursive script, appearing to read "Ray H. Darling, Jr.", written in black ink over the typed name.

Ray H. Darling, Jr.
Executive Secretary

Date: January 5, 1995

DOCKET NO. 93-2657

NOTICE IS GIVEN TO THE FOLLOWING:

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SECRETARY OF LABOR,
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ASARCO, INCORPORATED,
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DECISION AND ORDER

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C., Section 651, *et. seq.* hereafter referred to as the Act).

Respondent, ASARCO, Inc. (ASARCO), at all times relevant to this action maintained a worksite at 5th and Douglas Streets, Omaha, Nebraska, where it operates a primary lead refinery. ASARCO is an employer engaged in a business affecting commerce and as such is subject to the requirements of the Act.

On July 24, 1993 the Occupational Safety and Health Administration (OSHA) issued to ASARCO citations, together with proposed penalties, alleging violations of the Act. Respondent filed a timely notice of contest to "serious" citation 1, item 5, alleging violation of 29 CFR §1910.1025(k)(2)(i), bringing this proceeding before the Occupational Safety and Health Review Commission (Commission).

In lieu of a hearing, the parties have elected to submit this case on a stipulated record, pursuant to Commission Rule §2200.61. This matter is now ready for disposition.

Alleged Violation

Citation 1, item 5 alleges:

29 CFR 1910.1025(k)(2)(i): An employee removed from exposure to lead, or otherwise limited pursuant to this section was not provided with medical removal protection benefits:

Establishment - employees who have been removed from working in areas of the plant exceeding the action level were not provided with up to eighteen months of medical removal protection benefits in that employees who had been medically removed were not considered for advancement, promotion or lateral job changes, thereby limiting potential earnings and seniority rights and/or other employment rights based on their medical removal status.

Stipulated Facts

The parties agree that at all relevant times, Michael Dougherty was employed by ASARCO at the Omaha plant as a maintenance welder [Stip. #3]. Between February 2, and July 15, 1993 Dougherty was placed on medical removal to areas of the plant with lead exposure levels below OSHA's action level [Stip. #4]. In March 1993, Dougherty bid for an open position as a second class mason. Dougherty was not considered for the job solely on the basis of his medical removal status. The masonry position was performed in areas of the plant which were above the OSHA action level for lead, and ASARCO had an immediate need to fill the vacancy [Stip. #6 & 7]. The collective bargaining agreement in effect at ASARCO's Omaha plant states that requests for transfer to bid jobs will be granted "on the basis of Plant Seniority providing applicant has the ability to do the work required in the best judgment of the Management" [Stip. #2; Attachment 1, p. 7].

Discussion

Section 1910.1025(k)(2)(i) requires the employer to provide up to 18 months of medical removal protection benefits, including "earnings, seniority and other employment rights and benefits . . . as though the employee had not been removed from normal exposure to lead or otherwise limited."

The evidence establishes that the right to be considered for transfer on the basis of seniority and ability is a benefit of Mr. Dougherty's employment.^o Had Mr. Dougherty not suffered from elevated blood lead levels, ASARCO would have had to consider his

bid for the mason's position, and awarded him the position, if qualified. Dougherty was admittedly denied an equal opportunity to compete for the position; that opportunity was denied him solely on the basis of his medical removal status. He was, therefore, denied a "medical removal protection benefit" as defined by the cited standard.

ASARCO's failure to provide the said benefit is not excused by its need to "immediately" fill the posted position. If Dougherty was found to be qualified, the standard requires ASARCO to award the position to him, and hold the position open for him until his period of removal or limitation ends and he can be returned to his former job, or "to the position [he] would likely be occupying if he or she had never been removed." 43 Fed. Reg. 52,974 (1978). The burden imposed on ASARCO to fill the mason's position temporarily is no greater than the burden placed upon it to cover Dougherty's job as maintenance welder during his medical removal.

ASARCO defends solely on the basis that the language in the citation refers to its failure to consider Dougherty for "advancement, promotion or lateral job changes." ASARCO maintains that because the mason's position was actually a demotion from Dougherty's welding position, the stipulated facts fail to establish the specific violation charged.

ASARCO's argument is without merit. The language of the citation is sufficiently broad to encompass the conduct which is the subject of this matter. Moreover, it is clear from the stipulated facts that Respondent was fully aware of the issue in dispute despite the flawed pleadings. In such a case, amendment of the pleadings to conform to the evidence under Fed.R.Civ.P. 15(b) is appropriate. *Peavey Company*, No. 89-2836 (September 26, 1994). [Commission slip opinion] Accordingly, the citation is amended to allege ASARCO's failure to consider a medically removed employee's request for transfer.

Penalty

The undersigned is satisfied that the cited violation is correctly classified as "serious." The medical removal provisions are designed to ensure meaningful employee participation in blood testing. The provisions are meant to eliminate the possibility that employees will not voluntarily participate, fearing that they would be endangering their

jobs or the benefits associated with them. An employer's failure to adhere to the standard might encourage employees to conceal high blood lead levels. It is well settled that persistent exposure to excessive levels of airborne lead is substantially likely to result in serious physical harm. *See, e.g. Article II Gun Shop, Inc.*, Nos. 91-2146 & 91-3127 (September 29, 1994). [Commission slip opinion]; Appendix A to the lead standard, 29 C.F.R. §1920.1025.

Respondent is a large employer, with 8,500 employees nationwide, and approximately 220 employees in its Omaha plant. The gravity of the cited violation is moderately low, considering ASARCO's adherence to all other provisions of the medical removal standard [Stip. #5], and the reported occurrence of only one incident of this nature. No evidence of prior OSHA violations or bad faith was adduced in the stipulated facts, and those factors are not considered in assessing a penalty.

Based on the relevant factors, the Secretary's proposed penalty of \$2,125.00 is deemed appropriate.

Findings of Fact and Conclusions of Law

All findings of fact and conclusions of law relevant and necessary to a determination of the contested issues have been found specially and appear in the decision above. See Rule 52(a) of the Federal Rules of Civil Procedure.

ORDER

1. Serious citation 1, item 5 is **AFFIRMED** and a penalty of \$2,125.00 is **ASSESSED**.


James H. Barkley
Judge, OSHRC

Dated: December 23, 1994