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

SECRETARY OF LABOR, Complainant, v. ALLSTATE PAINTING AND CONTRACTING CO., INC., Respondent.	OSHRC Docket Nos. 97-1631 & 97-1727

DECISION

Before: RAILTON, Chairman, STEPHENS and ROGERS, Commissioners.

BY THE COMMISSION:

These consolidated cases arise out of citations charging Allstate Painting and Contracting Co., Inc. (Allstate), with numerous health and safety violations. A total penalty of $112,400 was proposed. Allstate contested the citations and argued as a threshold matter that it was not properly cited as the employer of the exposed workers. The judge disagreed and affirmed most of the alleged violations, assessing a total penalty of $42,500.

On review, Allstate argues that the judge erred in concluding that Allstate was the properly cited employer. For the reasons that follow, we agree with Allstate and reverse the judge.[1]

Background

The cited project involved the abrasive blasting and painting of bridges located near Fairborn, Ohio, for the Ohio Department of Transportation (ODOT). Using its

[1] Based on our disposition of these cases, we do not address the other arguments raised by Allstate on review.

status as a disadvantaged business entity, Allstate bid on and received a contract to perform the job for The Velotta Company (Velotta), a contractor hired by ODOT to perform bridge repairs for the project. Following the execution of its contract with Velotta, Allstate entered into a "management agreement" with American Painting Company, Inc. (American), wherein American agreed to perform the blasting and painting work. American's performance on its contract with Allstate was conditioned on Allstate's execution of an irrevocable assignment of payments from the Allstate/Velotta agreement to American, and Velotta's execution of a written acknowledgment of the assignment. An irrevocable assignment to American of Allstate's right, title and interest in the Velotta/Allstate agreement was attached to the Allstate/American agreement and was executed on the same day. Shortly thereafter, Velotta acknowledged the assignment.

In its agreement with American, Allstate agreed to purchase public liability insurance and any bonds required by the Allstate/Velotta contract. For its services, Allstate ultimately received approximately 4% of American's net profits from the job. In return, American agreed to provide all payroll services, including the withholding of taxes and the allotment of contributions to employee health and welfare funds. American also agreed to comply with prevailing wage laws, administer collective bargaining agreements, and replenish funds on the project account if they became low. The contract also stated that American would provide the services of "Anthony and/or Michael Katsourakis" to supervise and direct "Allstate's employees" at the worksite.

The record shows that Anthony Katsourakis ran the job with the assistance of his brother Michael and long-time American employee Ed Luba. The workers for the project were long-time employees of American whose hearing testimony indicates that they considered themselves to be American, not Allstate, employees. The Katsourakis brothers set the workers' salaries and had the de-facto authority to hire and fire, and together with Luba, discipline employees. Except for the Katsourakis brothers, the employees were paid from a project checking account established in the American/Allstate contract that was titled "Allstate" but to which only American principals had access. According to the record, Allstate had no supervisors or managers

at the worksite except during the OSHA inspection, when it sent its superintendent and foreman Pete Topsidas to participate in the conferences. There is nothing in the record to show whether any other Allstate employees were ever present at the site.

Discussion

Only an "employer" may be cited for a violation of the Act, see 29 U.S.C. § 658(a), and the Secretary has the burden of proving that a cited respondent is the employer of the affected workers at the site. *Timothy Victory*, 18 BNA OSHC 1023, 1995-1997 CCH OSHD ¶ 31,431 (No. 93-3359, 1997). In determining whether the Secretary has satisfied that burden, the Commission relies upon the test set forth in *Nationwide Mutual Insurance Company v. Darden*, 503 U.S. 316 (1992) ("*Darden*").[2] *Don Davis*, 19 BNA OSHC 1477, 2001 CCH OSHD ¶ 32,402 (No. 96-1378, 2001); *Vergona Crane Co*., 15 BNA OSHC 1782, 1991-1993 CCH OSHD ¶ 29,775 (No. 88-1745, 1992) ("*Vergona*"). *See also Weary v. Cochran*, 377 F.3d 522 (6th Cir. 2004) (relevant circuit follows *Darden*).

To decide whether the party in question was an employer under common law, the *Darden* Court looked primarily to the hiring party's right to "control the manner and means by which the product [was] accomplished." Factors pertinent to that issue 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

[2] Prior to *Darden*, the Commission applied an economic realities test which emphasized the substance over the form of the relationship and considered a number of factors, such as whom the workers considered to be their employer, and whether the alleged employer had the power to control the workers. *Van Buren-Madawaska Corp.*, 13 BNA OSHC 2157, 1987-90 CCH OSHD ¶28,504 (No. 87-214, 1989); *Loomis Cabinet Co.*, 15 BNA OSHC 1635, 1991-1993 CCH OSHD ¶29,689 (No. 88-2012, 1992), *aff'd*, 20 F.3d 928 (9th Cir. 1994). Applying an economic realities test here would not change the result.

employee benefits and the tax treatment of the hired party." *Darden,* 503 U.S. at 322, *citing Community for Creative Non-Violence v. Reid,* 490 U.S. 730 (1989). While no single factor under *Darden* is determinative, the primary focus is whether the putative employer controls the workers. *See Don Davis*, *supra*. We find that Allstate lacked such control here.

The judge based his finding that Allstate had enough control over the workers to be considered their employer on the Allstate/Velotta contract language placing responsibility on Allstate to perform the work, and on the Allstate/American contract identifying American's work crew as Allstate's employees. He also relied on what he considered to be other indicia of control, such as the evidence that the employees' paychecks were issued from an "Allstate" account and that the site-specific worker protection plan had Allstate's name on it.

The record establishes, however, that Allstate did not control the hiring, firing or disciplining of the workers at the site; did not supervise their work; and did not supply them with equipment or safety gear. The workers were long-term employees of American, not of Allstate, and Allstate had no right to assign any additional projects to them, regulate their arrival and departure time, or determine how they should do their work. Allstate also did not handle the workers' training, despite the fact that the name Allstate was written on top of the project's training sheets and safety plan. According to the record, American employees Ed Luba or Anthony Katsourakis conducted all safety training for the project.

Contrary to the judge's finding, the record also establishes that American, not Allstate, paid the workers. While the checking account from which the workers were paid had an Allstate title, the Allstate/American contract provided that only American principals would have signatory powers on the account. Therefore, Allstate never had access to any of the funds that were used to pay the employees, and reserved no right to issue or withhold any such payments. Allstate also could not increase the workers' salaries. Therefore, based on this evidence, we find that Allstate cannot be said to have

controlled the workers on the cited project such that it could be considered their employer. *See Darden; see also Vergona.*

We further note that in relying on Allstate's contract with Velotta to support his conclusion that Allstate retained control of the workers, the judge ignored the undisputed fact that Allstate's right, title and interest in the Allstate/Velotta contract were irrevocably assigned to American pursuant to the Allstate/American contract, an assignment that was acknowledged by Velotta.[3] The assignment clauses in the Allstate/American contract and the establishment of the project account identifying only American principals as authorized signatories establish that Allstate had no right to assert control over the workers or interfere with American's performance obligations to Velotta.

We also disagree with the judge's finding that the Katsourakises were acting as agents on behalf of Allstate and that their control was therefore imputable to Allstate. Under common law, an agency relationship arises where the principal has indicated a right to control the conduct of the agent on the matter entrusted to him. *See* RESTATEMENT (SECOND) OF AGENCY §§1 &2, (1958)*; cf. Eyerman v. Mary Kay Cosmetics, Inc*., 967 F. 2d 213, 219 (6th Cir. 1992) *citing Hanson v. Kynast*, 24 Ohio St. 3d 171, 494 N.E. 2d 1091 (1986) (an agency relationship contains three elements, one of which involves the right of the principal to control the agent's conduct); *see also Councell v. Douglas*, 163 Ohio St. 292, 126 N.E. 2d 597 (1955) (under Ohio law, the relation of principal and agent is identified by the retention by the principal of the right to control the agent's activities). The judge based his agency finding on the clause in the Allstate/American contract requiring American to provide the on-site services of one or

[3] Under Ohio law, Velotta's acknowledgment of the assignment, together with Anthony Katsourakis's testimony that he and Velotta used Allstate only for its disadvantaged business entity status, could be interpreted to constitute a novation such that Allstate would no longer be required or expected to perform under the contract. *See, e.g. Bolling v. Clevepak*, 20 Ohio App. 3d 113, 484 N.E. 2d 1367 (1984) (for a proper novation to relieve a contracting party from its obligations, it must appear that the one to whom the obligation runs must have consented to the assignment).

more of the Katsourakis brothers to supervise and direct the employees of Allstate. The contract clause, however, does not indicate that the Katsourakises would be under Allstate's control or even act on its behalf as its representative on site, and there was no indication on this record that Allstate had any de facto control over the Katsourakis brothers. At best, the Katsourakis brothers were independent contractors and this alone does not amount to an agency relationship. *See* RESTATEMENT (SECOND) OF AGENCY §2 (1958).

Finally, the Secretary claims on review that Allstate should be estopped from denying its employer status based on misrepresentations it made to OSHA.[4] To make out a case for estoppel based on misrepresentation, the reliance on the misleading conduct must have been reasonable; the party claiming estoppel must show that he did not know nor should have known that his adversary's conduct was misleading. *Heckler v. Community Health Serv. of Crawford County, Inc.*, 467 U.S. 51, 59 (1984). While the record does show that certain misrepresentations were made to the compliance officers during the inspection that may have led them to identify Allstate as the responsible employer, there was also evidence available to the compliance officers during and following the inspection that should have placed them on notice that Allstate lacked the type of control required to be considered the employer of the exposed employees. The record establishes that the compliance officers were aware that Anthony Katsourakis was a principal of American and that he was in charge of the site and the safety precautions. All of OSHA's dealings were with him, and according to OSHA Safety Specialist Steve Medlock, Katsourakis identified the workers at the job as employees of American who

[4] The Secretary also argues that Allstate made similar misrepresentations to the State of Ohio, but this record lacks the evidence to support her claim. The only communication to the State that appears in this record is a submission of payroll records showing that Allstate was the employer, and these records were submitted by Ethel Katsourakis, not by Allstate. There is nothing on this record to indicate that Ethel, the sister of the Katsourakis brothers, was in any way associated with Allstate. While it is possible that Allstate nonetheless may have been involved in a misuse of its disadvantaged business entity status, we view that as an issue for the State of Ohio to investigate and not, absent a showing of control, proof that Allstate was the employer of the affected workers.

were being paid by Allstate. OSHA also had possession of biological monitoring records for the exposed employees identifying American as the employer, as well as a copy of the Allstate/American contract which contained the irrevocable assignment of Allstate's obligations to American and Velotta's written acknowledgment. Moreover, we find it significant that OSHA relied on American's citation history in determining how to characterize the alleged violations for which Allstate was cited. Under these circumstances, OSHA should have realized that Allstate was not the employer for this project.[5]

For all of these reasons, we find that the judge erred in finding that Allstate was the employer of the exposed workers. Accordingly, we vacate the citations.

S/

W. Scott Railton
Chairman

S/

James M. Stephens
Commissioner

S/

Thomasina V. Rogers
Commissioner

Dated: March 15, 2005

[5] The issue of whether American was the employer for this project and therefore responsible for the alleged violations, is not before us here. We accordingly do not address whether any misrepresentations made by Anthony Katsourakis during this inspection may have tolled the statute of limitations as to American. *Cf. Ott v. Midland-Ross Corp.*, 600 F.2d 24, 28-31 (6th Cir. 1979) (defendant may be estopped from relying on contract or statute of limitations, if plaintiff acted in justifiable reliance on defendant's misrepresentation concerning it, regardless of defendant's good faith).

Secretary of Labor, Complainant, v. Allstate Painting & Contracting Co., Inc.,	OSHRC Docket Nos. **97-1631** & **97-1727** (Consolidated)

APPEARANCES

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Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

Allstate Painting & Contracting Co., Inc. (Allstate), a bridge abrasive blasting and painting contractor, was inspected twice by the Occupational Safety and Health Administration (OSHA) while it was working at two bridges along Interstate 675 near Fairborn, Ohio, during the Summer of 1997. As a result of the inspections, Allstate received serious and "other" than serious health citations (inspection no. 180489918) on August 14, 1997, and serious and willful safety citations (inspection no. 103233342) on September 12, 1997. Allstate timely contested the citations. The health and safety citations were consolidated for hearing.

The health citations (inspection no. 180489918) allege various violations of the cadmium standards at § 1926.1127; the lead standards at § 1926.62[1]; the inorganic arsenic standards at § 1926.1118; and the air contaminant standards at § 1926.55 for exposure to manganese and chromium. The health citation proposed penalties totaling $54,400.

[1] The lead standards cited predate revisions to the lead standards; 63 FR 1296 (January 8, 1998).

The safety citations (inspection no. 103233342) allege violations of the fall protection requirements at §§ 1926.451(g)(1)(i), 1926.501(b)(1)[2] and 1926.501(b)(15). The safety citations proposed penalties totaling $58,000.

The hearing was held February 23 to March 4, 1999, in Columbus, Ohio. During the hearing, the Secretary withdrew from the serious health citation (inspection no. 180489918), the alleged violations of § 1926.1127(i)(2)(ii)(item 5), § 1926.1127(j)(3)(i)(item 7a), § 1926.1118(m)(2)(i)(item 7b), § 1926.1127(j)(3)(ii)(item8a), § 1926.1118(m)(3)(ii)(item 8b) and § 1926.1118(n)(1)(i)(A)(item 17).

The parties stipulated jurisdiction and coverage (Tr. 6). In addition to disputing the alleged violations, Allstate argues that OSHA's inspection was discriminatory towards Greek Americans; Allstate was not the employer on the project; OSHA's air monitoring was invalid; and, if violations are found, the violations should be reclassified as other than serious. These arguments are rejected, and the violations are affirmed or dismissed based on the evidence in the record. The parties filed post-hearing briefs.

Background

On January 22, 1997, the Velotta Company, a bridge repair subcontractor under a general contract with the State of Ohio, Department of Transportation (ODOT), contracted with Allstate to perform abrasive blasting and painting on 15 bridges along a seven mile section of Interstate 675 in the area of Fairborn, Ohio. Allstate was given the contract pursuant to a special state program for disadvantaged business enterprises. The general contractor was Jurgensen Construction (Exh. C-1; Tr. 18, 193-194, 196-197).

On April 28, 1997, Allstate, in exchange for a percentage of the proceeds, hired American Painting & Contracting, Inc. (American), also an abrasive blasting and painting contractor, to "provide management services to assist Allstate in the completion of its responsibilities set forth in the Subcontract Agreement with Velotta" (Exh. C-2). Under the management agreement, American was to provide, among other things, two supervisors to "direct the employees of Allstate," furnish

[2] The Secretary also pleads in the alternative a violation of the General Duty Clause at § 5(a)(1) of the Occupational Safety and Health Act (Act).

all "materials, equipment, tools, management, skill and instrumentalities necessary for full and timely performance of all work," and select "a sufficient number of laborers to complete the services." Work on the project started on May 9, 1997, and was completed on time in late August, 1997 (Tr. 196).

Two OSHA safety compliance officers, while returning from another inspection on May 13, 1997, observed two Allstate employees climbing in the steel girders underneath a bridge over Interstate 675. The employees were not wearing fall protection (Exh. C-14; Tr. 248, 284). As a result of their observations, the compliance officers performed a safety inspection (inspection no. 103233342) resulting in citations for failing to provide fall protection.

Based on Allstate's abrasive blasting work, the Cincinnati OSHA office also conducted a health inspection of the project under a special emphasis program for lead in construction (Tr. R-21; Tr. 334-336, 1070-1071, 1121-1122). Senior Industrial Hygienist (IH) James Sweeney conducted the health inspection (Tr. 924). He performed air monitoring on two dates at different bridges while the employees used abrasive blasting to clean the steel of old paint and debris prior to painting.

During the abrasive blasting and painting, employees worked inside a large temporary containment (approximately 60 feet long, 18 to 60 feet wide, and 18 feet high) made from parachute material rigged from the bridge to ground level. The containment prevented dust contaminants released during the abrasive blasting from harming the surrounding environment. While inside the containment, the employees wore Bullard air supply helmets with a cape covering their upper body, gloves, extra clothing and work boots. To perform the blasting, Allstate used a System 10 abrasive blasting machine. The System 10 also allowed the used steel grit to be vacuumed, cleaned and recycled for additional blasting (Exhs. C-51, R-58; Tr. 31-32, 69, 73, 534-535, 545, 938, 942).

IH Sweeney's air monitoring was conducted on May 20, 1997, at a steel Core-10 overpass bridge (GRE-675-0895) (Tr. 935, 942). Employees John Jagars and Virgil Girten were performing abrasive blasting inside the containment (Exh. C-58, Tr. 937, 971). The monitoring results for Jagars showed a lead exposure level of 163 micrograms per cubic meter of air ($\mu g/m^3$), calculated as an 8-hour time weighted average (TWA); an inorganic arsenic exposure level of 8.3 $\mu g/m^3$ for an 8-hour TWA; and a cadmium exposure level of 1.63 $\mu g/m^3$ for an 8-hour TWA (Exhs. C-21, C-23, C-43, C-59; Tr. 969). Girten was not monitored.

On June 4, 1997, IH Sweeney also conducted air monitoring on employees working inside a containment erected at a railroad bridge (GRE-675-0615) (Exhs. C-45, C-46; Tr. 939-940). Employees Tony Xipolitas and Mike Mavroudis were performing abrasive blasting, while employee Steve Badurik periodically entered the containment to vacuum the used steel grit (Tr. 973). The monitoring results found that the employees were exposed to lead in excess of the permissible exposure level (PEL) of 50 µg/m³ for an 8-hour TWA and to cadmium in excess of the PEL of 5 µg/m³ for an 8-hour TWA. Also, the results found the employees to be exposed in excess of the PEL for inorganic arsenic and in excess of the threshold limit values (TLV) for manganese and chromium (Exhs. C-22, C-24, C-59).

As a result of the health inspection (inspection no. 180489918), citations were issued alleging violations involving the employees' exposures to lead, cadmium, arsenic, manganese, and chromium.

Discussion

Preliminary Matters

Selective Prosecution

Allstate argues that it was wrongly selected for inspection and citation because of its Greek American ownership. Allstate alleges that discriminatory selection is shown by OSHA's targeting of abrasive blasting employers who are predominantly owned by Greek Americans and by an alleged derogatory comment by IH Sweeney. The comment was made during an argument over the scheduling of air monitoring when IH Sweeney allegedly called Anthony Katsourakis, president of American Painting, a "damn Greek" (Tr. 173). Sweeney denies making the comment (Tr. 985, 1102).

To establish an affirmative defense of selective prosecution, there must be evidence of unreasonable conduct by OSHA. *Hamilton Fixture*, 16 BNA OSHC 1073, 1077 (No. 88-1720, 1993). The conscious exercise of some selectivity in enforcement is not in itself unreasonable. Relief is available only if the decision to inspect is shown to have been deliberately based on an unjustifiable standard such as race or religion or other arbitrary classification. In *U.S. v. Armstrong*, 517 U.S. 456 (1996), the Supreme Court stated that a person claiming selective prosecution:

> [m]ust demonstrate that the prosecutorial policy had a discriminatory effect and was motivated by a discriminatory purpose.

To establish a discriminatory effect, the party must "show that similarly situated individuals of a different race were not prosecuted." *Id* at 465.

At the time of Allstate's inspection, the Secretary was under a special emphasis program involving "Lead in Construction" (Exh. R-21). The program established a procedure for scheduling lead inspections. The program provided:

> Inspection sites will be randomly selected for inspection from the list compiled from the above sources using a random numbers table. (This selection process sets forth administratively neutral criteria to identify establishments for inspection.) As new sites are added they should be randomized for inspection.

For scheduling lead inspections, the Cincinnati OSHA office obtained from ODOT a list of bridge painting projects (Exh. R-34; Tr. 1074, 1078). OSHA agrees that most of the bridge painting contractors in Ohio are owned by Greek Americans. IH Sweeney has inspected many of the contractors in the past (Tr. 1079-1081, 1123-1124, 1127).

According to Allstate, there were many non-Greek American contractors among other classes of lead employers which Sweeney overlooked (Tr. 176, 179-180). By selecting for inspection Greek American employers, to the total exclusion of other employers, Allstate argues that the program implemented by OSHA had a discriminatory effect. Given Sweeney's racial slur and his knowledge of the companies, Allstate alleges that its selection for inspection was motivated by a discriminatory purpose.

Allstate's selective prosecution argument is rejected. OSHA's inspection was not shown as motivated by prejudice towards Greek American employers. Allstate's selection for a health inspection resulted from an unplanned safety inspection because employees were observed to be exposed to fall hazards without fall protection. When the safety inspection was initiated, the compliance officers were unaware of the employer's identity (Tr. 284-285). Upon returning to the office, their observations were properly reported to supervisors who recognized that the project involved abrasive blasting and was also within OSHA's special emphasis program for lead (Exh. R-21; Tr. 334, 1078). Richard Gilgrist, OSHA's area director and supervisor of industrial hygienists,

including Sweeney, testified that the health inspection was initiated after the referral from the safety inspection and after finding the project was also listed by ODOT (Exh. R-34; Tr. 1121-1122, 1129).

The list obtained from ODOT identified only the location of the project and not the employer (Tr. 1123). Also, according to OSHA, employers not involved in abrasive blasting were inspected in 1997 because of potential lead exposures (Tr. 1074, 1129, 1135).

OSHA's special emphasis program was implemented because of the serious health hazards involved in employees' exposure to lead. OSHA's decision to inspect Allstate was a reasonable response to the program. The program directed that lead inspections be conducted based first on a referral and secondly on a planned inspection (Exh. R-21, p. 3). The inspection of Allstate was not based on national origin but was more the result of a referral. In scheduling inspections, OSHA needs to consider its manpower requirements and administrative efficiency.

With regard to the ethnic slur allegedly used, IH Sweeney denied making the comment and denied having any bias against Greek Americans (Tr. 985, 1102). CO Steven Medlock, who observed the confrontation, heard no ethnic slur (Tr. 387-388, 395). However, an apparent neutral third party, an employee with a state inspection company, testified that he did overhear the derogatory comment (Tr. 780).

The statement, even if made, does not establish selective prosecution. Sweeney did not select Allstate for inspection but was assigned the inspection by his office (Tr. 333-334, 1070, 1132). Also, Katsourakis agreed that the comment was made during a confrontation over the scheduling of air monitoring. Both participants became emotional during the heated argument (Tr. 171-172, 985, 1100). If said by IH Sweeney, the statement was clearly inappropriate. However, it does not show that the inspection was motivated by discriminatory purposes. In this context, it is not an indication of prejudice or basis. This conclusion is also bolstered by listening to two days of IH Sweeney's testimony and observing his demeanor in the courtroom. He did not appear biased or show a lack of impartiality.

Furthermore, the facts offered by the Secretary establish a prima facie case of alleged violations. There is no showing that the Secretary's evidence was coerced, misleading or fraudulently obtained. Much of the evidence is based on observations, air monitoring data and employee interviews. John Jagars, an employee interviewed by IH Sweeney, testified that his written

statement reflected what was said and was not coerced in any way (Tr. 1345-1346, 1392-1393). Allstate is not relieved of its responsibility to comply with the Act.

Allstate Was the Employer

Allstate asserts that it was not the employer on the project. It claims that American Painting & Contracting, Inc. (American), was the employer. Under the management agreement with Allstate, American provided all of the services, equipment and supervision necessary for Allstate to complete the bridge painting project. Specifically, American provided (1) the on-site supervisory services of Michael Katsourakis and Anthony Katsourakis, both of whom are in American's management; (2) the payroll services, including payroll tax preparation, bank deposits, contributions to employee health and welfare funds, payment of union dues, and the preparation of certified payroll reports; (3) all materials, equipment, tools, management, and skills needed to perform the job in a timely manner; (4) all documentation necessary for regular payments to the project account; (5) performance and payment bonds to Allstate; and (6) a sufficient number of laborers to complete the services required under the subcontract. The contract payments were deposited in an Allstate project account, but the only authorized signatures on the account were Ethel Katsourakis, Anthony Katsourakis and Michael Katsourakis, all principals of American (Exh. C-2; Tr. 120-125, 200-202). In exchange, Allstate received a percentage of the proceeds from the subcontract.

Under its subcontract agreement, however, Allstate was the employer ultimately and contractually responsible for performing the work on the project. The responsibility for assuring the completion of the work remained with Allstate. Allstate received the subcontract because of its status as a disadvantaged business enterprise. Nick Hazinakis, president of Allstate, signed the subcontract agreement binding Allstate "to furnish all labor, materials, equipment, tools, management, skills and instrumentalities" necessary to fully and timely complete the project (Exh. C-1; Tr. 21). Allstate remained contractually responsible for the project.

Also, the management agreement with American provided that "Allstate wishes to hire American Painting Company, Inc. (herein referred to as "American"), to provide management services to assist Allstate in the completion of its responsibilities set forth in the Subcontract Agreement with Velotta" (Exh. C-2). The employees working on the project performing abrasive

blasting and painting were specifically designated as employees of Allstate under the management agreement. The agreement provided that American will:

> [s]elect and secure for Allstate a sufficient number of laborers to complete the services required by the Subcontract Agreement, however, such laborers shall be employees of Allstate.

The employees were paid with checks from Allstate's account (Tr. 200). The persons (Anthony Katsourakis and Michael Katsourakis) supervising the work of Allstate's employees, although owners of American, contracted to provide their supervisory skills to complete Allstate's project (Exh. C-2; Tr. 25). They acted as agents of Allstate and exercised their supervisory authority on behalf of Allstate.

The Act and OSHA regulations place the burden of compliance on the employer. An employer cannot shift its responsibility for the health and safety of its employees. *Pride Oil Well Service,* 1991-1993 CCH OSHD ¶ 29,807, p. 40,587 (1992). With the exception of Anthony Katsourakis and Michael Katsourakis, all of the employees who performed abrasive blasting and painting activities on this project and were exposed to the hazards alleged were paid by and identified as employees of Allstate (Exhs. C-3, C-57; Tr. 23, 381-382). The safety programs and training materials used on the project identified Allstate as the employer (Exhs. C-8, R-10, R-11, R-12, R-13, R-14, R-55). The management agreement states that American shall provide to Allstate services necessary to assist Allstate in its compliance with OSHA requirements, "including any requirements involving paint removal and the Interim Lead Standard" (Exh. C-2). The agreement is clear that it is Allstate who must comply with OSHA requirements on the project.

The key factor in determining whether a party is an employer is whether it has the right to control the work involved. An employer is liable for violations which it has the authority to correct, whether or not it in fact has exercised that authority. The control of the employees' activities can be shared by more than one employer. *Sam Hall & Sons, Inc.*, 1980 CCH OSHD ¶ 24,927 (1980); *Del-Mont Construction Co.*, 1981 CCH OSHD ¶ 25,324 (1981).

Allstate was properly cited by OSHA as a responsible employer for OSHA purposes. The Secretary is empowered with the "broad prosecutorial discretion" in deciding who to prosecute for

violations of the Act. *DeKalb Forge Co.*, 13 BNA OSHC 1146, 1153 (No. 83-299, 1987). Allstate's motion to dismiss is denied.

The Validity of the Air Monitoring Results

IH Sweeney conducted air monitoring during Allstate's abrasive blasting operations on two dates and at two separate bridge locations (Tr. 925-926, 941). His air monitoring found that three employees performing abrasive blasting and one employee vacuuming inside the containment were exposed to airborne levels of cadmium, lead, inorganic arsenic, manganese and chromium which, in some cases, exceeded the permissible exposure limits or threshold limit values set by OSHA.

Allstate argues that the air monitoring results are invalid because the monitoring samples were contaminated by dust and grit inadvertently entering the monitoring cassettes when the equipment fell off during monitoring. Also, Allstate notes that IH Sweeney failed to (1) observe the employees wearing the monitoring equipment inside the containment, (2) record pump information, and (3) place the monitoring cassette within the employee's breathing zone. These failures further affected the monitoring results.

To conduct air monitoring, OSHA used an MSA air sampling pump, trigon tubing and a double-A mixed cellulose-type filter resting on a backup pad inside a plastic cassette with a diameter of 37 millimeters. The cassette was attached to the back of the employee's blasting helmet pointing downward and the pump was clipped to the employee's belt. Any airborne particles of possible contaminants are collected on the filter as the pump draws air from the surrounding area through a small inlet hole in the plastic cassette. The captured air passes through the filter, which collects the particles for analysis. The pump has a floating ball or rotameter which sets a continuous flow rate (Exh. R-25; Tr. 942-943).

Abrasive blasting is performed while the employee stands on narrow scaffolding placed under the steel girders. The blaster moves along the scaffold and gets into every conceivable position (Tr. 646-647, 1224, 1381). John Jagars, the employee performing abrasive blasting on May 20, 1997, described leaning up against steel beams, sitting on the scaffold while straddling it, and laying with his back on the scaffold (Tr. 1379-1382). Jagars was sampled for approximately five

hours and refused to wear the monitoring equipment longer because it was bothersome and he was getting into tighter areas (Tr. 970, 1223). The other abrasive blasters on June 4, Tony Xipolitas and Mike Mavroudis, were observed working under similar conditions (Tr. 1590-1591). Steve Badurik, the groundsman who was also monitored, was observed vacuuming on his hands and knees (Tr. 1592).

According to John Jagars, during his monitoring, the hose detached from the pump, the cassette came loose and the whole unit fell to the floor of the containment (Tr. 1387-1388, 1400-1401). He also stated that he set the monitoring unit on the scaffold and reattached it when leaving the containment (Tr. 1402). After exiting the containment, Jagars testified that he took his Bullard helmet off and laid it on the ground, apparently while the pump continued to run (Tr. 1375-1376, 1583-1584). Sweeney agreed that Jagars "might have on that one occasion gotten his stuff off very, very quickly before I could turn it off and cap it" (Tr. 1334-1335).

George Levendis, operator of the System 10 blasting machine on June 4, testified that he observed the monitoring pumps and cassettes continually falling off the employees (Tr. 1581-1582, 1588-1589). He also stated that the cassette on Steve Badurik, groundsman, was vacuumed into the recycling unit and had to be retrieved (Tr. 1592-1593).

There is no dispute that IH Sweeney was not inside the containment to observe what was happening (Tr. 951). However, having considered the testimony and reviewed the sampling data, Allstate's arguments as to the validity of OSHA's monitoring results is rejected. The testimony of John Jagars and George Levendis is found unreliable and overstated. During the hearing, they appeared hostile, and their testimony was unclear and in some cases erroneous. For example, Levendis identified Virgil Girten among those whose pumps he claimed to have retrieved. However, Girten was never sampled by OSHA (Tr. 1271, 1580, 1605-1606, 1611). Also, Levendis testified to retrieving a pump from within the System 10 by opening a door without turning the equipment off (Tr. 1592-1593, 1617). However, the person involved in designing and selling the System 10 testified that the door must be closed for the system to operate (Tr. 825).

IH Sweeney did note in his sampling records several incidents when the monitoring cassette fell or came loose and needed to be reattached (Exhs. C-21, C-22; Tr. 952-955). However, those incidents were taken into account when recommending the citations by pre- and post-calibrating the

flow rates, periodically checking the pumps and filter for debris, frequently changing filters and adjusting the TWA calculations (Tr. 946-949, 950, 952, 956-957, 961, 1327-1328).

IH Sweeney observed the condition of the pumps and cassettes before, during and after each sampling and documented anything of concern (Exhs. C-21, C-22). One sample was discarded because it was damaged. The cassettes he retrieved were in the same location and same condition as when he originally attached them (Tr. 951, 953-954, 961-962, 1323).

Ray Abel, supervisory chemist from OSHA's Salt Lake City Laboratory, testified that employees in the lab noticed nothing wrong in the condition of the cassettes or filters (Exhs. C-23, C-24; Tr. 464, 479, 482, 484-485). The laboratory would have detected air versus non-air contamination (Tr. 1228). Abel described the quality control procedures in his laboratory to insure the integrity of the analysis. His review of the laboratory analysis did not show that any grit was detected on any of the samples (Tr. 610-611). Edward Foley, Allstate's expert, saw nothing in the analytical reports provided by the laboratory to suggest that the samples were contaminated (Tr. 1503).

Also, the cassettes which fell as described by Jagars and Levendis may have been one of the cassettes placed inside the blasting helmet and not considered by OSHA for exposure levels (Tr. 962). Allstate had requested an additional cassette inside the employee's blasting helmet. Further incidents such as disconnected pump tubing, a dead pump battery, and a destroyed pump more likely would have resulted in lower recorded levels of contaminants than reality. Under such conditions, the pump would cease drawing air through the filter (Tr. 606, 608-609, 1232, 1236, 1329).

Allstate's additional arguments involving compliance with the OSHA technical manual are speculative as to the affect on the monitoring results. There is no dispute that IH Sweeney did not fully comply with recommended practices of the technical manual. However, the manual's purpose is to promote agency efficiency and not to create an administrative strait jacket. *Del Monte Corporation,* 9 BNA OSHC 2136, 2140 (No. 11865, 1981). The Commission has consistently found that the manual does not confer procedural or substantive rights on employers. *Caterpillar, Inc.*,15 BNA OSHC 2153, 2173 n. 24 (No. 87-922, 1993).

IH Sweeney complied with the intent of the OSHA technical manual. His failure to observe the blasting work and record pump information was not shown to have invalidated the monitoring results. Sweeney did not enter the containment because he lacked appropriate protective equipment. Similarly, although IH Sweeney did not record the pump reading during sampling, he did check the pumps to assure that the readings remained consistent.

With regard to the placement of the cassettes, the OSHA technical manual states, 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." However, there are exceptions, such as for welding fumes (Exh. R-25). Although OSHA is not required to absolutely follow the procedures outlined in its technical manual, the Review Commission accords the guidelines significance and it is probative evidence of the proper sampling technique. *FMC Corp*., 5 BNA OSHC 1707, 1710 (No. 13155, 1977).

The court is satisfied that, during abrasive blasting, placing the sampling cassette in the back of the blasting helmet is an acceptable location to ascertain the level of employee exposure. Also, such placement is more favorable to Allstate. The placement of the cassette on the shoulder would have resulted in higher results caused by the dust hurricane generated during the blasting operation. This was confirmed by the Secretary's expert, John Cignatta, who has regularly performed and reviewed monitoring data obtained during abrasive blasting (Tr. 598-599). He has sampled with the cassette behind the blasting helmet and considers the method more appropriate than placing the cassette on the shoulder (Exh. C-39). Cignatta, who has performed air monitoring on a number of abrasive blasting projects, found OSHA's monitoring results consistent with his expectation (Tr. 614-615, 617).

OSHA's monitoring results are accepted to establish the levels of lead, cadmium, inorganic arsenic, manganese and chromium exposure.

Alleged Violations

SERIOUS HEALTH CITATION (Inspection No. 180489918)

Items 1a, 13a, 20a, 25a and 26a - Alleged Violations

of §§ 1926.1127(c), 1926.1118(c), 1926.62(c)(1), and 1926.55(a)

The citation alleges that on June 4, 1997, two employees performing abrasive blasting and one employee vacuuming were exposed to airborne concentrations of cadmium (item 1a), inorganic arsenic (item 13a), and lead (item 20a) in excess of the permissible exposure level (PEL). Also, the citation alleges that an employee performing abrasive blasting on May 20, 1997, was exposed to lead in excess of the PEL and one employee performing abrasive blasting on June 4, 1997, was exposed to airborne manganese (item 25a) and chromium (item 26a) at concentration levels which exceeded the threshold limit value (TLV).

Section 1926.1127(c) provides:

> The employer shall assure that no employee is exposed to an airborne concentration of cadmium in excess of five micrograms per cubic meter of air (5µg/m³), calculated as an eight-hour time-weighted average exposure (TWA).

Section 1926.1118(c) provides:

> The employer shall assure that no employee is exposed to inorganic arsenic at concentrations greater than 10 micrograms per cubic meter of air (10µg/m³), averaged over any 8-hour period.

Section 1926.62(c)(1) provides:

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

Section 1926.55(a) provides:

> Exposure of employees to inhalation, ingestion, skin absorption, or contact with any material or substance at a concentration above those specified in the "Threshold Limit Values of Airborne Contaminants for 1970" of the American Conference of Governmental Industrial Hygienists, shall be avoided. See Appendix A to this section.[3]

[3] The TLV is 5µg/m³ for manganese and 1µg/m³ for chromium (§ 1926.55, Appendix A). When a ceiling limit is established, an employee is not permitted to exceed the limit for any duration of time, no matter how short, unless administrative or engineering controls are first implemented (Tr. 1052-1053).

The May 20, 1997, air monitoring was performed at a Core-10 bridge (GRE-675-0895) and one employee (John Jagars) was sampled. Jagars' monitoring results showed lead exposure outside the helmet[4] of 163 µg/m³, arsenic exposure of 8.3 µg/m³ and cadmium exposure of 1.63 µg/m³ calculated on an 8-hour TWA (Exhs. C-21, C-29, C-43, C-59; Tr. 972-973).

On June 4, 1997, air monitoring was also performed at the railroad bridge (GRE-675-0615) on abrasive blasters Tony Xipolitas and Mike Mavroudis and groundsman Steve Badurik (Tr. 974). The monitoring results for Tony Xipolitas showed a lead exposure of 3,170 µg/m³, arsenic exposure of 17.3 µg/m³, and cadmium exposure of 39 µg/m³ calculated on an 8-hour TWA. Xipolitas' monitoring also showed a chromium exposure of 1.26 µg/m³. The air monitoring of Mike Mavroudis found a lead exposure of 2,500 µg/m³, arsenic exposure of 101 µg/m³, and cadmium exposure of 51.5 µg/m³, calculated on an 8-hour TWA. Mavroudis' monitoring also found exposure to manganese of 12 µg/m³ for 116 minutes and 110 µg/m³ for 63 minutes. The air monitoring results for Steve Badurik showed a lead exposure of 271 µg/m³, arsenic exposure of 15.2 µg/m³, and cadmium exposure of 5.83 µg/m³ (Exhs. C-22, C-30, C-31, C-32, C-43, C-59; Tr. 978-979, 1044-1045, 1053, 1055).

There is no dispute that exposure to lead, cadmium, inorganic arsenic, manganese and chromium can cause serious health problems. Lead exposure is known to cause birth defects and adverse affects to the blood forming system, reproductive system, nervous system and urinary system (Tr. 980-981, 994). Exposure to cadmium is known to cause cancer, kidney damage and lung damage (Tr. 981). Cadmium can be ingested or inhaled (Tr. 982). Exposure to arsenic can cause lung cancer. It is also a systemic poison (Tr. 981). Manganese causes problems with the central nervous system and adverse behavioral effects (Tr. 993). Chromium can produce nodular pulmonary disease and reduced lung function (Tr. 982).

The record indicates that such airborne contaminants are reasonably anticipated during abrasive blasting on bridges. John Cignatta, the Secretary's expert, testified that a bridge painted with a zinc rich prime coat, such as the railroad bridge (GRE-675-0615), always has lead present in

[4] At the request of Allstate, air monitoring was also performed inside the blasting helmet, which results were recorded but are not considered appropriate for determining employee exposure during blasting operations (Exh. C-43, R-37; Tr.983, 985).

the zinc. Also, the paint on the bridge was peeling, suggesting that additional coats containing lead may have been present (Tr. 548-549). He identified cadmium and arsenic also as a very common additive in older paints (Tr. 549-552). Manganese and chromium were described as trace alloy contaminants found in the bridge steel and the steel grit used for abrasive blasting (Tr. 550-551). According to John Cignatta, old railroad bridges would always concern him because of the possible presence of such heavy metals (Tr. 551-552).

On May 15, 1997, Allstate contracted Aapex Analytical, Inc., to conduct air monitoring on the project (Exh. C-5). The sampling time was approximately 242 minutes, and one sample involved the same railroad bridge, GRE 675-0615.[5] Aapex's air monitoring found the presence of lead, but identified the lead exposure levels for John Jagars and Mike Mavroudis to be less than 21µg/m³.

Aapex's monitoring results do not show Allstate acted with reasonable diligence to conclude that the contaminants were not present in levels exceeding the applicable limits. Allstate does not dispute that Aapex did not perform full-shift monitoring and did not test for air contaminants, other than lead (Allstate Brief, p. 36; Tr. 39-40). Aapex's air monitoring was not representative. *See* § 1926.62(d)(1)(iv). Allstate should have known of the presence of cadmium, inorganic arsenic, manganese and chromium.

Other than disputing the reliability of the monitoring, Allstate does not raise other arguments. Items 1a, 13a, 20a, 25a and 26a are affirmed.

Items 1b, 13b, 20b, 25b and 26b - Alleged Violations
§§ 1926.1127(f)(1)(i), 1926.118(g)(1)(i), 1926.62(e)(1), and 1926.55(b)

The citation alleges that on June 4, 1997, the containment used to perform abrasive blasting at the railroad bridge (GRE-675-0615) had no high volume dust collection system or local exhaust ventilation system to minimize employee exposures to airborne cadmium (item 1b), inorganic arsenic (item 13b), lead (item 20b), manganese (item 25b) and chromium (item 26b).

Section 1926.1127(f)(1)(i) under the cadmium standards provides in part:

[5] The other air sample was at another bridge, GRE 675-0634, not involved in this case.

> the employer shall implement engineering and work practice controls to reduce and maintain employee exposure to cadmium at or below the PEL, except to the extent that the employer can demonstrate that such controls are not feasible.

Similarly, engineering and work practice controls are required to be implemented whenever feasible to reduce employees' exposure below the applicable PEL or TLV, under the inorganic arsenic standard at § 1926.1118(g)(1)(i), under the lead standard at § 1926.62(e)(1), and for other airborne contaminants such as manganese and chromium under the standard at § 1926.55(b). As discussed, the record establishes that on June 4, Mavroudis, Xipolitas and Badurik were exposed to cadmium, inorganic arsenic and lead in excess of the applicable PEL, and manganese and chromium in excess of their TLV.

There is no dispute that the use of a dust collection system or local exhaust ventilation system minimizes the abrasive blaster's exposure (Tr. 997, 1029-1030, 1045-1046). Allstate recognizes the need for ventilation systems as an engineering control in its lead and cadmium programs (Exhs. C-61, R-55).

The issue in dispute is whether Allstate used a dust collection system during the June 4 abrasive blasting operation.[6] The Secretary maintains that there was no dust collection system. IH Sweeney testified that in checking the containment, he did not see a dust collection system (Tr. 974, 1045, 1053, 1094, 1255, 1312-1313). He also stated that Anthony Katsourakis and Steve Badurik agreed during their interviews (Tr. 974). His notes show Badurik as stating, "I don't recall any ventilation inside the containment on the day I was sampled by OSHA, 6-4-97" (Exh. C-56).

Allstate claims that dust collection was used on June 4. According to John Jagars, an abrasive blaster, on May 20, 1997, a dust collector was operating any time there was blasting, otherwise the visibility would be very poor (Tr. 1355, 1397). Edward Luba, groundsman and quality control, testified that he set up the dust collector and hoses at both the May 20 and June 4 containments. As far as he knew, the dust collector was operating (Tr. 1535-1536). George Levendis, also a groundsman who operates the System 10, was certain the dust collection system was

[6] There is no dispute that a dust collection system was in use during the May 20 abrasive blasting (Tr. 971, 1561).

operating (Exh. R-56; Tr. 1576,1587). Another employee, Scott Whitmyer, who performed painting, sandblasting and rigging, testified that he rigged the dust collection equipment and hoses for the containment. However, he was not on the project on June 4 during OSHA's air monitoring (Tr. 1656-1657). Anthony Katsourakis also testified that dust collection equipment was at the containment (Exh. R-57; Tr. 1716-1717).

The weight of the evidence indicates, however, that a dust collection system was not operating during the June 4 abrasive blasting. IH Sweeney did not see a system during his approximate 8 hours on site performing air monitoring. Sweeney has conducted a number of inspections involving abrasive blasting and is familiar with dust collection systems[7] (Tr. 924, 1079-1081). The testimony of Allstate's witnesses is conflicting as to who supposedly set up the system (Luba or Whitmyer) and involves employees who were not present during OSHA's air monitoring (Jagars, Whitmyer and Katsourakis). Also, the reliability of Levendis' testimony has previously been discussed.

Even if Allstate's dust collection system was operating, John Cignatta, the Secretary's expert, testified that additional engineering controls were feasible. He recommended a smaller containment, a more effective ventilation system with a dust collector and louvers (Exh. C-53; Tr. 561, 565-566, 745-746). If implemented, Cignatta anticipated a 50-percent reduction in the employees' exposure levels (Tr. 749). Allstate did not challenge Cignatta's recommended additional engineering controls. Allstate is required to implement all feasible controls (Tr. 997-998). Items 1b, 13b, 20b, 25b and 26b are affirmed.

Items 1c and 13c - Alleged Violations of §§ 1926.1127(f)(5)(i) and 1926.1118(g)(2)(i)

The citation alleges that Allstate did not implement a written compliance program for cadmium (item 1c) or inorganic arsenic (item 13c) prior to the commencement of the project.

Section 1926.1127(f)(5)(i) provides:

[7] The fact that IH Sweeney was not able to identify an abrasive recycling machine under the brand name of System 10 does not affect his credibility (Tr. 1093-1094).

> Where employee exposure to cadmium exceeds the PEL and the employer is required under paragraph (f)(1) of this section to implement controls to comply with the PEL, prior to the commencement of the job the employer shall establish and implement a written compliance program to reduce employee exposure to or below the PEL. To the extent that engineering and work practice controls cannot reduce exposures to or below the PEL, the employer shall include in the written compliance program the use of appropriate respiratory protection to achieve compliance with the PEL.

Section 1926.1118(g)(2)(i) under the inorganic arsenic standard provides:

> The employer shall establish and implement a written program to reduce exposures to or below the permissible exposure limit by means of engineering and work practice controls.

The Secretary argues that a copy of Allstate's cadmium compliance program was not provided to OSHA during the inspection (Tr. 998-999).

Although no reason was given for not furnishing OSHA with a copy, Allstate offered its cadmium compliance program at the hearing (Exh. R-55). The written program describes the use of engineering controls and respirator protection. The Secretary identifies no deficiencies. The fact that OSHA was not given a copy does not establish a violation.

On the other hand, a copy of Allstate's arsenic compliance program was requested and received by OSHA (Exh. C-60). According to IH Sweeney, Allstate failed to use the engineering controls on June 4, 1997, required by its written program.

The failure to use the engineering controls, which is the subject of another citation, does not mean that Allstate failed to have a written program. However, Allstate's written program did not contain, as required, any plans and studies used to determine the methods selected for reducing arsenic exposure, reports of technology considered in meeting the PEL, monitoring data, or a schedule for implementing engineering controls (Tr. 1034). Allstate does not dispute these deficiencies in its written program (Allstate Brief, p. 34).

Item 1c is vacated. Item 13c is affirmed.

Item 2a - Alleged Violation of § 1926.1127(d)(1)(i)

The citation alleges that Allstate did not perform any scrape or other sampling to detect the presence of cadmium. Section 1926.1127(d)(1)(i) provides:

> Prior to the performance of any construction work where employees may be potentially exposed to cadmium, the employer shall establish the applicability of this standard by determining whether cadmium is present in the workplace and whether there is the possibility that employee exposures will be at or above the action level. The employer shall designate a competent person who shall make this determination. Investigation and material testing techniques shall be used, as appropriate, in the determination. Investigation shall include a review of relevant plans, past reports, material safety data sheets, and other available records, and consultation with the property owner and discussions with appropriate individuals and agencies.

Allstate concedes that no determination for cadmium was made on the project (Allstate Brief, p. 29). The air monitoring performed by Aapex Analytical, Inc., on behalf of Allstate sampled for the presence of lead only (Exh. C-5, Tr. 39-40). Allstate failed to perform air or scrape sampling to determine the presence of cadmium (Tr. 1000-1001). Also, there is no showing that it reviewed relevant plans, past reports, material safety data sheets (MSDS), other records, or consulted with state officials to determine if cadmium was present. Item 2a is affirmed.

Item 2b - Alleged Violation of § 1926.1127(d)(2)(i)

The citation alleges that Allstate did not conduct air sampling to measure airborne cadmium levels for employees during the abrasive blasting operation. Section 1926.1127(d)(2)(i) provides in part:

> where a determination conducted under paragraph (d)(1)(i) of this section shows the possibility of employee exposure to cadmium at or above the action level, the employer shall conduct exposure monitoring as soon as practicable that is representative of the exposure for each employee in the workplace who is or may be exposed to cadmium at or above the action level.

The air sampling performed for Allstate on this project related only to lead exposure (Exh. C-5). Allstate offered no evidence that it considered or sampled for the presence of cadmium. Also, the sampling done by Aapex was not representative because it did not include the employee vacuuming the used steel grit.

Allstate's argument that since no determination was made, as required in item 2a above, there can be no violation of § 1926.1127(d)(2)(i), is rejected (Allstate Brief, p. 29). The standards address separate abatements. Section 1926.1127(d)(1)(i) involves a determination prior to commencing work of the possibility of cadmium exposure. Section 1926.1127(d)(2)(i) requires representative air monitoring to determine the exposure level for each employee. Item 2b is affirmed.

Items 3a and 15a - Alleged Violations of §§ 1926.1127(e)(1) and 1926.1118(f)(1)

The citation alleges that a cadmium (item 3a) or an arsenic (item 15a) regulated area was not established for each abrasive blasting containment.

Section 1926.1127(e)(1) provides:

> The employer shall 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 permissible exposure limit (PEL).

Similarly, § 1926.1118(f)(1) provides:

> The employer shall establish regulated areas where worker exposures to inorganic arsenic, without regard to the use of respirators, are in excess of the permissible limit.

The Secretary argues that Allstate did not establish a regulated area to prevent cadmium or arsenic exposure to other employees (Tr. 1037-1039). There is no dispute that Allstate's abrasive blasting was performed inside a containment consisting of tarps hung from the bridge. Access to the containment was limited to employees properly clothed and equipped with personal protective

equipment (Exhs. R-32, R-37). The employees who entered the containment wore Bullard air supply helmets with capes, gloves, extra clothing and work boots (Tr. 938).

OSHA defines a "regulated area" under the cadmium standard as "an area demarcated by the employer where employee's exposure to airborne concentrations of cadmium exceeds, or can reasonably be expected to exceed the permissible exposure limit (PEL)." *See* definitions at § 1926.1127(b). Similarly, under the arsenic standard, a regulated area is defined as "an area demarcated and segregated from the rest of the workplace which minimizes the number of persons exposed to arsenic; where access is limited to employees wearing proper clothing and equipment including respirators and where the consumption of food or beverages is prohibited." *See* § 1910.1118(f).

As defined by OSHA, the containment used to perform the abrasive blasting was a regulated area. Access to Allstate's containment was limited to employees properly clothed and equipped with air feed respirators. There is no evidence that employees, not properly equipped, were permitted in the containment. Also, there is no evidence that employees consumed food or beverages inside the containment. Although the containment was erected to prevent the release of airborne lead into the environment, it also functioned to regulate employees' exposure to air contaminants, including cadmium and arsenic. Items 3a and 15a are vacated.

Items 3b, 15b and 24 - Alleged Violations of §§ 1926.1127(m)(2), 1926.1118(p)(2)(i) and 1926.62(m)(2)(i)

The citation (item 3b) alleges cadmium warning signs bearing the information that "DANGER. CADMIUM. CANCER HAZARD. CAN CAUSE LUNG AND KIDNEY DISEASE. AUTHORIZED PERSONNEL ONLY. RESPIRATORS REQUIRED IN THIS AREA" were not posted at the containments. Section 1926.1127(m)(2) provides:

> (i) Warning signs shall be provided and displayed in regulated areas. In addition, warning signs shall be posted at all approaches to regulated areas so that an employee may reach the signs and take necessary protective steps before entering the area.

Subsection (ii) identifies the information that must be on the warning sign.

The citation (item 15b) also alleges that arsenic warning signs were not posted at the containments where abrasive blasting was performed. Section 1926.1118(p)(2)(i) provides:

> The employer shall post signs demarcating regulated areas bearing the legend; DANGER INORGANIC ARSENIC CANCER HAZARD AUTHORIZED PERSONNEL ONLY NO SMOKING OR EATING RESPIRATOR REQUIRED

Further, the citation (item 24) alleges that lead warning signs were not posted where abrasive blasting was performed. Section 1926.62(m)(2)(i) provides:

> The employer shall post the following warning signs in each work area where an employees exposure to lead is above the PEL. WARNING LEAD WORK AREA POISON NO SMOKING OR EATING

IH Sweeney testified that he did not observe any warning signs "anywhere on the project" (Tr. 1002-1004, 1051). Allstate agrees that there were no posted arsenic warning signs (Allstate Brief, p. 34; Tr. 1037-1038). Also, Allstate does not dispute the lack of cadmium warning signs.

George Levendis, operator, testified that a lead warning sign was taped on the front of the System 10 (Tr. 1565). As stated, the testimony of Levendis is not reliable. There is no showing that a warning sign was posted at the entrance to the containment. By failing to properly post warning signs, employees were not advised of the precautions to take and the adverse health effects of cadmium, lead and arsenic. Items 3b, 15b and 24 are affirmed.

Items 4a, 4b and 4c - Alleged Violations of §§ 1926.1127(i)(1), 1926.62(g)(1) and 1926.1118(j)(1)

The citation alleges that Allstate did not provide employees with work shoes and outer protective clothing to prevent exposure to cadmium (item 4a), lead (item 4b) and arsenic (item 4c). Section 1926.1127(i)(1) provides in part:

> 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 prevents contamination of the employee and the employee's garments.

Section 1926.62(g)(1) provides:

> Where an employee is exposed to lead above the PEL without regard to the use of respirators, where employees are exposed to lead compounds which may cause skin or eye irritation (e.g. lead arsenate, lead azide), and as interim protection for employees performing tasks as specified in paragraph (d)(2) of this section, the employer shall provide at no cost to the employee and assure that the employee uses appropriate protective work clothing and equipment that prevents contamination of the employee and the employee's garments.

Section 1926.1118(j)(1) provides:

> Where the possibility of skin or eye irritation from inorganic arsenic exists, and for all workers working in regulated areas, the employer shall provide at no cost to the employee and assure that employees use appropriate and clean protective work clothing and equipment.

The related standards further identify the required protective work clothing and equipment, such as coveralls, gloves, boots, face shields and full-body work clothing.

IH Sweeney testified that certain employees wore only their own personal pants, which they purchased as outer protective clothing and that all employees wore their own personal work boots (Tr. 1005-1006). Based on written interview statements, the Secretary maintains that Virgil Girten wore his own clothing; and Girten, Xipolitas and Mavroudis wore their own work shoes (Exh. C-56). Girten, Xipolitas and Mavroudis did not testify.

The record fails to establish a violation. The Secretary's reliance on written interview statements is misplaced. The statements from Girten, Xipolitas and Mavroudis are unclear and not given under oath (Exh. C-56). For example, Girten states that Allstate "pays for the overalls." He also states later that "Tony (Katsourakis) makes available uniform style shirts and pants, but I wear jeans and sweatshirts that I purchase." Xipolitas also agrees that Allstate pays for the uniform shirt and pants. He does not discuss his work boots.

Also, the statements do not show whether the employees were asked if they were reimbursed for their purchases. The employees who did testify stated uniformly that their purchases of work boots and outer clothing were reimbursed by Allstate or they used the company credit card. John Jagars, abrasive blaster, testified that Tony Katsourakis reimbursed him for the purchase of boots

(Tr. 1348-1349, 1353-1354). Similarly, George Levendis, groundsman, testified that he was reimbursed (Tr. 1567). Scott Whitmyer, abrasive blaster and painter, and Edward Luba, groundsman, stated that they sometimes used the company credit card for purchases (Tr. 1537, 1634, 1655, 1694). Items 4a, 4b and 4c are vacated.

Items 6a, 6b and 6c - Alleged Violations of §§ 1926.1127(i)(3)(iii), 1926.1118(j)(2)(viii) and 1926.62(g)(2)(viii)

The citation alleges that at least two abrasive blasting employees exposed to cadmium (item 6a), arsenic (item 6b) and lead (item 6c) routinely used compressed air to blow off their clothing before eating lunch.

Section 1926.1127(i)(3)(iii) provides:

> The employer shall prohibit the removal of cadmium from protective clothing and equipment by blowing, shaking, or any other means that disperses cadmium into the air.

Section 1926.1118(j)(2)(viii) provides:

> The employer shall prohibit the removal of inorganic arsenic from protective clothing or equipment by blowing or shaking.

Section 1926.62(g)(2)(viii) provides:

> The employer shall prohibit the removal of lead from protective clothing or equipment by blowing, shaking, or any other means which disperses lead into the air.

John Jagars and Virgil Girten, in their written interviews, stated that they used compressed air to blow dust off their clothing before exiting the containment (Exh. C-56, Tr. 1009-1010). Jagars similarly testified at the hearing (Tr. 1355, 1374). Allstate does not dispute that employees used compressed air to blow off their clothing (Allstate Brief, p. 30; Tr. 80). Allstate's written lead program provides that "at no time will compressed air be used for cleanup outside the contained and ventilated area" (Exh. C-62).

Sweeney did not see compressed air being used. Since compressed air was used inside the containment, any cadmium, arsenic and lead was confined to the containment and collected by the dust ventilation system (Tr. 1270, 1355). The airborne concentrations of cadmium and lead were not "dispersed into the air." Inside the containment, employees wore Bullard air supply helmets, capes and protective clothing (Tr. 1270). After the employees exited the containment, George Levendis, groundsman, vacuumed them off using a HEPA vacuum (Tr. 1374, 1593). Also, Girten was not monitored and there was no evidence that Girten was exposed to any contaminated dust. Items 6a, 6b and 6c are vacated.

Item 7c - Alleged Violation of § 1926.62(i)(3)(ii)

The citation alleges that one employee exposed to lead did not shower at the end of the work shift. Section 1926.62(i)(3)(ii) provides:

> The employer shall assure, where shower facilities are available, that employees shower at the end of the work shift and shall provide an adequate supply of cleansing agents and towels for use by affected employees.

The Secretary relies on the interview statement of Virgil Girten, who told IH Sweeney that he did not regularly shower at the end of his shift (Exh. C-56; Tr. 1011-1012). Girten, who performed both abrasive blasting and painting work, stated that he preferred to shower in his motel room (Exh. C-56; Tr. 1362).

Girten did not testify and was not monitored for exposure to lead during OSHA's air monitoring. The employees who did testify stated that showers were available and used. Girten, in his statement, described the shower trailer as having "soap, shampoo, clean towels, warm water and separate lockers for clean street clothing" (Exh. C-56).

Allstate's policy required employees to shower (Exhs. C-61, C-62). If Girten was not showering, there is no showing that Allstate knew or should have known of Girten's failure to use the shower trailer. Also, there is no showing that Girten's painting work exposed employees to airborne lead concentrations which would require a shower (Tr. 1363-1364). Girten's statement is not clear whether he was referring solely to the blasting operations. Item 7c is vacated.

Item 8c - Alleged Violation of § 1926.62(i)(4)(iii)

The citation alleges that an abrasive blasting employee exposed to airborne lead failed to wash his face prior to eating lunch. Section 1926.62(i)(4)(iii) provides:

> The employer shall assure that employees whose airborne exposure to lead is above the PEL, without regard to the use of a respirator, wash their hands and face prior to eating, drinking, smoking or applying cosmetics.

The employees ate their lunch alongside the expressway (Tr. 1014). IH Sweeney testified that Virgil Girten, an employee performing abrasive blasting on May 20, 1997, stated that he did not wash his face prior to eating. He washed his hands (Exh. C-56; Tr. 1280). Sweeney observed Girten eating his lunch (Tr. 1012-1013).

The standard applies if the employee's exposure is above the PEL for lead. Virgil Girten was not monitored and his exposure level was not ascertained. Although Girten's exposure was not monitored, the Secretary argues that he performed the same job and was in the same containment as John Jagars, another employee performing abrasive blasting (Tr. 1013-1014). Jagars' air monitoring results showed lead exposure of 163 $\mu g/m^3$, three times higher than the PEL for lead. Although Jagars results are accepted, the record fails to establish that Girten's lead exposure exceeded the PEL. It was not shown that Girten was in the containment for the same amount of time, during the same periods and in the same locations as Jagars. IH Sweeney was not in the containment and did not observe Girten (Tr. 951).

Further, Allstate's written lead training program requires employees to wash their faces and hands prior to eating. It directs employees not to enter the eating area "until appropriate decontamination procedures have been completed, including washing their face and hands thoroughly" (Exh. C-62). There is no showing that Allstate was aware of Girten's failure to completely wash. Other employees did properly wash. Item 8c is vacated.

Item 9a, 9b, and 9c - Alleged Violations of §§ 1926.1127(j)(4)(ii), 1926.62(i)(4)(iv), and 1926.1118(m)(5)

The citation alleges that HEPA filtered vacuums were not provided or were not used by employees exposed to cadmium, lead, and arsenic to suction surface dust off their clothing before eating lunch.

Section 1926.1127(j)(4)(ii) provides:

> The employer shall assure that employees do not enter lunchroom facilities with protective work clothing or equipment unless surface cadmium has been removed from the clothing and equipment by HEPA vacuuming or some other method that removes cadmium dust without dispersing it.

Section 1926.62(i)(4)(iv) provides:

> The employer shall assure that employees do not enter lunchroom facilities or eating areas with protective work clothing or equipment unless surface lead dust has been removed by vacuuming, down draft booth, or other cleaning method that limits dispersion of lead dust.

Section 1926.1118(m)(5) provides:

> The employer shall provide facilities for employees working in areas where exposure, without regard to the use of respirators, exceeds 100 µg/m³ to vacuum their protective clothing and clean or change shoes worn in such areas before entering change rooms, lunchrooms or shower rooms required by paragraph (j) of this section and shall assure that such employees use such facilities.

A HEPA vacuum is a high efficiency particulate air purifying vacuum which prevents the dispersement of dust which may contain cadmium, lead and inorganic arsenic (Tr. 1015). OSHA's air monitoring establishes the presence of cadmium, lead and inorganic arsenic. Allstate's own monitoring showed lead was present (Exh. C-5).

IH Sweeney testified that Mike Katsourakis, supervisor, stated that prior to June 4, there was no HEPA vacuum (Exh. C-56; Tr. 1016). Sweeney was also told by Virgil Girten on May 19, 1997, and again on August 7, 1997, that there was no vacuum available on site (Exh. C-56; Tr. 1016). Mike Katsourakis and Girten did not testify.

Edward Luba, groundsman, testified that a HEPA vacuum was on site on June 4, 1997; and it was located on the back of the System 10 (Tr. 1536). Luba testified that the vacuum was also present at the containment on May 20, 1997. John Jagars, who was abrasive blasting on May 20,

recalled that Levendis used the HEPA vacuum to remove the dust from his protective clothing (Tr. 1374). He testified that the HEPA vacuum was on the back of the blast unit (Tr. 1369).

The record is not sufficient to find a violation. The sworn testimony of Luba and Jagars contradicts the hearsay statements made to IH Sweeney. Also, Sweeney's testimony is unclear whether a HEPA vacuum was present at the project on June 4, 1997. During his direct testimony, he concedes that he may have seen the HEPA vacuum (Tr. 1016). However, on cross- examination, he testified that he did not observe anyone using the HEPA vacuum on June 4 (Tr. 1281). Sweeney acknowledged that Mike Mavroudis and Tony Xipolitas, abrasive blasters, told him that they vacuum off their clothing before eating lunch (Tr. 1273, 1281). Items 9a, 9b and 9c are vacated.

Item 10a and 10b - Alleged Violation of §§ 1926.1127(l)(2)(ii) and 1926.1127(l)(4)(i)

The citation (item 10a) alleges that the 1997 medical examinations did not include blood and urine testing for cadmium and for Beta-2 microglobulin in urine. Two abrasive blasters did not receive initial medical tests. Also, the citation (item 10b) alleges that employees did not receive periodic medical examinations within 12 months after the initial examination.

Section 1926.1127(l)(2)(ii) provides:

> The initial medical examination shall include:
> (A) A detailed medical and work history, with emphasis on: Past, present, and anticipated future exposure to cadmium; and history of renal, cardiovascular, respiratory, hematopoietic, reproductive, and/or musculo-skeletal system dysfunction; current usage of medication with potential nephrotoxic side-effects; and smoking history and current status.

Section 1926.1127(l)(4)(i) provides:

> For each employee who is covered by medical surveillance under paragraph (l)(1)(i)(A) of this section because of current or anticipated exposure to cadmium, the employer shall provide at least the minimum level of periodic medical surveillance, which consists of periodic medical examinations and periodic biological monitoring. A periodic medical examination shall be provided within one year after the initial examination required by paragraph (l)(2) of this section and thereafter at least biennially. Biological sampling shall

> be provided at least annually either as part of a periodic medical examination or separately as periodic biological monitoring.

The standard requires an initial medical examination for all employees who "are or may be" exposed to cadmium above the action level as part of a medical surveillance program. The action level for cadmium is an airborne concentration of 2.5 µg/m³, calculated as an 8-hour TWA. The initial medical examination includes a test of cadmium and Beta-2 microglobulin in urine and blood. *See* 1926.1127(l)(2)(ii). The examination determines how a person's body may react to the cadmium exposure (Tr. 1020-1021). Within one year after the initial examination, a follow-up medical examination is also to be provided.

There is no dispute that Girten and Jagars were performing abrasive blasting on May 20. Jagars' air monitoring results showed cadmium exposure of 1.63 to 2.6 µg/m³ calculated for an 8-hour TWA (Exh. C-59). As discussed, Girten's exposure was not monitored.

The record shows that no initial medical examination was given to Virgil Girten or John Jagars. Allstate presented no documentation showing that Girten or Jagars received an initial medical examination. Also, other employees (Mike Mavroudis and Tony Xipolitas) were not shown to have received an analysis of cadmium in urine or Beta-2 microglobulin in urine in April, 1996 (Exh. C-9)

Although Tony Xipolitas, Mike Mavroudis and Steven Badurik received initial medical examinations in April, 1996, they did not receive follow-up exams within 12 months, as required (Tr. 1019-1020). Their follow-up examinations were not until June 19, 1997 (Exh. C-10, R-42). Allstate does not dispute the lack of medical examinations (Allstate Brief, p. 32). Items 10a and 10b are affirmed.

Items 11a, 11b, 19a and 19b - Alleged Violations of §§ 1926.1127(m)(4)Ii), 1926.1127(m)(4)(iv)(A), 19261118(o)(1)(i) and 1926.1118(o)(2)(i)

The citation alleges that cadmium (item 11a) and arsenic (item 19a) training programs were not provided to employees who worked inside the containment. Also, copies of OSHA's cadmium (item 11b) and arsenic (item 19b) standards and their appendices were not made readily available to the employees (item 11b).

Section 1926.1127(m)(4)(i) provides:

> The employer shall institute a training program for all employees who are potentially exposed to cadmium, assure employee participation in the program, and maintain a record of the contents of such program.

Section 1926.1127(m)(4)(iv)(A) provides:

> The employer shall make a copy of this section and its appendices readily available to all affected employees and shall provide a copy without cost if requested.

Section 1926.1118(o)(1)(i) provides:

> The employer shall institute a training program for all employees who are subject to exposure to inorganic arsenic above the action level without regard to respirator use, or for whom there is the possibility of skin or eye irritation from inorganic arsenic. The employer shall assure that those employees participate in the training program.

Section 1926.1118(o)(2)(i) provides:

> The employer shall make readily available to all affected employees a copy of this standard and its appendices.

IH Sweeney testified that based on his interview, Virgil Girten had not received cadmium and arsenic training (Exh. C-56; Tr. 1021, 1041-1042). Sweeney's review of Allstate's training records failed to show any training on cadmium or arsenic (Tr. 1021-1022, 1042). Allstate's records described the training in lead and respiratory protection (Exhs. C-62, R-10, R-11, R-12). Also, during the OSHA inspection, Edward Luba, quality control, was not able to produce a copy of OSHA's standards. According to IH Sweeney, he was told that a copy was in Luba's motel room (Tr. 1023).

There is no dispute that Allstate has a written cadmium and arsenic program (Exh. C-60, R-55). Girten did not testify and his written statement was not under oath. Also, as discussed, Girten's exposure was not monitored.

The record shows that training was provided to employees, including Girten (Tr. 1396, 1532, 1541). Employees testified that they had received cadmium and arsenic training and that Girten participated in the training (Tr. 1396, 1532). Despite a lack of training records, Luba testified that he provided lead training prior to the 1997 bridge painting season, and it covered cadmium and

arsenic (Tr. 1531-1532). As part of Allstate's lead training manual, which Luba used for training, there is a section describing the health affects of cadmium and arsenic exposure (Exh. C-62, Section III; Tr. 1541). The other sections in the training manual deal with respiratory protection, medical surveillance, and engineering and work practice controls which are also applicable to cadmium and arsenic exposure.

Also, an employer is required to make copies of the cadmium and arsenic standards available to employees if the employees are exposed above the action limit. IH Sweeney requested a copy of the standards from Ed Luba, who failed to produce a copy (Tr. 1043). A copy was not produced at the site (Tr. 1043).

However, a copy of the standards were in the motel where the employees, except Jagars, stayed (Tr. 1043, 1599). It was not shown that the standards were not readily available as required. The location of the motel was not identified. Also, the record indicates that a copy of the standards may have been available in the job trailer (Tr. 1599). If employees wanted to see the regulations, they knew they should see Ed Luba (Tr. 1598-1599). Items 11a, 11b, 19a and 19b are vacated.

Items 12a, 12b and 12c - Alleged Violations of §§ 1926.1127(m)(3), 1926.1118(j)(2)(vii) and 1926.62(g)(2)(vii)

The citation alleges that warning labels for cadmium (items 12a), arsenic (item 12b) and lead (item 12c) were not attached to bags and barrels in which used outer protective clothing and equipment were discarded.

Section 1926.1127(m)(3) provides:

> Shipping and storage containers containing cadmium, cadmium compounds, or cadmium contaminated clothing, equipment, waste, scrap, or debris shall bear appropriate warning labels, as specified in paragraph (m)(3)(ii) of this section.

Section 1926.1118(j)(2)(vii) provides:

> The employer shall assure that the containers of contaminated protective clothing and equipment in the workplace or which are to be removed from the workplace are labeled as follows: CAUTION: Clothing contaminated with inorganic arsenic; do not remove dust by blowing or shaking. Dispose of inorganic arsenic contaminated was

> water in accordance with applicable local, State or Federal regulations.

Section 1926.62(g)(2)(vii) provides in part:

> The employer shall assure that the containers of contaminated protective clothing and equipment required by paragraph (g)(2)(v) of this section are labeled.

Warning labels on containers used for the disposal of contaminated clothing advise employees of the type of contaminant (lead, arsenic or cadmium), the possible health affects and certain precautions, such as not to blow or shake clothing.

The Secretary does not dispute that Allstate used bags or barrels for discarded, contaminated clothing at the end of the work shift. The bags or barrels did not have cadmium, arsenic or lead warning labels. According to Girten, the barrels were labeled as "contaminated" (Exh. C-56; Tr. 1025-1027, 1317-1318).

Allstate does not dispute that the containers lacked the required warning labels (Allstate Brief, p. 33). Allstate's written lead program provides that reusable clothing is collected at the end of each day in bags or containers which are properly labeled as contaminated clothing (Exh. C-62). The air monitoring performed for Allstate showed the presence of lead on the project (Exh. C-5). Allstate should have been aware of the presence of cadmium and arsenic. Items 12a, 12b and 12c are affirmed.

Item 14 - Alleged Violation of § 1926.1118(e)(2)

The citation alleges that no air sampling for arsenic was performed by or for Allstate. Section 1926.1118(e)(2) provides:

> Each employer who has a workplace or work operation covered by this standard shall monitor each such workplace and work operation to accurately determine the airborne concentration of inorganic arsenic to which employees may be exposed.

Allstate acknowledges that it did not monitor for arsenic (Allstate Brief, p. 34). It monitored only for lead (Exh. C-5; Tr. 1036). According to Cignatta, it is common to find arsenic on bridge blasting projects (Tr. 550). There is no indication that Allstate made any effort to determine if

arsenic was present on the project. OSHA's air monitoring showed the presence of inorganic arsenic above the PEL and that three employees were exposed. Item 14 is affirmed.

Item 16 - Alleged Violation of § 1926.1118(m)(3)(i)

The citation alleges that an appropriate lunchroom facility for employees exposed to inorganic arsenic was not provided. Section 1926.1118(m)(3)(i) provides:

> The employer shall provide for employees working in regulated areas, lunchroom facilities which have a temperature controlled, positive pressure, filtered air supply, and which are readily accessible to employees working in regulated areas.

Allstate does not dispute that there was no lunchroom facility (Allstate Brief, p. 34-35). Employees ate lunch on the grass along the side of the expressway. IH Sweeney observed employees on June 4, including abrasive blasters Tony Xipolitas and Mike Mavroudis, as well as their helper Steve Badurik, eating their lunches on the grassy area (Tr. 1039-1040). Xipolitas, Mavroudis and Badurik were exposed to inorganic arsenic. Item 16 is affirmed.

Item 18a and 18b - Alleged Violations of §§ 1926.1118(n)(5) and § 1926.1127(l)(9)

The citation alleges that appropriate information required by the inorganic arsenic (item 18a) and cadmium (item 18b) standards was not provided to physicians who performed medical examinations on employees. Sections 1926.1118(n)(5) and 1926.1127(l)(9) require that an employer provide the examining physician with certain information, including a copy of the arsenic and cadmium standards, a description of the affected employee's duties, the employee's anticipated exposure level, a description of protective equipment, and information from previous medical examinations.

After he requested all information provided to the employees' examining physician, IH Sweeney was only provided a copy of the OSHA lead standard (Tr. 1040-1041). There is no showing that the physicians were provided information about cadmium and arsenic exposures (Allstate Brief, p. 35). Items 18a and 18b are affirmed.

Item 21 - Alleged Violation of § 1926.62(d)(1)(iv)

The citation alleges that the air sampling performed by Aapex Analytical on May 15, 1997, was not representative of employees' exposures to lead. Section 1926.62(d)(1)(iv) provides:

> Full shift personal samples shall be representative of the monitored employee's regular, daily exposure to lead.

Whenever an employer has employees who may be subject to an occupational exposure to lead, the employer must make an initial determination if the employee may be exposed above the action level. Initial monitoring must include full shift personal samples that are representative of the employee's regular daily exposure to lead.

Allstate contracted with Aapex Analytical to perform initial air monitoring. Aapex performed its air monitoring on May 15, 1997, and monitored two employees for 241 and 242 minutes. Aapex recorded lead levels of less than 21 $\mu g/m^3$ (Exh. C-5).

Allstate acknowledges that Aapex's air monitoring did not comply because it was not for a full shift (Allstate Brief, p. 36). Also, the monitoring did not include all job classifications, *i.e.*, the employee vacuuming the used abrasive grit (Tr. 1046-1048, 1315, 1330-1331). Additionally, Aapex's sample results may not have been valid after May 15, since Allstate replaced a new grit recycling system with an older system and changed the steel grit (Tr. 1046-1047, 1319-1320). Item 21 is affirmed.

Items 22 and 23 - Alleged Violations of § 1926.62(f)(4)(i)

The citation (item 22) alleges that one employee did not perform a positive pressure and/or negative pressure leak check on his half-face air purifying respirator used to protect against lead, cadmium, arsenic, manganese and chromium exposures. Also, the citation (item 23) alleges that frequent testing for carbon monoxide was not performed on an oil lubricated air compressor used to supply breathing air to employees working inside the containment. Section 1926.62(f)(4)(i) provides:

> The employer shall institute a respiratory protection program in accordance with 29 CFR 1910.134(b), (d), (e) and (f).

Section 1910.134(e)(5)(i) requires that a pressure leak check be performed each time the respirator is used. Also, the respiratory protection program at § 1910.134(d)(2)(ii) requires that the oil lubricated compressor used to supply breathing air be frequently tested for carbon monoxide. OSHA's respiratory protection program was effective in 1997.[8]

Allstate's written respiratory program requires a positive and negative pressure test each time a respirator is used (Exh. C-63, p. 3). However, the written interview statement of Steve Badurik, the groundsman who vacuumed the used steel grit, indicates that he performed no test on his respirator (C-56). Badurik, who received three fit tests on the job, stated that "we do a negative and a positive respirator leak check at each respirator fit test, but at no other time" (Exh. C-56; Tr. 1293). Secretary asserts therefore that leak checks were not performed (Tr. 1048-1049).

Badurik did not testify. Badurik's statement by itself without further explanation is ambiguous. He could have meant the formal fit test with smoke. Also, even if Badurik did fail to do the pressure test, there is no showing that Allstate knew or should have known. According to Katsourakis, employees regularly performed pressure leak checks (Tr. 136). It is a simple test to check the pressure when you put the respirator on and take it off (Tr. 136). It is required by Allstate's written respirator program. Also, other employees (Girten and Xipolitas) told Sweeney that they did daily pressure tests (Exh. C-56).

However, the record does establish that frequent tests for the presence of carbon monoxide (item 23) were not conducted on the air compressors used to supply breathing air (Tr. 1049-1050). Allstate acknowledges that the tests were not performed (Allstate Brief, p. 37). Item 22 is vacated. Item 23 is affirmed.

Item 27 - Alleged Violation of § 1926.33(g)(1)

The citation alleges that Allstate failed to provide employees with information, initially and annually, concerning access to exposure records and medical records. Section 1926.33(g)(1) requires employees' access to their records and references § 1910.1020(g)(1), which provides:

[8] The respiratory protection standards cited at § 1910.134 predated any modifications after 1997 included in 63 FR 1270 (January 8, 1998) and 63 FR 20098, 20099 (April 23, 1998).

> Upon an employee's first entering into employment, and at least annually thereafter, each employer shall inform current employees covered by this section of the following:
>
> (i) The existence, location, and availability of any records covered by this section;
>
> (ii) The person responsible for maintaining and providing access to records; and
>
> (iii) Each employee's rights of access to these records.

Virgil Girten and Tony Xipolitas stated to IH Sweeney that they had not received any training regarding OSHA's "Employee Access Exposure or Medical Records" standard (Exh. C-56, R-44, Tr. 1056). The Secretary argues that the employees were unaware of their rights (Tr. 1057).

During the hearing, employees testified that they were familiar with their right to access medical records. John Jagars knew where his medical records were located and never had any trouble getting them. He was mailed the results of blood tests at his home (Tr. 1365). George Levendis testified that his medical records were at the office and he kept a copy (Tr. 1598).

IH Sweeney agreed that Xipolitas and Mavroudis had also stated that their air and blood samples were kept at the office (Tr. 1298). Badurik told him that he had received training from Ed Luba on OSHA access to exposure and medical records (Tr. 1298). The same training was also given to Mavroudis, Xipolitas and Girten (Tr. 1298-1299). The statement by Girten is unclear. He may not have understood what was covered by the standard. Girten did not testify. Item 27 is vacated.

Items 28a and 28b - Alleged Violations of §§ 1926.59(f)(5)(i) and 1926.59(f)(5)(ii)

The citation alleges that on May 20, 1997, an identity label (item 28a) and an information label (item 28b) were not attached to a 500-gallon tank containing diesel fuel used in operating the compressor. Section 1926.59(f)(5)(i) refers to § 1910.1200(f)(5)(i), which requires that each container of hazardous chemicals leaving the workplace be labeled, tagged, or marked with the "identity of hazardous chemical(s) contained therein."

Section 1926.59(f)(5)(ii) refers to § 1910.1200(f)(5)(ii), which provides:

> Appropriate hazard warnings, or alternatively, words, pictures, symbols, or combinations thereof, which provide at least general

> information regarding the hazards of the chemicals, and which, in conjunction with the other information immediately available to employees under the hazard communication program, will provide employees with the specific information regarding the physical and health hazards of the hazardous chemical.

There were two 500-gallon diesel fuel tanks at the project. Diesel fuel is a combustible liquid, and the fumes can cause eye and respiratory irritation. It is also classified as a potential carcinogen (Exh. C-64). IH Sweeney testified that one tank was not labeled and did not identify the health hazards associated with diesel fuel (Exh. C-58; Tr. 1058-1059).

However, IH Sweeney videotaped two tanks, but he could not recall which tank was the basis for the alleged violation (Exh. C-58; Tr. 1299). One tank in the video is clearly labeled as diesel fuel. Sweeney did not test either tank to see if they contained diesel fuel (Tr. 1299). Sweeney did not ask whether the tank was empty (Tr. 1299). Sweeney, however, did ask and receive an MSDS for diesel fuel (Tr. 1300).

The standard requires labeling on containers leaving the workplace. *See* § 1910.1200(f), which applies to "each container of hazardous chemicals leaving the workplace." There was no showing that the diesel tank was leaving the project. At least one purpose of providing the hazard information is to protect employees during shipment. Items 28a and 28b are vacated.

Item 29 - Alleged Violation of § 1926.59(h)(1)

The citation alleges that Allstate did not train employees regarding the symptoms and potential health hazards associated with manganese and chromium. Section 1926.59(h)(1) refers to § 1910.1200(h)(1), which provides in part:

> Employers shall provide employees with effective information and training on hazardous chemicals in their work area at the time of their initial assignment, and whenever a new physical or health hazard the employees have not previously been trained about is introduced into their work area.

Allstate's training primarily focused on exposure to lead. The Secretary argues that Virgil Girten in a written interview statement stated that there was no training on manganese and chromium. Also, documents received by IH Sweeney did not show any training (Tr. 1059-1061).

In the interview statement, Girten stated only that he did not "recall" receiving the training on manganese and chromium (Exh. C-56; Tr. 1284). However, Girten was present when Ed Luba, quality control, conducted his annual refresher training in the Spring of 1997 (Exh. C-56; Tr. 1396, 1540). Other employees testified that they had received the training and that Girten participated (Tr. 1396, 1532). Despite a lack of training records, Luba testified that lead training provided prior to the 1997 bridge painting season also covered other contaminants, such as manganese and chromium (Tr. 1531-1533). As part of Allstate's lead training manual, which Luba used for training, there is a section describing the health affects of manganese and chromium (Exh. C-62, Section III; Tr. 1541). The other sections in the training manual deal with respiratory protection, medical surveillance, engineering, and work practice controls, which are also applicable to manganese and chromium exposure. Item 29 is vacated.

SERIOUS CLASSIFICATION
FOR HEALTH CITATION NO. 1

A violation is serious under § 17(k) of the Act (29 U.S.C. § 666(k)), if it creates a substantial probability of death or serious physical harm and the employer knew or should have known of the violative condition. In determining whether a violation is serious, the issue is not whether an accident is likely to occur; it is rather, whether the result would likely be death or serious harm if an accident should occur. *Whiting-Turner Contracting Co.*, 13 BNA OSHC 2155, 2157 (No. 87-1238, 1989).

Allstate argues that the health violations, if found, should be reclassified as other than serious. Allstate notes that the employees showed no symptoms of poisoning from lead, cadmium, arsenic, manganese or chromium, nor had elevated blood levels requiring removal from work (Exh. R-36). When inside the containment, the employees wore a Bullard Hood and a half-mask respirator with a combined respiratory protection factor of 250 (Tr. 1448).

The violations affirmed were properly classified as serious. Allstate was aware of the presence of lead on the project and should have been aware of the other contaminants if its air monitoring was properly performed. Also, the employees were exposed to possible serious harm to their health. OSHA's air monitoring found employees exposed to levels in excess of the PEL for

lead, cadmium and inorganic arsenic and the TLV for manganese and chromium (Exh. C-43; Tr. 1242-1243). Even the monitoring results from inside the blasting helmet showed Jagars' exposure was excessive[9] for lead (68 µg/m³) and cadmium (2.6 µg/m³); and Badurik's exposure was excessive for lead (89 µg/m³)(Exh. C-43). Although not requiring medical removal, the employees' blood tests taken by Allstate also show the presence of these contaminants (Exh. R-42).

There is no dispute that individually, each of these contaminants can subject employees to serious health risks if exposure levels are excessive and adequate precautions are not taken. Such precautions which were not taken by Allstate included the lack of warning signs or labeling, failure to provide medical examinations and appropriate information to physicians, and the lack of lunchroom facilities.

OTHER THAN SERIOUS HEALTH CITATION (Inspection No. 180489918)

Item 1 - Alleged Violation of § 1926.62(f)(2)(ii)

The citation alleges that no powered, air-purifying respirators (PAPR) were available or offered to employees. Section 1926.62(f)(2)(ii) provides:

> The employer shall provide a powered, air-purifying respirator in lieu of the respirator specified in Table 1 whenever: (A) An employee chooses to use this type of respirator; and (B) This respirator will provide adequate protection to the employee.

The standard requires the employer to provide a PAPR "whenever . . . an employee chooses to use this type of respirator." IH Sweeney learned from Mike Katsourakis that Allstate had no PAPR's on site. Rather, Allstate had two types of atmospheric supplying abrasive blasting respirators and half-face air purifying respirators (Tr. 1061). Virgil Girten told Sweeney that he had not seen any PAPR's on site (Tr. 1062). The Secretary argues that the failure to have any PAPR's available meant employees could not choose (Tr. 1300).

The Secretary failed to show that any employee chose or wanted to wear a PAPR. The standard does not require that a PAPR be available on site. The standard only requires that one be provided if an employee chooses. IH Sweeney admitted that no employee voiced any concerns about

[9] It is noted that the cassette worn by Jagars fell out of the helmet during blasting (Exh. C-43).

not having a PAPR (Tr. 1301). Also, in his interview statement, John Jagars stated that "PAPR's are available to people who work for Allstate" (Exh. R-44). Xipolitas and Mavroudis indicated that "the helpers have worn PAPR's on this job" (Exh. R-44; Tr. 1302). Item 1 is vacated.

SERIOUS SAFETY CITATION (Inspection No. 103233342)

Item 1 - Alleged Violation of § 1926.451(g)(1)(i)

The citation alleges that an employee spray painting from a catenary scaffold on the underside of a bridge (GRE-675-0737) was not protected by fall protection when moving to another location. Section 1926.451(g)(1)(i) provides in part:

> Each employee on a scaffold more than 10 feet (3.1 m) above a lower level shall be protected from falling to that lower level.

Compliance Officer Steve Medlock observed two employees painting from a catenary scaffold inside a containment erected under the railroad bridge (Tr. 339-340, 347). The scaffold was approximately 14' 6" above the ground and was suspended beneath the bridge by cables (Tr. 344-345). The scaffold was erected under and perpendicular to the bridge's steel girders. To attach their safety harnesses and lanyards, horizontal lifelines were erected parallel to the girders and along the lower flange. The horizontal lifelines were erected approximately 10 feet apart (Exh. C-14).

One painter, Tony Xipolitas, was observed not remaining tied off while moving on the scaffold from one side of the girder to the other side. When moving, Xipolitas unhooked his lanyard from one horizontal lifeline, sat down on the scaffold, and scooted along the scaffold to the next horizontal lifeline before re-hooking his lanyard. While being observed, he unhooked his lanyard at least seven times during the 20-minute period (Tr. 340-341, 348-349). OSHA recommends that the employee wear two safety belts (Tr. 352-353).

Anthony Katsourakis was present while the two employees were painting (Tr. 352). Katsourakis agreed that Allstate's fall protection plan required employees to be tied off at all times. He also agreed that the employee could use a second lanyard (Tr. 62, 352-353, 431-432). The situation was corrected by providing the employee with a second lanyard. Item 1 is affirmed as serious.

WILLFUL SAFETY CITATION (Inspection No. 103233342)

Item 1 - Alleged Violation of § 1926.501(b)(1)
or in the alternative § 1926.451(g)(1) or § 5(a)(1) of the Act

The citation alleges that employees working from a vehicle-mounted elevating platform under the bridge (GRE-675-0737) were not provided with fall protection. The Secretary alleges, in the alternative, violations of §§ 1926.501(b)(1), 1926.451(g)(1) and 5(a)(1) of the Act.

Section 1926.501(b)(1) provides:

> Each employee on a walking/working surface (horizontal and vertical surface) with an unprotected side or edge which is 6 feet (1.8 m) or more above a lower level shall be protected from falling by the use of guardrail systems, safety net systems, or personal fall arrest systems.

Section 1926.451(g)(1) provides in part:

> Each employee on a scaffold more than 10 feet (3.1 m) above a lower level shall be protected from falling to that lower level.

Section 5(a)(1) of the Act is referred to as the General Duty Clause. To establish a violation of § 5(a)(1), the Secretary must prove that (1) there was an activity or condition in the employer's workplace that constituted a hazard to employees, (2) either the cited employer or its industry recognized that the condition or activity was hazardous, (3) the hazard was causing or likely to cause death or serious physical harm, and (4) there were feasible means to eliminate the hazard or materially reduce it. *Waldon Healthcare Ctr.*, 16 BNA OSHC 1052, 1058 (No. 89-2804, 1993).

While returning from another inspection, Compliance Officers Dale Henderson and Sam Merrick observed two employees[10] without fall protection. The employees were stringing a cable for a containment (Tr. 248, 251, 285, 353-354). The employees were exposed to a fall hazard of 28 feet (Tr. 360). The platform was approximately 14 feet above the ground (Exhs. C-14, R-10; Tr. 256, 365-368, 380). Anthony Katsourakis, supervisor, was at the site (Tr. 45, 286).

To access the underside of the bridge, the employees used an elevated platform mounted in the bed of a pickup truck. The platform had guardrails which could be raised into place (Tr. 1664). However, on the day of the OSHA inspection, the guardrails were not in place. On the platform, a

[10] This is the incident which initiated Allstate's safety and health inspections.

24-foot ladder was placed to access the bridge girders. One employee (Mike Kindinis) remained on the platform and held the ladder while two employees climbed to the girders (Tr. 256, 380). While on the platform, Kindinis was not tied off or otherwise protected from a fall hazard (Tr. 257).

Based on the record, the elevated platform was a scaffold which violated § 1926.451(g)(1). A scaffold at § 1926.450(b) is defined as:

> any temporary elevated platform (supported or suspended) and its supporting structure (including points of anchorage), used for supporting employees or materials or both.

The elevated platform was attached to and separate from the truck. It was a scaffold used by employees to place a ladder to access the bridge.

Allstate maintains that the elevated platform was not above 10 feet in height. Anthony Katsourakis testified that unextended the platform is 9 feet 11 inches (Tr. 100). Scott Whitmyer, however, testified that the platform was not completely down and was elevated approximately one foot (Tr. 1695-1696). After the incident, Medlock attempted to reconstruct the height of the platform and asked the operator to place it at the same height. Medlock measured the height as 12.9 feet (Tr. 327-329). The record, therefore, establishes the height to exceed 10 feet (Exhs. C-14, R-19; Tr. 256, 365-368, 380).

Allstate's greater hazard defense is also rejected. Allstate claims that the guardrails on the platform could not be raised because of the positioning of the ladder used to access the bridge (Tr. 56, 108-109). Richard Hayes, Allstate's safety expert, testified that the guardrails interfered with the use of the ladder (Tr. 851).

In order to establish a greater hazard, an employer must show that (1) the hazards of compliance exceeded the hazards of noncompliance, (2) alternative means of protecting employees are unavailable; and (3) a variance is unavailable or inappropriate. *Lauhoff Grain Corp.*, 13 BNA OSHC 1084, 1088 (No. 81-984, 1987). *See also Walker Towing Corp*., 14 BNA OSHC 2072, 2078 (No. 87-1359, 1991).

Section 1926.501(b)(1) requires fall protection whether by guardrails or a personal fall arrest system. The record fails to establish that the ladder could not have been positioned in another way

which did not interfere with placing the guardrails. Scott Whitmyer, who used the ladder, agreed with Medlock that there was no reason for not using the guardrails (Exh. C-67; Tr. 1740-1741).

Also, Allstate failed to show that other means of fall protection were not available. Allstate's claim that the employee could not be tied off because he needed to move was not supported by the record (Tr. 56). The employee on the platform did not move, and he could have tied off (Tr. 256, 288, 380-381). Richard Hayes' testimony indicates that the use of fall protection may only delay the operation and not create a greater hazard (Tr. 851). Further, Allstate acknowledges they did not request a variance (Tr. 64-66). Item 1 is affirmed.

Item 2 - Alleged Violation of § 1926.501(b)(15)

The citation alleges that employees working from a flange on the underside of the bridge (GRE-675-0822 and 0823) were not provided fall protection. Section 1926.501(b)(15) provides:

> Except as provided in § 1926.500(a)(2) or in § 1926.501(b)(1) through (b)(14), each employee on a walking/working surface 6 feet (1.8 m) or more above lower levels shall be protected from falling by a guardrail system, safety net system, or personal fall arrest system.

While the employee (Kindinis) held the ladder on the elevated platform, two employees (Scott Whitmyer and Tom Karagiannakis), also without fall protection, were walking or standing on the flange of the steel girders. The girders were approximately 28 feet above the ground. The employees were stringing a cable for a containment (Exh. C-14; Tr. 97, 353-354). After climbing the ladder from the elevated platform, Whitmyer described his job as carrying a rope 20 feet along the 10-inch wide flange of the girder to the next cross-brace, tying the rope, returning to the ladder, pulling the cable up which is attached to the rope, again walking across the flange to the next cross-brace, pulling the cable to the cross-brace, and returning to the ladder (Tr. 1666-1673). The other employee, Karagiannakis, remained at the ladder and pulled the "slack up for the cable" (Tr. 1678). Allstate does not dispute that the employees did not have fall protection.

Allstate argues that the employees were inspecting the girders to determine their adequacy to support the cables holding the scaffolding used for abrasive blasting and painting (Tr. 46- 47, 96-97, 850-855). Section 1026.500(a) provides that the fall protection requirements do not apply "when employees are making an inspection, investigation, or assessment of workplace conditions prior to

the actual start of construction work or after all construction work has been completed" (Tr. 415-416).

The record fails to show that the employees were inspecting bridge conditions prior to work. Allstate's bridge project had commenced in early May and was not completed until August. Also, when the three employees climbed onto the bridge, it was at the end of the work day (Tr. 1661). Hayes agreed that such inspections are not usually done at the end of the work day (Tr. 886). Whitmyer was installing the cables. He was performing work, not inspecting for future work. An inspection would not require all the activity described by Whitmyer (Tr. 361). *See* 59 Fed Reg 40672, 40675 (August 9, 1994).

During the OSHA inspection, there was no mention that Allstate was doing an inspection (Tr. 361-362, 1745). Katsourakis suggested that the reason he allowed them to work without fall protection was because it was near the end of the day and he wanted the task completed (Tr. 362).

Allstate's infeasibility argument must also fail. To prove infeasibility, an employer must show that: (1) the means of compliance prescribed by the applicable standard would have been infeasible under the circumstances in that either (a) its implementation would have been technologically or economically infeasible or (b) necessary work operations would have been technologically or economically infeasible after its implementation; and (2) either (a) an alternative method of protection was used or (b) there was no feasible alternative means of protection. *Gregory & Cook*, 17 BNA OSHC 1189, 1190 (No. 92-1891, 1995).

As described by the Secretary, Whitmyer could have used a fall protection device that allowed him to move on the flange while being tied off with a harness (Exhs. C-6, C-7; Tr. 360, 420-421). Allstate did not establish that such a device was not feasible. Also, Whitmyer agreed that there were times he could have tied off, such as when he was stationary (Exh. C-67; Tr. 1667-1668, 1739). Also, there is no showing that the other employee, Karagiannakis, who remained stationary, could not have been tied off (Tr. 1678-1680). Item 2 is affirmed.

WILLFUL CLASSIFICATION FOR ITEMS 1 AND 2 OF SAFETY CITATION (Inspection No. 103233342)

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 (No. 92-0264, 1994). A willful violation is "differentiated from other types of violations by a heightened awareness--of the illegality of the conduct or conditions--and by a state of mind--conscious disregard or plain indifference" *General Motors Corp., Electro-Motive Division,* 14 BNA OSHC 1064, 2068 (No. 82-630 et al., 1991).

Allstate's violations of § 1926.501(b)(1) and § 1926.501(b)(15) were willful. Three employees were subject to a fall hazard in excess of 10 feet without fall protection. Allstate's subcontract required compliance with OSHA (Exh. C-1). Scott Whitmyer, who had received fall protection training, was in charge of the rigging operation (Tr. 1639-1640, 1680). Also, Anthony Katsourakis, supervisor, was present at the site when the work was performed (Tr. 1712-1713). Katsourakis was also familiar with OSHA's fall protection requirements based on training and experience (Tr. 42-43). He knew that the employees were not wearing fall protection and that it violated the standards. Katsourakis' company, American Painting, has been inspected by OSHA and has received previous citations for the lack of fall protection (Tr. 41). In April, 1997, American Painting was inspected by the Toledo OSHA office and fall protection was specifically discussed with Katsourakis (Tr. 40-41, 223). Also, Katsourakis admitted to Medlock that he erred in not requiring fall protection and blamed his employees (Tr. 362-364). No employees had been disciplined (Tr. 44).

Allstate's disregard for use of fall protection was an attempt to reduce the time to complete the job. The project needed to be completed within a certain time (Tr. 46). Allstate was subject to damages of $10,000 per day if the project took more than 105 days to complete (Tr. 169-170). Allstate's concern about any delay in the work was shown by Katsourakis' objection to OSHA's air monitoring (Tr. 170-171). Allstate's claim of making an inspection was concocted after the fact. The real task was to string the cable for the containment.

PENALTY CONSIDERATIONS FOR HEALTH AND SAFETY CITATIONS

The Commission is the final arbiter of penalties in all contested cases. In determining an appropriate penalty, the Commission is required to consider the size of the employer's business, history of previous violations, the employer's good faith, and the gravity of the violation. Gravity is the principal factor to be considered.

Allstate is a small employer with less than 26 employees. Allstate maintained appropriate health and safety programs which were for the most part adequate (Tr. 302). Allstate is entitled to credit for history because it had not received a serious citation within the preceding three years. As stated, Allstate was considered the employer in this case and American Painting's prior citations are not considered as part of Allstate's history. The appropriate penalty for each violation is as follows:

SERIOUS HEALTH CITATION NO. 1

A grouped penalty of $1,500 is reasonable for violations of § 1926.1127(c)(item 1a) and § 1926.1127(f)(1)(i)(item 1b). Three employees were exposed to excessive levels of cadmium. Cadmium is known to cause cancer, kidney and lung damage. The principal engineering control of a dust ventilation system was not used for the containment on June 4, 1997.

A grouped penalty of $2,000 is reasonable for violations of § 1926.1127(d)(1)(i)(item 2a) and § 1926.1127(d)(2)(i)(item 2b). The three employees monitored showed exposure to excessive levels of cadmium. Allstate failed to sample and perform air monitoring to detect the presence of cadmium. Allstate only monitored for lead.

A penalty of $1,000 is reasonable for violation of § 1926.1127(m)(2)(item 3b). Three employees were exposed to cadmium in excess of the PEL. There were no warning signs to identify the presence of cadmium and its adverse health affects.

A grouped penalty of $2,000 is reasonable for violations § 1926.1127(l)(2)(ii)(item 10a) and § 1926.1127(l)(4)(i)(item 10b). Two employees had not received initial medical examinations and three employees had not received their annual medical examinations within 12 months. When they did, the examination was not complete. The employees were exposed to excessive airborne concentrations of lead, cadmium and inorganic arsenic.

A grouped penalty of $2,000 is reasonable for violations of § 1926.1127(m)(3)(item 12a), § 1926.1118(j)(2)(vii)(item 12b), and § 1926.62(g)(2)(vii)(item 12c). Containers used to discard

protective clothing were not provided with warning labels identifying the cadmium, arsenic and lead contamination. Without warning labels, employees and other persons handling the discarded clothing were not advised of the possible health affects and the necessary precautions.

A grouped penalty of $2,000 is reasonable for violations of § 1926.1118(c)(item 13a), § 1926.1118(g)(1)(i)(item 13b) and § 1926.1118(g)(2)(i)(item 13c). Three employees were exposed to excessive levels of inorganic arsenic, and Allstate's written arsenic program was inadequate and not complied with.

A penalty of $2,000 is reasonable for violation of § 1926.1118(e)(2)(item 14). Allstate failed to perform air monitoring for inorganic arsenic, although it is common on bridge blasting projects.

A penalty of $1,000 is reasonable for violation of § 1926.1118(p)(2)(i)(item 15b). No arsenic warning signs were posted at the containment advising employees of potential health affects and precautions.

A penalty of $2,000 is reasonable for violation of § 1926.1118(m)(3)(i)(item 16). An appropriate lunchroom facility was not provided to protect employees from arsenic exposure. Employees ate their lunch in a grassy area.

A grouped penalty of $2,000 is reasonable for violations of § 1926.1118(n)(5 (item 18a) and § 1926.1127(l)(9)(item 18b). Appropriate information and a copy of the standards for arsenic and cadmium was not provided to physicians who performed medical examinations.

A grouped penalty of $2,000 is reasonable for violations of § 1926.62(c)(1)(item 20a) and § 1926.62(e)(1)(item 20b). Employees were exposed to excessive levels of lead, and all engineering controls were not implemented to reduce the levels of concentration.

A penalty of $2,000 is reasonable for violation of § 1926.62(d)(1)(iv)(item 21). Although Allstate had air monitoring performed for lead, it was not representative of employees' exposure.

A penalty of $2,000 is reasonable for § 1926.62(f)(4)(i)(item 23). Allstate used compressors to supply breathing air to employees. However, frequent tests were not performed for the presence of carbon monoxide.

A penalty of $1,000 is reasonable for violation of § 1926.62(m)(2)(i)(item 24). There was no lead warning signs posted at the containment.

A grouped penalty of $2,000 is reasonable for violations § 1926.55(a)(items 25a and 26a) and § 1926.55(b)(items 25b and 26b). Employees were exposed to excessive levels of manganese and chromium and not all feasible engineering controls were implemented to reduce the airborne concentrations.

SERIOUS SAFETY CITATION

A penalty of $1,000 is reasonable for violation of § 1926.451(g)(1)(i)(item 1). One employee was exposed to a fall hazard of approximately 14 feet while painting from scaffolding. The employee was tied off except when moving from a location. During a short period of time, the employee unhooked his safety line seven times.

WILLFUL SAFETY CITATION

A penalty of $5,000 is reasonable for § 1926.501(b)(1)(item 1). One employee on an elevated platform was exposed to a fall hazard in excess of 10 feet without any fall protection. Although guard railing and safety belts were available, fall protection was not utilized.

A penalty of $10,000 is reasonable for violation of § 1926.501(b)(15)(item 2). Two employees were exposed to a fall hazard in excess of 20 feet without fall protection.

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:

SERIOUS HEALTH CITATION NO. 1 ISSUED AUGUST 14, 1997

1. Item 1a, in violation of § 1926.1127(c), and item 1b, in violation of § 1926.1127(f)(1)(i), are affirmed as serious and a penalty of $1,500 is assessed.

2. Item 1c, in violation of § 1926.1127(f)(5)(i), is vacated.

3. Item 2a, in violation of § 1926.1127(d)(1)(i), and item 2b, in violation of § 1926.1127(d)(2)(i) are affirmed as serious and a grouped penalty of $2,000 is assessed.

4. Item 3a, in violation of § 1926.1127(e)(1), is vacated.

5. Item 3b, in violation of § 1926.1127(m)(2), is affirmed as serious and a penalty of $1,000 is assessed.

6. Item 4a, in violation of § 1926.1127(i)(1), item 4b, in violation of § 1926.62(g)(1), and item 4c, in violation of § 1926.1118(j)(1), are vacated.

7. Item 5, in violation of § 1926.1127(i)(2)(ii), is withdrawn by the Secretary.

8. Item 6a, in violation of § 1926.1127(i)(3)(iii), item 6b, in violation of § 1926.1118(j)(2)(viii), and item 6c, in violation of § 1926.62(g)(2)(viii), are vacated.

9. Item 7a, in violation of § 1926.1127(j)(3)(i), and item 7b, in violation of § 1926.1118(m)(2)(i), are withdrawn by the Secretary.

10. Item 7c, in violation of § 1926.62(i)(3)(ii), is vacated.

11. Item 8a, in violation of § 1926.1127(j)(3)(ii), and item 8b, in violation of § 1926.1118(m)(3)(ii), are withdrawn by the Secretary.

12. Item 8c, in violation of § 1926.62(i)(4)(iii), is vacated.

13. Item 9a, in violation of § 1926.1127(j)(4)(ii), item 9b, in violation of § 1926.62(i)(4)(iv), and item 9c, in violation of § 1926.1118(m)(5), are vacated.

14. Item 10a, in violation of § 1926.1127(l)(2)(ii), and item 10b, in violation of § 1926.1127(l)(4)(i), are affirmed as serious and a grouped penalty of $2,000 is assessed.

15. Item 11a, in violation of § 1926.1127(m)(4)(i), and item 11b, in violation of § 1926.1127(m)(4)(iv)(A), are vacated.

16. Item 12a, in violation of § 1926.1127(m)(3), item 12b, in violation of § 1926.1118(j)(2)(vii), and item 12c, in violation of § 1926.62(g)(2)(vii), are affirmed as serious and a grouped penalty of $2,000 is assessed.

17. Item 13a, in violation of § 1926.1118(c), item 13b, in violation of § 1926.1118(g)(1)(i), and item 13c, in violation of § 1926.1118(g)(2)(i), are affirmed as serious and a grouped penalty of $2,000 is assessed.

18. Item 14, in violation of § 1926.1118(e)(2), is affirmed as serious and a penalty of $2,000 is assessed.

19. Item 15a, in violation of § 1926.1118(f)(1), is vacated.

20. Item 15b, in violation of § 1926.1118(p)(2)(i), is affirmed as serious and penalty of $1,000 is assessed.

21. Item 16, in violation of § 1926.1118(m)(3)(i), is affirmed as serious and a penalty of $2,000 is assessed.

22. Item 17, in violation of § 1926.1118(n)(1)(i)(A), is withdrawn by the Secretary.

23. Item 18a, in violation of § 1926.1118(n)(5), and item 18b, in violation of § 1926.1127(l)(9), are affirmed as serious and a grouped penalty of $2,000 is assessed.

24. Item 19a, in violation of § 1926.1118(o)(1)(i), and item 19b, in violation of § 1926.1118(o)(2)(i), are vacated.

25.. Item 20a, in violation of § 1926.62(c)(1), and item 20b, in violation of § 1926.62(e)(1), are affirmed as serious and a grouped penalty of $2,000 is assessed.

26. Item 21, in violation of § 1926.62(d)(1)(iv), is affirmed as serious and a penalty of $2,000 is assessed.

27. Item 22, in violation of § 1926.62(f)(4)(i), is vacated.

28. Item 23, in violation of § 1926.62(f)(4)(i), is affirmed as serious and a penalty of $2,000 is assessed.

29. Item 24, in violation of § 1926.62(m)(2)(i), is affirmed as serious and a penalty of $1,000 is assessed.

30. Items 25a and 26a, in violation of § 1926.55(a), and items 25b and 26b, in violation of § 1926.55(b), are affirmed as serious and a penalty of $2,000 is assessed.

31. Item 27, in violation of § 1926.33(g)(1), is vacated.

32. Item 28a, in violation of § 1926.59(f)(5)(i), and item 28b, in violation of § 1926.59(f)(5)(ii), are vacated.

33. Item 29, in violation of § 1926.59(h)(1), is vacated.

<u>OTHER THAN SERIOUS HEALTH CITATION ISSUED AUGUST 14, 1997</u>

Item 1, in violation of § 1926.62(f)(2)(ii), is vacated.

SERIOUS SAFETY CITATION ISSUED SEPTEMBER 12, 1997

Item 1, in violation of § 1926.451(g)(1)(i), is affirmed as serious and a penalty of $1,000 is assessed.

WILLFUL SAFETY CITATION ISSUED SEPTEMBER 12, 1997

1. Item 1, in violation of § 1926.501(b)(1), is affirmed as willful and a penalty of $5,000 is assessed.

2. Item 2, in violation of § 1926.501(b)(15), is affirmed as willful and a penalty of $10,000 is assessed.

/s/
KEN S. WELSCH
Judge

Date: February 7, 2000