



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.

SOUTHERN SCRAP MATERIALS CO., INC.,

Respondent,

W.H.,

Affected Employee.

OSHRC Docket No. 94-3393

ON BRIEFS:

Jordana W. Wilson, Attorney; Nicholas J. Levintow and Kenneth A. Hellman, Senior Trial Attorneys; Joseph M. Woodward, Associate Solicitor; Marvin Krislov, Acting Solicitor; U.S. Department of Labor, Washington, DC

For the Complainant

W. Scott Railton, Esq.; Reed, Smith, Shaw & McClay, L.L.P., McLean, VA; James D. Morgan; Fisher & Phillips, New Orleans, LA

For the Respondent

DECISION

Before: ROGERS, Chairman; ATTWOOD, Commissioner.

BY THE COMMISSION:

Southern Scrap Materials Co. ("Southern") operates a scrap recycling facility in Baton Rouge, Louisiana ("Baton Rouge facility"). The Occupational Safety and Health Administration ("OSHA") commenced an inspection of the Baton Rouge facility on April 4, 1994, and on September 30 of that year issued Southern four citations alleging numerous violations of the Occupational Safety and Health Act of 1970 ("Act" or "OSH Act"), 29 U.S.C. §§ 651-678. Most of these violations were alleged under the general industry lead and cadmium standards, 29

C.F.R. §§ 1910.1025 and .1027 (1994). Prior to the hearing in this matter, the Secretary withdrew several citation items. For those items that remained in dispute, the Secretary proposed a total penalty of \$1,937,000. Following the hearing, Administrative Law Judge Ken S. Welsch issued a decision affirming some of these citation items and assessing a total penalty of \$266,500.

On review before the Commission are numerous threshold challenges concerning the judge's rulings on discovery; the validity of the lead and cadmium standards; the reasonableness of OSHA's inspection under section 8(a) of the OSH Act, 29 U.S.C. § 657(a); the validity and reliability of OSHA's air monitoring; and the existence of an employment relationship between Southern and the workers allegedly exposed to the cited conditions. As discussed below, we reject Southern's challenges to the judge's discovery rulings, as well as its challenges to the validity of the lead and cadmium standards, and the reasonableness of OSHA's inspection. With one exception, we also reject Southern's challenges to the validity and reliability of OSHA's air monitoring. Additionally, we find that the Secretary failed to establish that Southern had an employment relationship with thirteen workers provided by another company, Barfield Enterprises ("Barfield"). We find, however, that the Secretary did establish that Southern had an employment relationship with Affected Employee W.H., a worker who was provided to Southern by a temporary employment agency.

The parties also raise challenges specific to the alleged violations that concern multi-employer liability, applicability of the cited standards, employer knowledge of the cited conditions, and characterization. Based on our resolution of all of the parties' challenges, as set forth below, we affirm Items 4 and 11 to 18 of Citation 1 as serious, Items 8a and 25 of Citation 2 as willful, and Item 3 of Citation 3 as serious; and we vacate Item 3 of Citation 1, and Items 1 to 7, 9, 11 to 18, 20 to 24, and 26 to 39 of Citation 2.¹ For the affirmed citation items, we assess a total penalty of \$114,500.

¹ Although the parties briefed Citation 2, Item 40, as requested, we decline to review the judge's disposition of this item. 29 C.F.R. § 2200.92(a); *Bay State Refining Co.*, 15 BNA OSHC 1471, 1476, 1991-93 CCH OSHD ¶ 29,579, p. 40,025 (No. 88-1731, 1992).

BACKGROUND

Southern's Baton Rouge facility consists of three scrap yards. Two of these yards, the Thomas and Stainless Yards, are the focus of the citation items at issue before the Commission. The Thomas Yard was divided into two sections that Southern identified as "ferrous" and "non-ferrous." In the ferrous section of the Thomas Yard, materials primarily made of iron were processed. A small portion of the scrap metal directed to this section was processed by torch cutting. An operator used a 60-foot pedestal crane to move this portion of scrap to designated torch cutting areas where workers known as "burners" cut the material into smaller pieces. In the non-ferrous section of the Thomas Yard, materials containing non-iron alloys were processed, including "dirty" or "irony" radiators. Burners "cleaned" the radiators by using cutting torches to remove "contaminants," such as ferrous clips, wires, and brackets. In the Stainless Yard, materials containing stainless steel and nickel alloys were processed. An operator used a mobile crane to move any scrap metal that required torch cutting into this yard's designated torch cutting area. As in the Thomas Yard, burners used cutting torches to cut the scrap metal into smaller pieces. The burners also used torches to remove material that was not stainless steel, such as copper fittings.

OSHA conducted a general programmed health inspection of both yards intermittently from April 4 to September 30, 1994. This inspection included air monitoring for lead and cadmium in the ferrous and non-ferrous sections of the Thomas Yard and in the Stainless Yard, as well as noise monitoring in both yards. At issue on review are serious violations of the general industry cadmium standard, as well as serious violations of a hearing protection standard, 29 C.F.R. § 1910.95(i)(2)(i), and a first aid standard, 29 C.F.R. § 1910.151(b) (1994). Also on review are willful violations of the general industry lead standard and a repeat violation of a machine guarding standard, 29 C.F.R. § 1910.215(b)(9).

DISCUSSION

I. Threshold Challenges

Before discussing the individual citation items in dispute on review, we first address the various threshold challenges. As noted, these issues relate to the judge's discovery rulings, the reasonableness of OSHA's inspection, the validity of the lead and cadmium standards, the validity and reliability of OSHA's air monitoring, and the existence of an employment

relationship between Southern and the workers whose alleged exposure is the subject of several citation items.

A. Discovery rulings

The judge denied Southern's multiple requests for sanctions against the Secretary for alleged discovery abuses. Southern renews its argument that the Secretary engaged in a "pattern of contumacious conduct" during discovery that denied Southern "the opportunity to defend itself fully." For the following reasons, we conclude that the judge did not abuse his discretion in denying Southern's motions for sanctions.

Background

Southern's claims of contumacy and prejudice center on the Secretary's conduct as it relates to four events involving document production. First, on January 20, 1995, along with its answer to the Secretary's complaint, Southern submitted a request for production of OSHA's investigative file. The Secretary initially responded to the request on February 24 with approximately 2,600 pages of material. Then, on February 28, the Secretary provided three additional documents that she characterized as "inadvertently omitted" from her response. Soon thereafter, Southern notified the Secretary that documents in the original series were missing. On March 17, the Secretary supplied additional documents to Southern, including thirty-eight pages that had been omitted from the original series of produced documents.

Second, Southern issued subpoenas to Compliance Officer ("CO") Brad Baptiste and the area director for the Baton Rouge OSHA Area Office, requesting that the Secretary produce for review the entire original investigative file and other relevant documents. The Secretary objected, stating that "[t]here are no other documents subject to the subpoena which have not been previously produced," but the judge overruled her objection in a May 25, 1995 order. At a June 16 deposition, the Secretary produced the investigative file which included significantly more material than her previous responses. Southern copied all of the documents produced at the deposition. Due to some confusion over whether all discoverable documents had been produced, the Secretary provided another copy of the investigative file to Southern on July 17, which by then contained approximately 6,700 pages of material. The Secretary explained that about 3,710 pages of the file produced on July 17 duplicated other documents in that file, and Southern's counsel was informed of this fact on numerous occasions.

Third, during an August 17, 1995 deposition of CO Baptiste, Southern discovered that the CO had earlier “discarded” a notebook he maintained as an “Inspection Log” and that the log was not produced in response to Southern’s previous document requests. The log included information relating to cases the CO investigated, including the inspection number, the name of the site and its address, the opening conference date, the number of employees, comments, and the citations and penalties. According to CO Baptiste, he discarded the log during his May 1995 move from Baton Rouge to Denver. Prior to discarding the log, CO Baptiste had been asked by the Solicitor of Labor to produce any documents associated with the case, but he testified that he did not then produce the log because he believed it “had no relevance to the case file” or the inspection. All of the information in the log was also maintained in a computer system, except for the information recorded in the comment section, which merely consisted of “[o]ne- or two-word listings of what were the major aspects of that case,” such as “ ‘lockout/tagout’ or something of that nature.”

Finally, on September 5, 1995, one day before the hearing began, the Secretary sent Southern several hundred pages of documents from OSHA’s Salt Lake Technical Center laboratory that were the subject of earlier document requests. Most of the information in these documents pertained to the laboratory’s analysis of OSHA’s lead and cadmium samples and was included in a final report that had been provided to Southern before the prehearing exchange, but the laboratory had omitted some analytical data from that report. The Secretary’s attorney requested the documents from the laboratory after learning of their existence and, immediately after receiving them, she sent them to Southern via overnight mail. The Secretary did not use these documents as exhibits, and she had already identified two witnesses from the Salt Lake laboratory—neither of whom testified as an expert—in her prehearing exchange. The judge gave Southern permission to either depose these witnesses, or merely talk to them and base cross-examinations on those conversations. The judge also stated that, if requested, he would order the Secretary to “hold off” on calling the witnesses until the case was reconvened, which would have given Southern several months to review the documents. Southern did not avail itself of any of these options.

Analysis

Under Commission Rule 52, a party may apply for an order compelling discovery when the other party refuses or obstructs discovery. 29 C.F.R. § 2200.52 (1995). If the judge enters an

order compelling discovery and a party fails to comply with that order, the judge may then “make such orders with regard to the failure as are just . . . after affording an opportunity to show cause why the order should not be entered, or upon the motion of a party.” *Id.* The judge, however, may not sanction a party by dismissing the citation “unless the record shows contumacious conduct by the noncomplying party or prejudice to the opposing party.” *St. Lawrence Food Corp.*, 21 BNA OSHC 1467, 1472, 2004-09 CCH OSHD ¶ 32,801, p. 52,480 (No. 04-1734, 2006) (consolidated).

In his decision, the judge found that CO Baptiste’s conduct during discovery was not contumacious because he was “new to legal proceedings.” With respect to the Secretary’s other alleged deficiencies in producing documents, the judge concluded that Southern had not been prejudiced in presenting its case but did not address whether the Secretary’s conduct was contumacious. We find that the Secretary’s response to Southern’s discovery requests did not rise to the level of contumacy. The Secretary responded to each of Southern’s requests for the investigative file, and she complied with the judge’s May 25 order requiring production of documents. Although the Secretary did not initially produce all required documents, she provided the remaining documents when she discovered the noted deficiencies. Indeed, after learning that the Salt Lake laboratory had created documents relating to the cadmium and lead tests, counsel for the Secretary immediately requested that the laboratory send the documents to her and, after receiving them, immediately sent them to Southern via overnight mail. There is no evidence that the Secretary intentionally withheld any of these documents from Southern or delayed their production. And we find no reason to disturb the judge’s conclusion that CO Baptiste’s destruction of the inspection log was not contumacious. Southern does not dispute the judge’s finding that the CO was “new to legal proceedings,” and nothing in the record undermines the CO’s explanations for discarding the log and failing to understand the log’s possible importance to the litigation. *Cf. Pittsburgh Forgings Co.*, 10 BNA OSHC 1512, 1514, 1982 CCH OSHD ¶ 25,974, p. 32,569 (No. 78-1361, 1982) (finding Secretary’s conduct contumacious where she (1) filed untimely response to motion; (2) was “on notice” that further failure to comply with orders would not be tolerated; (3) failed to comply with subsequent production requests; and (4) failed to provide all documents in timely manner “*without explanation*”).

Moreover, we find that the record evidence supports the judge's conclusion that Southern suffered no legal prejudice in its defense. As to the Secretary's delay in producing the Salt Lake laboratory documents, Southern chose not to pursue any of the remedies provided by the judge and, in any case, the representatives from the laboratory did not testify until October 23, 1995, affording Southern forty-seven days to review the documents. *See Genesee Brewing Co.*, 11 BNA OSHC 1516, 1518, 1983-84 CCH OSHD ¶ 26,519, p. 33,763 (No. 78-5178, 1983) (finding that extra case preparation and similar inconveniences do not amount to legal prejudice); *Samsonite Corp.*, 10 BNA OSHC 1583, 1587, 1982 CCH OSHD ¶ 26,054, pp. 32,736-37 (No. 79-5649, 1982) (finding that inability to prepare case in time for originally scheduled hearing does not constitute legal prejudice because continuance would cure any harm). And as to CO Baptiste's inspection log, Southern does not dispute that all of the data in the log, except the commentary, was included in other documents the Secretary provided. Also, the commentary itself consisted of only one- or two-word listings regarding "major aspects" of the case, such as the standards at issue, and Southern was able to examine all individuals who were present during the inspection, including CO Baptiste. Finally, Southern has neither explained nor provided evidence to show how its later receipt of the remaining materials prejudiced its case. Indeed, it is undisputed that by July 17, 1995, fifty-one days before the start of the hearing, the Secretary had provided Southern a complete copy of the investigative file, and Southern does not contend that it did not have time to adequately review this file.

Based on these facts, we conclude that the judge did not abuse his discretion in denying Southern's motions for discovery sanctions.

B. Reasonableness of OSHA's inspection

The judge rejected Southern's arguments that (1) the Secretary's inspection of the Baton Rouge facility was unreasonable under section 8(a) of the Act, 29 U.S.C. § 657(a), due to its long duration; and (2) Southern's facility was impermissibly selected for inspection in retaliation for the circumstances surrounding a prior settlement agreement between the Solicitor's Office and Southern. For the reasons that follow, we conclude that the judge's decision is supported by applicable precedent and the record evidence.

Under section 8(a), the Secretary must conduct a worksite inspection "during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner." 29 U.S.C. § 657(a); *Andrew Catapano Enters., Inc.*, 17 BNA OSHC 1776, 1780,

1995-97 CCH OSHD ¶ 31,180, p. 43,606 (No. 90-0050, 1996) (consolidated). An employer raising a challenge under this provision must show the Secretary's inspection was unreasonable and resulted in actual prejudice to the employer "in the preparation or presentation of its defense on the merits." *GEM Indus., Inc.*, 17 BNA OSHC 1184, 1187, 1993-95 CCH OSHD ¶ 30,762, p. 42,747 (No. 93-1122, 1995), *aff'd without published opinion*, 149 F.3d 1183 (6th Cir. 1998) (table). In rejecting Southern's claim that OSHA's inspection of the worksite was "unreasonably long," the judge found that (1) the general programmed health inspection occurred during parts of twenty-five days over a five-month period; (2) the inspection involved three separate yards spread over twenty-five acres and covered approximately 130 employees; (3) numerous safety and health standards were at issue; and (4) delays were caused by monitoring problems, scheduling conflicts, and weather. Southern does not dispute these findings, and it does not contend that any particular inspection activities were unnecessary. Accordingly, we conclude that Southern has failed to demonstrate that OSHA's inspection of the Baton Rouge facility was unreasonably long. Moreover, Southern has neither asserted nor demonstrated that the length of OSHA's inspection prejudiced its defense. *Id.* at 1187, 1993-95 CCH OSHD at p. 42,747.

Southern's retaliation allegation rests on its claim that the Baton Rouge facility was selected for inspection because local OSHA officials were "unhappy" that the Solicitor's Office and Southern had settled several citations issued in 1989. In support of this argument, Southern asserts that the assistant area director ("AAD") at the Baton Rouge OSHA Area Office admitted he did not like the prior settlement agreement, and CO Baptiste showed bias by referring to Southern's attorneys as "slick lawyers." The judge concluded that Southern failed to show CO Baptiste or his supervisors were hostile to Southern, and he accepted CO Baptiste's explanation that his comment was intended as a joke and not to intimidate or harass, noting that the CO's conduct and testimony at the hearing showed no "trace of bias, prejudice, or animosity toward Southern."

We have reviewed the record and Southern's briefs, and find that Southern has failed to explain the legal basis for its retaliation argument. To the extent that Southern is alleging a violation of its rights under either section 8(a) of the Act or the Fourth Amendment, such arguments are foreclosed by Southern's consent to OSHA's inspection and failure to allege that the inspection exceeded the scope of its consent. *Cody-Zeigler Inc.*, 19 BNA OSHC 1410, 1411-12, 2001 CCH OSHD ¶ 32,352, pp. 49,627-29 (No. 99-0912, 2001) (consolidated) (holding that

employer's consent to inspection precluded any probable cause challenge under Fourth Amendment, and finding it unnecessary to address selection issue because section 8(a) " 'does not require the Secretary to obtain evidence of any particular sort to support his decision to seek a consensual inspection' " (citation omitted)), *aff'd per curiam*, 19 BNA OSHC 1777 (D.C. Cir. 2002).

To the extent that Southern is asserting the affirmative defense of vindictive prosecution, we find the company has not met its burden of establishing such a claim. Although there is no uniform test for proving vindictive prosecution, "a threshold showing common to all tests is evidence that the government action was taken in response to an exercise of a protected right." *Nat'l Eng'g & Contracting Co.*, 18 BNA OSHC 1075, 1077, 1995-97 CCH OSHD ¶ 31,433, p. 44,453 (No. 94- 2787, 1997) (consolidated), *aff'd*, 181 F.3d 715 (6th Cir. 1999). There is no contention or evidence that a protected right was at issue here. As to retaliatory motive, the AAD testified that he neither liked nor agreed with the settlement agreement, but the record does not show that he harbored ill will toward Southern. And we find no reason to disturb the judge's decision to credit CO Baptiste's explanation regarding his "slick lawyers" comment. *See Am. Wrecking Corp.*, 19 BNA OSHC 1703, 1708, 2001 CCH OSHD ¶ 32,504, p. 50,401 (No. 96-1330, 2001) (consolidated) (deferring to judge's credibility determinations because he heard witnesses and observed their demeanor). Additionally, the record contains no evidence showing that Southern would not have been inspected absent a retaliatory motive.² *Nat'l Eng'g & Contracting Co.*, 18 BNA OSHC at 1078, 1995-97 CCH OSHD at p. 44,454 (concluding that, even where retaliatory motive is established, employer "must produce evidence tending to show that it would not have been cited absent that motive").

For all of these reasons, we reject Southern's reasonableness challenge to OSHA's inspection of the Baton Rouge facility.

² Southern argues that the judge erred by not granting it access to OSHA's inspection list, claiming the list may have demonstrated "that OSHA procedures for selecting employers for inspection were abused." The Commission has held that " '[t]o compel discovery on a vindictive prosecution claim, a defendant must show a colorable basis for the claim,' " which requires " 'some evidence tending to show the essential elements of the claim.' " *See Sturm Ruger & Co.*, 20 BNA OSHC 1720, 1726, 2002-04 CCH OSHD ¶ 32,719, p. 51,853 (No. 99-1873, 2004) (citation omitted), *aff'd per curiam*, 135 F. App'x 431 (1st Cir. 2005). As discussed above, the record lacks such evidence.

C. Validity of the lead and cadmium standards

Southern contends in this enforcement proceeding that the general industry lead and cadmium standards, promulgated under section 6(b)(5) of the Act, 29 U.S.C. § 655(b)(5), are invalid as to the scrap metal industry because OSHA did not conduct required health risk assessments and feasibility studies specific to that industry. *See CBI Servs., Inc.*, 19 BNA OSHC 1591, 1594, 2001 CCH OSHD ¶ 32,473, pp. 50,226-27 (No. 95-0489, 2001) (re-affirming that section 6(f) pre-enforcement challenge mechanism does not preclude substantive or procedural challenges in enforcement proceedings), *aff'd per curiam*, 53 F. App'x 122 (D.C. Cir. 2002). In promulgating a standard “dealing with toxic materials or harmful physical agents” under section 6(b)(5) of the Act, the Secretary must first determine, pursuant to the definition of “occupational safety and health standard” at section 3(8), 29 U.S.C. § 652(8), that the standard “is reasonably necessary and appropriate to remedy a significant risk of material health impairment.” *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst. (“API”)*, 448 U.S. 607, 639-40 (1980) (noting in plurality opinion that risk-assessment requirement of section 3(8) applies to standards promulgated under section 6(b)(5)). And once “the Secretary has made the threshold determination that such a risk exists with respect to a toxic substance,” she must then consider a proposed standard’s technological and economic feasibility, as required by section 6(b)(5). 29 U.S.C. § 655(b)(5) (requiring that standards pertaining to toxic materials or harmful physical agents be set to “most adequately assure[], to the extent feasible, . . . that no employee will suffer material impairment”); *Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 508-09 (1981) (feasibility analysis required by section 6(b)(5)).

Here, the judge determined that Southern was specifically precluded from challenging the validity of the lead standard due to its membership in the Institute of Scrap Recycling Industries, Inc. (“ISRI”), which previously participated in a judicial challenge to the validity of the standard. The judge also rejected Southern’s invalidity claims as to both the lead and cadmium standards, concluding that OSHA had made sufficient risk and feasibility findings in the standards’ rulemakings. For the reasons that follow, we reject Southern’s validity challenges to both standards.

Lead Standard

In promulgating the 1978 general industry lead standard, OSHA created new protections against occupational lead exposure, including a lower 8-hour time-weighted average (“TWA”)

permissible exposure limit (“PEL”) of 50 $\mu\text{g}/\text{m}^3$. Occupational Exposure to Lead, 43 Fed. Reg. 52,952 (Nov. 14, 1978) (final rule). Extensive pre-enforcement litigation challenging the validity of the standard followed its promulgation, and in its 1981 *Steelworkers* decision, the D.C. Circuit found the rulemaking free of procedural error and substantially upheld its validity as to most industries. *Steelworkers v. Marshall* (“*Steelworkers*”), 647 F.2d 1189, 1311 (D.C. Cir. 1981). However, the court remanded the rulemaking record to the Secretary for reconsideration of the feasibility of the standard’s requirement that the PEL be achieved by use of engineering and work practice controls in certain industries, including “independent collecting and processing of scrap lead (excluding collecting and processing that is part of a secondary smelting operation).” *Id.* As directed by the court, OSHA made additional feasibility findings for most of the enumerated industries, including the “Collection and Processing of Scrap (Excluding Battery Breaking),” and in light of those findings, OSHA amended the lead standard to permit employers to use respirators as a supplement to engineering and work practice controls where such controls alone prove infeasible to achieve the PEL. Occupational Exposure to Lead, 46 Fed. Reg. 60,758, 60,758-61 (Dec. 11, 1981) (amendment to final rule) (29 C.F.R. § 1910.1025(e)(1)(i)). OSHA found that, as amended, the standard was technologically and economically feasible for those industries.³ *Id.* at 60,764-65; *see* Occupational Exposure to Lead, 46 Fed. Reg. 6134, 6151-54 (Feb. 21, 1981) (amendment to final rule).

In response to Southern’s claim that the lead standard is invalid because OSHA did not conduct risk assessments and feasibility studies specific to its industry, the Secretary maintains that the company had “ample opportunity to participate in the promulgation of the [lead] standard and raise its challenge[]” based on its participation in a professional association that challenged the rule. *See Caterpillar Tractor Co.*, 12 BNA OSHC 1768, 1769-70, 1986-87 CCH OSHD ¶ 27,554, pp. 35,785-86 (No. 80-4061, 1986) (remanding issue of whether employer was collaterally estopped from challenging validity of lead standard due to its membership in trade association that participated in earlier challenge where record evidence was insufficient). The

³ OSHA also added an exemption for employees exposed to lead thirty days or less per year, requiring their employers to use engineering and work practice controls to reduce lead exposure to 200 $\mu\text{g}/\text{m}^3$, but permitting them to use any combination of such controls and/or respirators to further reduce lead exposure to or below 50 $\mu\text{g}/\text{m}^3$, regardless of feasibility. Occupational Exposure to Lead, 46 Fed. Reg. at 60,758-61 (29 C.F.R. § 1910.1025(e)(1)(ii)).

judge correctly noted that the National Association of Recycling Industries (“NARI”) participated in the lead standard’s rulemaking and initial pre-enforcement litigation. And ISRI—the successor to NARI—was a petitioner and intervenor in the pre-enforcement challenge to OSHA’s additional feasibility determinations. *Am. Iron & Steel Inst. v. OSHA*, 939 F.2d 975, 1010 (D.C. Cir. 1991). However, there is no evidence in this record that Southern or its parent, Southern Holdings, was a member of either NARI or ISRI at that time. The record shows only that Southern Holdings subscribed to ISRI publications and that Jim Arledge, Southern Holdings’ corporate safety director, once attended a seminar sponsored by ISRI. Accordingly, we conclude that Southern is not precluded from challenging the validity of the lead standard in this enforcement proceeding.

We nonetheless reject Southern’s claim that the lead standard is invalid. The D.C. Circuit explicitly found in *Steelworkers* that, “[i]n creating the new lead standard, OSHA has clearly met the Section 3(8) threshold test of proving ‘significant harm’ described by the [API] plurality.” 647 F.2d at 1248, 1251. The court did not question OSHA’s decision to aggregate industries for purposes of its health risk assessment and found that the standard’s promulgation complied with section 3(8) with regard to general industry as a whole, which includes the scrap metal processing industry. *Id.* at 1248-51. This type of industry aggregation for purposes of risk assessment has been approved in pre-enforcement challenges to other OSHA standards as well. *See UAW v. OSHA*, 37 F.3d 665, 670 (D.C. Cir. 1994) (upholding OSHA’s decision to adopt single general industry standard because risk relates to type of work rather than type of industry); *Am. Dental Assoc. v. Martin*, 984 F.2d 823, 827 (7th Cir. 1993) (holding that OSHA need not assess risk “workplace by workplace” where “rational explanation” for choosing not to disaggregate risk by industry is sufficient).

Southern challenges OSHA’s feasibility findings on the ground that “required . . . feasibility studies . . . w[ere] not done for Southern’s industry.” This argument is without merit. Following the D.C. Circuit’s remand of the lead standard in *Steelworkers*, OSHA made feasibility findings that specifically pertained to the scrap metal processing industry and, as noted above, amended the standard to permit employers to use respirators as a supplement to engineering and work practice controls where such controls alone prove infeasible to achieve the

PEL.⁴ On review, Southern does not address, or even acknowledge, any of OSHA's post-remand feasibility findings or amendments to the standard. Nor has Southern raised or proved infeasibility as an affirmative defense to any of the citation items alleging violations of the lead standard, or otherwise alleged or shown that compliance with the cited provisions was infeasible. *Atl. & Gulf Stevedores, Inc. v. OSHRC*, 534 F.2d 541, 551 (3d Cir. 1976) (noting that validity challenge “[i]n an enforcement proceeding . . . is an affirmative defense to a citation, and the petitioning employer bears the burden of proof on the issue”). In fact, none of the lead citations at issue even allege violations of standards requiring the use of engineering and/or work practice controls. In these circumstances, Southern lacks standing to challenge the validity of the standard based on feasibility. See *Simplex Time Recorder Co. v. Brock*, 766 F.2d 575, 583 (D.C. Cir. 1985) (noting that “in order to challenge a regulation as invalid, a person or company must demonstrate some identifiable stake in the outcome apart from a generalized uneasiness that the regulation is somehow wrong,” and “cannot object to a regulation which does not affect it in this case merely because it finds the procedure by which that regulation was adopted to have been irregular”). We thus reject Southern's validity challenge to the lead standard.

Cadmium Standard

In 1992, OSHA promulgated the general industry cadmium standard, which established new protections, including a lower 8-hour TWA PEL of 5 $\mu\text{g}/\text{m}^3$. Occupational Exposure to Cadmium (“Cadmium Preamble”), 57 Fed. Reg. 42,102 (Sept. 14, 1992) (final rule). The standard applies across industry lines to “all occupational exposures to cadmium and cadmium compounds, in all forms, and in all industries covered by the Occupational Safety and Health Act, except the construction-related industries.” 29 C.F.R. § 1910.1027(a).

In its preamble to the final rule, OSHA made numerous evidence-based findings regarding the significant health risks associated with cadmium exposure above an 8-hour TWA PEL of 5 $\mu\text{g}/\text{m}^3$. Cadmium Preamble, 57 Fed. Reg. at 42,108-210. Because Southern has not specifically challenged any of these findings, we conclude that it has failed to establish that OSHA's risk findings under section 3(8) were insufficient. *API*, 448 U.S. at 639; *Holly Springs Brick & Tile Co.*, 16 BNA OSHC 1856, 1859-60, 1993-95 CCH OSHD ¶ 30,468, pp. 42,075-76

⁴ These feasibility findings were made as to Standard Industrial Classification 5093, Scrap and Waste Materials. Occupational Exposure to Lead, 46 Fed. Reg. at 60,765; Occupational Exposure to Lead, 46 Fed. Reg. at 6153.

(No. 90-3312, 1994) (rejecting validity challenge where respondent “failed to prove an absence of significant risk of health impairment from exposure to silica”).

With respect to feasibility, OSHA made findings for a number of specific industries; but it also considered other “affected” industries, characterized them as “general industry,” and analyzed ten occupations in these industries “that are not directly associated with cadmium but may involve incidental exposure in the use of products containing cadmium.” Cadmium Preamble, 57 Fed. Reg. at 42,224-326. Although none of the industries referenced in the preamble were identified by the industrial classification pertaining to scrap metal processing, one of the ten occupational categories OSHA analyzed was that of “[w]elders, brazers, and solderers.” *Id.* at 42,313. In this occupational category, OSHA included workers “who use welding and flamecutting equipment such as arc welders, gas welders, and gas torches to join, cut, trim, and scarf metal components.” *Id.* We find this to be a fair description of the job tasks performed by Southern employees who were allegedly exposed to cadmium. Moreover, Southern has failed to raise infeasibility as an affirmative defense to any of the citation items alleging violations of the cadmium standard, and has not otherwise alleged that compliance with the cited provisions of the standard was infeasible. We therefore conclude that Southern both lacked standing to challenge the validity of the cadmium standard based on feasibility, and failed to show that compliance with the cited provisions would have been infeasible. *Simplex Time Recorder Co.*, 766 F.2d at 583; *Atl. & Gulf Stevedores, Inc.*, 534 F.2d at 551.

D. OSHA’s air monitoring

OSHA conducted personal air monitoring at the Baton Rouge facility for both cadmium and lead. On April 13, 1994, CO Dorinda Folse collected air monitoring samples from two Southern burners who were working in the Stainless Yard. Both of the burners torch cut scrap, and one also moved scrap into the torch cutting area with a mobile crane. The sample for the burner who performed both tasks showed a cadmium level in excess of the PEL, and the sample for the burner who only torch cut scrap showed a cadmium level in excess of the action level but not the PEL.⁵ That same day, CO Baptiste monitored five members of a burning crew provided by Barfield (the “Barfield burners”) working in the ferrous section of the Thomas Yard. On May

⁵ The action level for cadmium exposure is an 8-hour TWA of 2.5 $\mu\text{g}/\text{m}^3$, and the PEL is an 8-hour TWA of 5 $\mu\text{g}/\text{m}^3$. 29 C.F.R. § 1910.1027(b), (c).

26, 1994, he collected another five samples from these same burners and, on June 15, 1994, he collected an air monitoring sample from W.H., a burner working in the non-ferrous section of the Thomas Yard. Seven of the ten samples from the Barfield burners, as well as the sample from W.H., showed lead levels in excess of the PEL. 29 C.F.R. § 1910.1025(c)(1), (2).⁶ Of the three remaining samples from the Barfield burners, one sample showed a lead level in excess of the action level but below the PEL, and the other two samples showed lead levels below the action level. 29 C.F.R. § 1910.1025(b).⁷

To measure the burners' exposure, the COs attached a sampling cassette inlet to each burner's collar within his breathing zone, which conformed to OSHA's general protocol for air monitoring. The burners wore hard hats with attached face shields, and the sampling cassette inlets were placed outside of the face shields.⁸ Relying on an earlier Commission case, the judge accepted Southern's argument that OSHA's "welding fume" protocol for exposure monitoring—which required placement of the sampling inlet inside a worker's welding helmet—applied to the burners because he equated their face shields with welding helmets. *See Equitable Shipyards, Inc.*, 13 BNA OSHC 1177, 1986-87 CCH OSHD ¶ 27,859 (No. 81-1685, 1987) (consolidated). Therefore, the judge found that the COs had improperly placed the sampling cassette inlets outside the burners' face shields. Based on this determination, the judge invalidated OSHA's exposure monitoring results and vacated a number of the lead and cadmium citation items.

On review, the Secretary challenges the judge's conclusion, claiming that it was proper for the COs to take personal air monitoring measurements outside of the burners' face shields. In response, Southern argues that the judge was correct to apply the welding fume protocol, and

⁶ The PEL for lead exposure is 50 $\mu\text{g}/\text{m}^3$ averaged over an 8-hour period or, where "an employee is exposed to lead for more than 8 hours in a work day," the PEL as a TWA for that day is "reduced according to the following formula: Maximum permissible limit (in $\mu\text{g}/\text{m}^3$) = 400 \div hours worked in the day." 29 C.F.R. § 1910.1025(c).

⁷ The action level for lead exposure is 30 $\mu\text{g}/\text{m}^3$ averaged over an 8-hour period. 29 C.F.R. § 1910.1025(b).

⁸ Each face shield, made of curved clear or tinted plastic, was attached to the burner's hardhat and hinged to allow the shield to be raised above the head when not in use. The shield only extended as far back on the face as the temples, and straight down to the chin. In three of four photographs that show W.H. holding a cutting torch, he is wearing a hardhat without an attached face shield. In the fourth photograph, W.H. is wearing a hardhat with an attached face shield, but he is shown burning material while the shield is in the raised position.

further claims that the COs deviated from OSHA's Technical Manual in a number of other ways that undermine the reliability of the sampling results.⁹ For the reasons that follow, we conclude that all but one of OSHA's monitoring results are both valid and reliable.

Placement of cassettes outside of face shields

The issue here is whether, under the general industry lead and cadmium standards, an employee's use of a face shield should be taken into account when assessing the employee's exposure to airborne lead or cadmium. The Secretary argues that because these standards expressly quantify the action level and PEL without regard to the use of any respiratory protection, the obligations under these standards are triggered by airborne levels of lead and cadmium *within* an employee's breathing zone but *outside* of that employee's personal protective equipment ("PPE"), which includes a face shield. Southern argues, however, that the language of the provisions in question plainly refers only to respirators and not to other PPE, and that the breathing zone of an employee wearing a face shield can be accurately measured only inside the face shield.

Southern is correct that the wording of the lead and cadmium standards describes employee exposure as that "which would occur if the employee were not using a respirator" or, in the case of the cadmium standard, "respiratory protective equipment."¹⁰ And as Southern

⁹ "The Technical Manual, OSHA Instruction CPL 2-2.20B ch. 1 (Nov. 13, 1990), 'does not contain requirements to which the Secretary must adhere, but notes that any departure from its procedures is relevant to the reliability of the sampling results.' " *E. Smalis Painting Co.* ("Smalis"), 22 BNA OSHC 1553, 1556 n.2 (No. 94-1979, 2009) (citation omitted).

¹⁰ Under the general industry lead standard, an employer must perform monitoring in enumerated circumstances to determine employee exposure to lead. 29 C.F.R. § 1910.1025(d). For the purpose of this monitoring, the standard explicitly provides that "employee exposure is that exposure which would occur if the employee were not using a respirator." 29 C.F.R. § 1910.1025(d)(1)(i). The same procedure applies when (1) measuring exposure at or above the action level, which triggers certain medical surveillance and training requirements that are at issue here; and (2) determining the applicability of certain PEL-triggered provisions, such as requirements for protective clothing and equipment, and hygiene facilities and practices. 29 C.F.R. § 1910.1025(b), (g)(1), (i), (j)(1)(i), (l)(1)(ii) (1994). Similarly, under the general industry cadmium standard, the phrase "[e]mployee exposure and similar language" is defined as "the exposure to airborne cadmium that would occur if the employee were not using respiratory protective equipment." 29 C.F.R. § 1910.1027(b). Most of the provisions at issue here are triggered by employee exposure to cadmium that exceeds either the action level or the PEL. 29 C.F.R. § 1910.1027(c), (d)(1)(i), (e)(1), (g)(1), (i)(1), (j)(1), (l)(1)(i)(A) (1994).

points out, neither standard addresses whether employee exposure should take into account an employee's use of a face shield. Nonetheless, when each standard is read as a whole and its provisions construed together, we agree with the Secretary that the measurements for assessing employee exposure must be taken without regard to an employee's use of a face shield. *See Hughes Bros., Inc.*, 6 BNA OSHC 1830, 1833, 1978 CCH OSHD ¶ 22,902, p. 27,717 (No. 12523, 1978) (reading standard "as a whole" and construing its provisions together); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (noting that "[a] court must . . . interpret the statute 'as a symmetrical and coherent regulatory scheme,' and 'fit, if possible, all parts into a harmonious whole' " (citations omitted)); *Am. Fed'n of Gov't Employees, Local 2782 v. FLRA*, 803 F.2d 737, 740 (D.C. Cir. 1986) ("It is a generally accepted precept of interpretation that statutes or regulations are to be read as a whole, with 'each part or section . . . construed in connection with every other part or section.' " (citation omitted)); 2A Sutherland Statutory Construction § 46:5 (stating that statutes should be interpreted as "a harmonious whole" and "it is not proper to confine interpretation to the one section to be construed").

Indeed, to interpret employee exposure in the way that Southern advocates would compromise a number of protections afforded by each standard, including those pertaining to engineering and work practice controls, respirator use, hygiene, and other personal protective equipment ("PPE"). Both the lead and cadmium standards require an employer to implement engineering and work practice controls as the primary means of limiting an employee's exposure to levels at or below the PEL. An employer may rely upon respirator use to achieve compliance with the PEL, but only if it is not feasible to attain this result through the use of controls. 29 C.F.R. §§ 1910.1025(c)(3), (e); .1027(f)(1). Thus, in order to determine whether such controls have effectively reduced employee exposure to the PEL—or, if not, to identify the lowest feasible exposure level obtainable by controls alone—airborne lead and cadmium levels must be measured without regard to respirator use. For the same reason, they must also be measured outside of a face shield, since to do otherwise would result in measurements that do not accurately reflect the efficacy of the controls that an employer has instituted. Similarly, when engineering and work practice controls cannot feasibly reduce employee exposure to the PEL, measurements taken inside of the face shield may not accurately assess the type of respiratory protection necessary to supplement those controls.

Assessing employee exposure by measuring inside the face shield would also compromise the effectiveness of the lead and cadmium standards' hygiene-related protections. 29 C.F.R. §§ 1910.1025(i), .1027(j)(1). The plain language of both standards requires that an employer provide protections, such as showers, clean change rooms, and lunchrooms, to employees whose exposure is above the PEL without regard to any respirator use.¹¹ Under Southern's interpretation of the standards, the employer could sidestep these hygiene requirements when measurements, which might otherwise show lead or cadmium levels in excess of the PEL, are lowered by placing the sampling inlet inside a worker's face shield. 29 C.F.R. §§ 1910.1025(i)(2)-(4), .1027(j)(1). Such an interpretation would make little sense because the hygiene requirements address an employee's exposure to lead and cadmium from secondary sources—i.e., lead and cadmium that has accumulated on the employee's body, food, or clothing. Cadmium Preamble, 57 Fed. Reg. at 42,350; Occupational Exposure to Lead, 43 Fed. Reg. at 52,995. Given that a face shield would not protect against the accumulation of lead and cadmium on food, or on apparel and equipment that an employee would wear, requiring that measurements be taken outside of an employee's face shield would most accurately assess the potential for accumulation of these toxic metals on secondary sources and, therefore, would effectuate the purposes of the standards. *See Sharon & Walter Constr. Inc.*, 23 BNA OSHC 1286, 1293, 2011 CCH OSHD ¶ 33,103, p. 54,900 (No. 00-1402, 2010) (interpreting statutory provision by “look[ing] to the context and purpose of the Act as a whole, and the particular provision at issue”); *Hughes Bros., Inc.*, 6 BNA OSHC at 1833, 1978 CCH OSHD at p. 27,717 (“in the absence of persuasive contrary evidence of the drafter's intent, the standard should be construed to effectuate and not hinder the statutory purpose of employee protection”).

Similarly, the effectiveness of the lead and cadmium standards' PPE-related protections would be compromised by Southern's interpretation. Both standards require the employer to

¹¹ The lead standard requires, *inter alia*, that employers provide showers, clean change rooms, and lunchrooms “in areas where [the employees'] airborne exposure to lead is above the PEL, without regard to the use of respirator.” 29 C.F.R. § 1910.1025(i). Similarly, under the general industry cadmium standard, “[f]or employees whose airborne exposure to cadmium is above the PEL, the employer shall provide clean change rooms, handwashing facilities, showers, and lunchroom facilities” 29 C.F.R. § 1910.1027(j)(1). As noted, the cadmium standard defines “[e]mployee exposure and similar language” as “the exposure to airborne cadmium that would occur if the employee were not using respiratory protective equipment.” 29 C.F.R. § 1910.1027(b).

provide “appropriate protective work clothing and equipment” to any employee whose exposure is above the PEL without regard to respirator use. 29 C.F.R. §§ 1910.1025(g)(1), .1027(i)(1). As with the hygiene requirements, the standards’ plain language does not allow the employer to assess employee exposure by measuring lead and cadmium levels that have been lowered through the use of a respirator, but Southern’s interpretation would permit the employer, under some circumstances, to sidestep these requirements by basing its employee exposure measurement on levels that have been lowered through the use of a face shield. 29 C.F.R. §§ 1910.1025(g)(1); .1027(b), (i)(1). The lead standard preamble, however, specifies that the purpose of the PPE requirements “for employees who are exposed to lead above the PEL [is] to assure that clothing, shoes, and equipment on which lead dust can accumulate during the work shift are not worn home or in the lunchroom.” Occupational Exposure to Lead, 43 Fed. Reg. at 52,994; *accord* Cadmium Preamble, 57 Fed. Reg. at 42,350 (“Protective clothing and foot coverings are required to prevent contamination of the employee’s body and the employee’s street clothing and shoes.”). Thus, as with the hygiene requirements, use of PPE is intended to prevent the employees’ apparel and equipment from becoming secondary sources of contamination. Accordingly, in order to most accurately assess the potential for accumulation of lead and cadmium on these secondary sources, exposure measurements must be taken outside of an employee’s face shield.

Given the various purposes that employee exposure monitoring serves under the lead and cadmium standards, we conclude that these standards, “read as a whole, with ‘each part or section . . . construed in connection with every other part or section,’” require that for any employee wearing a face shield, airborne lead and cadmium exposure levels must be measured outside of the face shield. *Am. Fed’n of Gov’t Employees, Local 2782*, 803 F.2d at 740 (citation omitted). We therefore reject the judge’s conclusion that OSHA’s monitoring results were flawed because they measured airborne lead and cadmium levels outside of the burners’ face shields.¹²

¹² Relying on *Equitable Shipyards, Inc.*, 13 BNA OSHC at 1179-81, 1986-87 CCH OSHD at pp. 36,467-70, Southern contends that the judge was correct to apply the welding fume protocol here. In *Equitable Shipyards*, the Commission assessed whether it was permissible to measure welding fumes outside of a worker’s welding helmet where the cited standards were silent regarding sampling procedures. *Id.* at 1179-81, 1986-87 CCH OSHD at pp. 36,467-70. Here,

Other alleged sampling errors

Through its cross-examination of CO Baptiste and testimony from Leslie Joseph Ungers, its expert on the theory and practice of industrial hygiene, Southern highlighted several alleged deviations from OSHA's Technical Manual that it claims render OSHA's monitoring results unreliable. Southern first points to CO Baptiste's testimony that he did not calibrate the monitoring equipment on site at the Baton Rouge facility. Although Southern relies on a provision of the Technical Manual in effect at that time, which instructed the CO to "[d]o the calibration at the pressure and temperature *where the sampling is to be conducted*," this requirement was in the section of the manual pertaining to "Respirable Dust." The section applicable here pertained to "Total Dust and Metal Fumes" and instructed the CO to "[c]alibrate personal sampling pumps before and after each day of sampling . . . as described in Section E." Section E included no requirement pertaining to the location of calibration for primary calibration devices, but prescribed that a precision rotameter—ordinarily a secondary calibration device—must be calibrated at the "sampling site" if it is used "in place of a primary device" and "altitude or temperature at the sampling site are substantially different from the calibration site." The record evidence does not indicate that the device used by CO Baptiste to calibrate the equipment was a precision rotameter or, if it was such a device, "altitude or temperature" would have required calibration to occur on site. Moreover, in describing the ideal procedure for calibrating equipment, Ungers, Southern's own expert witness, did not state that calibration must take place on site.

Southern also points to CO Baptiste's testimony that after collecting air monitoring samples on May 26, 1994, he did not post-calibrate the equipment for eleven days even though the OSHA Technical Manual required him to recalibrate the equipment "as soon as possible." As Ungers explained, the equipment should be post-calibrated "as soon as possible . . . to see that you haven't had too much variation in its operation." Here, with respect to four of the five air monitoring samples collected on May 26, the pre- and post-calibration flow rates had discrepancies of 2% to 4.4%, and the flow rates for the fifth sample had a discrepancy of 6.1%.

however, we have addressed the sampling procedures based on the specific requirements of the lead and cadmium standards. The Commission's decision in *Equitable Shipyards* is therefore inapposite.

As explained by OSHA supervisory chemist Steve Edwards and as set forth in an appendix to the OSHA Technical Manual, a potential error of 5% is factored into all exposure calculations for possible calibration errors. Additionally, the significance of any calibration errors, including the one in excess of 5%, is minimized by the high concentration of lead found in the five air monitoring samples taken on May 26; the results show that the burners' lead exposure was 47% to 247% above the PEL. See *Smalis*, 22 BNA OSHC at 1556-58 (finding methodology and results "sufficiently reliable" where COs failed to comply with several guidelines in OSHA's Technical Manual but degree of measured exposure was "unprecedented" and sampling results themselves consistently showed overexposure); *Manganas Painting Co.*, 21 BNA OSHC at 1972-73, 2004-09 CCH OSHD at pp. 53,390-91 (finding methodology and results "sufficiently reliable" where CO's sampling methods "conformed in many respects with accepted guidelines" and reported results were "largely consistent" in showing overexposure and "degree of measured overexposure was exceedingly high").

Additionally, Southern challenges the methods CO Baptiste used to package and send the collected samples to the Salt Lake laboratory for processing. CO Baptiste testified that a specially designed box containing the sampling cassettes was shipped in the same large box that contained lead wipe and bulk samples from the site. OSHA's Technical Manual instructed the CO to "[m]ail bulk samples and air samples separately to avoid cross-contamination." Edwards explained, however, that the laboratory's requirements would be satisfied if different types of samples were secured in separate boxes even if they were then placed in a single large box. Here, the record evidence shows that each sample was individually packaged and sealed in a separate container, and the laboratory verified that each seal was intact. Thus, the possibility of cross-contamination during shipping was minimized.¹³

¹³ Southern argues that no evidence in the record precluded the possibility of cross-contamination once the samples arrived at the Salt Lake laboratory, emphasizing that chemists at the laboratory (1) admitted these samples were co-mingled with samples from other compliance personnel and (2) could not verify based on personal knowledge whether the air monitoring samples were uncontaminated upon receipt. As to Southern's first point, although the record shows the laboratory received the samples at issue and samples from other sources at the same time, Edwards testified that in light of standard laboratory policy, such as leaving samples sealed while in the receiving room and including quality controls in each "run," there was only a "minute" possibility that cross-contamination could occur. As to Southern's second point, although the chemists who processed the samples at issue did not testify, and Edwards and Ray

Finally, as to the June 15, 1994 monitoring of W.H., Southern challenges the monitoring results on the ground that the inlet for his sampling device was not in the required downward position. Based on one of the photographs of W.H., Ungers testified that the inlet to the sampling device CO Baptiste attached to W.H.'s collar was placed "in a more horizontal position" even though OSHA's Technical Manual states that "[t]he inlet should always be in a downward vertical position to avoid gross contamination." Ungers explained that when the inlet to a cassette is placed in a horizontal position, the filter might pick up projectile particles, sparks or pieces of dust that are not suspended in air but are thrown toward and enter the filter, and that this is problematic because the purpose of air monitoring is to measure particles that are suspended in air. The Secretary has not challenged Unger's interpretation of the photograph or his testimony regarding the importance of maintaining the inlet in the downward position. Furthermore, there are no monitoring results against which to compare W.H.'s measured exposure: he was the only worker monitored in the non-ferrous area of the Thomas Yard, and the materials he torch cut were different from the materials torch cut by workers in the other monitored areas. Cf. *Smalis*, 22 BNA OSHC at 1557 (noting that "evidence indicates that a sampling cassette's upward orientation can affect its measured intake," but finding that "measured exposure was consistent with the other monitoring results").

Based on these facts, we find that the first three deviations from the Technical Manual protocol highlighted by Southern are insufficient to render the COs' monitoring results unreliable. But we also find that, in light of the un rebutted testimony concerning the position of W.H.'s sampling device, we cannot rely on his monitoring result to establish the level of lead to which he was exposed. See *Smalis*, 22 BNA OSHC at 1556-58; *Manganas Painting Co.*, 21 BNA OSHC at 1972-73, 2004-09 CCH OSHD at pp. 53,390-91. We therefore conclude that OSHA's monitoring results from April 13, 1994, and May 26, 1994, reliably measured the

Abel, another supervisor, could not remember whether they had observed the chemists perform this job task, the supervisors explained what procedure chemists at the laboratory were required to follow when processing samples. Southern provided no evidence showing that this procedure was in any way deficient and it never attempted to depose the chemists or call them as witnesses. Given Edwards' un rebutted testimony that the risk of cross-contamination in the laboratory was minute, and the lack of any evidence that the chemists failed to follow standard laboratory policy when processing the samples at issue, we find no basis for concluding that conduct at the laboratory compromised the integrity of these samples.

sampled burners' exposure to lead and cadmium in the Stainless Yard and the ferrous section of the Thomas Yard, but that the record evidence does not establish the level of airborne lead to which W.H. was exposed on June 15, 1994, while he worked in the non-ferrous section of the Thomas Yard.

E. Employment relationships

Southern disputes the Secretary's allegation that certain individuals who worked at the Baton Rouge facility were its employees. In particular, Southern contends that W.H., who was referred to work at Southern through a temporary employment agency, was not its "direct" employee, and that Barfield, a company that supplied a group of burners who performed torch cutting at Southern's facility, was the burners' sole employer.

To determine whether an employment relationship exists between a cited employer and a particular worker, the Commission applies the common-law agency doctrine enunciated in *Nationwide Mutual Insurance Company v. Darden*, 503 U.S. 318 (1992). *Sharon & Walter Constr., Inc.*, 23 BNA OSHC at 1289, 2011 CCH OSHD at pp. 54,896-97. This doctrine focuses on "the hiring party's right to control the manner and means by which the product is accomplished." *Darden*, 503 U.S. at 323 (citation omitted). Factors relevant to this inquiry include

the skill required [for the job]; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

Id. at 323-24 (citation omitted). The Commission has recognized that in the context of the OSH Act, the control exercised over a worker is the " 'principal guidepost' " to determining the existence of an employment relationship. *Froedtert Mem'l Lutheran Hosp., Inc.* ("Froedtert"), 20 BNA OSHC 1500, 1506, 2002-04 CCH OSHD ¶ 32,730, p. 51,908 (No. 97-1839, 2004) (quoting *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 448 (2003)). Here, the judge concluded that the Secretary established only W.H., and not the Barfield burners, had an employment relationship with Southern. As discussed below, we agree with the judge's conclusion.

W.H.

W.H. is one of the burners whose alleged exposure is the subject of a number of the lead standard violations contained in Willful Citation 2. Although Temp Staffers, a temporary work agency, supplied W.H. to work as a burner in the non-ferrous area of Southern's Thomas Yard, W.H.'s relationship with Temp Staffers is not determinative of whether he had an employment relationship with Southern at the time of the alleged violations. *Froedtert*, 20 BNA OSHC at 1505, 2002-04 CCH OSHD at p. 51,906. According to CO Baptiste's air monitoring report entered into evidence and W.H.'s filings in support of his election of party status, W.H. worked at the Baton Rouge facility for two to three years, and his employment there ended in June 1994, approximately three months before OSHA issued Southern the citations in this case.¹⁴ In challenging the judge's conclusion that W.H. was its employee, Southern argues that nothing but CO Baptiste's "speculation on the record" indicates that W.H. was supervised by, or received work duties from, Southern. Applying the factors set forth in *Darden*, we conclude that the evidence supports the Secretary's contention that W.H. was an employee of Southern when he performed work in the Thomas Yard during the citation period.

With respect to the temporary workers provided by Temp Staffers, including W.H., the record evidence shows that Southern controlled "the manner and means" of their daily work. *Darden*, 503 U.S. at 323. CO Baptiste testified that corporate safety director Arledge informed him that Southern supervised W.H. and the other workers provided by Temp Staffers. CO Baptiste's testimony is corroborated by a temporary worker from Temp Staffers who testified that Southern supervised all Temp Staffers personnel, instructing them where to work and what to do within the Baton Rouge facility. This temporary worker further testified that Southern provided him and other Temp Staffers personnel with safety belts, and required that they purchase certain personal protective equipment from Southern. According to the temporary worker, as well as Richard Friederichsen, a member of Southern's management team, Southern also trained the Temp Staffers personnel on how to perform the burning operations. And according to Arledge and Tim Smith, Southern's site safety coordinator, Southern provided

¹⁴ The judge found that W.H. worked at the facility from May 25 to June 24, 1994, and Southern asserted in its brief that W.H. worked there for only one month. We could find no evidence in the record to substantiate the judge's finding or Southern's assertion. Accordingly, we credit the un rebutted evidence contained in the CO's report and W.H.'s own submission.

training to the Temp Staffers personnel on the hazard communication and respiratory protection programs and lockout/tagout procedures. Finally, Friederichsen testified, and the temporary worker verified, that Temp Staffers merely acted as a personnel department—the agency interviewed potential workers, assessed skill levels, conducted background checks, selected those who would work at the Baton Rouge facility, and handled payroll for the workers, but performed no function impacting the manner and means of their daily work. *Froedtert*, 20 BNA OSHC at 1506-08, 2002-04 CCH OSHD at pp. 51,908-09 (recognizing that some evidence showed hospital “did not *directly* control all aspects of [temp] housekeepers’ placement at the hospital or their working conditions,” but concluding that hospital was employer of temps because “weight of the evidence indicate[d] that [it] controlled the manner and means of the temps’ daily work”). Given this evidence, we conclude that the Secretary has established that W.H. was an employee of Southern during the period of time that he worked at the Baton Rouge facility.¹⁵

Barfield Burners

The alleged exposure of thirteen Barfield burners is also the subject of a number of the lead standard violations contained in Willful Citation 2. The judge concluded that these burners were not employees of Southern but worked solely for Barfield, who was an independent contractor hired by Southern to perform burning activities in the ferrous section of the Thomas Yard. The Secretary challenges the judge’s conclusion, arguing that the record evidence shows Southern controlled “the manner and means by which” the Barfield burners cut the scrap metal. Applying the factors set forth in *Darden*, we conclude that the Secretary failed to establish that the Barfield burners were Southern’s employees.

In 1994, Southern contracted with Barfield to torch cut scrap metal at its Baton Rouge facility. The two companies orally agreed that Barfield would be paid for scrap metal that it

¹⁵ Southern argues that even if W.H. was its employee, he should not have been granted party status as an affected employee under Commission Rule 20(a), 29 C.F.R. § 2200.20(a), because he was not employed by Southern at the time of the hearing. We agree with the judge, however, that this rule does not preclude participation in OSHA proceedings by employees who, at the time of the hearing, are no longer employed by the cited employer. And we agree with the Secretary that W.H. would have otherwise satisfied the requirements for intervention under Commission Rule 21, 29 C.F.R. § 2200.21.

processed on a per-ton basis.¹⁶ The two companies also agreed that Southern would provide the worksite, the crane to pick up the scrap, the scrap itself, and the fuel needed for torch cutting; while Barfield would provide the burners and their personal safety equipment, the cutting torches and the hoses, the tips and strikers, and the consumable supplies needed for the burning process. In terms of the *Darden* factors, the companies' agreement therefore required Southern to provide the "location of the work," but both Barfield and Southern were responsible for providing different "instrumentalities and tools" necessary to accomplish the contracted work, i.e., the torch cutting of scrap metal. *Darden*, 503 U.S. at 323.

Pursuant to the companies' agreement, the Barfield burning crew worked in the ferrous section of the Thomas Yard for about eight or nine months, from February to October 1994, and at least some of the burners were on the crew during most, if not all, of that period. The relationship between Southern and the burners was thus of relatively long duration. *Id.* (listing "duration of the relationship" as relevant factor). The Barfield burners' work at Southern required torch cutting mostly heavy gauge materials. It is not clear from the record what skill level is required to torch cut such material, but we note that most of the burners on this particular crew had four or five years of experience torch cutting scrap metal, and some of them had as much as ten years of experience. *Id.* (listing "skill required" for job as relevant factor).

Each week, the crew usually worked at the Thomas Yard for five ten-hour days and one eight-hour day, but these work shifts were set by Barfield, not Southern. And it was Barfield, not Southern, that paid the burners by the hour. Indeed, as noted, Southern paid Barfield based on the tonnage of scrap metal it processed, not the number of hours its burners worked. Southern, therefore, did not handle any financial matters pertaining to the Barfield burners and exercised little discretion over "when and how long" they worked at the Thomas Yard. *Id.* at 323-24 (listing pay, benefits, and taxes, as well as discretion over "when and how long" hired party worked as relevant factors). *But see Froedtert*, 20 BNA OSHC at 1507-08, 2002-04 CCH OSHD at p. 51,909 (noting that "[t]he Commission and some courts have discounted the effect of [pay/benefits/taxes] factor[s] on evaluating the employer status of a using employer").

¹⁶ The only written record of this agreement is a hold harmless and indemnity document signed by Barfield.

It is undisputed that torch cutting was a regular part of Southern's business, and that Southern directly employed its own burners in addition to those provided by Barfield. *Darden*, 503 U.S. at 324 (listing "whether the work is part of the regular business of the hiring party" as relevant factor). Nonetheless, the record shows that Southern exercised only minimal supervision over the individual Barfield burners, and the burners themselves did not work with any of Southern's own burners or those it obtained from a temporary employment agency. In contrast, Barfield's presence at Southern's facility included its own supervisory personnel who oversaw and directed the Barfield burners while they torch cut scrap metal at Southern's Thomas Yard. *Froedtert*, 20 BNA OSHC at 1506, 2002-04 CCH OSHD at p. 51,908 (noting that "the control exercised over a worker remains a 'principal guidepost' " in assessing existence of employment relationship under OSH Act). Barfield assigned Dick Roberts, one of its employees, to supervise the crew and authorized him to make decisions regarding the burners, including determining whether a burner should be disciplined or fired. Roberts arranged living quarters for the burners, toured the worksite to which the burners were assigned, positioned the burners so that they were cutting away from one another, and occasionally observed the burners while they worked to make certain they wore protective equipment. On the two or three occasions that Roberts could not travel to the Baton Rouge facility, a trip he usually made weekly, Barfield's owner would visit the worksite to check on the burning crew.

Also, Jamie Figueroa, a Barfield foreman, was at the worksite on a daily basis torch cutting with his fellow burners, and acting as a "go-between" for his crew and the "Southern Scrap people" due to his fluency in English. As foreman, Figueroa was responsible for (1) training new burners on how to perform their work activities; (2) making certain that other members of the burning crew were at the job and had the necessary supplies and equipment; (3) in Roberts' absence, recording the time that the crew had worked; (4) reporting to Roberts how members of the burning crew were performing their jobs; and (5) providing the crew with transportation to the worksite. Additionally, Figueroa had the authority to allow the burners to leave early for personal reasons. Figueroa also had the authority to discipline a burner for unsafe conduct, but only Roberts and Barfield's owner had the authority to fire a burner.

Furthermore, the record shows that although Southern personnel kept an eye on the Barfield burners' safety practices, Barfield was ultimately responsible for any disciplinary action. Southern's site safety coordinator, Smith, testified that he would conduct safety rounds

of the Thomas and Stainless Yards once or twice a day during which he would check whether workers were using appropriate safety equipment, such as “[h]ardhats, steel toed shoes, safety glasses, [and] ear plugs.” Smith also “would and could instruct Barfield burners to put on their safety equipment if they weren’t wearing it.” Jeff Hasenkampf, Southern’s supervisor of the ferrous section of the Thomas Yard, stated that he had the authority to remove a Barfield burner for safety reasons. And Barfield supervisor Roberts acknowledged that if Southern believed the burners were working in an unsafe manner, Southern “could stop us right there.” But in all such circumstances, it was understood that Hasenkampf or Smith would inform either Barfield supervisor Roberts or foreman Figueroa of any situation involving one of their burners. While Southern could have removed an individual Barfield burner from its premises for unsafe conduct, Barfield alone had authority to discipline the burner. In sum, the record evidence shows that Barfield was responsible for directly supervising its burners.

Finally, although Southern determined what particular scrap Barfield would torch cut, how it was to be cut, and placed it in the yard as the work progressed, Southern communicated directly with Barfield foreman Figueroa or supervisor Roberts regarding the work sequence. Moreover, with the exception of Smith’s safety rounds, there is no evidence indicating that during the citation period, Southern ever instructed a non-supervisory Barfield employee how to perform his job. Rather, it was Figueroa and Roberts who provided such instruction to the Barfield burners. Thus, while Southern exercised control over the scrap metal that Barfield processed and instructed Barfield which specific pieces of scrap required torch cutting, Southern’s instructions were to Barfield, the independent contractor it hired to perform this task, and not to the individual Barfield burners.¹⁷ *Don Davis*, 19 BNA OSHC 1477, 1482, 2001 CCH

¹⁷ Near the beginning of Barfield’s time working at Southern, three of its more experienced burners—one of whom was foreman Figueroa—torch cut railcars that Southern had purchased from the Ethyl Corporation (“Ethyl”). This project lasted several weeks and was completed before OSHA commenced its inspection of the Baton Rouge facility. It is undisputed that Southern medically evaluated the three Barfield burners selected to work on the project, and these burners participated in Southern’s respiratory protection program while torch cutting the railcars. The Secretary relies heavily on this evidence to support her contention that Southern was the Barfield burners’ employer. But the record evidence does not show that Southern could have required the individual Barfield burners to participate in its respiratory program without first gaining authorization directly from Barfield. Indeed, according to foreman Figueroa, it was Barfield supervisor Roberts, not Southern, who selected the three burners to participate in this

OSHD ¶ 32,402, p. 49,898 (No. 96-1378, 2001) (“One who cannot hire, discipline, or fire a worker, cannot assign him additional projects, and does not set the worker’s pay or work hours cannot be said to control the worker.”); *Rockwell Int’l Corp.*, 17 BNA OSHC 1801, 1805, 1995-97 CCH OSHD ¶ 31,150, pp. 43,533-34 (No. 93-45, 1996) (consolidated) (finding that NASA was not employer of workers where “NASA’s control was more in the nature of restrictions . . . than it was in supervising [the workers’] actions” while they performed their specific work activities).

Under these circumstances, we conclude that the record evidence as a whole does not establish that an employment relationship existed between the Barfield burners and Southern.

II. Willful Citation 2—Lead

All of the items in this citation allege willful violations of the general industry lead standard, § 1910.1025. The judge vacated Items 1 to 7, 11 to 18, and 20 to 23 based on his treatment of OSHA’s air monitoring measurements. He found, however, that the record evidence established the violations alleged in Items 8a, 9, and 24 through 39, as well as their willful characterization. For the reasons that follow, we affirm Items 8a and 25 as willful, and vacate all of the other items in Citation 2.

A. Items 1 to 6, 12 to 17, 26 to 30, and 32 to 39

In these items, the Secretary alleges lead overexposure, PPE, and training violations on a per-employee basis, 29 C.F.R. § 1910.1025(c)(1), (g)(1), (l)(I)(ii) (1994), and identifies only Barfield burners as exposed employees. As discussed above, we agree with the judge’s conclusion that the Barfield burners were not employees of Southern. The judge, however, reached the merits of these items—all of which arise out of work performed by the Barfield burners in the Thomas Yard—based on his *sua sponte* application of the multi-employer worksite doctrine. Applying this doctrine, the judge concluded that Southern was “responsible for the health and safety of Barfield’s workers for conditions it created and controlled.”¹⁸

project. And although Roberts testified that he did not know that the burners were provided respiratory training until the project’s completion, foreman Figueroa surely did, as he worked alongside the other burners on this project and participated in the training himself.

¹⁸ We note that the judge made only a passing reference to “creating” employer liability and the Secretary did not emphasize this theory in her briefs on review. *See Summit Contractors, Inc.*, 23 BNA OSHC 1196, 1206-07, 2010 CCH OSHD ¶ 33,079, pp. 54,695-96 (No. 05-0839, 2010)

An employer on a multi-employer worksite may be liable as a controlling employer for the violations of other employers when that employer “ ‘could be reasonably expected to prevent or detect and abate the violations *due to its supervisory authority and control over the worksite.*’ ” *IBP, Inc.*, 17 BNA OSHC 2073, 2074, 1995-97 CCH OSHD ¶ 31,296, p. 43,984 (No. 93-3059, 1997) (quoting *Red Lobster Inns of Am., Inc.*, 8 BNA OSHC 1762, 1763, 1980 CCH OSHD ¶ 24,636, p. 30,220 (No. 76-4754, 1980)), *rev’d on other grounds*, 144 F.3d 861 (D.C. Cir. 1998); *Harvey Workover, Inc.*, 7 BNA OSHC 1687, 1689, 1979 CCH OSHD ¶ 23,830, p. 28,909 (No. 76-1408, 1979); *see Summit Contractors, Inc.*, 23 BNA OSHC at 1206, 2010 CCH OSHD at p. 54,695 (finding controlling employer where record shows company “maintained significant control over the worksite in general and over the cited condition in particular”). Here, the record evidence shows that, as the owner/operator of the Thomas Yard, Southern had control over the worksite. Indeed, Southern controlled what scrap metal entered the yard, selected the specific pieces of scrap that the Barfield burners would torch cut, and transported that scrap to the burners’ torch cutting area. The record also shows that Southern possessed some degree of authority over all worksite operations—including Barfield’s—as evidenced by Southern’s site safety coordinator’s daily rounds of the Thomas and Stainless Yards. Under these circumstances, we find that Southern was a controlling employer at this worksite.

The remaining question is what Southern’s specific obligations were as a controlling employer with regard to the overexposure, PPE, and training provisions at issue here. The Secretary never raised the multi-employer worksite doctrine or controlling employer liability in her pre-hearing filings or post-hearing brief before the judge; rather, she focused exclusively on her contention that Southern had an employment relationship with the Barfield burners. In light of the judge’s *sua sponte* application of the doctrine, however, the Secretary addressed the issue in her brief to the Commission, though her primary contention remains that the Barfield burners were Southern’s employees. But in her discussion of the doctrine before us, she has neither defined what would have constituted compliance with these cited provisions for a controlling employer such as Southern, nor articulated how Southern’s conduct here was deficient with

(recognizing continuing viability of creating employer liability), *petition for review filed*, Docket No. 10-1329 (D.C. Cir. Oct. 15, 2010). Without further argument from the Secretary and a more developed record on this issue, we are unable to determine whether Southern would be responsible as a creating employer for any of the violations that pertain to the Barfield burners.

respect to the cited conditions. *David Weekley Homes*, 19 BNA OSHC 1116, 1118-19, 2000 CCH OSHD ¶ 32,203, p. 48,775 (No. 96-0898, 2000) (vacating fall protection training violation issued to general contractor, where subcontractor committed violation and Secretary “failed to define what would have constituted compliance for [general contractor] under the circumstances and how [its] conduct was deficient”). Under these circumstances, we find that the Secretary has failed to establish Southern’s liability for the cited conditions alleged in Items 1 to 6 (overexposure), 12 to 17 (PPE), and 26 to 30, 32 to 39 (training). We therefore vacate all twenty-five items.

B. Items 7, 18, and 31

In these items, the Secretary alleges lead overexposure, PPE, and training violations that pertain only to W.H., who we have found was a Southern employee. 29 C.F.R. § 1910.1025(c)(2), (g)(1), (l)(1)(ii) (1994). Overexposure occurs under § 1910.1025(c)(2) when the PEL is exceeded. The PPE requirements under § 1910.1025(g)(1) are triggered when “an employee is exposed to lead above the PEL, without regard to the use of respirators or where the possibility of skin or eye irritation exists.” And the training requirements under § 1910.1025(l)(1)(ii) (1994) apply to an employee who is “subject to exposure to lead at or above the action level or for whom the possibility of eye or skin irritation exists.”

OSHA’s monitoring result pertaining to W.H. shows that he was exposed to lead. This result is consistent with evidence showing that he “cleaned” radiators by melting or cutting solders that, as discussed below, likely contained lead. But because of the monitoring irregularity we previously discussed, we are unable to determine whether W.H. was exposed to amounts of airborne lead as high as the action level or above the PEL, and we found nothing in the record showing that W.H.’s work activity could have resulted in eye or skin irritation. We thus vacate Items 7, 18, and 31 for lack of proof.

C. Item 9

This item, which the judge affirmed, consists of seven instances in which the Secretary alleges that Southern failed to provide employees with written notification of monitoring results, as prescribed by 29 C.F.R. § 1910.1025(d)(8)(i) (1994). The notification requirement of this provision states that “[w]ithin 5 working days after the receipt of monitoring results, the employer shall notify each *employee* in writing of the results which represent that employee’s exposure.” *Id.* (emphasis added).

It is undisputed that Southern possessed airborne lead monitoring results for the workers identified in this item, but the record contains so little evidence of their employment status that we are unable to determine whether these workers were employees of Southern or any other employer. According to CO Baptiste, the worker referenced in paragraph (a) of Item 9 still worked at the Baton Rouge facility during the 1994 inspection, about five years after he was tested in 1989, but there is no evidence in the record regarding his employment status at any point in time. The workers referenced in paragraphs (b) through (e) were both monitored while working at Southern, but there is likewise no evidence in the record concerning an employment relationship with Southern or any other employer. And all the record discloses about the workers referenced in paragraphs (f) and (g) is that the CO believed they may have worked for an independent torching contractor when Southern monitored them for lead exposure.

In light of the limited record evidence, we conclude that the Secretary has failed to establish that any of the workers listed in Item 9 had an employment relationship with Southern or any other employer during the time they worked at Southern and were monitored for lead exposure. *Id.* Although we find it troubling that Southern did not notify these workers of their monitoring results, particularly as some of the results showed exposure significantly above the PEL, we are constrained by the scope of the standard, which explicitly limits an employer's notification obligation to "employee[s]." *Id.* We therefore vacate this item.

D. Items 11, 20 to 24

In these items, the Secretary alleges respirator use, hygiene, and medical surveillance violations that identify only W.H. and the Barfield burners as exposed employees. The respirator use requirements apply, as relevant here, to "work situations in which engineering and work practice controls are not sufficient to reduce exposures to or below the [PEL]." 29 C.F.R. § 1910.1025(f)(1) (1994). The hygiene requirements are triggered when employees "work in areas where their airborne exposure to lead is above the PEL, without regard to the use of respirators." 29 C.F.R. § 1910.1025(i). And the medical surveillance requirements apply to "all employees who are or may be exposed above the action level for more than 30 days per year." 29 C.F.R. § 1910.1025(j)(1).

The record evidence, as noted, does not establish that W.H. was exposed to lead in excess of either the action level or the PEL, but OSHA's air monitoring does show that the Barfield burners were exposed to such elevated levels of lead. However, as previously discussed with

respect to the overexposure, PPE, and training violations, we cannot determine Southern's liability for the cited conditions as they relate to the burners, because the Secretary has neither defined what would have constituted compliance with the cited provisions for a controlling employer, nor articulated how Southern's conduct here was deficient with respect to the cited conditions. We therefore vacate Items 11 and 20 to 24.

E. Items 8a and 25

In Items 8(a) and 25, the Secretary alleges, respectively, that Southern violated the initial determination and training provisions of the lead standard. 29 C.F.R. § 1910.1025(d)(2), (l)(1)(i). Under the initial determination provision, “[e]ach employer who has a workplace or work operation covered by this standard shall determine if any e[m]ployee may be exposed to lead at or above the action level.” 29 C.F.R. § 1910.1025(d)(2). This initial determination must be made if the possibility of employee exposure to any quantity of airborne lead is known to exist. 29 C.F.R. § 1910.1025 App. B (1994) (stating that “employer is required to make an initial determination of whether the action level is exceeded for any employee” when “lead is present in the workplace where [employee works] in *any quantity*” (emphasis added)). Under the training provision, “[e]ach employer who has a workplace in which there is a potential exposure to airborne lead shall inform employees of the content of Appendices A and B.” 29 C.F.R. § 1910.1025(l)(1)(i). As with the initial determination provision, this provision's requirement is triggered by potential employee exposure to any quantity of airborne lead.

Merits

The allegations in Items 8a and 25 cover any potential lead exposure that may have existed in the Thomas Yard. In the non-ferrous section of that yard, the record evidence shows that W.H. was exposed to airborne lead while he “cleaned” radiators with a cutting torch. Although the Secretary has failed to establish that W.H.'s exposure was at the action level or higher, we find that his sampling result and evidence concerning his work on the radiators show that he was exposed to some quantity of airborne lead. Therefore, under these particular provisions, § 1910.1025(d)(2) and (l)(1)(i), Southern was required to make an initial determination with respect to W.H. and any other Southern employee potentially exposed to lead generated by his work activity, and inform them of the content of Appendices A and B, which Southern does not dispute it failed to do. The record evidence also shows that Southern's supervisors and safety personnel knew that (1) some of the radiators were soldered; (2) W.H. had

to either cut or melt the solders with a cutting torch; and (3) some of the solders contained lead but had never been tested to determine the amount of lead. Southern thus had actual knowledge that W.H. was potentially exposed to airborne lead while he “cleaned” the radiators, and also had knowledge that other employees working in close proximity to him could have potentially suffered lead exposure. *Contour Erection & Siding Sys., Inc.*, 22 BNA OSHC 1072, 1073, 2004-09 CCH OSHD ¶ 32,943, p. 53,787 (No. 06-0792, 2007) (noting that Secretary must prove that “‘employer knew or could have known with the exercise of reasonable diligence of the conditions constituting the violation’ ” (citation omitted)).

In the ferrous section of the Thomas Yard, the record evidence shows that the Barfield burners were exposed to airborne lead in excess of the PEL while they torch cut miscellaneous iron scrap and some of Southern’s own employees occasionally worked near the Barfield burners while they performed this work. Indeed, site safety coordinator Smith, a Southern employee, admitted that during his daily rounds of the Thomas Yard he would inform the Barfield burners of any PPE violations he observed, indicating that he was near the burners while they torch cut scrap metal. In light of the high level of airborne lead that was generated by the burners’ torch cutting work, as evidenced by OSHA’s air monitoring results, we find it probable that Southern’s own employees, including Smith, were potentially exposed to airborne lead in the ferrous section. Southern was thus obligated under § 1910.1025(d)(2) and (l)(1)(i) to make an initial determination for such employees and inform them of the content of Appendices A and B, which Southern does not dispute it failed to do.¹⁹

Moreover, we find Southern had actual knowledge that significant amounts of airborne lead would be generated by the Barfield burners’ torch cutting work. In 1989, Southern monitored burners who were torch cutting miscellaneous iron scrap, the same type of scrap that the Barfield burners subsequently torch cut during the citation period at issue here.²⁰ One of the

¹⁹ As the initial determination and training requirement violations may be affirmed without taking the Barfield burners’ exposure into consideration, we need not address Southern’s liability as a controlling employer.

²⁰ Southern argues that if it was obligated to comply with § 1910.1025(d)(2), the 1989 air monitoring “amounted to an initial determination.” But even if the 1989 monitoring would have otherwise sufficed, it occurred nearly five years before OSHA’s inspection here, well outside of the twelve months that monitoring results may be used to provide the basis of an initial determination. 29 C.F.R. § 1910.1025(d)(3)(iii).

sampling results from that monitoring measured lead exposure in excess of the action level, while other results measured lower levels of lead exposure. And the record establishes that Southern supervisors and safety personnel were aware that during the citation period here (1) painted scrap metal was entering the Baton Rouge facility; (2) the paint could potentially contain lead; and (3) torch cutting the painted scrap could expose the burners to lead. Based on this evidence, we find that Southern had knowledge that its own employees were exposed to airborne lead during the Barfield burners' torch cutting work. *Contour Erection & Siding Sys., Inc.*, 22 BNA OSHC at 1073, 2004-09 CCH OSHD at p. 53,787 (“The actual or constructive knowledge of a supervisor or foreman . . . can generally be imputed to the employer.”).

Under these circumstances, we conclude that the Secretary has established that Southern violated § 1910.1025(l)(1)(i) and (d)(2). We therefore affirm Items 8a and 25.

Willful Characterization

“The hallmark of a willful violation is the employer’s state of mind at the time of the violation—an ‘intentional, knowing, or voluntary disregard for the requirements of the Act or . . . plain indifference to employee safety.’ ” *Kaspar Wire Works, Inc.*, 18 BNA OSHC 2178, 2181, 2000 CCH OSHD ¶ 32,134, p. 48,406 (No. 90-2775, 2000) (citation omitted), *aff’d*, 268 F.3d 1123 (D.C. Cir. 2001).

[I]t is not enough for the Secretary to show that an employer was aware of conduct or conditions constituting the alleged violation; such evidence is already necessary to establish any violation A willful violation is differentiated by heightened awareness of the illegality of the conduct or conditions and by a state of mind of conscious disregard or plain indifference

Hern Iron Works, Inc., 16 BNA OSHC 1206, 1214, 1993-95 CCH OSHD ¶ 30,046, pp. 41,256-57 (No. 89-433, 1993). This state of mind is evident where “ ‘the employer was actually aware, at the time of the violative act, that the act was unlawful, or that it possessed a state of mind such that if it were informed of the standard, it would not care.’ ” *AJP Constr. Inc. v. Sec’y*, 357 F.3d 70, 74 (D.C. Cir. 2004) (emphasis and citations omitted).

The overwhelming evidence here shows that Southern had a heightened awareness of the general industry lead standard and, more specifically of the initial determination and training provisions at issue in Items 8a and 25. Indeed, in 1989, OSHA issued a citation to Southern, alleging numerous violations of the lead standard, including the initial determination and training provisions. Although the citation items were ultimately withdrawn by the Secretary pursuant to the 1991 settlement agreement, the issuance of the citation and even the subsequent settlement

discussions heightened Southern's awareness of these particular lead standard provisions. *See Revoli Constr. Co.*, 19 BNA OSHC 1682, 1685-86, 2001 CCH OSHD ¶ 32,497, pp. 50,377-78 (No. 00-0315, 2001) (finding employer had heightened awareness of requirements of standard where it had received citations in prior years alleging violations of same standard); *Falcon Steel Co.*, 16 BNA OSHC 1179, 1188, 1993-95 CCH OSHD ¶ 30,059, p. 41,336 (No. 89-2883, 1993) (consolidated) (“ ‘Once an employer has been cited for an infraction under a standard, this tends to apprise the employer of the requirement of the standard and to alert him that special attention may be required to prevent future violations of that standard.’ ” (citation omitted)).

The record evidence also shows that members of Southern's management were aware of the lead standard's requirements. *See Branham Sign Co.*, 18 BNA OSHC 2132, 2134, 2000 CCH OSHD ¶ 32,106, p. 48,263 (No. 98-752, 2000) (“The state of mind of a supervisory employee, his or her knowledge and conduct, may be imputed to the employer for purposes of finding that the violation was willful.”). Southern vice-president Friederichsen admitted that he had learned of the lead standard as a result of OSHA's 1989 inspection of the Baton Rouge facility. And Joel DuPre and Hasenkampf, two Southern supervisors in the Thomas Yard, received instruction regarding aspects of the lead standard from corporate safety director Arledge during a safety meeting in February 1994,²¹ several months before the inspection that resulted in the citations here. Also, in July 1992, Arledge and Howard Fish, another Southern supervisor, met with representatives of Ethyl to discuss whether the railcars should be processed at Ethyl's facility using a “full lead program.” During this meeting, Ethyl and Southern discussed various aspects of Ethyl's lead program and specific requirements of the lead standard. As a whole, this evidence demonstrates that Southern was well aware of the general industry lead standard's requirements and had a heightened awareness of both § 1910.1025(d)(2) and (l)(1)(i), the specific provisions violated here.

Southern also had a heightened awareness, at the time of its employees' potential lead exposure in the Thomas Yard, that it was required to make an initial determination under § 1910.1025(d)(2) and inform these employees of the content of Appendices A and B under § 1910.1025(l)(1)(i). As we have already found, Southern had actual knowledge that W.H. was

²¹ Arledge was well-versed in the general industry lead standard and its requirements, as evidenced by the lead program that he drafted for Southern's sister facility in New Orleans.

potentially exposed to some quantity of airborne lead. In addition, based on its knowledge of the Barfield burners' high level of lead exposure, Southern would have known that any Southern employee working near the burners would also be exposed to lead generated by the torch cutting work. Despite this knowledge, Southern made no attempt to comply with the initial determination and training requirements of the lead standard. *See Gen. Motors Corp.*, 22 BNA OSHC 1019, 1045, 2004-09 CCH OSHD ¶ 32,928, pp. 53,624-25 (No. 91-2834E, 2007) (consolidated) (concluding that employer acted with conscious disregard for requirements of cited LOTO retraining standard where its own health and safety trainer advised safety department of need for compliance, yet no effort was made to provide requisite retraining); *CBI Servs. Inc.*, 19 BNA OSHC at 1605-07, 2001 CCH OSHD at pp. 50,237-39 (concluding employer acted with conscious disregard where supervisor knew of cited standard and violative conditions).

We reject Southern's contention that it made a good faith effort to comply with the requirements of the general industry lead standard. *See Caterpillar Inc.*, 17 BNA OSHC 1731, 1733, 1995-97 CCH OSHD ¶ 31,134, p. 43,483 (No. 93-373, 1996) (characterizing violation as willful where employer relied upon "patently inadequate" abatement procedures), *aff'd*, 122 F.3d 438 (7th Cir. 1997). According to Southern, "it maintained an aggressive program with its customers to monitor and ensure that lead-based scrap was not a problem in the yard." This assertion lacks credibility, however, in light of Southern's knowledge that W.H. was potentially exposed to lead while "cleaning" the radiators and the Barfield burners' torch cutting work was generating high levels of airborne lead. Southern also claims that, before the inspection period at issue here, it exhibited good faith during the Ethyl railcar project by implementing a *partial* lead program that included medical evaluations, respirator fit-testing, and respirator training for the three Barfield burners involved in that project. The record evidence shows, however, that Ethyl would have required implementation of a *full* lead program for torch cutting conducted at its facility, and that Southern decided to complete the railcar project at its own facility to avoid the cost of complying with all of the requirements of the lead standard.²² Making a conscious

²² Southern also suggests that any non-compliance with the lead standard during the railcar project was due to Arledge's good faith belief "that worker exposure on the Ethyl cars for fewer than thirty days did not trigger all of the requirements of the lead standard." It is true that some lead standard provisions are triggered by employee exposure to a certain level of lead for more

decision to disregard known protections required by the lead standard in an attempt to save money is plainly inconsistent with any claim of good faith. *See Smalis*, 22 BNA OSHC at 1577 (finding employer “would not have complied with either the notification or provision of benefits requirements, even had it known of its obligations” based on “economic concerns” that employer expressed to OSHA, and employer’s “emphasis on productivity over employee safety”). But even if we were to accept Southern’s claim that it made a good faith effort to comply with the lead standard during the railcar project, Southern has pointed to no evidence showing that any such efforts extended to its day-to-day operations, including its processing of miscellaneous iron scrap and radiators.

Finally, Southern claims that “[t]he numbers it obtained” from its 1989 monitoring “convinced . . . Arledge that there was no lead problem,” and that OSHA’s subsequent withdrawal of the lead items in its 1989 citation “contributed to [his] appreciation that there was no danger of employee exposure to lead.” We reject Southern’s self-serving take on these events, which is plainly belied by the facts. As we have already found, rather than providing confirmation of no lead danger, Southern’s own 1989 air monitoring of burners torch cutting miscellaneous iron scrap actually informed it that this work had the potential to generate high levels of airborne lead. And with respect to OSHA’s withdrawal of the 1989 citation, Arledge testified that the citation’s lead items were based on OSHA’s air monitoring of completely different work. Accordingly, based on Southern’s own evidence, the withdrawal of these citation items has no bearing on Southern’s belief as to whether W.H.’s work on radiators, or the Barfield burners’ work on miscellaneous iron scrap, created a “lead problem.” In fact, under the terms of the 1991 settlement agreement, Southern was required to “undertake a review of its administrative controls pertaining to lead containing or potentially containing materials offered to [it] as scrap.” This is hardly an admission by the Secretary that Southern’s operations were free of any lead problems. Based on this evidence, we find that Southern did not establish that it believed it had no “lead problem” or that its conduct was permissible. *Manganas Painting Co.*,

than thirty days per year. 29 C.F.R. § 1910.1025(e)(1)(i), (j)(1). But neither of the two provisions at issue here, § 1910.1025(d)(2) and (l)(1)(i), includes a thirty-day requirement, and Southern neither contends nor shows that Arledge believed otherwise. *See Falcon Steel Co.*, 16 BNA OSHC at 1182, 1993-95 CCH OSHD at p. 41,331 (finding of willfulness based in part on “the uncompromising language of the standard itself”).

21 BNA OSHC at 1991, 2004-09 CCH OSHD at p. 53,406 (noting that willful characterization is not justified if employer has “ ‘a good faith, albeit mistaken, belief that particular conduct is permissible’ ” (citation omitted)).

Under these circumstances, we conclude that Southern’s violations of the initial determination and training requirements, § 1910.1025(d)(2) and (l)(I)(i), were willful. *See MJP Constr. Co.*, 19 BNA OSHC 1638, 1648, 2001 CCH OSHD ¶ 32,484, p. 50,307 (No. 98-0502, 2001) (“[A]n employer’s prior history of violations, its awareness of the requirements of the standards, and its knowledge of the existence of violative conditions are all relevant considerations in determining whether a violation is willful in nature.”), *aff’d per curiam*, 56 F. App’x 1 (D.C. Cir. 2003); *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2209, 1991-93 CCH OSHD ¶ 29,964, p. 41,029 (No. 87-2059, 1993) (“[A] willful violation can be found where an employer has been previously cited for violations of the standards in question, is aware of the requirements of the standards, and is on notice that violative conditions exist.”). Accordingly, we affirm Items 8a and 25 of Citation 2 as willful violations.

III. Serious Citation 1

Ten items alleging violations of various general industry provisions, including the cadmium standard, are at issue under this citation. Two citation items, Items 3 and 4, allege serious violations of the hearing protection and medical services standards, §§ 1910.95(i)(2)(i) and .151(b), respectively. The remaining citation items, Items 11 through 18, allege serious violations of the cadmium standard, § 1910.1027. The judge vacated Item 4 (medical services) for lack of proof, and he vacated Items 11, 15, and 16 (cadmium) based on his treatment of OSHA’s air monitoring measurements. The judge found, however, that the record evidence established the violations alleged in Items 3 (hearing protection), 12 to 14, 17, and 18 (cadmium). For the reasons that follow, we vacate Item 3, and affirm Items 4 and 11 to 18 as serious.

A. Item 3—Hearing protection

In this item, the Secretary alleges that Southern failed to “ensure that hearing protectors [were] worn” by a Southern employee and a Barfield burner exposed to sound levels exceeding 90 decibels for 8 hours. 29 C.F.R. § 1910.95(i)(2)(i) (cross-referencing 29 C.F.R. § 1910.95(b)(1)). The judge affirmed the violation as serious and rejected Southern’s affirmative defense of unpreventable employee misconduct.

On review, Southern contends the Secretary failed to make a prima facie showing that hearing protection required under the standard was not worn. With respect to the Southern employee, CO Folsie monitored his noise exposure with a dosimeter and determined that he was exposed to an 8-hour TWA of 94.7 decibels. However, the record shows that this employee performed a number of different job tasks during the monitoring period and that he worked without wearing hearing protection only during some of them. Specifically, he did not wear hearing protection while torch cutting scrap metal or working near a piece of cutting equipment known as a “shearer,” but he did wear hearing protection while operating a mobile crane. In these circumstances we are unable to determine whether his noise exposure exceeded the permissible level during the times he did not wear hearing protection. We therefore conclude that the Secretary has failed to establish a violation of § 1910.95(i)(2)(i) as to that employee.

The record evidence does show, however, that the Barfield burner was exposed to sound levels exceeding 90 decibels for 8 hours and that he failed to wear hearing protection during the entire period he was monitored. CO Baptiste’s dosimeter reading of the burner shows that he was exposed to an 8-hour TWA of 95.09 decibels. Southern does not dispute the accuracy of this reading, but contends that no evidence “connect[s] the times when [the burner] was in a high noise area with those times he was not wearing hearing protection.” CO Baptiste testified, however, that the Barfield burner “hung [the foam earplugs] around his neck during the day” and “did not use them,” and the CO’s noise report survey indicates that the burner was wearing no hearing protection on each of the five occasions that the CO observed him during the testing period. Nonetheless, as discussed above, the Secretary has not established that the burner was an employee of Southern, nor has she shown that Southern was liable for the burner’s exposure under the multi-employer worksite doctrine. We thus vacate Item 3.

B. Item 4—Medical services

In this item, the Secretary alleges a serious violation for Southern’s alleged failure to provide temporary employees with immediate first-aid or readily available transportation to a hospital for treatment. The cited provision requires that, “[i]n the absence of an infirmary, clinic, or hospital in near proximity to the workplace which is used for treatment of all injured employees, a person or persons shall be adequately trained to render first aid.” 29 C.F.R. § 1910.151(b) (1994). The judge vacated the item, finding that although Southern did not provide first aid or transportation to a hospital for any of its workers furnished by temporary

employment agencies, there was a hospital with an emergency room within 2.7 miles of Southern's facility, which he concluded was "in near proximity" to Southern. The judge also found that Southern would call 911 if such a worker was injured, and noted there was no record evidence that the hospital would not transport injured workers from Southern or provide first aid treatment to them.

As Southern does not claim it had someone at the Baton Rouge facility adequately trained to render first aid, the only issue on review is whether the hospital it relied on to treat injured employees was "in near proximity" to the facility. Relying on the Commission's decision in *Love Box Co.*, 4 BNA OSHC 1138, 1975-76 CCH OSHD ¶ 20,588 (No. 6286, 1976), for the proposition that first aid must be administered within three minutes of a serious accident, the Secretary argues that the size of Southern's scrap yards and their distance from the hospital made it highly improbable that employees could receive first aid within the three-minute timeframe. In response, Southern disputes that "in all cases and in all places" Commission precedent requires first aid to be administered within three minutes of an accident. For the following reasons, we agree with the Secretary.

In *Love Box*, the Commission noted that "[i]n serious accidents, . . . , first aid, to be effective must be administered within three minutes." 4 BNA OSHC at 1142, 1975-76 CCH OSHD at p. 24,630 (citation omitted and emphasis added). The record here shows that a serious accident could have occurred at Southern's facility. Indeed, workers operated cutting torches and utilized shearers to process scrap metal. Additionally, forklifts and cranes moved within the facility, and tall stacks of scrap metal were present. Possible injuries from these activities and conditions included severe burns from the torches and severed or crushed body parts from moving vehicles, falling stacks of scrap, or operating shearers. The record also shows that workers provided by Temp Staffers²³ suffered falls, puncture wounds, lacerations, bone fractures, burns, strained muscles, and other injuries while performing their assigned job tasks. As noted, the record places the hospital at 2.7 miles from the Thomas Yard entrance. The Thomas Yard, where most of the torch cutting occurred, is 12.5 acres, with the cutting areas

²³ Based on our discussion of the evidence concerning W.H.'s employment relationship with Southern, we conclude that all personnel provided by Temp Staffers who worked in the Thomas Yard during the citation period were employees of Southern.

located in the middle of the yard. Following a call to 911, emergency workers would have had to travel the 2.7 miles to the Baton Rouge facility, and then reach the injured employee in the appropriate yard within three minutes. Given the improbability of such a scenario, we find the Secretary has established that the hospital was not “in near proximity” to Southern. Accordingly, we affirm Item 4 as serious.

C. Items 11 to 18—Cadmium

On review, Southern argues that all of the cadmium items should be vacated because the exposure monitoring was invalid and it lacked knowledge that its employees were exposed to cadmium at the Baton Rouge facility. In response, the Secretary contends the exposure monitoring was valid and argues that Southern should have known that its employees could be exposed to cadmium in the Stainless Yard and that a cadmium program was therefore required. For the reasons that follow, we affirm all of the violations alleged under the cadmium standard.

Knowledge of the violative conditions

To prove knowledge, the Secretary must show that the “ ‘employer knew or could have known with the exercise of reasonable diligence of the conditions constituting the violation.’ ” *Contour Erection & Siding Sys.*, 22 BNA OSHC at 1073, 2004-09 CCH OSHD at p. 53,787 (citation omitted). Southern does not dispute that it knew one of the scrap materials that entered its facility for processing, including torch cutting, was stainless steel. Indeed, Southern’s Stainless Yard was dedicated to processing such scrap. Although Southern argues that it could not have anticipated that its stainless steel scrap contained cadmium, we find otherwise.

It is well-settled that an employer has an obligation to ascertain the hazards to which its employees may be exposed. *Gen. Motors Corp.*, 22 BNA OSHC at 1030, 2004-09 CCH OSHD at pp. 53,611-12 (noting that Commission has considered several factors in assessing reasonable diligence, including “ ‘employer’s obligation . . . to anticipate hazards to which employees may be exposed, and to take measures to prevent the occurrence of violations’ ” (citation omitted)); *Automatic Sprinkler Corp.*, 8 BNA OSHC 1384, 1387, 1980 CCH OSHD ¶ 24,495, p. 29,926 (No. 76-5089, 1980) (holding that “employer must . . . determine what hazards exist or may arise during the work” and “then give specific and appropriate instructions to prevent exposure to unsafe conditions”). Here, Southern vice-president Friederichsen and Stainless Yard manager James Cooper both claimed they had no reason to anticipate that their employees would be exposed to cadmium because they believed stainless steel is an anticorrosive material that did not

need any sort of coating. But this claim is belied by Southern's own material safety data sheet ("MSDS") for stainless steel scrap, which expressly provides that such scrap could include a protective coating that contains cadmium.²⁴ In fact, the MSDS states that hazards presented by cadmium "would produce their greatest potential for exposure during processes such as melting, cutting, [and] welding" because the listed processes could generate harmful metal fumes.²⁵ And it is undisputed that the Southern employees monitored by OSHA were torch cutting stainless steel scrap, the very work activity specified in the MSDS as producing the potential for exposure to cadmium.

If Southern, armed with this knowledge, had exercised reasonable diligence, it would have made an initial exposure determination under the standard to assess its employees' potential exposure to cadmium when torch cutting stainless steel scrap. 29 C.F.R. § 1910.1027(d)(1); *Gen. Motors Corp.*, 22 BNA OSHC at 1030, 2004-09 CCH OSHD at pp. 53,611-12. Based on this determination, Southern would have found, as evidenced by OSHA's air monitoring results, that its employees were potentially exposed to airborne cadmium above both the action level and PEL. 29 C.F.R. § 1910.1027(b), (c). Accordingly, we find that Southern had knowledge of its employees' potential exposure to cadmium and could have known, with the exercise of reasonable diligence, that such exposure had the potential to exceed these levels.

Based on our knowledge finding, we turn now to the individual citation items at issue under the cadmium standard.

Item 11

In this item, the Secretary alleges a serious violation of 29 C.F.R. § 1910.1027(c), which requires the employer to "assure that no employee is exposed to an airborne concentration of cadmium" above the PEL. Although OSHA's monitoring showed that one burner's exposure

²⁴ Although Southern argues that its MSDSs were generic documents brought in as a group and were not reflective of materials or substances that were present or torch cut in its yards, Southern possessed a MSDS for stainless steel scrap. And as noted, the record reflects that such scrap was in fact present at Southern's facility and torch cut by Southern employees in the Stainless Yard.

²⁵ The record also shows that when handling safety and health issues at the Baton Rouge facility, Southern worked quite closely with and, in fact, relied on corporate safety director Arledge. See discussion *infra* of Repeat Citation 3. And Arledge testified that not only was he familiar with the MSDS for stainless steel scrap, but he knew that such scrap could have a coating which, if torch cut, would release harmful elements.

level was twice the PEL, the judge vacated the citation item based on his rejection of OSHA's monitoring procedures. As we disagree with the judge and have found the monitoring results valid, we find that the record establishes that Southern's employees were exposed to cadmium above the PEL. *See* 29 C.F.R. § 1910.1027(b) (defining PEL for airborne cadmium exposure as 8-hour TWA of 5 µg/m³). Accordingly, we affirm Item 11 as serious.

Item 12

In this item, the Secretary alleges a serious violation of § 1910.1027(d)(1)(i), which requires “[e]ach employer who has a workplace or work operation covered by this section [to] determine if any employee may be exposed to cadmium at or above the action level.” The Secretary alleges that Southern failed to perform initial monitoring for “all job classifications with potential for cadmium exposure during routine daily operations,” including “cutters/burners, truck drivers, forklift and [mobile crane] operators, maintenance employees, laborers, and others.” 29 C.F.R. § 1910.1027(d)(1), (2). The judge affirmed the violation based on his finding of potential exposure to cadmium in the Stainless Yard.

Southern does not dispute that it failed to conduct initial monitoring for cadmium exposure at the Stainless Yard. OSHA's monitoring results show that two Southern employees—one who was torch cutting and operating a mobile crane, and another who was only torch cutting—were exposed to cadmium. Moreover, CO Baptiste testified that he observed other Southern employees in or near the torch cutting area of the Stainless Yard who could have been exposed to airborne cadmium generated by the burners' work activity. Accordingly, we affirm Item 12 as serious.

Item 13

In this item, the Secretary alleges a serious violation of 29 C.F.R. § 1910.1027(e)(1), which requires the employer to “establish a regulated area wherever an employee's exposure to airborne concentrations of cadmium is, or can reasonably be expected to be in excess of the [PEL].” The Secretary alleges that Southern failed to establish a regulated area in the Stainless Yard where one of its burners was exposed to cadmium in excess of the PEL, and these conditions exposed other employees, such as “cutters/burners, truck drivers, forklift and [mobile crane] operators, maintenance employees, laborers, and others to the hazard of exposure to cadmium compounds.” The judge affirmed the violation, finding that cadmium was present and that Southern did not establish a regulated area.

Southern does not dispute that it failed to establish a regulated area within the Stainless Yard. As explained above, OSHA's monitoring results show that a burner was exposed to cadmium in excess of the PEL. Southern's failure to establish a regulated area affected not only the two burners engaged in torch cutting, but also any Southern employee who had reason to come near the torch cutting area. We thus affirm Item 13 as serious.

Item 14

In this item, the Secretary alleges a serious violation of 29 C.F.R. § 1910.1027(g)(1) (1994), which states that where respirators are required by the cadmium standard, the employer must "provide them at no cost to the employee" and assure that they are used in compliance with the standard. The Secretary alleges that one of Southern's burners "did not wear a respirator during his shift" even though his work exposed him to cadmium in excess of the PEL, which under the standard would require use of a respirator. 29 C.F.R. § 1910.1027(g)(1) (1994). The judge affirmed the violation. On review, Southern does not dispute that the burner, who we find was exposed to cadmium above the PEL, failed to wear a respirator or that Southern did not require him to wear one. Accordingly, we affirm Item 14 as serious.

Items 15 and 16

In Item 15, the Secretary alleges a serious violation of 29 C.F.R. § 1910.1027(i)(1), which provides that "[i]f an employee is exposed to airborne cadmium above the PEL or where skin or eye irritation is associated with cadmium exposure at any level," the employer must "provide at no cost to the employee, and assure that the employee uses, appropriate protective work clothing and equipment." The Secretary alleges that one of Southern's burners, who was shown to be exposed above the PEL, "did not wear coveralls or similar full-body work clothing during the shift." In Item 16, the Secretary alleges a serious violation of 29 C.F.R. § 1910.1027(j)(1), which requires the employer to "provide clean change rooms, handwashing facilities, showers, and lunchroom facilities" for employees who are exposed to cadmium above the PEL. Again referencing the one Southern burner shown to be exposed above this level, the Secretary alleges that "[n]o clean change rooms, handwashing facilities, showers, and lunchroom facilities were provided to exposed employees."

The judge vacated both items based on his rejection of OSHA's air monitoring. As discussed above, we have found that OSHA's monitoring results show that a Southern burner was exposed to cadmium at a level that exceeded the PEL. And Southern does not dispute that it

failed to assure this burner wore the protective work clothing and equipment required under § 1910.1027(i)(1), and that it failed to provide the facilities required under § 1910.1027(j)(1). Accordingly, we affirm Items 15 and 16 as serious.

Item 17

In this item, the Secretary alleges a serious violation of 29 C.F.R. § 1910.1027(l)(1)(i)(A), which requires the employer to “institute a medical surveillance program for all employees who are or may be exposed to cadmium at or above the action level unless the employer demonstrates that the employee is not, and will not be, exposed at or above the action level on 30 or more days per year.” The Secretary alleges that two Southern burners exposed above the action level were not “included in a complete medical surveillance program meeting the requirements of the standard” even though their work exposed them to cadmium in excess of the action level. The judge affirmed the violation.

OSHA’s monitoring results show that both Southern employees were exposed to cadmium in excess of the action level, and Southern does not dispute that they performed their work tasks for thirty or more days per year and were not included in a complete medical surveillance program. Thus, we affirm Item 17 as serious.

Item 18

In the final item, the Secretary alleges a serious violation of the hazard communication provision of the cadmium standard. 29 C.F.R. § 1910.1027(m)(1). Under this provision, “[i]n communications concerning cadmium hazards,” employers are required to comply with 29 C.F.R. § 1910.1200, OSHA’s Hazard Communications Standard, which applies to chemicals “known to be present in the workplace in such a manner that employees may be exposed under normal conditions of use or in a foreseeable emergency.” 29 C.F.R. § 1910.1200(b)(2). The Secretary alleges that Southern’s “[e]mployees were not informed of the hazards associated with cadmium, symptoms of exposure, health effects, [or] proper protective measures[;] no MSDS was available, and no warning signs were posted in the work area.” The judge affirmed the violation.

Southern does not dispute that it failed to include cadmium in its hazard communications program. Additionally, OSHA’s monitoring results show that cadmium was present in the Stainless Yard, and that Southern’s employees were potentially exposed under normal conditions while torch cutting or working near torch cutting activities. Thus, we affirm Item 18 as serious.

IV. Repeat Citation 3, Item 3—Machine Guarding

In this item, the Secretary alleges a repeat violation of 29 C.F.R. § 1910.215(b)(9), which mandates that on certain grinders, “the distance between the wheel periphery and the adjustable tongue or the end of the peripheral member at the top shall never exceed one-fourth inch.” The judge affirmed the violation and characterized it as repeat. Only the characterization of the violation is at issue on review.

The Secretary based the repeat characterization of the violation on a 1993 citation issued to Southern’s sister corporation, Southern Scrap Recycling—Houma, Inc. (“Houma”), that became a final order of the Commission. *See Potlatch Corp.*, 7 BNA OSHC 1061, 1063, 1979 CCH OSHD ¶ 23,294, p. 28,171 (No. 16183, 1979) (holding that under section 17(a), 29 U.S.C. § 666(a), violation may be characterized as repeat where there is “Commission final order against the same employer for a substantially similar violation”). Before the judge, the Secretary proceeded on the assumption that Houma is one of Southern’s facilities. Although Southern pointed out in its post-hearing brief that Southern and Houma are separately incorporated entities, the Secretary did not address this fact in her reply to Southern’s brief. Nonetheless, the judge characterized the violation as repeat based on his findings that (1) the Houma citation included a violation substantially similar to the one at issue here, and (2) “the two corporations were operated as a single entity.” On review, Southern challenges only the judge’s latter finding. The Secretary, now acknowledging that Southern and Houma are separately incorporated, agrees with the judge’s conclusion and argues that the companies are a “single employer” and, therefore, the citation issued to Houma establishes Southern’s repeat liability. For the reasons that follow, we reject the judge’s repeat characterization and affirm the violation as serious.

Under Commission precedent, the factors relevant to determining whether separate entities are regarded as a single employer include whether they share a common worksite, are interrelated and integrated with respect to operations and safety and health matters, and share a common president, management, supervision, or ownership. *See, e.g., Altor, Inc.*, 23 BNA OSHC 1458, 1463, 2011 CCH OSHD ¶ 33,135, p. 55,134 (No. 99-0958, 2011), *petition for review filed*, Docket No. 11-2718 (3d Cir. June 27, 2011); *Loretto-Oswego Residential Health Care Facility (“Loretto”)*, 23 BNA OSHC 1356, 2011 CCH OSHD ¶ 33,113 (No. 02-1164, 2011) (consolidated), *petition for review filed*, Docket No. 11-888 (2d Cir. Mar. 7, 2011); *Vergona Crane Co.*, 15 BNA OSHC 1782, 1783, 1991-93 CCH OSHD ¶ 29,775, p. 40,496

(No. 88-1745, 1992). At the time of the violation here, Southern and Houma were both owned by Southern Holdings and shared a company president. But there is no evidence in the record showing that supervision or management at the two subsidiary companies' scrap yards was shared, nor is there any evidence showing that the companies' operations, which were geographically separate, were interrelated or integrated with one another in any way.

As to Southern Holdings' involvement with Southern and Houma, the limited evidence in the record shows that the personnel primarily responsible for overseeing daily operations at the two subsidiary companies were not employees of Southern Holdings. Day-to-day administrative matters at Southern were, for the most part, handled by supervisors employed by Southern, and "oversight responsibility" at Houma was handled by the general manager of another nearby scrap yard. And on matters other than safety and health, the record is essentially silent as to whether Southern Holdings' operations were interrelated or integrated with those of either Southern or Houma.

On decisions and general activities related to safety and health, the record establishes that while corporate safety director Arledge, a Southern Holdings employee, possessed and exercised considerable authority over such matters at Southern,²⁶ the nature and extent of his involvement at Houma is unknown. He testified that, to some extent, he was involved with safety at all of the scrap yards associated with Southern Holdings,²⁷ and that he drafted Houma's safety program. But the record contains little evidence regarding the extent of his authority at Houma to

²⁶ Arledge visited the Baton Rouge facility fifteen to twenty times a year to review safety issues and conduct a "full" safety audit. As the individual primarily responsible for making decisions on safety policy and compliance at Southern, Arledge instructed Southern management on what actions to take to comply with safety and health requirements, conducted on-site safety training, and developed a written safety program for Southern, subject to comments and changes from Southern management. Arledge also was a primary participant in OSHA's inspection of Southern's Baton Rouge facility.

²⁷ Arledge, as corporate safety director, "would try" to conduct a full safety audit at least one time each year at all of the "sites" associated with Southern Holdings—Arledge testified that "there were 35 locations total that [he] had to travel to." He would also visit sites to address safety, environmental, or training issues, but these visits were made more frequently to larger sites such as the Baton Rouge facility. Arledge did not specifically indicate how often he visited the Houma scrap yard.

implement that program or to control other operational decisions affecting safety and health.²⁸ The only other record evidence bearing on the extent of Southern Holdings' control over Southern and Houma is that it maintained records on work-related injuries and illnesses for both subsidiary companies. However, we cannot determine from the record whether Southern Holdings was simply a central repository for the scrap yards' records, or actually handled the safety and health recordkeeping responsibilities for the companies.

On this record, we are unable to determine whether Southern and Houma comprise a single employer, and conclude that the Secretary has failed to establish the existence of such a relationship. *See Loretto*, 23 BNA OSHC at 1358 n.4, 2011 CCH OSHD at p. 55,002 n.4 (finding that where Secretary alleges single-employer relationship, she bears burden to establish its existence). Southern does not contest that it committed a violation that exposed employees to the risk of serious physical harm and allegations in the citation item, which identified "the hazard of being struck by shattered wheel," contemplate the possibility of such harm. We thus affirm Item 3 as serious.

V. Penalties

Under section 17(j) of the OSH Act, 29 U.S.C. § 666(j), the Commission must give "due consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of the previous violations." The principal factor in a penalty determination is gravity, which "is based on the number of employees exposed, duration of exposure, likelihood of injury, and precautions taken against injury." *Siemens Energy & Automation, Inc.*, 20 BNA OSHC 2196, 2201, 2004-09 CCH OSHD ¶ 32,880, p. 53,231 (No. 00-1052, 2005).

For the citation items we affirm, the penalty amounts proposed by the Secretary and assessed by the judge were as follows. With respect to Citation 1, for each of the cadmium items that he affirmed (Items 12, 13, 14, 17, and 18), the judge assessed the Secretary's proposed

²⁸ We note that Arledge sent a representative from his office to participate in OSHA's 1992 inspection of the Houma scrap yard. But given the lack of other evidence regarding Arledge's authority at Houma, it is unclear if this is an example of Arledge exercising authority at Houma or if he was simply providing support services at Houma's request. *See Loretto*, 23 BNA OSHC at 1360, 2011 CCH OSHD at p. 55,003 (noting that, in context of other evidence, parent corporation's participation in OSHA inspection was not "indicative of a broader involvement in safety matters at [subsidiary corporation]").

penalty of \$2,500. For each of the cadmium items that the judge vacated but we affirm (Items 11, 15, and 16), the Secretary proposed a penalty of \$2,500, and for the medical services item (Item 4), the Secretary proposed a penalty of \$5,000. With respect to Citation 2, as to the lead citation items he affirmed, the judge reduced the Secretary's proposed penalty of \$40,000 to \$20,000 for grouped Items 8a and 8b upon the Secretary's withdrawal of the latter sub-item, and he assessed the proposed penalty of \$55,000 for Item 25. Finally, with respect to Citation 3, as to the machine guarding item (Item 3), the judge assessed the proposed penalty of \$10,000 based on the repeat characterization. On review, Southern challenges the appropriateness of the judge's penalty assessments, particularly with regard to history, good faith, and gravity.

It is well-settled that "[t]he Commission is the final arbiter of penalties" *Hern Iron Works, Inc.*, 16 BNA OSHC 1619, 1624, 1993-95 CCH OSHD ¶ 30,363, p. 41,884 (No. 88-1962, 1994). In addressing the penalties here, we have weighed Southern's arguments and considered all of the statutory factors in light of the record evidence. Southern has 130 employees and no history of previous violations at the Baton Rouge facility.²⁹ And for the reasons set forth above in the merits discussion of this decision, we find that Southern did not act in good faith with respect to its compliance with the cited OSHA standards. With regard to gravity, the most important factor, the record establishes that Southern's failure to comply with the medical services requirement at issue in Citation 1, Item 4 delayed access to medical treatment for serious injuries. For the cadmium and lead citation items, the evidence establishes that cadmium exposure could result in cancer of the prostate and lungs, kidney problems, and death; and lead exposure could result in widespread harm to the nervous system, brain, kidneys, and blood, and possibly death, resulting in a particularly high gravity assessment. For Citation 3, Item 3, which alleges a machine guarding violation, the record shows that employees could have been struck by projectiles rotating or shooting out of the machinery.

Taking into account the maximum penalties permitted under sections 17(a) and 17(b) of the OSH Act, we have considered the appropriate penalty amounts to assess in light of the section 17(j) factors. *See Valdak Corp.*, 17 BNA OSHA 1135, 1138, 1993-95 CCH OSHD ¶ 30,759, p. 42,742 (No. 93-0239, 1995) ("The Act places limits for penalty amounts but places

²⁹ In evaluating Southern's history, we do not rely on the prior citation(s) issued to Houma in 1993.

no restrictions on the Commission's authority to raise or lower penalties within those limits.?), *aff'd*, 73 F.3d 1466 (8th Cir. 1996). Based on our analysis, we assess the following penalty amounts for the items we affirm: Citation 1, Item 4 - \$5,000; Citation 1, Items 11 to 18 - \$2,500 each; Citation 2, Item 8a - \$32,000; Citation 2, Item 25 - \$55,000; and Citation 3, Item 3 - \$2,500.

ORDER

We vacate Citation 1, Item 3, and Citation 2, Items 1 to 7, 9, 11 to 18, 20 to 24, and 26 to 39. We affirm Citation 1, Items 4 and 11 to 18 as serious violations; Citation 2, Items 8a and 25 as willful violations; and Citation 3, Item 3 as a serious violation. We assess a total penalty of \$114,500, as follows: Citation 1, Item 4 - \$5,000; Citation 1, Items 11 to 18 - \$2,500 each; Citation 2, Item 8a - \$32,000; Citation 2, Item 25 - \$55,000; and Citation 3, Item 3 - \$2,500.

SO ORDERED.

/s/ _____
Thomasina V. Rogers
Chairman

/s/ _____
Cynthia L. Attwood
Commissioner

Dated: 09/28/2011

DECISION AND ORDER

Southern Scrap Materials Co., Inc. (SSM), owns and operates three scrap metal processing yards in Baton Rouge, Louisiana. After an inspection by the Occupational Safety and Health Administration (OSHA), SSM received four citations on September 30, 1994. Citation No. 1, consisting of twenty-one items, alleges serious safety and health violations including workers' exposure to cadmium and proposes penalties totaling \$58,500. Citation No. 2, consisting of forty items, alleges willful and egregious violations for workers' exposure to lead and proposes penalties totaling \$1,935,000. Citation No. 3, consisting of four items, alleges repeat safety violations and proposes penalties totaling \$30,200. Citation No. 4, consisting of three items, alleges "other" than serious safety violations and proposes penalties totaling \$3,000.

SSM timely contested the citations. The hearing held in New Orleans, Louisiana, took twenty-two days. Over SSM's objection, *{redacted}* participated as an "affected employee" pursuant to Commission Rule 20.

SSM acknowledges that it is an employer engaged in a business affecting commerce within the meaning of § 3(5) of the Occupational Safety and Health Act (Act) (Tr. 6). The Secretary withdraws Citation No. 1, items 1a, 1b, 6, 7, 8 and 10; Citation No. 2, items 8b, 10a, and 10b; and Citation No. 3, items 2 and 4 (Secretary's Brief, p. 2; Tr. 25).

The principal issues in dispute involve the alleged workers' exposure to airborne concentrations of cadmium and lead during SSM's torch cutting operations. In monitoring for cadmium and lead exposures, OSHA placed the filter cassette outside the worker's face shield instead of inside the shield. The monitoring establishes the presence of cadmium and lead at SSM. However, this method of monitoring during torch cutting fails to accurately establish the worker's level of exposure. Therefore, the alleged violations which require showing that the worker's exposure exceeded the permissible exposure limit (PEL) are vacated.

Background

SSM,¹a wholly-owned subsidiary of Southern Holdings, Inc., procures and processes scrap metal at three different yards in Baton Rouge, Louisiana, for sale to steel mills, foundries, and smelters. SSM's main yard is the Thomas yard; the yard to the north is called the Stainless yard; and the yard across the river is referred to as the Shredder yard. The three yards comprise 24 acres and employ 130 employees (Tr. 2150).

The Thomas yard is twelve and a half acres where, in addition to processing scrap metal, SSM maintains administrative offices and a maintenance facility. A large portion of the Thomas yard, referred to as the ferrous department, is used to process iron-based scrap metal, *e.g.*, steel plates, railroad tracks, and axles. A smaller portion of the Thomas yard is used to process miscellaneous nonferrous scrap, *e.g.*, copper, aluminum, and other noniron-based metals derived from radiators, heat exchangers, and tube bundles (Tr. 43, 1236-1238). The Stainless yard, which is smaller and a couple blocks north of the Thomas yard, processes stainless steel alloys (Tr. 44, 3061). At the Shredder yard, a large shredder machine is used to render large metal objects such as automobiles, refrigerators, and appliances into smaller pieces which are separated into ferrous, nonferrous, and nonmetal pieces (Tr. 1461).

The scrap metal processed by the three yards is purchased from three basic sources. There are approximately 30,000 tons of scrap purchased each month (Tr. 1558). Generally, the scrap metal is purchased from petrochemical businesses (Tr. 2070). SSM maintains long-term scrap metal procurement contracts with large chemical companies including Exxon, Dow, and BASF. These large corporate customers regularly sell scrap to SSM which locates collection bins at their plants (Tr. 1474-1475). SSM also purchases scrap from brokers and approximately 20,000 "peddlers" who bring the scrap metal to SSM's yards (Tr. 1472-1473, 1525). Additionally, SSM obtains scrap metal from bidding on large demolition projects such as bridges (Tr. 1866, 3174).

Processing the scrap metal at the Thomas and Stainless yards is generally done by large hydraulic shears which cut the scrap metal into the specified sizes for sale (Tr. 1461). The scrap metal, which cannot be processed by shears, is cut to size by workers using oxygen-propane

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Since April 1995, SSM is incorporated as SSXLC (Tr. 1437).

cutting torches (Tr. 298, 694).² Generally, the scrap metal is torch cut into 4-foot pieces to fit into the shears. The Thomas yard processes approximately 15,000 to 20,000 tons of ferrous scrap metal each month (Tr. 1889). During the period of OSHA's inspection, SSM estimated that approximately 98 percent of the scrap metal purchased was either sold to SSM without further processing after sorting or processed by the shears. The remaining 2 percent was processed by cutting torches (Tr. 3215). In 1994, to cut the iron scrap by torch in the ferrous department, SSM contracted with Barfield Enterprises, a Texas corporation, to supply the workers (Tr. 513). There was also some scrap metal such as radiators with iron attachments (clips or brackets) which was removed by torch cutting (Tr. 1115, 3226-3227). The radiators were cleaned in the nonferrous department by SSM workers or workers provided by temporary employment agencies (Tr. 3226).

SSM sells the processed scrap metal to steel mills and foundries throughout the United States and overseas. The mills and foundries set specifications as to the type and size of scrap metal accepted (Tr. 1476, 3168). The amount, if any, of nonferrous or other contaminants contained in the scrap are limited by the mills (Tr. 3188-3189). They reject shipments containing contaminants exceeding their specifications (Tr. 1814-1815, 3191-3192).

OSHA's inspection of SSM was performed by Industrial Hygienist Brad Baptiste with some assistance in air monitoring at the Stainless yard by Industrial Hygienist Dorinda Folse (Tr. 1149). Baptiste was on-site twenty-five days extending over a five-month period during April through September 1994. Baptiste observed SSM's processes, conducted noise and air monitoring surveys at the various torch cutting locations, and interviewed workers and SSM's management. Based on the inspection, OSHA cited SSM for numerous safety and health violations principally involving the workers' torch cutting the scrap metal and their exposure to excessive concentrations of airborne cadmium and lead.

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Other equipment at the yards used in processing include crushers to reduce aluminum cans in size and balers to bale the cans (Tr. 1461).

Discussion

Preliminary Matters

SSM's Motion to Dismiss

SSM renews its motion to dismiss the citations because of OSHA's failure to timely file SSM's notice of contest with the Review Commission (Respondent's Brief, p. 9). Rule 33 of the Commission's Rules of Procedure requires OSHA, within fifteen working days after receipt of an employer's notice of contest, to notify the Review Commission of the receipt in writing and promptly furnish any documents filed by the contesting party.

SSM's notice of contest was received by OSHA on October 21, 1994, and filed with the Review Commission on December 2, 1994. The Secretary does not dispute that she failed to file SSM's notice of contest within fifteen working days. She states the oversight was due to a shortage of office personnel in OSHA's area office which was involved in explosion investigations at several refineries. During the hearing, SSM did not examine OSHA about the delay.

SSM's motion to dismiss was originally denied by order dated January 11, 1995. The record still does not show that OSHA's conduct was contumacious. Its delay in filing the notice of contest was uncontroverted and excusable. There is no showing that SSM was prejudiced in proceeding in this case due to OSHA's delay. *See Ford Development Corp.*, 15 BNA OSHC 2003, 1991-93 CCH OSHD ¶ 29,900, pp. 40,796-97 (No. 90-1505, 1992).

SSM's motion to dismiss is denied.

SSM's Motion for Sanctions

SSM moves for sanctions against the Secretary for failing to timely produce documents requested during discovery (Respondent's Brief, p. 10). SSM states that documents from OSHA's inspection files, files from the Salt Lake City laboratory, and Baptiste's journal were not furnished until the hearing or was destroyed, as in the case of the journal. Because of the Secretary's failure to timely produce documents, SSM asserts it was prejudiced in preparing for hearing.

SSM's motion was previously denied by order dated August 29, 1995, and also on the first day of the hearing (Tr. 7-32). Other than the journal, all known documents were furnished to SSM prior to the hearing or at the hearing, with SSM given sufficient time to prepare its

defense. There is no evidence that any documents not already provided to SSM exist. SSM is unable to identify any remaining documents.

The Secretary represents, and the record reflects, that there were thousands of pages of documents located in OSHA's area, regional, and national offices, and also at the Salt Lake City laboratory. Many of the documents were duplicates, and copies were already available to SSM from the area office files. The Secretary does not dispute that some documents were not timely provided during discovery. Some documents from Salt Lake City were not given to SSM until the hearing. However, the hearing lasted twenty-two days covering a five-month period. SSM was allowed sufficient time to review the Salt Lake City documents. The witnesses from Salt Lake City did not testify until the ninth day of the hearing. SSM was not prejudiced by the delay.

With regard to the journal destroyed by Baptiste, the record reflects that he used it to make notes on-site during his inspection. He states that it was destroyed after the information was transcribed into the inspection files. Although the journal should not have been destroyed, the court concludes Baptiste was new to legal proceedings. His inspection files were provided to SSM. There is no showing of contumacious conduct, or that the journal contained information which benefited SSM. Both parties were denied the benefit of any entries in the journal.

SSM's motion for sanctions is denied.

Reasonableness of the Inspection

SSM moves to dismiss the citations pursuant to section 8(a) of the Act, 29 U.S.C. 657(a), because of the alleged unreasonableness of the inspection. SSM's inspection was described by OSHA as a general scheduled programmed health inspection (Tr. 2394). SSM alleges the inspection was unreasonable and for the purpose of harassment. SSM claims it was selected for the inspection because OSHA withdrew an alleged lead citation in 1989 as part of a settlement (Exh. R-13). As evidence of harassment, SSM points to the length of OSHA's on-site inspection, the number of citations issued, and a statement made by Baptiste during the inspection referring to SSM's attorney as a "slick lawyer" in settling the 1989 citations (Tr. 2143-2144, 2150).

SSM was selected for inspection from an inspection list of employers furnished to the area office from OSHA's national office. SSM's request for the inspection list was denied at the

hearing (Tr. 473-497, 2395, 2400). By consenting to the inspection and not requiring an inspection warrant, SSM waived its Fourth Amendment right to require a warrant based on probable cause. Therefore, SSM was not entitled to OSHA's inspection list. Section 8(a) also does not apply to an employer's selection for inspection. There was no showing of preselection.

Section 8(a) requires that OSHA's inspection be conducted in a reasonable manner, at reasonable times, and within reasonable limits. *See Adams Steel Erection, Inc.*, 13 BNA OSHC 1073, 1079, 1986-87 CCH OSHD ¶ 27,815, p. 36,403 (No. 77-3804, 1987). SSM asserts the inspection was unreasonable. It is an affirmative defense, and the burden is on SSM to show unreasonable conduct by OSHA during the inspection. *Hamilton Fixture*, 16 BNA OSHC 1073, 1077, 1993 CCH OSHD ¶ 30,034, p. 41,173 (No. 88-1720, 1993). The evidence must show that OSHA substantially failed to comply with the provisions of § 8(a), and such noncompliance substantially prejudiced SSM. *Gem Industrial, Inc.*, 17 BNA OSHC 1185, 1995 CCH OSHD ¶ 30,762 (No. 93-1122, 1995).

The record does not show the inspection was unreasonable. There is no dispute the inspection was conducted during normal working hours and at times to accommodate SSM's safety director from New Orleans. There is also no evidence the inspection was disruptive of SSM's business operations or production. OSHA's inspection was a general health inspection, taking part of twenty-five on-site days, and conducted over a five-month period. For the most part, there was one industrial hygienist involved in the inspection. His inspection involved 3 separate yards, 25 acres of scrap metal processing, and covered approximately 130 employees.

Although twenty-five days is a long inspection, it was not shown to be unreasonable considering the nature and extent of the alleged violations. There were sixty-eight separate safety and health standards cited. The health monitoring found evidence of worker exposure to noise and airborne concentrations of cadmium and lead. Delays during the inspection were caused by monitoring problems, scheduling conflicts, and weather (Tr. 236, 561, 1149). Thus, the inspection was conducted in a reasonable manner, and there was no showing the inspection substantially prejudiced SSM.

Further, OSHA's settlement of the 1989 lead citation was not shown as a basis for harassment. The Secretary agreed to the settlement and voluntarily withdrew the lead citation (Exh. R-13). Although Baptiste testified he was aware of the settlement agreement, he was hired after the 1989 inspection and did not participate in the decision to withdraw the lead citation.

Baptiste exhibited no vendetta against SSM (Tr. 463, 465, 972). Also, there is no evidence that Baptiste's supervisors were hostile to SSM (Tr. 1215, 2429, 3533).

Baptiste's comment referring to SSM's attorney as a "slick lawyer" was admittedly inappropriate. The court accepts Baptiste's explanation that it was intended to be a joke and not intended to intimidate or harass (Tr. 511, 940). Baptiste's conduct and testimony at the hearing did not bear a trace of bias, prejudice, or animosity toward SSM.

SSM's motion to dismiss the citations under § 8(a) is denied.

{redacted}'s Status As an Affected Employee

SSM renews its objection to *{redacted}*'s status as an affected employee and moves to strike all evidence obtained by *{redacted}*'s counsel during the hearing (Respondent's Brief, p. 13). SSM argues that *{redacted}* is not an affected employee because he was not an employee of SSM and was no longer working on SSM property when the citations were issued. *{redacted}* was employed by TempStaffers, a temporary employment agency providing workers to SSM. SSM asserts that *{redacted}* requested party status to obtain information for a private lawsuit.

{redacted} was granted party status as an affected employee under Commission Rule 20. The rule provides that affected employees "may elect party status concerning any matter in which the Act confers a right to participate." "Affected employee" is defined at Commission Rule 1(e) as "an employee of a cited employer who is exposed to or has access to the hazard arising out of the alleged violative circumstances, conditions, practices or operations."

In determining whether *{redacted}* was an employee of SSM, the Commission applies an economic realities test. As described in *Loomis Cabinet Co.*, 15 BNA OSHC 1635, 1637, 1992 CCH OSHD ¶ 29,775 (No. 88-2012, 1992), the economic realities test employs the following factors: (1) who does the worker considers his employer; (2) does the alleged employer have the power or responsibility to control the worker; (3) does the alleged employer have the power to fire, hire, or modify the employment conditions of the worker; (4) does the worker's ability to increase his wages depend on efficiency rather than initiative, judgment, and foresight; and (5) how are the worker's wages established? The key factor in addressing an employment issue is the right to control the work. See *Abbonizio Contractors, Inc.*, 16 BNA OSHC 2125, 1994 CCH OSHD ¶ 30,109 (No. 91-2929, 1994).

It is undisputed that at the request of SSM, TempStaffers, a temporary employment agency, provided *{redacted}* to SSM to work as a laborer. TempStaffers functioned as a personnel department for SSM. SSM did not hire any workers as full-time employees unless they first came through TempStaffers. SSM identified its job needs to TempStaffers. TempStaffers performed background checks on prospective workers, interviewed the workers, and made the selection.

While working on its property, SSM assigned the worker to a job, provided him with any training, set the worker's hours, and provided the worker with any tools or equipment. SSM gave the worker a safety belt. Workers had to buy hardhats and goggles from SSM (Tr. 4070-4072, 4075). SSM supervised the work and controlled the working conditions. SSM paid TempStaffers for the service, and TempStaffers paid the worker an hourly wage.

During OSHA's inspection, *{redacted}* was torch cutting radiators, heat exchangers, and tube bundles in the nonferrous department at SSM's Thomas yard. *{redacted}* worked at SSM from May 25 to June 24, 1994. He was hired as a laborer. He worked eight hours per day. He was trained to do his job by SSM. SSM also provided *{redacted}* with hazard communication and lockout/tagout training (Tr. 1584, 2796). *{redacted}* was supervised by SSM's nonferrous supervisor (Exhs. C-34, R-3; Tr. 242, 311, 976, 3355). There were no TempStaffer supervisors at SSM (Tr. 976). *{redacted}* was required to work the schedule set by SSM, and he exercised no independent judgment. His hourly wage was not dependent on how many radiators were cut. SSM had the power to modify *{redacted}*'s working conditions. His work was controlled by SSM.

Thus, under the economic realities test, *{redacted}* meets the requirement of an "employee of a cited employer" under Commission Rule 1(e). SSM controlled his job and working conditions. The fact that he is no longer employed on SSM property does not change his employment status at the time of his alleged exposure to unsafe conditions. The Commission rule does not limit participation in OSHA proceedings to employees currently employed at the time of the hearing.

OSHA alleges *{redacted}* was exposed to hazardous conditions while working at SSM. He was monitored for airborne concentrations of lead on June 15, 1994. Willful Citation No. 2 identifies *{redacted}* as an exposed employee to excessive airborne concentrations of lead. See

items 7, 11(h), 18, 20(h), 21(h), 22a(h), 22b(h), and 31. Thus, the Secretary identifies *{redacted}* as exposed or having access to a hazard arising out of the alleged violative conditions.

Therefore, *{redacted}* met the definition of “affected employee.” As an “affected employee,” *{redacted}* was given party status and entitled to participate in the hearing. His participation included the right to present witnesses, cross-examine witnesses, and offer documentary evidence on the issues in dispute. See *Donovan v. Oil, Chemical, and Atomic Workers International Union*, 718 F.2d 1341, 1349 (5th Cir. 1983). Although the Secretary has the burden of proof to establish the alleged violations, an affected employee is entitled to fully participate at the hearing as any other party. SSM was not prejudiced by *{redacted}*’s participation. Any information obtained by *{redacted}* was available to him under the Freedom of Information Act or by attending the public hearing.

SSM’s motion to strike *{redacted}*’s party status or evidence is denied.

Validity of the Lead and Cadmium Standards to the Scrap Metal Industry

SSM seeks to dismiss the alleged violations of the lead and cadmium standards on the basis that the standards are invalid to the scrap metal industry as identified under SIC Code 5093³(Respondent’s Brief, p. 34). SSM asserts that during rulemaking proceedings, OSHA failed to demonstrate that the lead and cadmium standards produce a significant health risk and are feasible of attainment in the scrap metal industry.

The Review Commission does consider challenges to the validity of standards in enforcement proceedings. See *Holly Springs Brick & Tile Co.*, 16 BNA OSHC 1856, 1858 (No. 90-3312, 1994); *Deering Milliken, Inc. v. OSHRC*, 630 F.2d 1094 (5th Cir. 1980). This includes standards promulgated under the elaborate rulemaking procedures at section 6(b) of the Act. *RSR Corp. v. Donovan*, 747 F.2d 294, 302 (5th Cir. 1984). The burden of proving a standard invalid in an enforcement proceeding lies with the party challenging the validity. It is a heavy burden. See *Atlantic & Gulf Stevedores v. OSHRC*, 534 F.2d 541, n. 13 (3d Cir. 1976).

1. Lead Standard

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Standard Industrial Classification is from a manual of the Office of Management and Budget which classifies businesses. SIC Code 5093 includes businesses engaged in assembling, breaking up, and sorting wholesale distribution of scrap and waste materials. Also, it includes those engaged in wrecking automobiles, iron steel, and nonferrous metals.

The lead standard was promulgated under § 6(b) of the Act. After promulgation in 1978, there was extensive litigation involving the lead standard, including its findings of technological and economic feasibility. In 1980 the D. C. Circuit Court substantially upheld the validity of the lead standard as to most industries. The court, however, remanded the lead standard to OSHA for additional feasibility findings in a number of miscellaneous industries, including industries involved in collecting and processing scrap lead. *United Steelworkers of America v. Marshall*, 647 F.2d 1189 (D.C. Cir. 1980), *cert. denied*, 453 U.S. 913, 101 S. Ct. 3148 (1981). *Also see American Iron & Steel Institute v. OSHA*, 939 F.2d 975 (D.C. Cir. 1991). In December 1981, OSHA made additional feasibility determinations for the miscellaneous industries. See 46 F.R. 60,758 (December 11, 1981). The court accepted OSHA's determinations.

OSHA's deputy director for health standards identified three documents used by OSHA during its rulemaking proceedings which involved the scrap metal industry under SIC Code 5093 (Exhs. R-35, R-36, R-37; Tr. 3400). The documents refer to three companies in Utah which accept ferrous scrap material. It was not shown how these documents were used in the rulemaking process. The deputy director, however, testified that OSHA did make specific feasibility findings for scrap metal processors under SIC Code 5093 (Tr. 3401). He also stated that OSHA's feasibility findings related to any industry where a torch was used to cut or burn metal (Tr. 3405-3406).

A review of the Federal Register shows OSHA made risk and feasibility findings for all employers engaged in the "collection and processing of lead scrap" under SIC Code 5093. See 46 F.R. 60,758, 60,764-60,765 (December 11, 1981). OSHA described the industry as establishments engaged in collecting, cleaning, breaking, sorting, chopping, cutting, baling, and distributing all types of scrap metal for delivery to remelters and secondary smelters. In making its risk and feasibility analysis, OSHA recognized the number of employees exposed above the permissible exposure limit (PEL) may be small, and that the amount of lead content may be irregular and sporadic depending on the type of scrap metal processed and the nature of processing. Therefore, OSHA exempted scrap metal processors from the requirements of implementing engineering controls whose employees were exposed above the PEL for less than thirty days. The other requirements of the lead standard, however, were made applicable to the scrap metal industry.

OSHA's risk and feasibility findings for the scrap metal industry are sufficient and satisfy the requirements of § 6(b) of the Act. Further, the record shows the National Association of Recycling Industries (NARI) actively participated in OSHA's rulemaking process. NARI is a predecessor association to the Institute of Scrap Recycling Institute, Inc (Tr. 1788, 1795). SSM is an active member (Tr. 1250, 1252-1253). The Institute of Scrap Recycling Industries, Inc., also intervened in a challenge to the feasibility of the lead standard. *American Iron and Steel Institute v. OSHA*, 939 F.2d 975 (D. C. Cir. 1991). Based on a need for an agency's standards to reach finality, courts refuse to entertain challenges to the validity of a standard during enforcement proceedings where an employer previously participated in OSHA's rulemaking process and did not raise a challenge. *RSR Corp. v. Donovan*, 747 F.2d 294, 302 (5th Cir. 1984). Similarly, SSM through its association participated in previous challenges to the lead standard.

Also, SSM was aware of the presence of lead at its facility since it was shown by its air monitoring in 1989 and 1992 (Exh. C-42; Tr. 1330, 1332, 2098). One worker's lead exposure was above the PEL, and another worker's level exceeded the action level for lead (Tr. 2254). Although the 1989 lead citation was withdrawn, SSM was on notice that OSHA considered the lead standard applicable to its facility (Exhs. C-41, R-13). Southern Holdings, SSM's parent company, implemented a full lead program at its scrap facility in New Orleans (Exh. C-47; Tr. 1343-1344).

SSM's challenge to the validity of the lead standard is denied.

II. Cadmium Standard

Unlike the lead standard, there is no evidence that OSHA made specific feasibility findings for the scrap metal industry under SIC Code 5039 in promulgating the cadmium standard. OSHA's deputy director for health standards testified that, based on his review of OSHA's rulemaking docket for cadmium, he was unable to locate any documents involving SIC Code 5093 which led to the adoption of the cadmium standard in 1992. He further could not recall receiving any information with respect to cadmium in the scrap metal industry (Tr. 3417). He testified that OSHA did not identify SIC Code 5093 as an impacted or potentially impacted industry for cadmium exposure (Tr. 3421).

However, the cadmium standard specifically describes at § 1910.1027(a) its scope to include “all occupational exposures to cadmium and cadmium compounds, in all forms, and in all industries covered by the Occupational Safety and Health Act except the construction-related industries, which are covered under 29 C.F.R. 1926.63.” A review of the Federal Register reveals that in addition to making health risk assessments and feasibility findings for specific industries, OSHA included a general industry analysis which addressed potential cadmium exposure in occupations that are not directly associated with cadmium but may involve incidental exposure in the use of products containing cadmium. 57 F.R. 42,102, 42,310-42,333 (September 14, 1992). Among the occupations considered, OSHA identified “welders, brazers, and solderers” as possibly exposed to cadmium fumes released from cadmium-bearing base metals, brazing rods, or solders. Within the welder category, OSHA included “employees who use welding and flame cutting equipment such as arc welders, gas welders, and gas torches to join, cut, trim, and scarf metal components.” 57 F.R. at 42,312. OSHA made health risk assessments and feasibility analyses for the welder category.

SSM’s use of torch cutting to process the scrap metal is within the welder category. An industry-by-industry risk-finding is not required: *U.A.W. v. OSHA*, 37 F.3d 665, 670 (D.C. Cir. 1994); *American Dental Assn. v. Martin*, 984 F.2d 823, 827 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 172 (1993). The Review Commission has also concluded that OSHA is not required to assess the significant health risk for each affected industry. *Holly Springs Brick & Tile Co.*, 16 BNA OSHC 1856 (No. 90-3312, 1994). As with lead, SSM was aware of the potential applicability of the cadmium standard to its scrap metal yards. Prior to the OSHA citations, SSM’s holding company found the presence of cadmium at its scrap metal facility in New Orleans, and the corporate safety director was familiar with the cadmium standards (Tr. 1384-1385, 1408).

SSM’s challenge to the validity of the cadmium standard is denied.

The Validity of OSHA Air Monitoring Results

SSM challenges OSHA’s air monitoring results for lead and cadmium during the torch cutting operations in the ferrous and nonferrous departments because of the placement of the filter cassettes on the worker’s collar and not inside his face shield. SSM asserts the monitoring results do not accurately reflect the worker’s exposure level to airborne lead and cadmium.

There is no dispute that OSHA clipped the filter cassettes to the worker's collar within 9 inches of his breathing zone, but outside of the worker's face shield. While torch cutting the scrap metal, workers wore face shields which, when in the down position, covered their faces (Tr. 585, 587). The face shield, made of clear or tinted curved plastic, was hinged to the hardhat allowing the shield to be raised above the head or lowered in front of the face. When lowered, the shield covered the face to the chin or throat and curved behind the worker's temple. The primary purpose of the face shield was to protect the worker's eyes and face (Exhs. C-25 thru C-32; Tr. 233, 238, 1152-1153).

In *Equitable Shipyards*, 13 BNA OSHC 1177 (Nos. 81-1685, 81-1762 & 81-2089, 1987), the Review Commission invalidated samples of airborne contaminants taken outside of helmets worn by welders. The Commission reasoned that a filter cassette attached to the welder's collar, outside of the welding helmet, was unreliable and failed to provide an accurate indication of the worker's exposure. The Commission noted that OSHA's technical manual directed industrial hygienists when sampling for welding fumes to place the filter cassette inside the welding helmet to achieve an accurate characterization of the employee's exposure. 13 BNA OSHC at 1181. See also OSHA technical manual (Exh. R-48⁴ p. 6, D.2 and Exh. R-47).

The Secretary argues the technical manual relating to welding fumes is not applicable in this case. SSM's workers were not welding and were wearing face shields, not welding helmets. OSHA's technical manual states that, when generally sampling for air contaminants, "attach the collection device to the shirt collar or as close as practical to the nose and mouth of the employee, *i.e.*, in a hemisphere forward of the shoulders with a radius of approximately 6 to 9 inches" (Exh. C-48, p. 1, B.5). Monitoring of welding fumes is under special sampling procedures and is considered an exception to OSHA's general sampling method.

In another case involving monitoring for lead exposure during torch cutting operations by workers wearing face shields, a judge concluded OSHA improperly sampled a worker's exposure by not placing the filter cassette inside the worker's face shield. The judge found that welding and torch cutting were closely allied processes and "to require different sampling techniques dependent upon whether the welder/cutter's facial barrier is classified as a 'face shield' rather than a welding helmet creates a distinction without a relevant difference."

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Exhibit C-24 is the same document except minus page 2.

Louisville Scrap Material Co., Inc., 17 BNA OSHC 1620 (No. 94-2293, 1995). The court agrees.

Welding and torch cutting generate the same type of fume when the operation is performed on the same type of base metal with the same type of surface coating. Welding and torch cutting are allied processes that OSHA has classified them as such. See § 1910.251, *et seq.* A welder is defined as any operator using electric or gas welding and cutting equipment. Although OSHA is not required to absolutely follow the procedures outlined in its technical manual, the Review Commission accords the guidelines significance and are probative evidence of the proper sampling technique. *FMC Corp.*, 5 BNA OSHC 1707, 1710, 1977-78 CCH OSHD ¶ 22,060, p. 26,573 (No. 13155, 1977).

There is no support in the record for the deputy director's opinion that the face shield provided no respirator protection (Tr. 1109). To the contrary, literature offered by SSM supports a finding that the level of exposure is different inside versus outside the shield. Studies found that welders using welding helmets were exposed to the airborne concentrations inside the helmet which varied from 36 percent to 71 percent less than the concentrations outside the helmet (Exhs. R-42, R-44). This significant difference in the worker's exposure level depended on the placement of the sampling cassette. Although one would reasonably expect the welding helmet to provide more protection from air containments than the face shield used at SSM, it is also reasonable to assume there is still a difference in the exposure levels inside the face shield as opposed to outside the shield. The facial barrier created when the face shield is down during torch cutting work limits to an extent the worker's exposure to air containments. No studies were offered involving face shields and torch cutting operations. There is also no shown statistical correlation to compare the exposure levels outside versus inside the welder's helmet or face shield.

Therefore, OSHA's air monitoring results for lead and cadmium exposure of the workers engaged in torch cutting were not shown to accurately measure the workers' exposure levels. However, despite SSM's arguments to the contrary, the record establishes the presence of airborne concentrations of lead and cadmium at SSM. To what extent OSHA's incorrect sampling procedure affected the alleged violations is discussed separately as to each alleged violation.

SSM's Responsibility for Barfield's Workers

SSM asserts the workers monitored by OSHA for exposure to airborne lead in the ferrous department were not employees of SSM. The workers' torch cutting scrap metals in the ferrous department were employed by Barfield Enterprises, an independent contractor. SSM argues that any violations of the lead standards were the responsibility of Barfield (Respondent's Brief, p. 58). However, OSHA opened no inspection files and no citations were issued to Barfield Enterprises.

There is no dispute that SSM verbally contracted⁵ with Barfield Enterprises, Inc., a corporation from Texas, to torch cut scrap metal in SSM's Thomas yard (Tr. 3455). Barfield was in business to provide torch cutting services to steel mills, scrap yards, and other companies in a number of southern states (Tr. 2534-2538). Barfield furnished approximately ten workers to SSM to torch cut scrap metal from February to October 1994⁶(Tr. 2629). The workers were supervised by Barfield's on-site foreman, *{redacted}*. Another Barfield supervisor visited the Thomas yard several days each week (Tr. 515, 2646-2648, 2565). The workers were Mexican nationals who spoke little English. There is no dispute that *{redacted}*, and *{redacted}* were the workers furnished by Barfield Enterprises. Barfield paid the workers an hourly rate and furnished them with rented housing in the Baton Rouge area (Tr. 2566). All equipment such as torches, hoses, and face shields were provided by Barfield.

Barfield was paid by the ton of scrap metal processed by its workers based on the type of metal processed (Tr. 2570-2572). SSM provided an area in the Thomas yard for the workers to torch cut the scrap metal. SSM selected the scrap metal for cutting, moved the scrap metal to and from the area, and furnished propane gas for the workers' cutting torches. SSM also furnished the workers with respirators, if requested, and some safety-related training (Tr. 1295-1296, 2138, 2624, 2776, 2991-2993). SSM retained the authority to stop the workers' torch cutting if their work was unsatisfactory or unsafe (Tr. 2141, 2675).

Barfield, a separate and independent corporation, was hired by SSM to torch cut scrap metal which could not be cut by SSM's large shears. Barfield's business is to provide this service and does so for other scrap yards. Barfield hires, fires, pays the wages, and sets the

⁵The parties did sign a hold harmless agreement (Exh. R-28).

⁶Barfield anticipated working longer than October 1994 (Tr. 2720).

working conditions for the workers. The workers are paid an hourly wage by Barfield. Barfield's compensation is based on the tonnage processed. Although SSM furnished the workers a place on-site to work and identified scrap metal to cut, it is not shown that SSM controlled or had the authority to control the workers. The workers did not consider SSM their employer. Thus, in applying the "economic realities" test, the workers were not employees of SSM.

Having concluded that Barfield was an independent contractor, SSM nevertheless is not relieved of its responsibility to provide the workers a safe workplace. An employer at a multi-employer worksite is responsible for abating hazardous conditions which expose workers of other employers where the employer could be reasonably expected to prevent or detect and abate the violations because of its control over the worksite and its supervisory authority. *IBP, Inc.* 17 BNA OSHC 2073, 2074-76 (No. 93-3059, 1997). The multi-employer worksite analysis applies to an employer at a nonconstruction worksite such as SSM.

Applying this analysis, SSM was responsible for the health and safety of Barfield's workers for conditions it created and controlled. The alleged violations involve the workers' exposure to air concentrations of lead. If exposure existed to lead, it was the result of scrap metal which SSM contracted Barfield to process. SSM owned the workplace. SSM selected the scrap metal to cut. SSM's responsibility was to ensure that workers on its property were not exposed to airborne contaminants or hazardous metals it contracted to process. Any unsafe conditions, if existed, were under the control of SSM. SSM was under a duty to inform Barfield or prevent the processing of hazardous materials without implementing appropriate protective measures. Barfield relied on SSM to identify any hazards. SSM failed to inform Barfield of the possible lead exposure (Tr. 2629). Therefore, if violations of the lead standard are found, SSM is a responsible employer because of its control over the work environment.

This does not imply that Barfield has no responsibility for the safety of its workers and may have been subject to an OSHA citation. By not citing Barfield, SSM argues OSHA engaged in selective prosecution. However, the Secretary is empowered with the "broad prosecutorial discretion" in deciding whom to prosecute for violations of the Act. *DeKalb Forge Co.*, 13 BNA OSHC 1146, 1153, 1986-87 CCH OSHD ¶ 27,842, p. 36,451 (No. 83-299, 1987). Based on this broad discretion, there is no showing that the selection of SSM for the issuance of a citation was

motivated by discriminatory purposes or had a discriminatory effect. As explained by OSHA, SSM did not identify Barfield as an independent contractor when asked at the beginning of the inspection (Tr. 512). SSM's claim of "selective prosecution" is denied. *See Vergona Crane Co.*, 15 BNA OSHC 1782, 1787-88 (No. 88-1745, 1992).

The Citations

Having made preliminary findings, attention is directed to the various citation items remaining in contest.

SERIOUS CITATION NO. 1

Item 2 - Alleged Violation of § 1910.27(d)(1)(iv)

In the Shredder yard, OSHA alleges the safety cage on the fixed ladder used to access a pedestal crane was 15 feet above ground level in violation of § 1910.27(d)(1)(iv). The standard requires the cage on a fixed ladder to extend to a point not less than 7 feet nor more than 8 feet above the base of the ladder.

SSM's pedestal crane is stationary and moves scrap metal to the shredder (Tr. 2174). To access the crane, the operator climbs a fixed vertical ladder to a platform. The fixed ladder is protected, for the most part, by a cage. Based on his observations, however, Industrial Hygienist Baptiste determined the cage ended 15 feet above the base of the ladder (Exh. C-7; Tr. 98-99). SSM immediately extended the cage (Tr. 100, 878).

SSM argues that the Secretary failed to establish the application of the standard, employees' exposure, and the height of the cage (Respondent's Brief, p. 119). SSM asserts that the pedestal crane is covered by the overhead and gantry crane standards at § 1910.179(c)(2), which incorporates the ANSI standards for access to the crane.

SSM's arguments are rejected. Although the § 1910.179 standards apply to cranes such as the pedestal crane, § 1910.179(d)(4)(iii) specifically requires that ladders be "permanently and securely fastened in place and shall be constructed in compliance with § 1910.27." Therefore, § 1910.27(d)(1)(iv) is the appropriate standard, and the evidence supports a violation.

Industrial Hygienist Baptiste determined the height of the cage by counting the rungs on the ladder which were 1 foot apart (Tr. 99, 877). Despite James Arledge's⁷ denial, Baptiste's testimony is more credible (Tr. 2175). Arledge offered no other measurements, and a photograph of the pedestal crane show a height greater than 8 feet (Exh. C-7). Although no employee was seen using the ladder, the record established exposure based on access. The ladder was the only means identified to access the crane by the operator. The crane was used daily (Tr. 99, 1355).

The violation of § 1910.27(d)(1)(iv) is considered "serious" within the meaning of § 17(k) of the Act. The unguarded portion of the ladder was in plain view. SSM conducted daily safety audits, and it should have been aware of the inadequate cage and possible fall hazard (Tr. 96, 1569-1570). The operator was exposed to a fall hazard in excess of 10 feet. Such a fall hazard could cause serious injury or possible death.

A serious violation of § 1910.27(d)(1)(iv) is affirmed.

Item 3 - Alleged Violation of § 1910.95(i)(2)(i)

OSHA alleges the Barko⁸ operator and a torch cutter were exposed to noise levels above 90 dBA for an eight hour time-weighted average without the use of hearing protection. Section 1910.95(i)(2)(i) requires that, if employees are exposed to noise levels above 90 dBA for eight hours, the employer must ensure that hearing protectors are worn.

Industrial Hygienists Baptiste and Folsie monitored workers' exposure to noise in the Thomas and Stainless yards. They monitored the noise exposure of ten workers, including torch cutters and equipment operators. OSHA's noise monitoring found the noise exposure level for the Barko operator to be 94.7 dBA; for a worker torch cutting, 95.1 dBA for an eight hour time-weighted average (Exhs. C-8, C-9; Tr. 103). Neither the operator nor the worker was wearing hearing protection. The worker torch cutting had ear plugs around his neck but was not using them (Tr. 103, 118). Based on these findings which are not disputed by SSM, a violation of §1910.95(i)(2)(i) is established.

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⁸ The corporate safety director who accompanied Baptiste for most of his inspection.

The Barko is a hydraulic crane.

SSM asserts an employee's misconduct defense (Respondent's Brief, p. 109). SSM claims it has a comprehensive hearing protection program (Exh. C-10). Baptiste rated SSM's program as better than other employers (Tr. 887). Hearing protection was provided at no cost (Exhs. R-33, R-34). SSM provided an annual audiogram to workers. SSM also designated certain areas in the Thomas and Stainless yards as high noise areas. The areas were posted with warning signs which stated hearing protection was required in the area (Exhs. R-19, R-26; Tr. 2178, 2180, 2308). SSM notes that only two workers were identified not wearing hearing protection.

In order to establish an employee misconduct defense, SSM must show that the action of its employees represented a departure from a work rule that was effectively communicated and enforced. *Mosser Construction Co.*, 15 BNA OSHC 1408, 1414, 1991 CCH OSHD ¶ 29,540, p. 39,905 (No. 89-1027, 1991). SSM has the burden of proof.

The record establishes that SSM implemented a good hearing conservation program and developed rules for wearing hearing protection. Based on its written program, training, and posted warning signs, SSM's hearing protection rule was communicated to employees. SSM, however, failed to show effective enforcement. There is no showing that the rule was enforced or that any worker was reprimanded for not wearing hearing protection. Although OSHA was present on-site for twenty-five days, noise monitoring was performed on only ten workers during three days. Although not monitored, Baptiste testified that most of the workers torch cutting were not wearing hearing protection (Tr. 879). Noncompliance by the two workers indicates ineffective enforcement. SSM's daily safety audits in the yards were not shown to adequately detect unsafe conditions. The lack of hearing protection was in plain view. An employee's misconduct defense is rejected.

Under § 17(k), the violation is considered serious in that SSM should have known of the lack of hearing protection with the exercise of reasonable diligence. It allegedly conducted daily safety audits of the yard. The exposure to excessive noise subjected workers to possible hearing loss.

A serious violation of § 1910.95(i)(2)(i) is affirmed.

Item 4 - Alleged Violation of § 1910.151(b)

The citation alleges SSM failed to provide employees with immediate first aid or transportation to an infirmary or hospital. Section 1910.151(b) provides:

In the absence of an infirmary, clinic, or hospital in near proximity to the workplace which is used for the treatment of all injured employees, a person or persons shall be adequately trained to render first aid.

The essential facts are not in dispute. For workers furnished by temporary employment agencies such as TempStaffers, SSM's policy is not to render first aid on-site (Tr. 123-125). SSM also does not transport an injured worker to a hospital for treatment. The record shows that several temporary workers were injured while at SSM (Exh. C-55). Two such workers, *{redacted}* and *{redacted}*, did not receive first aid from SSM after receiving injuries. *{redacted}* was not treated for an injury to his foot (Tr. 4054-4056). *{redacted}* waited twenty minutes for transportation to a clinic after receiving burn injuries (Tr. 125, 997-998).

SSM argues the standard does not require an employer to transport nor to render first aid on-site to an injured worker if a suitable hospital or clinic is nearby its facility. It is uncontroverted that a hospital with emergency room service is within 2.7 miles of SSM (Tr. 2859). There is no evidence that injured workers are excluded from treatment by the hospital (Tr. 124). SSM asserts that in the event of an emergency, SSM decides whether to send the worker to the hospital or call "911." If a temporary worker, SSM's policy is to contact the temporary agency and call "911" if it is a serious injury. SSM does not transport an injured temporary worker to the hospital because of insurance and liability reasons (Tr. 2187, 2860-2861, 3063-3064). Baptiste was aware that SSM called "911" (Tr. 126).

The record shows SSM does not have an employee on-site who is adequately trained in first aid. *{redacted}* renders only minor first aid for cuts and scratches. He is not specifically trained in first aid. However, § 1910.151(b) requires an employer to assure that it has employees adequately trained to render first aid *only if* there is no infirmary, clinic, or hospital in near proximity available to render treatment.

A hospital with an emergency room is within 2.7 miles of SSM. The court finds that 2.7 miles is in "close proximity" of SSM. Also, there is no showing that the hospital's emergency service does not transport injured workers from SSM or provide them first aid treatment. The fact that SSM may provide first aid to some workers, and not to workers provided by temporary employment agencies, does not violate §1910.151(b) as long as such workers are provided

medical treatment at a hospital in close proximity. The standard is silent as to an employer's responsibility to transport injured workers to the clinic or hospital. However, it contemplates that such treatment is rendered at a hospital, clinic, or infirmary. The twenty-minute wait for transportation by the hospital was not shown to be caused by SSM's refusal to contact the hospital. Similarly, the failure of a worker to receive treatment for a foot injury was also not shown to be due to SSM's refusal to contact the hospital or the hospital's refusal to render treatment. The Secretary's burden to establish the violation was not met.

An alleged violation of § 1910.151(b) is vacated.

Item 5 - Alleged Violation of § 1910.151(c)

The citation alleges SSM failed to provide eye flushing facilities. Section 1910.151(c) provides:

Where the eyes or body of any person may be exposed to injurious corrosive materials, suitable facilities for quick drenching or flushing of the eyes and body shall be provided within the work for immediate emergency use.

Workers used a degreaser known as Big Red Cleaning System Degreaser to clean parts and equipment in the maintenance department. According to OSHA, the material safety data sheet (MSDS) identified the degreaser as a corrosive. Industrial Hygienist Baptiste described the eye wash facility in disrepair and not accessible because of the scrap metal (Tr. 127-128, 898-899). SSM's first aid log showed several eye injuries to workers. However, there was no record of an eye injury caused by a corrosive or the use of the Big Red Degreaser (Tr. 128).

SSM argues the Secretary failed to show that any person was "exposed to injurious corrosive materials" as required by the standard (Respondent's Brief, p. 122). SSM's maintenance supervisor testified the degreaser was not caustic or corrosive. He described the effect in the eye as similar to soap (Tr. 3098-3099).

The MSDS for the degreaser was not made part of the record. Baptiste's testimony regarding the character of the degreaser is not supported by the record. Baptiste's notes from the inspection refer to the degreaser as an "eye irritant," not as a corrosive (Exh. R-9). An eye irritant would affect the eye in the manner described by the maintenance supervisor. Therefore,

the record is not sufficient to show that an “eye irritant” exposed workers to an “injurious corrosive material.”

Also, notes from the inspection file identified sink and water hoses around the maintenance building which provided water for flushing eyes (Tr. 900). Also, a water bottle was available in the guard office for eye flushing (Tr. 898).

An alleged violation of § 1910.151(c) is vacated.

Item 9 - Alleged Violation of § 1910.305(g)(2)(ii)

In the maintenance building, OSHA alleges that spliced flexible cords were used to supply 110-volt electric power to hand tools and fans. Section 1910.305(g)(2)(ii) requires:

Flexible cords shall be used in continuous lengths without splice or tape. Hard service flexible cords No. 12 or larger may be repaired if spliced so that the splice retains the insulation, outer sheath properties, and usage characteristics of the cord being spliced.

Industrial Hygienist Baptiste observed two or three extension cords in the maintenance building which were used to supply 110-volt electric power to a grinder and ventilation fans. The extension cords were taped as if spliced (Exh. C-15; Tr. 155, 922). SSM’s maintenance supervisor immediately removed the cords from service (Tr. 158). The supervisor acknowledged that despite his attempts to police the cords, occasionally employees used damaged cords (Tr. 155).

SSM argues that because the tape was not removed from the cords, there is no evidence the cords were damaged and spliced (Respondent’s Brief, p. 129; Tr. 923). SSM cites *Metal Recycling Co.*, 16 BNA OSHC 1324 (No. 92-533, 1993) (violation affirmed based on a close examination of the cord). SSM also asserts that there is no evidence as to the size of the cord.

Although the tape was not removed, the weight of the evidence shows the cords were damaged. The maintenance supervisor and corporate safety director who were present during the inspection immediately removed the cords from service and destroyed them (Tr. 158, 2209). They did not protest Baptiste’s findings. The statement of the supervisor indicates that he also considered the cords damaged. Further, the corporate safety director was unable to offer any other reason for taping the cords. He conceded that the use of tape generally indicated a spliced cord (Tr. 2210). *{redacted}*, chief of security and safety director, who inspected the yard daily

testified that if he saw tape on an electrical cord, he considered it a safety violation and destroyed the cord (Tr. 2939).

The record, however, fails to show that the extension cords were not “hard service flexible cord No. 12 and larger” which permit splicing. OSHA was unable to identify the type or size of the extension cords observed during the inspection. Also, a photograph of one cord does not assist in identification (Exh. C-15). The Secretary failed to meet her burden of proof.

An alleged violation of § 1910.305(g)(2)(ii) is vacated.

Item 11 - Alleged Violation of § 1910.1027(c)

The citation alleges that on April 13, 1994, workers torch cutting in the Stainless yard were exposed to airborne concentrations of cadmium in excess of the permissible exposure limit (PEL) for eight hours time-weighted average (TWA). Section 1910.1027(c) limits the exposure of cadmium to five micrograms per cubic meter of air (5 ug/m³), calculated as eight hour time-weighted average.

OSHA’s air monitorind found two workers *{redacted}* in the Stainless yard exposee to cadmium. The two workers were torch cutting large pieces of steel into 4-foot pieces, removing any attached iron or copper (Tr. 1155). The workers wore long sleeved shirts, gloves, safety glasses, and face shields which attached to their hardhats (Tr. 1152-1153). *{redacted}* exposure level to cadmium was recorded at 10.2 micrograms per cubic meter for an eight-hour time-weighted average, twice the PEL of 5 micrograms. In addition to torch cutting, *{redacted}* also operated the Barko hydraulic crane used to move the scrap metal around the yard (Tr. 1166-1167). After OSHA’s inspection, *{redacted}* was removed from torch cutting work because his blood test showed “high blood.” He was not told if it was a high level of cadmium or lead (Tr. 2049-2050). The corporate safety director testified that *{redacted}* was removed from torch-cutting because there was blood in his urine (Tr. 2340). However, the manager of the Stainless yard testified that the test did find a “minute” amount of cadmium in his blood and the doctor instructed *{redacted}* not to torch cut (Tr. 3080-3081).

The other torch cutter monitored, *{redacted}*, showed exposure to air concentrations of cadmium of 3.9 micrograms per cubic meter for an eight-hour time-weighted average (Exhs. C-19, C-20; Tr. 169, 173-174, 1150). Although not above the PEL, *{redacted}*’s cadmium level

was above the action level.⁹ To perform the air monitoring, OSHA placed the filter cassette on the torch cutter's collar within 9 inches of his breathing zone. The cassette was not inside the face shield when the shield was down during torch cutting. The flow rate for the pumps was set at 2.0 liters as if monitoring for "welding fumes" (Tr.1151, 1160).

There is no dispute that the requirements of the cadmium standards were not implemented by SSM (Tr. 182, 191-192). SSM was aware of the cadmium standard and did not monitor for cadmium in the Stainless yard (Tr. 177-178, 1301, 2338).

As discussed under preliminary matters, OSHA's method of air monitoring fumes from torch cutting fumes failed to accurately establish the worker's level of exposure to airborne concentrations of cadmium. Although the court is convinced that workers were exposed to cadmium, placing the filter cassettes outside the worker's face shield failed to show the worker's level of exposure exceeded the PEL. The workers kept their face shields down in front of their faces while torch cutting the scrap metal. By placing the filter cassette on the worker's collar, OSHA's air monitoring failed to take into account the facial barrier created by the face shield. There is no known correlation between the exposure level inside the face shield as opposed to outside the shield, which could be used with reasonable certainty to establish the level of exposure.

An alleged violation of § 1910.1027(c) is vacated.

Item 12 - Alleged Violation of § 1910.1027(d)(1)(i)

The citation alleges SSM failed to conduct initial personnel air monitoring to determine if workers were exposed to airborne concentrations of cadmium above the action level. OSHA identified workers torch cutting, truck drivers, forklift operators, the Barko operator, maintenance employees, and laborers as workers potentially exposed to airborne concentrations of cadmium. Section 1910.1027(d)(1)(i) requires an employer to determine if any worker "may be exposed to cadmium at or above the action level."

SSM admits that it did not perform initial air monitoring at its facilities (Tr. 178, 180). The corporate safety director told OSHA that "he had not gotten around to it" (Tr. 182). Instead, SSM refers to monitoring done at a New Orleans facility which found cadmium below a quantifiable level as representative (Tr. 2133-2135).

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The action level is 2.5 micrograms per cubic meter of air calculated as an eight-hour time-weighted average. § 1910.1027(b).

The presence of airborne concentrations of cadmium in the Stainless yard is established by OSHA's air monitoring results from the two workers torch cutting. OSHA recorded levels of 10.2 and 3.9 micrograms per cubic meter for an eight-hour time-weighted average (Exhs. C-19, C-20). One worker (*{redacted}*), who showed the highest level of cadmium exposure, also worked as the Barko operator. He torch cut scrap metal for part of the day and also operated the Barko crane to move the scrap in the yard (Exh. C-19; Tr. 1167). Other workers in the Stainless Yard, such as equipment operators, truck drivers, and forklift operators, worked in and around the torch cutting area (Tr. 184).

The requirement to determine if employee exposure to cadmium exists in the workplace under § 1027(d)(1)(i) is triggered if a potential for exposure is shown. Initial monitoring allows an employer to identify which workers may be exposed above the action level of 2.5 micrograms. If such levels of exposure are found, the employer is expected to initiate protective measures and, if practical, abate the condition causing the exposure.

For the purpose of showing the potential for exposure to cadmium, OSHA's monitoring results on April 13, 1994, are accepted. The presence of airborne concentrations of cadmium in the Stainless yard and SSM's need to conduct initial monitoring is established. SSM argues, however, that because of the nature of stainless steel and the monitoring results from a New Orleans facility also owned by Southern Holdings, there was no reason to expect cadmium in the Stainless yard (Tr. 1302, 1384).

In order to establish a violation of a standard, the Secretary must show that the employer knew or should have known with the exercise of reasonable diligence of the violative condition. An employer who lacks actual knowledge is nevertheless charged with constructive knowledge of conditions that could be reasonably detected. An employer is expected to make a reasonable effort, including inspecting the workplace, to anticipate hazards which expose employees. *Pace Constr. Corp.*, 14 BNA OSHC 2216, 2221, 1991-93 CCH OSHD ¶ 29,333, p. 39,431 (No. 86-758, 1991).

SSM processes a variety of scrap metals by torch cutting. It torch cuts any metal that cannot be processed by the shears, including radiators and heat exchangers. Although SSM notified its sellers of scrap that it would not accept any hazardous materials, cadmium was not specifically identified as hazardous. Further, there is no showing that all sellers of scrap were notified of SSM prohibition, particularly SSM's 20,000 peddlers. SSM failed to take reasonable

precautions to keep hazardous or contaminated metals from entering its property. There was no inspection or testing of the metals (Tr. 1596-1597, 1600).

The monitoring at the New Orleans facility was not shown as representative of the exposure in the Stainless yard. The New Orleans yard processes metal from naval ships. SSM processes principally scrap metals from large chemical companies (Tr. 2070, 2107, 2150). Also, the monitoring in New Orleans detected the presence of cadmium, indicating the potential for exposure to cadmium (Tr. 1408, 2135). The corporate safety director did not know the actual amounts of cadmium detected and the relationship, if any, to OSHA's exposure levels. Further, the monitoring conducted in New Orleans was by area sample and not by personal samples (Tr. 1408, 2258, 2265-2267).

Section 1910.1027(d)(1)(iii) permits an employer to rely on representative sampling if "employees perform the same job tasks, in the same job classification, on the same shift, in the same work area, and the length, duration, and level of cadmium exposures are similar." This was not shown. SSM failed to show the level of exposure in New Orleans was representative of the Stainless yard.

SSM also lacked a reasonable basis for failing to perform initial monitoring. To avoid initial monitoring, an employer may show by objective data that employees' exposure to cadmium will not exceed the action level under the expected conditions of processing, use, or handling. See § 1910.1027(d)(2)(iii). Objective data requires showing an industry-wide study or laboratory test results from manufacturers of cadmium-containing products or materials. See § 1910.1027(n)(2). Such objective data was not shown.

By failing to perform initial monitoring, workers were exposed to airborne concentrations of cadmium at levels which could expose the workers to potential serious illness. SSM should have known of the potential exposure of cadmium.

A serious violation of § 1910.1027(d)(1)(i) is affirmed.

Item 13 - Alleged Violation of § 1910.1027(e)(1)

The citation alleges SSM did not establish a regulated area in the Stainless yard where workers' exposure to airborne cadmium exceeded the PEL of five micrograms. SSM does not dispute that no regulated area was designated. Section 1910.1027(e)(1) requires:

The employer shall establish a regulated area wherever an employee's exposure to airborne concentrations of cadmium is, or can be reasonably be expected to be in excess of the permissible exposure limit (PEL).

SSM's argument regarding the validity of OSHA's method of monitoring is rejected as applicable to §1910.1027(e)(1). The standard requires showing that the exposure to cadmium "can reasonably be expected to be in excess of the permissible exposure limit (PEL)." OSHA's air monitoring establishes the presence of cadmium in the area where workers were torch cutting in the Stainless yard. The two air samples taken on April 13, 1994, included *{redacted}{redacted}*'s sample which was twice the PEL (Exhs. C-19, C-20). Although the samples may not reflect the exact level of exposure, the results do establish the presence of cadmium. If OSHA's monitoring had been conducted with a filter cassette placed inside the face shield, there still is a reasonable expectation the results would exceed the PEL. According to the manager of the Stainless yard, *{redacted}*'s blood did detect the presence of cadmium (Tr. 3080-3081).

SSM failed to exercise reasonable diligence in determining whether workers were exposed to cadmium. A worker's exposure to cadmium subjects the worker to possible serious illness.

A serious violation of § 1910.1027(e)(1) is affirmed.

Item 14 - Alleged Violation of § 1910.1027(g)(1)

The citation alleges SSM failed to provide respirators and ensure their use to workers torch cutting in the Stainless yard on April 13, 1994, in violation of § 1910.1027(g)(1). The standard requires workers to wear respirators at no cost under certain circumstances including in regulated areas. §1910.1027(g)(1)(i)-(viii).

There is no dispute that *{redacted}* was not wearing a respirator while torch cutting scrap metal in the Stainless yard on April 13, 1994 (Exh. C-19). Respirators were available, but SSM did not require their use in the torch cutting area. Respirators were not mandatory (Tr.

195). Although SSM has a written respirator program, it was not in effect in the torch cutting area during the inspection (Exh. C-35; Tr. 1366, 1369).

As discussed above, the torch cutting area should have been designated as a regulated area under § 1910.1027(e). OSHA's air monitoring of *{redacted}* shows that his exposure to cadmium may reasonably be expected to exceed the PEL if monitored properly.

A serious violation of § 1910.1027(g)(1) is affirmed.

Item 15 - Alleged Violation of § 1910.1027(i)(1)

The citation alleges SSM failed to provide and ensure the use of appropriate protective work clothing and equipment that prevent cadmium contamination to workers torch cutting in the Stainless yard. Section 1910.1027(i)(1) requires:

If an employee is exposed to airborne cadmium above the PEL or where skin or eye irritation is associated with cadmium exposure at any level, the employer shall provide at no cost to the employee, and assure that the employee uses, appropriate protective work clothing and equipment that prevent contamination of the employee and the employee's garments.

It is undisputed that the protective work clothing and equipment were not required or provided by SSM. The workers torch cutting in the Stainless yard wore long sleeve shirts, jeans, and hardhats (Exh. C-19; Tr. 1152, 2025). SSM admits the requirements of the cadmium standards were not implemented (Tr. 199-200).

The standard requires protective work clothing if workers are exposed to cadmium above the PEL, or where it is shown that skin and eye irritation is associated with exposure to cadmium at any level. *{redacted}*, a 36-year-old from Laos, testified he was no longer able to work as a torch cutter because a blood test found "high blood levels" (Tr. 2049-2050). SSM claims *{redacted}* was removed from torch cutting because there was blood in his urine with a "minute" amount of cadmium (Tr. 2340, 3080-3081).

As discussed, OSHA's method of air monitoring outside the face shield failed to establish that workers were exposed to levels of cadmium at or above the PEL. Also, there is no evidence of "eye or skin irritation" associated with exposure to cadmium. Although there was cadmium detected in his blood, *{redacted}* did not complain of eye or skin irritation. Other

workers failed to make such complaints. The record fails to establish a requirement for protective work clothing.

An alleged violation of § 1910.1027(i)(1) is vacated.

Item 16 - Alleged Violation of § 1910.1027(j)(1)

OSHA alleges that SSM failed to provide change rooms, hand washing facilities, showers, and lunchrooms to a worker torch cutting in the Stainless yard. Section 1910.1027(j)(1) requires that:

For employees whose airborne exposure to cadmium is above the PEL, the employer shall provide clean change rooms, hand washing facilities, showers, and lunchroom facilities that comply with 29 CFR §1910.141.

There is no dispute that change rooms were not provided (Tr. 169, 173-174, 201). Although cadmium was shown to be present in the Stainless yard, the record fails to establish that the workers' exposure exceeded the PEL. OSHA's monitoring outside the face shield failed to accurately record the worker's level of exposure to airborne cadmium.

An alleged violation of § 1910.1027(j)(1) is vacated.

Item 17 - Alleged Violation of § 1910.1027(l)(1)(i)(a)

The citation alleges SSM failed to institute a medical surveillance program for two workers torch cutting (*{redacted}* and *{redacted}*) in the Stainless yard. Section 1910.1027(l)(1)(i)(a) provides:

The employer shall institute a medical surveillance program for all employees who are or may be exposed to cadmium at or above the action level unless the employer demonstrates that the employee is not, and will not be, exposed at or above the action level on 30 or more days per year (twelve consecutive months);

SSM does not dispute that it did not initiate a medical surveillance program for cadmium. Also, OSHA's monitoring results for cadmium establishes that workers "may" be exposed to cadmium at or above the action level. The standard is couched in terms of possibilities. The level of exposure may be as much as 10 micrograms, or twice the PEL. Without a medical surveillance program, workers were exposed to airborne concentrations of cadmium which could cause serious illness. SSM was aware of the cadmium requirements.

Therefore, a serious violation is established unless SSM demonstrates that workers will not be exposed at or above the action level for thirty days or more per year. This is an exception to the requirement for medical surveillance. SSM did not show that the possible exposure was less than thirty days. One worker testified he did some torch cutting every week (Tr. 2048). Another worker torch cutting in the Stainless yard testified he cut the entire day (Tr. 4082, 4086).

A serious violation of § 1910.1027(l)(1)(i)(a) is affirmed.

Item 18 - Alleged Violation of § 1910.1027(m)(1)

SSM was also cited for failing to comply with the hazard communication program for the cadmium hazards in the Stainless yard. Section 1910.1027(m)(1)¹⁰ requires:

In communications concerning cadmium hazards, employers shall comply with the requirements of OSHA's Hazard Communication Standard, 29 CFR 1910.1200, including but not limited to the requirements concerning warning

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The citation issued on September 30, 1994, was amended to correct the designation of the standard allegedly violated. It was originally cited as §1910.1027(g)(1).

signs and labels, material safety data sheets (MSDS), and employee information and training.

SSM does not dispute that the requirements under the cadmium standards were not implemented in the Stainless yard. SSM's corporate safety director told OSHA that hazardous communication training for cadmium was not provided to workers (Tr. 169, 173-174). This was confirmed by a worker in the Stainless yard who was unfamiliar with material safety data sheets. He was not trained in the hazards associated with torch cutting (Tr. 2045, 4062, 4068, 4080-4081). The hazard communication requirements regarding employee training and information is triggered if there is potential worker exposure to airborne cadmium. See § 1910.1027(m)(4). OSHA's air monitoring establishes the presence of airborne cadmium in the Stainless yard. The monitoring shows the potential for exposure to cadmium. SSM failed to take reasonable precautions such as training to insure that workers were aware of the potential exposure and adequately protected. Workers were exposed to possible serious illness from cadmium.

A serious violation of § 1910.1027(m)(1) is affirmed.

Item 19 - Alleged Violation of § 1910.1030(c)(1)(i)

The citation alleges SSM failed to establish a written exposure control plan for security supervisors who regularly provided emergency first-aid to injured workers. Section 1910.1030(c)(1)(i) requires an employer to establish a written exposure control plan designed to eliminate or minimize the potential exposure to blood borne pathogens¹¹ for employees with occupational exposure¹² to blood or other infectious materials. The standard requires an employer to determine which workers are potentially exposed to bloodborne pathogens. The exposure must be reasonably anticipated.

SSM designated *{redacted}*, chief of security and safety director, and *{redacted}*, his assistant, to provide first aid treatment to workers (Tr. 206-207). *{redacted}* testified that he

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“Blood borne pathogens” mean “pathogenic microorganisms that are present in human blood and can cause disease in humans . . . including, but not limited to hepatitis B virus” § 1910.1030(b).

Occupational exposure means reasonably anticipated skin, eye, mucous membrane, or parenteral contact with blood or other potentially infectious materials that may result from the performance of an employee's duties. § 1910.1030(b).

administered first-aid as often as two to three times a week (Tr. 1567-1568). The first aid included washing out workers' eyes, applying hydrogen peroxide, and patching scrapes and cuts (Tr. 205-206). Industrial Hygienist Baptiste observed them administering first-aid without gloves (Tr. 209). Also, neither *{redacted}* nor *{redacted}* was given first aid training or Hepatitis B shots (Tr. 206-207). OSHA concedes that *{redacted}* and *{redacted}* were not likely to be exposed to "sharps," the most common form of transmittal of bloodborne diseases. 56 F.R. 64,010, 64,142.

SSM does not dispute that it did not have a written exposure control plan. SSM argues that the standard applies primarily to health care providers and other occupations where employees are exposed to blood and body fluids as part of their regular duties (Respondent's Brief, p. 151). The first-aid *{redacted}* rendered was for relatively minor cuts and scrapes. More serious injuries were referred to a doctor (Tr. 2859). SSM argues that providing first-aid for minor cuts and scrapes did not expose *{redacted}* to blood or other infectious materials.

The preamble to the bloodborne pathogen standard indicates that it primarily targets the health care industry. The only reference to first-aid providers is in the section discussing the "Good Samaritan." For the "good Samaritan" to be covered by the standard, the exposure to blood or infectious materials must be reasonably anticipated, and the contact must result from the performance of an employee's assigned duties as a member of a first-aid team. See 56 F.R. 64,101-64,102 (1991); see also *Patterson Drilling Co.*, 16 BNA OSHC 1990 (No. 93-1371, 1994) (ALJ).

{redacted} were regularly exposed to blood from injured workers. *{redacted}* and *{redacted}* told OSHA that providing first-aid was part of their assigned duties and, if not provided, their jobs were jeopardized (Tr. 206). They were observed treating bleeding cuts and scrapes. Also, they were seen removing an object from a worker's eye. They utilized a first-aid kit. SSM failed to implement an exposure control plan.

A serious violation of § 1910.1030(c)(1)(i) is affirmed.

Item 20 - Alleged Violation of § 1910.1200(e)(1)

The citation alleges SSM failed to develop and implement a written site-specific hazard communication program as required by § 1910.1200(e)(1). OSHA alleges that workers were

exposed to compressed oxygen, propane, acetylene, degreasers, diesel fuel, gasoline, motor oils, lead, and cadmium. The standard requires an employer to develop, implement, and maintain at each workplace a written hazard communication program.

The parties agree SSM maintained a written hazard communication program. OSHA described the program as adequate (Exh. C-21; Tr. 218). SSM also maintained an extensive collection of MSDSs (Tr. 213).

The Secretary, although acknowledging the existence of the program, argues that it was not implemented (Tr. 214-216; 218). To show the lack of implementation, Industrial Hygienist Baptiste described a fire in a vessel being torch cut and no one knew the type of material in the vessel (Tr. 215). Also, there were pipes and 55-gallon drums which Baptiste testified were not analyzed (Tr. 215-216).

Baptiste's testimony does not establish a violation. His testimony that a worker did not know what an "MSDS" was or the content of a vessel on fire fails to show the lack of program implementation. There could be a number of reasons other than lack of implementation as to why a worker responded negatively to OSHA's questions. The worker may not have understood the question or did not want to be involved in an OSHA inspection against his employer. SSM did have a written hazardous communication program which Baptiste conceded was adequate. The standard requires an employer to implement a hazardous communication program. It does not require a worker to be able to answer OSHA's questions.

An alleged violation of § 1910.1200(e)(1) is vacated.

Item 21 - Alleged Violation of § 1910.1200(h)

The citation alleges SSM failed to develop and implement an employee information and training program for employees exposed to materials covered by a hazard communication program in violation of § 1910.1200(h). The standard requires an employer to provide information and training on hazardous chemicals in the work area at the time of the worker's initial assignment and whenever a new worker is introduced into the work area.

OSHA alleges workers used compressed oxygen, propane, acetylene, degreasers, diesel fuel, gasoline, motor oils, lead, and cadmium. Other than lead and cadmium, there is no dispute that workers were exposed to the remaining chemicals and such chemicals were hazardous.

Hazardous chemical includes “any chemical which is a physical hazard or a health hazard.” § 1910.1200(c).

Industrial Hygienist Baptiste testified he was given conflicting information about who provided the training. *{redacted}* told him that department supervisors trained employees; yet, the department supervisors stated *{redacted}* provided the training (Tr. 214-215, 223-224). Workers (*{redacted}*, *{redacted}*, *{redacted}*, *{redacted}*, and *{redacted}*) testified they were not trained or provided information on chemicals used in their work areas (Tr. 2045, 4047, 4054, 4062, 4081).

However, the workers’ testimony is refuted by records from their personnel files. The records show they were trained in safety, lockout/tagout, and hazardous communication. Although *{redacted}* denied receiving any training, their personnel files showed they received the training. Signed acknowledgments in their file reflect that training was given (Exhs. R-55 through R-59; Tr. 4118, 4129-4132). The personnel records are given more weight than the workers’ testimony because of the general nature of the questions asked during the hearing and the workers’ possible bias toward SSM due to their private lawsuits.

Also, the record fails to show that some workers were exposed to the hazardous chemicals identified by OSHA. For example, *{redacted}*, the “cleaning lady,” cleaned the offices and was not exposed to propane, compressed oxygen, acetylene, gasoline, diesel fuel, and motor oils (Tr. 4042). It is also unlikely that she was exposed to lead or cadmium from the torch cutting operation. Further, the maintenance supervisor testified he trained the workers in his department. Maintenance workers were the most likely to be exposed to hazardous chemicals (Tr. 3098-3099).

An alleged violation of § 1910.1200(h) is vacated.

Penalty Considerations for Citation No. 1

The Commission is the final arbiter of penalties in all contested cases. Section 17(j) of the Act, requires consideration of the size of the employer's business, history of previous violations, the employer's good faith, and the gravity of the violation in determining an appropriate penalty. Gravity is the principal factor.

SSM is not given credit for size, history, and good faith. SSM employed 130 employees (Tr. 2150). It received a serious citation in the past three years. Also, the nature and number of the violations found does not entitle SSM to credit for good faith.

A penalty of \$2,500 is reasonable for the violation of § 1910.27(d)(1)(iv) (item 2) in that the ladder to the pedestal crane was climbed daily. The lack of a proper cage was in plain view. SSM allegedly inspected the yard daily for safety violations, and it should have been aware of the condition. The crane operator was exposed to a fall hazard in excess of 10 feet.

With regard to the lack of hearing protection required by §1910.95(i)(2)(i) (item 3), a penalty of \$1,000 is reasonable. Two workers were not wearing hearing protection. The workers were exposed to noise levels in excess of 90 dBA. Their failure to wear hearing protection was in plain view. However, it is noted SSM maintained a hearing conservation program, provided hearing protection at no cost, and designated high noise areas in the yard.

A penalty of \$2,500 is reasonable for violation of § 1910.1027(d)(1)(i) (item 12). The record establishes exposure to cadmium in the Stainless yard. Two employees were shown to potentially be exposed above the action level for cadmium. One employee exposure level was twice the PEL. SSM was aware of the monitoring requirements. It failed to take reasonable precautions. It performed no initial air monitoring.

SSM maintained no regulated areas. Workers working in the area of the torch cutting in the Stainless yard were potentially exposed to cadmium. A penalty of \$2,500 is reasonable for violation of § 1910.1027(e)(1) (item 13).

A penalty of \$2,500 is reasonable for violation of § 1910.1027(g)(1) (item 14). At least one worker who was not wearing a respirator, was potentially exposed to a cadmium level exceeding the PEL.

A penalty of \$2,500 is reasonable for violation of § 1910.1027(l)(1)(i)(a) (item 17). SSM failed to institute a medical surveillance program for two workers torch cutting in the Stainless yard who showed exposure to airborne cadmium.

As a result of failing to recognize the possible cadmium hazard in the Stainless Yard in its hazard communication program, a penalty of \$2,500 is reasonable for violation of § 1910.1027(m)(1) (item 18).

A penalty of \$2,500 is also reasonable for violation of § 1910.1030(c)(1)(i) (item 19). Two workers were exposed to possible bloodborne pathogens. As part of their assigned duties, the employees regularly administered first aid for cuts and scratches. SSM failed to implement an exposure control plan.

WILLFUL CITATION NO. 2

Citation No. 2 alleges violations of the lead standards. Also, OSHA applies its egregious policy to several of the alleged violations.

Items 1, 2, 3, 4, 5 and 6 - Alleged Violations of § 1910.1025(c)(1)

Each item alleges that a different worker provided by Barfield Enterprises torch cutting scrap metal in the ferrous department of the Thomas yard was exposed to lead concentrations in excess of the permissible exposure limit (PEL). Section 1910.1025(c)(2) requires:

The employer shall assure that no employee is exposed to lead at concentrations greater than fifty micrograms per cubic meter of air (50 ug/m³) averaged over an 8-hour period.

Industrial Hygienist Baptiste monitored the workers for exposure to airborne concentrations of lead on April 13 and May 26, 1994 (Exhs. C-22, C-23). His air monitoring results for an eight hour time-weighted average (TWA) found lead exposure levels for *{redacted}* (item 1) of 205 and 99 micrograms, *{redacted}* (item 2) of 62 micrograms, *{redacted}* (item 3) of 105 micrograms, *{redacted}* (item 4) of 140 micrograms, *{redacted}*'s (item 5) of 74 micrograms, and for *{redacted}* (item 6) of 170 micrograms.

On April 13, 1994, the monitoring involved five workers from a crew of eight to ten workers. The workers were in two locations in the ferrous department (Tr. 231). The air

monitoring was conducted for six hours when the workers abruptly stopped torch cutting and left the yard. It was a Friday, the end of the week. On May 26, the monitoring was for a full eight hour shift and again involved five workers (Tr. 240). On both occasions, the workers were torch cutting similar types of scrap metal (Tr. 234-237).

The PEL for lead is 50 micrograms per cubic meter of air for an eight-hour TWA. Based on OSHA's monitoring, the record establishes that workers were exposed to airborne concentrations of lead which could be significant. However, OSHA's method of monitoring outside of the worker's face shield failed to accurately measure the worker's level of exposure to lead. OSHA's monitoring results did not establish that the workers' exposure level exceeded the PEL of 50 micrograms. The facial barrier created by the face shield in front of the worker's face during torch cutting prevented an accurate recording of the worker's level of exposure. Such facial barriers affected the worker's exposure to airborne concentrations of lead from the fumes caused by the torch cutting.

The standard of 50 micrograms is based on a worker's personal level of exposure to lead. It is not based on environmental exposure. By conducting its monitoring outside the shield, the Secretary failed to establish the workers' level of personal exposure. There is also no correlation shown between the level of exposure inside the face shield versus outside the shield which could be used to adjust OSHA's findings.

The alleged violations of § 1910.1025(c)(1) (items 1 through 6) are vacated.

Item 7 - Alleged Violation of § 1910.1025(c)(2)

SSM was cited for exposing a cutter/burner (*{redacted}*) in the nonferrous department of the Thomas Yard to a lead level in excess of a reduced PEL. Section 1910.1025(c)(2) provides that:

If an employee is exposed to lead for more than 8 hours in any work day, the permissible exposure limit, as a time weighted average (TWA) for that day, shall be reduced according to the following formula: Maximum permissible limit (in ug/m(3)) = 400 divided by hours worked in the day.

{redacted} was monitored for airborne concentrations of lead in the nonferrous department on June 15, 1994. *{redacted}* was removing steel clips or supports from radiators with a propane torch. He was cleaning "dirty radiators" (Tr. 3227). *{redacted}* was also torch cutting heat exchangers to remove plates or bands from the tube bundles (Tr. 309, 312).

{redacted} was monitored for nine hours. The monitoring found a nine-hour TWA exposure level of 467 micrograms of lead per cubic meter of air (Exh. C-22, p. 924, C-23, p. 886; Tr. 242). Based §1910.1025(c)(2), the reduced PEL for *{redacted}*'s lead exposure was 44 micrograms instead of 50 micrograms (Tr. 307). Therefore, *{redacted}*'s level of exposure was recorded at ten times the PEL.

As discussed, however, OSHA's method of air monitoring during the torch cutting process failed to accurately establish that *{redacted}*'s level of exposure to lead was in excess of the reduced PEL of 44 micrograms. Although *{redacted}*'s exposure appears significant, the Secretary offered no adjustment factor. The literature offered by SSM showed the lead levels varied from 31 to 70 percent based on the placement of the cassette on welders wearing welding helmets.

An alleged violation of § 1910.1025(c)(2) is vacated.

Item 8a - Alleged Violation of § 1910.1025(d)(2)

The citation alleges SSM failed to conduct initial personal air monitoring in the Thomas yard on workers who were potentially exposed to lead. OSHA identified the jobs of torch-cutters, crane operators, truck drivers, HRB bailer press operators, forklift and Barko operators, maintenance employees, and laborers as having a potential exposure to lead. Section 1910.1025(d)(2) requires an employer to make an initial determination if any worker may be exposed to lead levels at or above the action level of 30 micrograms per cubic meter of air averaged over an eight hour period. The purpose for initial air monitoring is to establish or evaluate the workers' potential exposure to lead during the course of their job duties.

OSHA's air monitoring does establish the presence of airborne concentrations of lead in the ferrous and nonferrous departments in the Thomas Yard. Although OSHA's monitoring failed to accurately measure the worker's level of exposure to lead, the monitoring does show that workers were potentially exposed to lead. The level of airborne lead detected by OSHA indicates that SSM has a lead exposure problem. *Louisville Scrap Metal Co.*, 1995 OSHRC 138 (No. 94-2293, 1995); *TTX Co., Acorn Div.*, 16 BNA OSHC 163, 1994 CCH OSHD ¶30,302 (No. 93-0033, 1993); *Cleveland Aluminum Casting Co.*, 12 BNA OSHC 1349, 1985 CCH OSHD ¶27,268 (No. 84-198, 1985); *aff'd w/o published opinion*, 788 F.2d 38 (D.C. Cir. 1986). Leslie Ungers, SSM's expert, recognized the potential lead exposure from the dust fumes emitted

during torch cutting of scrap metals (Tr. 3981-3983). The level of lead exposure could be more than four times the PEL according to OSHA's results. OSHA found *{redacted}* at 205 micrograms and *{redacted}* at 467 micrograms (Exhs. C-22, C-23).

SSM argues that it performed initial monitoring in 1989 and 1992 when it monitored workers in response to OSHA's 1989 citation for lead and while torch cutting railcars from Ethyl (Exh. C-41). SSM's reliance upon its monitoring is misplaced. First, its monitoring found two workers (*{redacted}*) were exposed lead levels above the action level. One worker's exposure was above the PEL. Further, SSM characterizes that its purpose for monitoring in 1989 was to challenge the OSHA citation and not to make an initial determination as required by the standard. Also, the standard requires personal air monitoring. SSM's monitoring in 1989 was by area sampling and no initial monitoring was conducted in the nonferrous department (Tr. 314, 1346). With regard to the jobs identified by OSHA, the record shows that such jobs required the workers to be in and around the torch-cutting operation and thus potentially exposed to airborne concentrations of lead.

A violation of § 1910.1025(d)(2) is affirmed.

Item 9 - Alleged Violation of § 1910.1025(d)(8)(i)

The citation alleges SSM failed to notify workers of the results of their lead exposure monitoring. Section 1910.1025(d)(8)(i) requires that within five working days after the receipt of monitoring results showing lead exposure, an employer must notify each worker in writing of the results which represent that worker's exposure.

SSM acknowledges that five workers monitored by SSM in 1989 and 1992 were not notified in writing of their air monitoring results (Tr. 318-319). SSM's lead monitoring results found that on December 12, 1989 (*{redacted}* - 5.0 µg/m³, *{redacted}* - 5.7 µg/m³ and *{redacted}* - 10.0 µg/m³); on December 20, 1989 (*{redacted}* - 12.7 µg/m³, *{redacted}* - 31.2 µg/m³); and, on September 30, 1992 (*{redacted}* - 23.4 µg/m³, and *{redacted}*- 41.6 µg/m³) (Exh. C-41).

SSM argues that the violation is time barred because the monitoring was performed more than six months prior to the citation. Also, SSM asserts that it has no duty to inform workers of an independent contractor (Respondent's Brief, p. 67).

Section 9(c) of the Act provides that "no citation may be issued under this section after the expiration of six months following the occurrence of any violation." A violation for failing

to provide monitoring results to workers is not time barred; it is a continuing violation until the worker is informed of his lead exposure level. *See Johnson Controls, Inc.*, 15 BNA OSHC 2132, 2136 (No. 89-2614, 1993) (inaccurate entry on OSHA Form 200 violates Act until it is corrected); *Sun Ship, Inc.*, 12 BNA OSHC 1185 (No. 80-3192, 1985). Although the exposure levels to lead were below the PEL, the standard requires notification to workers of results showing lead exposure regardless of the level detected. SSM's monitoring found levels above the action level for *{redacted}* and *{redacted}*.

SSM performed the monitoring for lead exposure at its facility. SSM has a duty to inform workers their lead exposure including workers of an independent contractor. SSM monitored the lead levels on the workers and the monitoring was done at its facility while the workers were processing SSM's scrap metal. The requirements of the standard are not limited to employees. The standard uses the broader classification of "worker." Although OSHA may have known the results, the standard places the responsibility for notifying workers on the employer.

A violation of § 1910.1025(d)(8)(i) is affirmed.

Item 11 - Alleged Violation of § 1910.1025(f)(1)

The citation alleges SSM failed to require the use of respirators for workers exposed to airborne concentrations of lead while torch cutting scrap metal in the Thomas yard. Section 1910.1025(f)(1) requires respirators when a worker's exposure to airborne concentrations of lead is above the PEL or whenever requested.

Industrial Hygienist Baptiste observed workers torch cutting scrap metal. The workers were not wearing respirators (Tr. 321). The workers were *{redacted}* on April 13, 1994; *{redacted}* on May 26, 1994; and *{redacted}* on June 15, 1994. The nonferrous supervisor acknowledged that workers were not wearing respirators while burning "dirty radiators" (Tr. 3020). SSM's corporate safety director also testified that respirators were required only during the torch cutting of the Ethyl railcars prior to OSHA's inspection (Exhs. C-35, C-36, C-37; Tr. 328, 726, 1366). Respirators were available for any worker who wanted to wear a respirator. Respirators were not required by SSM.

The Secretary has not met her burden of proof. OSHA's air monitoring found that workers were exposed to airborne concentrations of lead. However, the accuracy of the air

monitoring was flawed by the placement of the filter cassette outside the worker's face shield. The air monitoring failed to establish that the level of exposure exceeded the PEL. There is also no evidence that any worker who wanted a respirator was prohibited by SSM from using one. Respirators were available and Baptist observed *{redacted}* sometimes wearing a respirator (Exh. R-4, R-5; Tr. 256, 321).

An alleged violation of § 1910.1025(f)(1) is vacated.

Items 12, 13, 14, 15, 16, 17 and 18 - Alleged Violations of § 1910.1025(g)(1)

Each item alleges SSM failed to ensure the use of appropriate protective work clothing and equipment for a each worker torch cutting in the Thomas yard. Section 1910.1025(g)(1) requires:

If an employee is exposed to lead above the PEL, without regard to the use of respirators or where the possibility of skin or eye irritation exists, the employer shall provide at no cost to the employee and assure that the employee uses appropriate protective work clothing and equipment.

SSM does not dispute that protective work clothing, gloves, and equipment were not provided to workers torch cutting scrap metal in the Thomas yard. The workers wore street clothing of jeans and shirts (Tr. 324). SSM acknowledges the clothing was not appropriate protective clothing for lead exposure (Tr. 1347).

The standard requires a showing that workers are exposed above the PEL, or there exists the possibility of skin or eye irritation. Neither requirement triggering the standard was shown. As discussed, OSHA's air monitoring method precludes a finding that workers were exposed to lead at or above the PEL. Although the air monitoring results show the potential presence of significant quantities of lead, there is also no showing the lead exposure caused eye or skin irritations. *{redacted}* complained of stomach and chest pains (Exh. C-22). Other workers suffered from nausea, metal taste in the mouth, and stomach queasiness (Tr. 786). Two torch-cutters showed blood lead levels of 21 and 40 (Tr. 787). However, such complaints are not evidence of possible eye or skin irritation.

An alleged violation of § 1910.1025(g)(1) is vacated.

Item 19 - Alleged Violation of § 1910.1025(h)(1)

The citation alleges SSM failed to maintain surfaces in the Thomas yard free of lead accumulations. Section 1910.1025(h)(1) requires all surfaces maintained “as free as practicable” of accumulations of lead.

Industrial Hygienist Baptiste took one bulk and five wipe samples from various surfaces including a permanent bench, filing cabinet, picnic/dining table, and another table (Tr. 752). The surfaces were in areas where workers took breaks and ate lunch (Tr. 342-343). The level of lead accumulation on the bench in the drivers’ waiting area was 96.9 micrograms; on the filing cabinet, 122.5 micrograms; on the picnic/dining table, 34.8 micrograms; on the table in the locker trailer, 23.8 micrograms; and on the picnic/dining table in the maintenance shop, 37 micrograms (Exhs. C-22, C-23, C-38; Tr. 335).

Baptiste described his method of taking the wipe samples as visualizing an area 10 inches square with the assistance of a ruler held above the surface. The dust in the area was then scraped into a glass collection vial. Once collected, the vial was sealed (Tr. 753, 762). The wipe samples were packed into the same box with the bulk sample and sent for analysis to OSHA’s laboratory in Salt Lake City. No blank cassettes were sent with the samples.

SSM argues the wipe samples were not valid due to sampling and handling errors (Respondent’s Brief, p. 74). SSM maintains that Baptiste failed to use a template as required in OSHA’s technical manual and failed to send a blank with the samples for analysis (Exh. C-24, p. 23; Tr. 763-764, 3942-3944). SSM also argues the wipe and bulk samples should not have been sent in the same package.

OSHA’s technical manual instructs industrial hygienists to use a template in order that a precise area of 100-square centimeters is sampled. The manual also directs hygienists to send bulk and wipe samples separately to avoid cross-contamination and a blank cassette for comparison purposes (Exh. C-24, pp. 1.7, 2.3; Tr. 3943). A blank cassette reflects any contamination from the manufacturer or that may be in the reagents used to prepare the sample at the laboratory (Tr. 1635). The amount of contamination found in the blank cassette is subtracted from the cassette used in the air monitoring.

OSHA’s technical manual is accepted as a guide which OSHA is expected to follow. However, failure to follow the technical manual does not automatically invalidate a citation. *Equitable Shipyards, Inc.*, 13 BNA OSHC 1177, 1179 (Nos. 81-1685, 81-1762, 81-2089, 1987). Although the ruler method used by the industrial hygienist may not provide an exact 100-square

centimeter of surface area, any discrepancy was not shown as significant in affecting the sample results. The hygienist explained his method would “typically” result in less accumulation (Tr. 762). Also, the shipping error and failure to send a blank were not shown to affect the results obtained from the samples (Tr. 1634-1635, 1649, 1682, 1691). The supervisory chemist from the Salt Lake City laboratory testified that there was no evidence of any cross-contamination. The seals on the bulk and wipe samples were intact. SSM’s expert also acknowledged that there was no indication any seals were broken (Tr. 3938). The chemist also testified the use of a laboratory blank cassette would not significantly change the analytical results. Therefore, for the purposes of §1910.1025(h)(1), the wipe and bulk samples establish the presence of lead accumulation.

However, the record fails to establish that the amount of accumulation found was not “free as practicable.” The standard cited is not triggered by a certain amount of accumulation. Instead, the standard requires that the surfaces be maintained as “free as practicable of accumulations of lead.” There is no showing SSM’s cleaning of the areas was deficient or that the accumulations represented other than the lowest practical accumulations of lead under the circumstances. The Secretary failed to show that lower levels could be obtained. The standard does not prohibit all accumulations. The purpose of the standard is to ensure that surfaces are regularly cleaned. The frequency of cleaning depends on the circumstances of each situation. The Secretary failed to show what it expected of SSM or that SSM’s cleaning was deficient. Merely establishing the amount of accumulation does not meet the Secretary’s burden of establishing a violation. As noted by OSHA’s deputy director for compliance programs, CPL 2-2.58 which applies to an identical lead standard for construction at §1926.62(h)(1) provides that OSHA does not expect that surfaces should be cleaner than “HUD’s recommended level for acceptable decontamination of 200 u/ft² for floors in evaluating cleanliness of change areas, storage facilities, and lunch rooms/eating areas” (Exh. R-15; Tr. 1116). In this case, the levels of accumulations were below 200 micrograms.

An alleged violation of § 1910.1025(h)(1) is vacated.

Items 20, 21, 22a, 22b and 23 - Alleged Violations of §§ 1910.1025(i)(1), 1910.1025(i)(2)(i) 1910.1025(i)(3)(i), 1910.1025(i)(3)(ii), and 1910.1025(i)(4)(i)

SSM was cited for failing to assure that food, beverage, and tobacco products were not present or consumed in the ferrous and nonferrous departments in violation of § 1910.1025(i)(1) (item 20); for failing to provide clean changing rooms in violation of § 1910.1025(i)(2)(i) (item 21); for failing to require showers at the end of the work shift in violation of § 1910.1025(i)(3)(i) (item 22a); for failing to provide shower facilities in violation of § 1910.1025(i)(3)(ii) (item 22b); and for failing to provide lunchroom facilities in violation of § 1910.1025(i)(4)(i) (item 23). OSHA identified eight workers monitored for airborne lead as exposed while torch cutting scrap metal. To trigger these hygiene requirements, each standard requires a showing that workers are exposed to airborne concentrations of lead in excess of the PEL of 50 micrograms without regard to the use of respirators.

It is undisputed that a lead program was not implemented in the Thomas yard and that the hygiene provisions of §1910.1025(i) were not provided workers torch cutting scrap metal. The workers were not prohibited from smoking or eating in the work area. There were no change rooms, lunchroom facilities, or shower facilities (Respondent's Brief, pp. 72-73; Tr. 1348-1349).

As discussed, OSHA's method of monitoring fails to establish that the worker's level of exposure to lead exceeded the PEL. The Secretary cites *Cleveland Aluminum Casting Co.*, 12 BNA OSHC 1349, 1352-1353 (1985), *aff'd w/o published opinion*, 788 F.2d 38 (D.C. Cir. 1986), in which the judge sustained a violation of the change room standard even though the monitoring could not support a violation of § 1910.1025(c)(1). However, the *Cleveland* case is not applicable. The judge did not find a violation of § 1910.1025(c)(1) because of OSHA's failure to consider the use of respirators by employees in its sampling which was not required for finding a violation of the change room standard. Unlike the *Cleveland* case, OSHA's air monitoring at SSM failed to accurately establish the worker's level of exposure by placing the cassette outside the worker's face shield.

The Secretary also cites *Louisville Scrap Material Co., Inc.*, 17 BNA OSHC 1620 (No. 94-2293, 1995). The judge, in a similar case as here, accepted OSHA's monitoring results to establish a violation of § 1910.1025(i)(2)(i) even though OSHA's sampling method was rejected because the filter cassette was placed outside the worker's face shield. The judge reasoned that the use of the face shield was not a factor in measuring the amount of lead which could be inhaled or ingested from accumulated lead on the workers' clothing and skin. Unlike

the standards dealing with individual exposure which address the hazard of respirable lead primarily from the immediate source, such as the fumes and dust generated by workers directly engaged in the torch cutting process, the hygiene standards at § 1910.1025(i) address the hazards of exposure from additional sources, such as lead-contaminated clothing and skin. Therefore, for the purposes of such standards, as requiring change rooms, the judge found the monitoring results obtained by OSHA were sufficient to establish that lead levels exceeded the PEL even though the sampling cassette was placed outside the worker's face shield.

This court does not accept the analysis in the *Louisville Scrap Material Co., Inc.*, case as appropriate to establish the PEL for compliance with §1910.1025(i). The lead standard does not provide for separate PEL's depending on the nature of exposure. There is only one source of exposure in this case, and that involves torch cutting scrap metal. Standards including the hygiene facilities under §1910.1025(i) are triggered by the level of worker's exposure, which in the case of torch cutting, must be measured from inside the face shield. The record in this case fails to show that the worker's level of exposure to lead exceeded the PEL.

Accordingly, alleged violations of §§ 1910.1025(i)(1), 1910.1025(i)(2)(i), 1910.1025(i)(3)(i), 1910.1025(i)(3)(ii), and 1910.1025(i)(4)(i) are vacated.

Item 24 - Alleged Violation of § 1910.1025(j)(1)(i)

SSM was cited for failing to institute a medical surveillance program for workers torch cutting scrap metal in the Thomas yard. Section 1910.1025(j)(1)(i) requires an employer to "institute a medical surveillance program for all employees who are or may be exposed above the action level for more than 30 days per year."

SSM argues the Secretary failed to show that the torch cutters were exposed to airborne lead above the action level for more than thirty days per year. Based on compilations by SSM showing the number of "dirty radiators" purchased and the average time taken to clean the radiators in the nonferrous department, SSM claims it spent less than thirty days per year cleaning radiators (Exh. R-32). SSM also asserts the medical evidence shows workers were not exposed on a daily basis to lead levels in excess of the PEL (Exhs. R-30, R-31).

The standard requires a medical surveillance program for workers who *may be exposed* above the action level. The record establishes that workers' level of exposure to lead may exceed the action level for more than thirty days a year (Exhs. C-22, C-23). The torch cutting

process occurred daily (Tr. 1352). Cleaning dirty radiators was not the only torch cutting operation which involved the release of airborne concentrations of lead. Workers were torch cutting other scrap metals. The Barfield workers were torch cutting at SSM from February to October, 1994 (Tr. 2629).

A violation of § 1910.1025(j)(1)(i) is affirmed.

Item 25 - Alleged Violation of § 1910.1025(l)(1)(i)

The citation alleges SSM failed to inform workers including pickers, laborers, crane operators, equipment operators, forklift drivers, mechanics, welders, and workers torch-cutting in the Thomas yard of the contents of Appendices A and B of the lead standard. Section 1910.1025(l)(1)(i) requires workers to be informed of the appendices where there is potential exposure to airborne lead at any level. The contents of Appendix A include substance identification, health hazard data, and PEL information. Appendix B includes information about exposure monitoring, methods of compliance, respiratory protection, protective work clothing, housekeeping, hygiene facilities, medical surveillance and removal, employee information, and training.

One worker testified he was not informed by SSM of the hazards associated with torch cutting scrap metal (Tr. 2045). Two other workers testified they had received no safety information or training (Tr. 4062, 4081). The lead training provided to the workers demolishing the Ethyl rail cars in early 1994 was not given to all workers torch cutting metals in the ferrous department (Exh. C-37).

SSM does not dispute that the appendices were not provided to the workers in the Thomas yard (Respondent's Brief, p. 79). SSM, however, argues that it was Barfield Enterprises's duty to provide the appendices to its workers. Also, SSM argues that other employees identified by OSHA such as the drivers, mechanics, and welders were not shown to be exposed to lead. No monitoring was performed on these workers.

OSHA's monitoring results establish the workers' potential exposure to lead. SSM has the responsibility to provide a safe workplace to workers of other employers. It is SSM's duty to assure that workers of Barfield were provided with the appendices. SSM had supervisory authority and control over the worksite. SSM purchased the scrap metal for processing. SSM directed the workers and selected the scrap metal to torch cut. SSM exercised control over the

Thomas yard. SSM was in the best position to know the contents of the scrap metal, including the potential for lead exposure. See *IBP, Inc.* 17 BNA OSHC 2073 (No. 93-3059, 1997) (owner of meat processing plant responsible for lockout/tagout violations of an independent contractor). Also, there was nothing preventing other workers of SSM from coming into the torch-cutting area. The torch cutting area was not regulated. Therefore, other workers in the Thomas yard should also be informed of Appendices A and B.

A violation of § 1910.1025(l)(1)(i) is affirmed.

Items 26 through 39 - Alleged Violations of § 1910.1025(l)(1)(ii)

SSM was cited for failing to institute and require a training program for workers engaged in torch cutting scrap metal. Under OSHA's egregious policy, the standard was cited separately for each worker (*{redacted}*, *{redacted}*, and *{redacted}*). The workers' exposure to airborne lead concentrations were shown by OSHA's monitoring (Exhs. C-22, C-23). Section 1910.1025(l)(1)(ii) provides:

The employer shall institute a training program for and assure the participation of all employees who are subject to exposure to lead at or above the action level or for whom the possibility of skin or eye irritation exists.

SSM argues that some workers (*{redacted}*, and *{redacted}*) were trained in lead exposure when SSM contracted to torch cut Ethyl railcars prior to OSHA's inspection (Tr. 725). Also, SSM argues that many of the workers were not shown to be exposed to lead. There was no lead monitoring performed on *{redacted}* (item 32), *{redacted}* (item 33), *{redacted}* (item 34), *{redacted}* (item 35), *{redacted}* (item 36), and *{redacted}* (item 39). Other workers, such as *{redacted}*, showed levels of exposure below the action level (Tr. 368) (Respondent's Brief, p. 79).

The standard requires the training of workers "subject to" exposure to airborne lead at or above the action level of 30 micrograms. OSHA's monitoring establishes the potential for exposure in excess of the action level regardless of the placement of the filter cassette outside the face shield. The workers not monitored were nevertheless shown doing the same job, in the same manner, and at the same time as the workers monitored. Therefore, there is reasonable expectation that the workers were subject to lead exposure at or above the action level.

SSM's corporate safety director acknowledges that no lead training was provided any workers except for a few workers engaged in torch cutting the Ethyl railcars (Tr. 353, 2271). However, even this training did not satisfy all training requirements. It was not a full lead program (Tr. 1375, 2123). Also, the training was not shown to comply with the standard (Exhs. C-36, C-37; Tr. 353, 356, 986). *{redacted}*, SSM's safety director, did not know how to fit test respirators (Tr. 1589).

The violations of § 1910.1025(l)(1)(ii) (items 26 through 39) are affirmed. OSHA's willful classification and egregious policy are separately discussed.

Item 40 - Alleged Violation of § 1910.1025(m)(2)(i)

The citation alleges SSM failed to post warning signs in the ferrous and nonferrous departments of the Thomas yard where workers were torch cutting scrap metals. Section 1910.1025(m)(2)(i) requires an employer to post warning signs in each work area where the PEL is exceeded. The sign is to state: "Warning - Lead Work Area - Poison - No Smoking or Eating."

In addition to inadequate monitoring procedures, SSM argues that Baptiste's conduct at its workplace showed he did not believe the lead exposure level presented a hazard (Tr. 2474-2475). SSM notes the hygienist took none of the precautions required by the *Field Operations Manual*. He did not wear a respirator; he drank from the workers' water container in the ferrous department; and he failed to warn workers of his monitoring results. Also, SSM argues that it made a good faith effort to protect workers and was not aware of the possible lead exposure (Respondent's Brief, p. 52).

Warning signs are meant to alert workers to the danger of eating and smoking in work areas exposed to excessive concentrations of lead. SSM does not dispute there was no lead warning sign in the Thomas yard. Workers were observed eating and smoking in the area where they were torch cutting the scrap metals. There was also a water container in the area (Exh. C-39; Tr. 343-344).

SSM's arguments regarding the field operation manual and lack of knowledge are rejected. Although the Baptiste should have followed the manual in order to protect himself, SSM is not relieved of its responsibility to protect the safety of workers at its facility. Steps taken to detect lead were not shown sufficient to allege a lack of knowledge. SSM is in the scrap

metal business obtaining scrap from variety sources including “peddlers.” There were no internal checks made to ensure that lead was not being received by the facility. Its letters to customers did not specifically prohibit lead from entering its property. There was no inspection or testing for lead. Photographs taken from the yard showed painted scrap metal which, unless tested, may have contained lead. SSM did not prohibit painted scrap metal. SSM was aware that radiators contained lead in the solder holding the pieces together. Therefore, SSM, with reasonable diligence, should have known of the workers’ exposure to lead. Its expert acknowledged the potential for lead exposure from torch cutting scrap metal (Tr. 3983).

OSHA’s method of monitoring, however, failed to establish an overexposure to airborne lead. Its method was not sufficient to show worker’s level of exposure exceeded the PEL for lead.

An alleged violation of § 1910.1025(m)(2)(i) is vacated.

Willful Classification for Citation No. 2

OSHA alleges SSM’s violations of the lead standard, §§ 1910.1025(d)(2) (item 8a), 1910.1025(d)(8)(i) (item 9), 1910.1025(j)(1)(i) (item 24), 1910.1025(l)(1)(i) (item 25), and 1910.1025(l)(1)(ii) (items 26 through 39), were willful.

A willful violation is “one committed with intentional knowing or voluntary disregard for the requirements of the Act, or with plain indifference to employee safety.” *Conie Construction, Inc.*, 16 BNA OSHC 1870, 1872, 1994 CCH OSHD ¶ 30,474, p. 42,089 (No. 92-264, 1994). A willful violation is differentiated from other classifications of violations by a heightened awareness of the illegality of the conduct or conditions and by a state of mind showing conscious disregard or plain indifference. A violation is not willful if the employer has a good faith belief that it was in compliance with the cited condition. The test of good faith is an objective one-- whether the employer’s belief concerning a factual matter, or the interpretation of a rule, was reasonable under the circumstances. *General Motors Corp., Electro-Motive Div.*, 14 BNA OSHC 1064, 2068, 1991 CCH OSHD 1991 CCH OSHD ¶ 29,240 (No. 82-630, 1991); *Tampa Shipyards Inc.*, 15 BNA OSHC 1533, 1541, 1991-93 CCH OSHD 29,617, p. 40,104 (No. 86-360, 1992).

SSM should have known of the workers’ exposure to lead during torch cutting. Although it knew of the requirements of the lead standard, SSM did no general air monitoring at its facility

for lead exposure. Its air monitoring in 1989 and 1992 was for the limited purpose of refuting OSHA 1989 citation and complying with Ethyl's requirements while torch cutting its railcars. This monitoring, however, even showed two workers overexposed to airborne lead. The monitoring of routine scrap in 1989 found a worker exposed above the action level for lead (Exh. C-42; Tr. 1398, 2098, 2103). The 1992 monitoring found a lead level for one worker of 785 micrograms which is fifteen times the PEL (Exh. C-43; Tr. 1333). In response to its limited monitoring, SSM maintains that it attempted to prevent lead from entering its yard. SSM sent letters to customers and posted signs warning against accepting "dangerous materials." SSM asserts its conduct showed a good faith effort to comply.

On the contrary, SSM's efforts were inadequate and not reasonable under the circumstances. SSM showed plain indifference. There was no effort to verify that lead was not present in the yard. Its letters to customers did not include the more than 20,000 peddlers who brought scrap metal to SSM. These letters also did not specifically identify lead-containing metals as a prohibited metal. SSM did not ensure that the scrap metal entering its property contained no lead. It visually inspected a small percentage of scrape metal entering the yard. It inspected the scrape for radiation, rubber, batteries and asbestos. There was no inspection for lead contaminated materials (Tr. 1597, 1600). The corporate safety director testified that there was no policy prohibiting lead painted metal from entering the yard (Tr. 2982). There was also no policy of testing the metals (Tr. 1396, 2247-2248). Instead, SSM relied on its customers for compliance (Tr. 1890, 1902).

Although aware of the dangerous of lead, SSM made no effort by further monitoring to ensure that it complied with the lead standard (Tr. 1596). SSM was aware that sources of lead included lead paint, marine cable with sheathing, wheel weights, grating that seals soil pipe joints, solder, most copper and brass (Tr. 1788, 3322-3323). These items were processed by SSM, including torch cutting. SSM regularly cleaned radiators to remove the iron attachments (clips and brackets) (Tr. 3226-3227, 3229). Despite recognizing that lead exposure could occur when torch cutting the attachments secured by solder or on metals with lead, SSM failed to monitor the torch cutting process to assess the workers' level of exposure (Tr. 1349-1350, 1355).

Also, SSM made exceptions to its own policy against lead when it contracted to torch cut the Ethyl railcars in 1992 and early 1994 and when it torch cut the solder on radiators to remove the brackets and clips. SSM did not take bulk samples of painted metal or the solder to

determine if it contained lead (Tr. 1503-1504). SSM was told that there was a possibility of lead penetration in the Ethyl railcars that lead fumes could be released by the heat of a torch (Exh. C-45, p. 02062; Tr. 3442). In fact, if the railcars were torch cut on Ethyl's property, Ethyl required implementation of a full lead program (Tr. 1375, 2123). Instead, SSM opted to torch cut the railcars on its property with some lead training and a respirator program provided to the Barfield workers (Exh. C-35; Tr. 1366, 1369, 2137-2138, 2271). Also, SSM conceded that it receives lead sheeting and lead weights (Tr. 3201).

SSM receives 30,000 tons of scrap per month which SSM claims make it impossible to test (Tr. 1556). However, SSM only torch cuts approximately two percent of the scrap metal (Tr. 3215). SSM also refuses to accept radioactive materials. To prevent their entry, SSM uses detection equipment and hand held detectors (Tr. 1275, 1277). However, by continuing to torch cut scrap metal without inspecting, testing, or monitoring for lead exposure, SSM exhibited a plain indifference to the requirements of the lead standard and the health of its workers.

The violations of §§ 1910.1025(d)(2) (item 8a), 1910.1025(d)(8)(i) (item 9), 1910.1025(j)(1)(i) (item 24), 1910.1025(l)(1)(i) (item 25), and 1910.1025(l)(1)(ii) (items 26 through 39) are willful.

Application of the Egregious Policy

The Secretary applied her egregious policy to the violation of § 1910.1025(l)(1)(ii) (items 26 through 39). The Secretary, in appropriate circumstances, may cite and penalize separately for each instance of noncompliance with a single standard. The egregious penalty procedure is applicable only to willful violations that are considered particularly flagrant. See OSHA Instruction CPL 2.80 (Exh. C-57).

An egregious penalty in certain cases is acceptable to the Review Commission. The test whether the standard cited permits multiple or single violation depends on whether the cited standard can "reasonably be read to involve as many violations as there were failures to [comply]." *Caterpillar, Inc.*, 15 BNA OSHC 2153, 2172-2173 (No. 87-922, 1993). It is

irrelevant if the multiple violations of a standard result from a “single management decision” or if they potentially could be abated by a “single action.” See *Hartford Roofing Co.*, 17 BNA OSHC 1361, 1366-1367 (No. 92-3855, 1995). Rather, the correct inquiry focuses on the language of the standard. The language of the cited standard determines appropriateness of instance-by-instance citation, not whether the employer made a single decision. *Sanders Lead Company*, 17 BNA OSHC 1197 (No. 87-260, 1995); *J. A. Jones Constr. Co.*, 15 BNA OSHC 2201, 1991-93 CCH OSHD ¶ 29,964 (No. 87-2059, 1993).

In assessing the appropriateness of the egregious policy under § 1910.1025(l)(1)(ii), the Secretary argues that the standard places an obligation on the employer which is applicable to each exposed employee (Tr. 1012, 1016). Berrien Zettler, Deputy Director of Compliance Programs, stated that the routine manner of assessing penalties would not be enough to make a point to SSM (Tr. 1010.1012).

SSM argues that application of the egregious policy is not appropriate. There is no evidence that SSM was a “bad actor.” *S. A. Healy Co.*, 17 BNA OSHC 1150 (No. 89-1508, 1995). Also, the language of the standard does not permit the egregious policy (Respondent’s Brief, p. 100).

The court agrees. The standard requires an employer to “institute a training program for and insure the participation of all employees who are subject to exposure to lead at or above the action level.” § 1910.1025(l)(1)(ii). The plain reading of the standard reveals that its focus is on an employer’s duty to train employees. The language of the standard prohibits a single course of action, not individual acts. Abatement may be achieved by a single training program. The wording of the standard addresses employees in the aggregate, not individually. To prove a violation of the training standard, it makes no difference whether one or ten employees were not trained.

Accordingly, § 1910.1025(l)(1)(ii) (items 26 through 39) does not permit a per-instance assessment. A grouped penalty will be considered for violation of § 1910.1025(l)(1)(ii).

Penalty Consideration for Citation No. 2

As discussed, no reduction is given to SSM for size, history, and good faith.

A penalty of \$20,000 is reasonable for willful violation of § 1910.1025(d)(2) (item 8a). SSM failed to conduct the initial monitoring required by the standard. More than ten workers were potentially exposed to airborne lead concentrations.

A penalty of \$40,000 is reasonable for willful violation of § 1910.1025(d)(8)(i) (item 9). SSM acknowledges it failed to notify workers of the lead exposures. There were seven workers who were not notified.

A penalty of \$70,000 is reasonable for willful violation of § 1910.1025(j)(1)(i) (item 24). There was no medical surveillance program for workers potentially exposed to lead.

A penalty of \$55,000 is reasonable for willful violation of § 1910.1025(l)(1)(i) (item 25). Workers were not informed of the contents of the lead requirements.

A grouped penalty of \$50,000 is reasonable for a grouped willful violation of §1910.1025(l)(1)(ii) (items 26 through 39). There was no training program given to workers exposed to lead.

REPEAT CITATION NO. 3

Item 1 - Alleged Violation of § 1910.147(c)(4)(i)

The citation alleges SSM failed to develop specific written lockout/tagout procedures for equipment such as the scrap shears, HRB bailer presses, cranes, a car shredder, can crusher, and other equipment. Section 1910.147(c)(4)(i) requires an employer to develop energy control procedures for the “control of potentially hazardous energy” when employees are engaged in maintenance or service work on equipment.¹³ Industrial Hygienist Baptiste observed a worker clearing a jam on the 880 shear machine. The shear was not locked or tagged out (Exh. C-50; Tr. 396). He understood that workers cleared jams on the shear every couple of hours (Tr. 396). Clearing a jam is defined as service and maintenance. See § 1910.1047(b) (definition of “servicing and/or maintenance”). Two former employees testified they were not familiar with lockout/tagout procedures (Tr. 4062, 4069, 4082).

¹³

The standard provides an exception to documenting the lockout procedure for a particular machine. SSM does not claim the exception.

SSM maintained a written lockout on-site program (Exh. R-19). A former OSHA compliance officer testified that the written lockout program was comprehensive and beyond the requirements of the standard (Tr. 3766-3767). The written program included specific lockout procedures for each machine or a piece of equipment listed with the exception of the can crusher (Tr. 2077, 2228-2234). The record is undisputed that the can crusher did not require a lockout procedure. It was a cord and plug-operated machine (Tr. 2350-2351). See § 1910.147(a)(2)(iii)(A). Also, it is uncontroverted that workers were provided the information and trained in the written lockout program (Tr. 2793-2794, 3089, 3092-3094). The citation alleges no written program. SSM had a written lockout program. Also, the record is not sufficient to show that the equipment or machinery identified presented a hazard of unexpected energization. *General Motors Corp.*, 17 BNA OSHC 1217 (Nos. 91-2973, 91-3116, 91-3117, 1995), *aff'd*, 89 F.3d 313 (6th Cir. 1996).

An alleged violation of § 1910.147(c)(4)(i) is vacated.

Item 3 - Alleged Violation of § 1910.215(b)(9)

The citation alleges that two grinders in Shredder and Thomas yards were not properly protected by tongue guards. Section 1910.215(b)(9) requires the use of safety guards on grinders which can be adjusted to the constantly decreasing diameter of the abrasive wheel and maintain a distance not to exceed 1/4 inch between the wheel periphery and the adjustable guard.

Industrial Hygienist Baptiste observed the two grinders in the maintenance areas. There was no tongue guard on the dual wheel bench grinder at the Shredder yard (Exhs. C-51, C-53; Tr. 404). The pedestal grinder in the Thomas yard did have a tongue guard, but it was not adjusted to within 1/4 inch of the wheel. The tongue guard was observed not properly adjusted on three occasions (Exh. C-52; Tr. 403-404). The grinders were regularly used to sharpen tools or perform other work in the maintenance areas. The grinder without a tongue guard was purchased new within the year and was used daily (Tr. 3125).

SSM does not dispute the lack of a guard on the bench grinder or the improper adjustment of the guard on the pedestal grinder. Instead, SSM asserts it is a continuing problem to maintain guards on grinders (Respondent's Brief, p. 130). It claims that it conducts ongoing daily reviews of its grinders. Guarding and proper adjustment of guards is among the items that

are checked each day (Tr. 2792-2793, 3108). SSM asserts that the record supports nothing more than a technical violation.

The record establishes a violation of § 1910.215(b)(9). SSM does not dispute the violation. There is no evidence that employees were properly trained and instructed to replace or readjust the tongue guards. The lack of a guard on one grinder is more than a matter of maintaining proper adjustment. SSM's alleged daily inspection of the workplace were not shown to be adequate and were performed by employees who exhibited a lack of safety training and understanding.

A violation of § 1910.215(b)(9) is affirmed. The violation is classified as a repeat under § 17 of the Act. The Secretary alleges a repeat classification based on prior citations issued on January 8, 1993, to the Houma facility involving the same standard (Exh. C-49; Tr. 398-399).

A violation is considered a repeat under § 17(a) if, at the time of the alleged repeat violation, there is a Commission final order against the employer for a substantially similar violation. *Potlatch Corporation*, 7 BNA OSHC 1061, 1063, 1979 CCH OSHD ¶ 23,294, p. 28, 171 (No. 16183, 1979). The Secretary establishes a prima facie similarity if both violations are of the same standard. *Monitor Constr. Co.*, 16 BNA OSHC 1589, 1594, 1993-95 CCH OSHD ¶ 30,338, p. 41,825 (No. 91-1807, 1994). A review of the prior citation issued to the Houma facility establishes that the same standard under similar conditions was previously cited by OSHA (Exh. C-49).

SSM argues, however, that the Houma facility is not part of SSM. It is operated by Southern Scrap Materials Co., Ltd., a separate corporation which is headquartered in New Orleans. SSM asserts there is no evidence showing it as a single entity (Respondent's Brief, p. 132).

The Commission ordinarily does not pierce the corporate veil for the purpose of determining whether a company committed a repeat violation. In *Hills Department Stores, Inc.*, 14 BNA OSHC 1798 (No. 89-1807, 1980) (ALJ), the judge held that because the Secretary failed to provide evidence showing that the parent and subsidiary should be treated as a single entity, the parent company could not be held liable for the acts of the subsidiary. The burden of proof is on the Secretary. "The fact that two corporations have common management personnel is insufficient in and of itself to justify ignoring the separate corporate entities." *Id.* at 1799.

In this case, the record shows a commonality between SSM and Houma. SSM is wholly owned by Southern Holdings which also owns Southern Scrap in Houma (Tr. 1227-1229). Southern Holdings' corporate safety director regularly provided safety advice and training to SSM. He regularly visited and inspected SSM. He developed the written safety programs for SSM. He participated in the OSHA inspection as the employer's representative of SSM. He was also contacted during OSHA's inspection at Houma. The corporate safety director permitted the inspection of Houma to proceed (Tr. 1181). Also, SSM throughout this proceeding attempted to rely on monitoring done at other facilities such as the New Orleans facility as representative of conditions at SSM. Thus, for the purposes of a repeat classification, the two corporations were operated as a single entity.

Accordingly, a violation of § 1910.215(b)(9) is affirmed as a repeat violation. A penalty of \$10,000 is reasonable. There were two grinders found not in compliance. One grinder did not have a guard exposing the operator to a greater possible hazard.

“OTHER” THAN SERIOUS CITATION NO. 4

Item 1 - Alleged Violation of § 1904.2(a)

The citation alleges SSM failed to record all recordable injuries and illnesses of workers furnished by a temporary labor pool on the OSHA 200 logs. Section 1904.2(a) provides:

Each employer shall, (1) maintain in each establishment a log and summary of all recordable occupational injuries and illnesses for that establishment; and (2) enter each recordable injury and illness on the log and summary as early as practicable but no later than 6 working days after receiving information that a recordable injury or illness has occurred.

SSM does not dispute that occupational injuries and illness of workers provided by temporary employment agencies are not reflected on its 200 logs. SSM’s corporate safety director acknowledges that it was SSM’s policy not to record the injuries or illnesses of workers from temporary agencies (Exhs. C-54, C-55; Tr. 409-410). SSM maintains OSHA 200 logs on its own regular employees (Tr. 409-410).

SSM argues that it is not the employer of the temporary workers. The standard, however, requires a log and summary of all recordable occupational injuries and illnesses “for that establishment.” The language of the standard includes temporary workers working at SSM’s establishment. The plain wording of the standard focuses on the injuries and illnesses at the establishment and not the employment relationship with the workers. The purpose of the OSHA 200 log is to identify the types of injuries and the particular equipment used at the time the injuries occur. SSM is responsible for recording any illnesses or injuries to workers working at SSM while performing SSM’s work. Also, as discussed, the workers from temporary agencies may also be considered employees of SSM under the economic realities test. SSM controlled and supervised their work. Further, it is noted that SSM maintained some injury record for the temporary employees. This record was incomplete and not equivalent to the OSHA 200 logs because lost workdays were not shown (Exh. C-55; Tr. 410-411).

A violation of § 1904.2(a) is affirmed. Although “other” than serious, a penalty of \$3,000 is assessed. It is a recordkeeping violation which allows a penalty to be assessed.

Item 2 - Alleged Violation of § 1910.95(c)(1)

The citation alleges that SSM failed to maintain an effective hearing conservation program. Section 1910.95(c)(1) requires, in part:

The employer shall administer a continuing, effective hearing conservation program whenever employee noise exposures equal or exceed an 8-hour time-weighted average sound level (TWA) of 85 decibels measured on the A scale (slow response) or, equivalently, a dose of fifty percent.

The Industrial Hygienists monitored the noise levels for five workers including workers torch cutting scrap metals, a shear operator, sorter, express operator, baler operator, and equipment operator. OSHA found the noise levels based on an eight hour time-weighted average to range from 87.1 to 95.1 dBA (Exhs. C-8, C-9). Although hearing protectors were available, the industrial hygienist considered them dirty and not properly worn (Tr. 414-415).

It is uncontroverted that SSM maintained a written hearing conservation program (Exh. C-10; Tr. 3761-3762). The industrial hygienist considered the written program to be better than at many other workplaces (Tr. 887). SSM gave workers annual audiograms and informed them of the results (Tr. 3763). High noise areas in the yard were established by SSM's noise surveys and based on experience with similar equipment at other facilities (Tr. 2311). SSM maintained a map that identified areas in the yard as high noise areas (Exh. R-19; Tr. 2178). Signs were also posted designating the high noise areas and requiring hearing protection (Exh. R-26; Tr. 2180, 2182, 2308). Hearing protection was provided to employees (Exhs. R-33, R-34; Tr. 3307).

OSHA identified two workers not wearing hearing protection: *{redacted}* and *{redacted}* (Exhs. C-8, C-9). The monitoring records indicate that Ramirez had "foam ear plugs around neck - (dirty)" (Exh. C-8). Industrial Hygienist Baptiste testified that at times during the day *{redacted}* ear plugs were not worn (Tr. 886-887). Also, the monitoring record for *{redacted}* indicates that he was wearing hearing protection while operating the Barko crane (Exh. C-9; Tr. 1195, 1200). Except for these two workers, the record indicates other workers monitored wore hearing protection.

The industrial hygienist was at SSM twenty-five days over a six-month period, and the record identifies only two workers for part of one day not wearing hearing protection (Tr. 561, 881, 3818). The failure of the two workers to wear hearing protection on one day based on the number of days OSHA was on-site and the number of workers affected does not establish a failure to maintain an effective hearing conservation program. Also, the number of alleged

“dirty” hearing protectors and deficiencies in the written program were not identified and detailed. The Secretary failed to meet her burden of proof.

An alleged violation of § 1910.95(c)(1) is vacated.

Item 3 - Alleged Violation of § 1910.106(f)(6)

SSM was cited for failing to post “No Smoking” signs at the refueling tank in the Thomas yard. The standard provides:

Class I liquids shall not be handled, drawn, or dispensed where flammable vapors may reach a source of ignition. Smoking shall be prohibited except in designated localities. “No Smoking” signs shall be conspicuously posted where a hazard from flammable liquid vapors is normally present.

It is undisputed that there were no “No Smoking” signs at the refueling tank south of the maintenance building (Exh. C-56; Tr. 415). SSM acknowledges that it maintained the fuel tank for the purpose of refueling equipment used in its daily operations (Tr. 2238-2239). SSM argues that the standard does not apply because its refueling tank is not a “bulk plant” (Respondent’s Brief, p. 132).

Section 1910.106(f) applies to bulk plants. A “bulk plant” is defined as “that portion of a property where flammable or combustible liquids are received by tank vessel, pipelines, tank car, or tank vehicle, and are stored or blended in bulk for the purpose of distributing such liquids by tank vessel, pipeline, tank car, tank vehicle or container.” § 1910.106(a)(7). The refueling tank used by SSM was part of an activity incidental to the primary business of SSM. The Secretary failed to show that the refueling tank was a bulk plant. The liquids were not retained for the purpose of redistribution in bulk.

An alleged violation of § 1910.106(f)(6) is vacated.

FINDINGS OF FACT
AND CONCLUSIONS OF LAW

The foregoing decision 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 decision, it is ORDERED that the citations be disposed of as follows:

CITATION NO. 1

1. Item 1a, in violation of § 1910.23(c)(1), and item 1b, in violation of §1910.23(d)(1)(iii), are withdrawn by the Secretary.
2. Item 2, in violation of § 1910.27(d)(1)(iv), is affirmed and a penalty of \$2,500 is assessed.
3. Item 3, in violation of § 1910.95(I)(2)(i), is affirmed and a penalty of \$1,000 is assessed.
4. Item 4, in violation of § 1910.151(b), is vacated.
5. Item 5, in violation of § 1910.151(c), is vacated.
6. Item 6, in violation of § 1910.157(g)(4), is withdrawn by the Secretary.
7. Item 7, in violation of § 1910.212(a)(3)(ii), is withdrawn by the Secretary.
8. Item 8, in violation of § 1910.303(g)(2)(i), is withdrawn by the Secretary.
9. Item 9, in violation of § 1910.305(g)(2)(ii), is vacated.
10. Item 10, in violation of § 1910.305(g)(2)(iii), is withdrawn by the Secretary.
11. Item 11, in violation of § 1910.1027(c), is vacated.
12. Item 12, in violation of § 1910.1027(d)(1)(i), is affirmed and a penalty of \$2,500 is assessed.
13. Item 13, in violation of § 1910.1027(e)(1), is affirmed and a penalty of \$2,500 is assessed.
14. Item 14, in violation of § 1910.1027(g)(1), is affirmed and a penalty of \$2,500 is assessed.
15. Item 15, in violation of § 1910.1027(I)(1), is vacated.
16. Item 16, in violation of § 1910.1027(j)(1), is vacated.

17. Item 17, in violation of § 1910.1027(l)(1)(i)(a), is affirmed and a penalty of \$2,500 is assessed.
18. Item 18, in violation of § 1910.1027(m)(1), is affirmed and a penalty of \$2,500 is assessed.
19. Item 19, in violation of § 1910.1030(c)(1)(i), is affirmed and a penalty of \$2,500 is assessed.
20. Item 20, in violation of § 1910.1200(e)(1), is vacated.
21. Item 21, in violation of § 1910.1200(h), is vacated.

CITATION NO. 2

1. Items 1, 2, 3, 4, 5 and 6, in violation of § 1910.1025(c)(1), are vacated.
2. Item 7, in violation of § 1910.1025(c)(2), is vacated.
3. Item 8a, in violation of § 1910.1025(d)(2), is affirmed and a penalty of \$20,000 is assessed.
4. Item 8b, in violation of § 1910.1025(d)(6)(iii), is withdrawn by the Secretary.
5. Item 9, in violation of § 1910.1025(d)(8)(i), is affirmed and a penalty of \$40,000 is assessed.
6. Item 10a, in violation of § 1910.1025(e)(1), and item 10b, in violation of §1910.1025(e)(3)(i), are withdrawn by the Secretary.
7. Item 11, in violation of § 1910.1025(f)(1), is vacated.
8. Items 12, 13, 14, 15, 16, 17 and 18, in violation of § 1910.1025(g)(1), are vacated.
9. Item 19, in violation of § 1910.1025(h)(1), is vacated.
10. Item 20, in violation of § 1910.1025(i)(1), is vacated.
11. Item 21, in violation of § 1910.1025(i)(2)(i), is vacated.
12. Item 22a, in violation of § 1910.1025(i)(3)(i), and item 22b, in violation of §1910.1025(i)(3)(ii), are vacated.
13. Item 23, in violation of § 1910.1025(i)(4)(i), is vacated.
14. Item 24, in violation of § 1910.1025(j)(1)(i), is affirmed and a penalty of \$70,000 is assessed.

15. Item 25, in violation of § 1910.1025(l)(1)(i), is affirmed and a penalty of \$55,000 is assessed.

16. Items 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38 and 39, in violation of § 1910.1025(1)(l)(ii), are affirmed and a grouped penalty of \$50,000 is assessed.

17. Item 40, in violation of § 1910.1025(m)(2)(i), is vacated.

CITATION NO. 3

1. Item 1, in violation of § 1910.147(c)(4)(i), is vacated.

2. Item 2, in violation of § 1910.157(e)(3), is withdrawn by the Secretary.

3. Item 3, in violation of § 1910.215(b)(9), is affirmed and a penalty of \$10,000 is assessed.

4. Item 4, in violation of § 1910.1200(e)(1)(i), is withdrawn by the Secretary.

CITATION NO. 4

1. Item 1, in violation of § 1904.2(a), is affirmed and a penalty of \$3,000 is assessed.

2. Item 2, in violation of § 1910.95(c)(1), is vacated.

3. Item 3, in violation of § 1910.106(f)(6), is vacated.

/s/
KEN S. WELSCH
Judge

Date: October 13, 1997