



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

SECRETARY OF LABOR,

Complainant,

v.

A. G. MAZZOCCHI, INC.,

Respondent.

OSHRC Docket No. 98-1696

**APPEARANCES:**

Peter J. Vassalo, Attorney; Daniel J. Mick, Counsel for Regional Trial Litigation; Donald G. Shalhoub, Deputy Associate Solicitor; Joseph M. Woodward, Associate Solicitor; Henry L. Solano, Solicitor; U.S. Department of Labor, Washington, DC

For the Complainant

Joseph P. Paranac, Jr., Esq.; Jasinski & Paranac, P.C., Newark, NJ

For the Respondent

**DECISION**

Before: THOMPSON, Chairman; ROGERS, Commissioner.

BY THE COMMISSION:

STATEMENT OF THE CASE

In April 1997, A. G. Mazzocchi, Inc. ("AGM"), a demolition contractor, began a six-month project under contract with Hutchinson Construction ("Hutchinson") to demolish a 350-ton hammerhead crane and components at the Philadelphia Navy Yard ("Navy Yard"). The project required AGM's employees to torch-cut through steel covered in lead-based paint.

Upon receiving reports that AGM employees who worked at the Navy Yard project had sustained high blood-lead levels ("BLLs"), the Occupational Safety and Health Administration ("OSHA") commenced a five-month inspection of the project on March 27, 1998. As a result of the inspection, OSHA issued AGM a citation alleging

serious, willful and “other than serious” violations of the Occupational Safety and Health Act of 1970 (“the Act”), 29 U.S.C. §§ 651-678, for failing to comply with various provisions of 29 C.F.R. § 1926.62, OSHA’s lead in construction standard.<sup>1</sup> The Secretary proposed a penalty of \$105,000 for those items. AGM contested the citations, and after a hearing, Chief Administrative Law Judge Irving Sommer affirmed all but one of the lead in construction items, and assessed the total proposed penalty.

On review are numerous challenges by AGM to the judge’s decision. Specifically, AGM questions the applicability of certain portions of the lead in construction standard, the merits of the citation items arising under the lead in construction standard, and the judge’s characterization of two of these items as willful.<sup>2</sup> For the following reasons, we find the cited provisions apply, and we affirm the citation items on review as alleged.

#### FINDINGS OF FACT

AGM assigned three torch-cutters to demolish the hammerhead crane at the Navy Yard. As a result of this work, AGM’s employees were exposed to airborne concentrations of lead. This exposure was monitored by AET Environmental, Inc. (“AET”), an environmental-safety company retained by Hutchinson, the project’s general contractor, to oversee safety at the project, which included instituting measures to abate some, but not all, of the lead paint present on portions of the crane. In addition, AGM retained a medical facility, Omni-Med Employer-Testing, Inc. (“Omni-Med”), to collect blood samples from its employees. Omni-Med, in turn, retained Quest Diagnostics Inc. (“Quest”), to conduct the analysis of each blood sample. Once an analysis was complete, Omni-Med would notify AGM of the results by telephone and mail.

On May 21, 1997, AET collected a personal air sample from AGM’s main torch-cutter for the project, whom we shall refer to as “John Doe.”<sup>3</sup> The results from the

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<sup>1</sup> In the other than serious citation, the Secretary alleged a violation of 29 C.F.R. § 1904.2, one of OSHA’s recordkeeping regulations, and proposed a penalty of \$500. This item, which was affirmed below, was not petitioned for review.

<sup>2</sup> On review, the parties do not dispute the characterization of the serious citation items at issue or any of the penalties assessed by the judge.

<sup>3</sup> Because we discuss the medical condition of the employee in question throughout this opinion, we refer to him as “John Doe” rather than by his name out of consideration for

monitoring demonstrate that on that day, John Doe was exposed to airborne concentrations of lead in the amounts of 1600  $\mu\text{g}/\text{m}^3$  and 1300  $\mu\text{g}/\text{m}^3$ . A biological monitoring report issued by Omni-Med on the same day demonstrated that John Doe's BLL was elevated above normal levels. Subsequent blood tests demonstrated that as the job progressed, John Doe's BLL reached and exceeded 50  $\mu\text{g}/\text{dl}$ , an amount that can trigger an employer's obligation under the lead in construction standard to remove the employee from any task involving exposure to airborne concentrations of lead in excess of the action level.<sup>4</sup>

OSHA began its inspection of AGM on March 27, 1998, with an opening conference at the New Jersey office of AGM's Vice President, Grace Mazzocchi ("Mazzocchi"). During the opening conference, Compliance Officer ("CO") Warren Simpson asked to see copies of all biological monitoring reports for employees who had worked at the Navy Yard project. Mazzocchi produced a file containing some records which CO Simpson reviewed in her office.

Following the opening conference, CO Simpson obtained copies of Omni-Med's records, which contained two biological monitoring reports that had not been produced by Mazzocchi during the opening conference. These reports were dated September 10, 1997 and October 25, 1997, and related to blood samples collected from John Doe. The September 10, 1997 report indicated a BLL of 64.8  $\mu\text{g}/\text{dl}$  and the October 25, 1997 report indicated a BLL of 61.2  $\mu\text{g}/\text{dl}$ . CO Simpson then contacted Quest, and discovered that its records corresponded with Omni-Med's records with respect to the BLLs shown in these two reports.

CO Simpson then telephoned Mazzocchi to inquire further into these two reports. At that time, Mazzocchi advised the CO to speak to her attorney, and indicated she would not respond to the CO's inquiries until she was served with a subpoena. In response, OSHA served Mazzocchi with a subpoena duces tecum directing the production of copies

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his privacy. For this same reason, we have redacted the employee's name from the Chief Administrative Law Judge's Decision.

<sup>4</sup> An employer must remove an employee from work having an exposure to airborne lead at or above the action level of 30  $\mu\text{g}/\text{m}^3$  on each occasion that a periodic and follow-up blood sampling test indicates the employee's BLL is at or above 50  $\mu\text{g}/\text{dl}$ . 29 C.F.R. § 1926.62(k).

of all biological monitoring reports for employees who had worked at the Navy Yard, and copies of any documents sent to AGM employees within the past two years, notifying them of their BLLs. Following several telephone calls between OSHA and Mazzocchi's attorney, OSHA agreed to limit the scope of the subpoena to documents pertaining to John Doe. AGM then provided a partial response to the subpoena, but did not provide copies of John Doe's September 10, 1997 or October 25, 1997 BLL reports.

The OSHA investigation also revealed that in August 1997, while the Navy Yard project was on-going, Hutchinson and AET had continually asked AGM to provide updated copies of BLL reports for AGM employees working at the yard. Mazzocchi responded to those requests on September 17, 1997, by faxing a number of documents to Hutchinson. Among them was a report from a blood sample collected from John Doe, dated September 10, 1997, but indicating a BLL of 40.0 µg/dl.<sup>5</sup>

### I. SERIOUS CITATION ITEMS

Under Item 1, the Secretary alleges AGM failed to make available blood sampling and analysis for lead and ZPP levels to John Doe as required by 29 C.F.R. § 1926.62(j)(2)(i). Under Item 2a, the Secretary alleges the medical exam AGM provided to John Doe failed to comply with § 1926.62(j)(3)(i)(A)(D)(3). Under Item 2b, the Secretary alleges that AGM failed to provide important information about John Doe's history of lead exposure to a physician conducting a medical examination as required by 29 C.F.R. § 1926.62(j)(3)(iv)(A)(1-4).

#### *A. Applicability of Cited Standards*

##### Principles of Law

To prove a violation of an OSHA standard, the Secretary must show by a preponderance of the evidence that: (1) the cited standard applies; (2) the employer failed to comply with the terms of the cited standard; (3) employees had access to the violative condition; and (4) the employer either knew or could have known with the exercise of reasonable diligence of the violative condition. *Astra Pharmaceutical Prod., Inc.*, 9 BNA

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<sup>5</sup> Although this report has the same date as the reports from Omni-Med and Quest, the reported BLL numbers differ. The report OSHA obtained from AET dated September 10, 1997 (the one Mazzocchi faxed) listed a BLL of 40.0 µg/dl and the reports from Omni-Med and Quest dated September 10, 1997 both listed a BLL of 64.8 µg/dl.

OSHC 2126, 2129, 1981 CCH OSHD ¶ 25,578, pp. 31,899-900 (No. 78-6247, 1981), *aff'd in pertinent part*, 681 F.2d 69 (1st Cir. 1982).

The Secretary alleges violations here under two provisions of the Lead in Construction standard: 29 C.F.R. § 1926.62(j)(2)(i) and 29 C.F.R. § 1926.62(j)(3). To prove that § 1926.62(j)(2)(i) applies, the Secretary must show that employees are “exposed on any one day at or above the action level,” or “are or may be exposed . . . at or above the action level for more than 30 days in any consecutive 12 months.”<sup>6</sup> To prove that § 1926.62(j)(3) applies, the Secretary must show that employees “are or may be exposed . . . at or above the action level for more than 30 days in any consecutive 12 months.”

In addition, a provision of the Lead in Construction standard relevant here states that when an employer has not “perform[ed] an employee exposure assessment” and its employee is performing certain tasks—such as torch-cutting— “the employer shall treat the employee as if the employee were exposed to lead in excess of 2,500 µg/m<sup>3</sup>[.]” 29 C.F.R. § 1926.62(d)(2)(iv). This presumption is based on the Secretary’s finding that certain tasks related to lead normally expose employees to very high concentrations of airborne lead. Occupational Safety and Health Administration, Lead Exposure in Construction Action: Interim final rule, 58 Fed. Reg. 26590, 26594-96 (May 4, 1993) (“Preamble”).

#### Analysis

The Secretary alleges that the requirements of each of the cited provisions at issue under the serious citation items were triggered because John Doe may have been exposed to airborne concentrations of lead at or above the action level for more than 30 days in a 12-month period. The judge agreed, finding that John Doe performed a high risk activity at the Navy Yard throughout the 6-month project and air monitoring showed he was

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<sup>6</sup> The action level for airborne concentrations of lead is defined as:

employee exposure, without regard to the use of respirators, to an airborne concentration of lead of 30 micrograms per cubic meter of air (30 µg/m<sup>3</sup>) calculated as an 8-hour time-weighted average (TWA).

29 C.F.R. § 1926.62(b).

exposed to airborne concentrations of lead above the action level on May 21, 1997.<sup>7</sup> AGM contends that the result of this air monitoring was not typical of John Doe's usual exposure as he was working inside the crane's partially enclosed wheel-house on the day he was monitored, but outside the wheel-house for most of the remainder of the project. As a result, AGM argues, John Doe's exposure on May 21, 1997 would have been substantially higher than his exposure on other days and, therefore, was not representative of his exposure on other days.

The Commission has considered in the context of the general industry lead standard what evidence must be introduced to establish that air monitoring on one day may be relied upon to represent exposures on other days; however, this issue has not yet been considered in the context of the lead in construction standard. *See, e.g., Atl. Battery Co.*, 16 BNA OSHC 2131, 2136-38, 1993-95 CCH OSHD ¶ 30,636, 42,541 (No. 90-1747, 1994) (discussing factors pertinent to determining if results of air monitoring represent employee's typical exposure). Unlike the general industry standard, however, the lead in construction standard requires employers who have not yet performed initial air monitoring to presume that employees performing tasks identified by the standard as high-risk are exposed above the PEL of 50 µg/dl. 29 C.F.R. § 1926.62(d)(2). Indeed, the Secretary has determined that the task of torch-cutting where lead is present produces exposures in excess of 50 times the PEL. Preamble, 58 Fed. Reg. 26594-96. *See also Bianchi Trison Corp. v. Chao*, 409 F.3d 196, 203 n.11 (3d Cir. 2005) (stating in dicta that "[t]he Standard also establishes a rebuttable presumption that certain tasks, including torch cutting materials with lead-based paint or coatings, result in exposures above the permissible action level").

Here, John Doe performed torch-cutting on the crane at the Navy Yard on the day his exposure was monitored at 26 times the PEL, and he performed torch-cutting on every work day for nearly a six-month period thereafter. Lead was present wherever he worked, as AET's abatement report established that even in abated areas, some amount of lead paint remained. Under these circumstances, we find it more likely than not that

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<sup>7</sup> The judge also relied on evidence that John Doe's BLL rose during the course of the Navy Yard project. We find that the cited standards apply here on other grounds and, therefore, need not consider whether the judge's reliance was warranted.

during this six-month period of time, there were at least 30 days in addition to May 21, 1997, when John Doe was exposed to airborne concentrations of lead in excess of the action level. We accordingly find the Secretary established that John Doe was a “covered employee” within the meaning of § 1926.62(j)(1)(ii). *See Astra Pharmaceutical Prods. Inc.*, 9 BNA OSHC at 2131 n.16, 1981 CCH OSHD at p. 31,901 n.16 (noting that the preponderance of the evidence test applies to Commission proceedings)

We also find that AGM failed to rebut this showing as the company introduced no reliable evidence of subsequent air monitoring to establish that John Doe’s exposure level had fallen below the action level, or any other specific evidence to question either the air monitoring performed on May 21 or the exposure levels presumed under the standard when monitoring has not yet been conducted. Nor did AGM introduce expert testimony or any other evidence to demonstrate the effect the layout of the wheel-house might have had on John Doe’s exposure. In this regard, AGM’s contention is nothing more than mere conjecture.

Having determined that John Doe was covered by the three provisions cited under the serious citation items, we now turn to the merits of each individual item.

### *B. Merits*

#### 1. Item 1: Biological Monitoring

##### Principles of Law

Section 1926.62(j)(2)(i), the standard cited under this item, provides in relevant part:

*Blood lead and ZPP level sampling and analysis.* The employer shall make available biological monitoring in the form of blood sampling and analysis for lead and zinc protoporphyrin levels to each employee covered under paragraphs (j)(1)(i) and [(j)(1)](ii) . . . on the following schedule: (A) For each employee covered under paragraph (j)(1)(ii) of this section, at least every 2 months for the first 6 months and every 6 months thereafter; (B) For each employee covered under paragraphs (j)(1)(i) or (ii) of this section whose last blood sampling and analysis indicated a blood level at or above 40 µg/dl, at least every two months. This frequency shall continue until two consecutive blood sampling and analyses indicate a blood lead level below 40 µg/dl; and (C)....

29 C.F.R. § 1926.62(j)(2)(i).

## Analysis

The Secretary alleges AGM violated this provision by failing to make sampling and analysis of ZPP levels available to John Doe at the intervals required by the standard. The judge agreed with the Secretary and affirmed this item. AGM contends it instructed Omni-Med to make the sampling and analysis for ZPP levels available to John Doe, and any omission was the fault of Omni-Med. In support of this contention, AGM produced a two-year old memo it had sent to Omni-Med asking the company to include sampling and analysis for BLL and ZPP levels for two employees, neither of which was John Doe.

We agree with the judge and affirm this item. According to the report from a sampling and analysis of a May 16, 1997 blood test, John Doe had a BLL of 44.6 µg/dl. At that point, AGM was required under the standard to make biological monitoring—both BLL and ZPP analysis—available to John Doe every two months.<sup>8</sup> The record shows, however, that Omni-Med collected blood from John Doe for sampling and analysis for ZPP levels only once—on May 16, 1997, and never again, even though sampling and analysis for BLL was provided to him six more times between May 1997 and June 1998.

There is also testimony in the record from the Omni-Med nurse who handled AGM's account explaining that Omni-Med only collected blood samples for the tests AGM requested. Because ZPP testing was an additional expense, the nurse testified that AGM had to specifically request ZPP analysis in each instance. This testimony, together with proof that AGM continued to receive reports for BLLs that did not include analysis for ZPP levels, but did not complain or otherwise report the lack of ZPP testing to Omni-Med, establishes that AGM failed to make sampling and analysis for ZPP levels available to John Doe at the required frequency. *Cf. Thomas Indus. Coatings Inc.*, 21 BNA OSHC 2283, 2289-90, 2008 CCH OSHD ¶ 32,937, pp. 53,740-41 (No. 97-1073, 2007) (holding

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<sup>8</sup> Although not asserted by the Secretary, we observe that under the facts of this case, AGM would have been required to make this biological monitoring available even if John Doe had not been shown to be a “covered employee” within the meaning of § 1926.62(j)(1)(ii). The cited provision, § 1926.62(j)(2)(i), also applies to employees covered by § 1926.62(j)(1)(i) for whom blood sampling and analysis indicate BLLs in excess of 40.0 µg/dl. *See* 29 C.F.R. § 1926.62(j)(1). John Doe would fall into this category, as he was exposed to airborne concentrations of lead in excess of the AL on one day, and the May 16, 1997 report indicated his BLL was in excess of 40.0 µg/dl.



evidence that blood tests were not performed insufficient under the circumstances to establish blood tests were not made available). Accordingly, we affirm Citation 1, Item 1.

## 2. Items 2a and 2b: Medical Examination

### Principles of Law

Under Item 2a,<sup>9</sup> the Secretary alleges a violation of 29 C.F.R. § 1926.62(j)(3)(ii)(A)(B) and (D), which provides:

*Content.* The content of medical examinations made available pursuant to paragraph (j)(3)(i)(B)-(C) of this section shall be determined by an examining physician and, if requested by an employee shall include pregnancy testing or laboratory evaluation of male fertility. Medical examinations made available pursuant to paragraph (j)(3)(i)(A) of this section shall include the following elements:

(A) A detailed work history and a medical history, with particular attention to past lead exposure (occupational and non-occupational) personal habits (smoking, hygiene) and past gastrointestinal, hematologic, renal, cardiovascular, reproductive and neurological problems.

(B) A thorough physical examination, with particular attention to teeth, gums, hematologic, gastrointestinal, renal cardiovascular, and neurological systems. Pulmonary status should be evaluated if respiratory protection will be used;

(D) A blood sample and analysis which determines:

(3) Zinc Protoporphyrin.

29 C.F.R. § 1926.62(j)(3)(ii)(A)(B) and (D).

Under Item 2b, the Secretary alleges a violation of 29 C.F.R. § 1926.62(j)(3)(iv)(A), which provides:

The employer shall provide an initial physician conducting a medical examination or consultation under this section with the following information:

(1) A copy of this regulation for lead including all Appendices:

(2) A description of the affected employee's duties as they relate to the employee's exposure;

(3) The employee's exposure level or anticipated exposure level to lead and to any other toxic substance (if applicable);

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<sup>9</sup> This item was initially issued under only § 1926.62(j)(3)(ii)(A), but was amended by the Secretary in her Complaint to allege violations of two additional paragraphs under this provision.

- (4) A description of any personal protective equipment used or to be used;
- (5) Prior blood lead determinations; and
- (6) All prior written medical opinions covering the employee in the employer's possession or control.

29 C.F.R. § 1926.62(j)(3)(iv)(A).

#### Analysis

The Secretary alleges AGM violated these provisions by failing to provide a compliant medical examination to John Doe, and failing to provide Omni-Med with information pertaining to John Doe's lead-exposure history, use of personal protective equipment, or a copy of the lead in construction standard. The judge affirmed these items based on his findings that the only examination AGM provided to John Doe in a timely fashion failed to address issues concerning lead exposure, and AGM did not provide to the examining physician, or to Omni-Med generally, certain information pertaining to John Doe's lead exposure. AGM claims Omni-Med already had a copy of the lead standard in its files and would nonetheless have been aware of John Doe's past lead poisoning because it had collected his blood samples for BLL analysis.<sup>10</sup>

Again, we agree with the judge and affirm this citation item. AGM's obligation to make available a compliant examination was triggered by the May 21, 1997 report indicating that John Doe's BLL had reached 44.0 µg/dl. Under 29 C.F.R. § 1926.62(j)(3)(i)(A), AGM had one year in which to make a medical examination required by the cited standard available to John Doe. During that time, AGM provided only one medical examination to John Doe—on December 6, 1997—and that examination was conducted to determine his fitness to operate a commercial vehicle.<sup>11</sup> Because the examination did not address John Doe's history of lead poisoning or past lead exposure, or include blood sampling and analysis to determine ZPP levels, AGM did

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<sup>10</sup> AGM claims Item 1 should be vacated because a medical examination conducted for John Doe prior to the commencement of the project detailed his medical and work histories. The examination in question, however, was conducted two years before the Navy Yard project and, therefore, could not have addressed John Doe's exposure on that job.

<sup>11</sup> We note that upon completion of the Navy Yard project at the end of October 1997, AGM assigned John Doe to drive a truck and, therefore, he was required by the New Jersey State Department of Transportation to undergo a medical examination in order to renew his commercial driver's license.

not comply with 29 C.F.R. § 1926.62(j)(3)(ii)(A)(B)&(D).

AGM also failed to inform either the physician conducting the December 6, 1997 medical examination, or Omni-Med generally, that John Doe worked as a torch-cutter at the Navy Yard project, used a full-face respirator, and was exposed to airborne concentrations of lead in excess of the action level, all of which are required by 29 C.F.R. § 1926.62(j)(3)(iv)(A). Accordingly, even though Omni-Med was aware of John Doe's lead exposure and may have had a copy of the lead in construction standard in its office, AGM still failed to comply with the terms of the cited standard by not providing all of the required information. Accordingly, we affirm Citation 1, Items 2a and 2b.

## II. WILLFUL CITATION ITEMS

### *A. Merits*

#### 1. Item 1: Employee Notification

##### Principles of Law

Under Item 1, the Secretary alleges a violation of 29 C.F.R. § 1926.62(j)(2)(iv), which provides:

*Employee Notification.* (A) Within five working days after the receipt of biological monitoring results, the employer shall notify each employee in writing of his or her blood lead level; and (B) the employer shall notify each employee whose blood lead level exceeds 40 µg/dl that the standard requires temporary medical removal with Medical Removal Protection benefits when an employee's blood lead level exceeds the numerical criterion for medical removal under paragraph (k)(1)(i) of this section.

29 C.F.R. § 1926.62(j)(2)(iv).

##### Analysis

The Secretary alleges AGM violated this provision by failing to notify John Doe in writing of his BLL levels.<sup>12</sup> The judge affirmed the item based on John Doe's testimony that he first learned of his elevated BLL when an employee of the State of New

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<sup>12</sup> The Secretary alleges, and the judge found, that AGM also violated the cited provision by failing to notify John Doe—in writing or otherwise—that if his BLL reaches and exceeds 50 µg/dl, he will be entitled to temporary medical removal with protection benefits. The judge based his finding on AGM's failure to present evidence that it had provided *written* notice of these benefits, and on John Doe's testimony that he was not told about such benefits and was not removed from the job. Because we affirm this item on other grounds, we need not address whether the judge's conclusion in this regard was error.

Jersey telephoned him and informed him that his BLL was elevated. The judge also relied on AGM's response to the subpoena, which requested the production of any documents notifying employees of their BLL; AGM failed to identify any such notifications, and failed to produce any document—such as John Doe's September 10, 1997 or October 25, 1997 BLL reports—that would have placed him on notice of his BLL. Instead, the response stated that Mazzocchi had notified John Doe of his BLL by telephone.

AGM claims it routinely distributed copies of the BLL reports to its employees with their paychecks. This was uncontradicted by John Doe's admission that he occasionally received documents with his paychecks, but did not necessarily retain or recall them. AGM also maintains that any failure to notify John Doe was partly due to its not having received the September 10, 1997 report indicating that John Doe's BLL reading was 64.8  $\mu\text{g}/\text{dl}$ . Additionally, AGM claims that any September 10, 1997 report it received showed a BLL of 40  $\mu\text{g}/\text{dl}$ , and if that level was incorrect, the error was due to a misprint by a remote printer at Omni-Med.

We affirm this citation item, but on different grounds than the judge. First, we find that the September 10, 1997 report indicating that John Doe's BLL was 64.8  $\mu\text{g}/\text{dl}$  was delivered to AGM. The records of both Omni-Med and Quest indicate that they had obtained this result, and under Omni-Med's procedures, Omni-Med would telephone AGM with the results as soon as they were received, then follow up with a mailing. There is no evidence to suggest that an error occurred during this process, and we find little merit in AGM's claim that the alleged 40.0  $\mu\text{g}/\text{dl}$  report was the result of the remote printer located at Omni-Med simply misprinting and inserting "40.0" instead of "64.8." Although the Omni-Med nurse conceded it was "possible" for the remote printer to print incorrectly, that speculative possibility does not rise to the level of probability given the lack of history of such an occurrence and the nurse's testimony that she always compared the levels reported on the remote printer copy with the hard copy to ensure they were identical. Indeed, both the Omni-Med nurse—an Omni-Med employee for ten years—and Linda Van Kampen—the nineteen-year Quest employee who handled Omni-Med's account—testified they knew of no situation in which two different reports had ever been

delivered. Moreover, Mazzocchi admitted at the hearing that she did receive the September 10, 1997 report showing John Doe's BLL to be 64.8 µg/dl.<sup>13</sup>

Second, we find that AGM failed to provide John Doe with written notification that his BLL was 64.8 µg/dl. Mazzocchi admitted she did not notify John Doe of this BLL, and her admission is corroborated by evidence that John Doe learned of his elevated BLL from an employee of the State of New Jersey, rather than from AGM.<sup>14</sup> Thus, even if AGM normally distributed copies of BLL reports to its employees by placing them in with their paychecks, we find the company failed to do so in this instance. Accordingly, we affirm Citation 2, Item 1.

## 2. Item 2b: Requested Records

### Principles of law

Under Item 2b, the Secretary alleges a violation of 29 C.F.R. § 1926.62(n)(5), which provides:

*Availability.* The employer shall make available upon request all records required to be maintained by paragraph (n) of this section to affected employees, former employees, and their designated representatives, and to the Assistant Secretary and the Director for examination and copying.

29 C.F.R. § 1926.62(n)(5).

### Analysis

The Secretary alleges a violation under this provision because AGM failed to make available John Doe's September 10, 1997 and October 25, 1997 BLL reports to OSHA upon request. The judge affirmed the item after finding AGM had been asked by OSHA to produce the reports eight times and failed to do so each time. We rely on two instances during which AGM was asked to provide the reports but failed to do so, and on those grounds, we affirm this item. The first instance occurred during the opening conference when CO Simpson asked Mazzocchi to produce copies of the BLL reports for employees who had worked at the Navy Yard project. The second occurred in response to the subpoena duces tecum which requested, as amended, copies of BLL reports for

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<sup>13</sup> See discussion regarding Mazzocchi's contradictory testimony and the alteration of the September 10, 1997 report, *infra*.

<sup>14</sup> While the record is unclear as to when John Doe was contacted by the state, it is clear he never learned of this elevated BLL from AGM.

John Doe within the past two years. Although both the September 1997 and October 1997 reports met these criteria and AGM admitted to having at least *some* version of the September 1997 report,<sup>15</sup> AGM failed to produce either one.

We also reject AGM's claim that the judge erred in affirming this item because doing so was inconsistent with his decision to vacate Item 2a, under which the Secretary had alleged a violation of 29 C.F.R. § 1926.62(n)(2)(iii)(c), for failing to maintain accurate records. The judge vacated Item 2a based on CO Simpson's testimony that the cited provision would be satisfied if either the employer or the examining physician maintained the records, and Omni-Med in fact had copies of all the records.<sup>16</sup> Thus, according to AGM, it should not be held responsible for failing to produce records it was not required to maintain.

AGM's argument overlooks the fact that an employer's obligation to make records available upon request does not disappear simply because an employer may have relied on a medical facility to maintain those records on its behalf. At a minimum, the employer has the obligation to request the records from the medical facility upon which it relies. *Cf. Kaspar Wire Works, Inc.*, 18 BNA OSHC 2178, 2186-88, 2000 CCH OSHD ¶ 32,134, p. 48,411-12 (No. 90-2775, 2000), *aff'd*, 268 F.3d 1123 (D.C. Cir. 2001) (vacating citation item issued under 29 C.F.R. § 1910.20 because employer did not have a "right" to obtain the records, after noting that employer attempted to obtain the records from the medical facilities, and, by time the citation was issued, had produced most of the records sought).

Here, AGM had free access to Omni-Med's records, as demonstrated by testimony from Omni-Med's nurse that she forwarded copies of the reports to AGM on a routine basis. Yet AGM failed to request copies of the missing reports from Omni-Med, either during the opening conference or during the preparation of its response to the subpoena. Moreover, the record does not support AGM's claim it relied on Omni-Med to maintain these records. There is no evidence that Mazzocchi or anyone from AGM had

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<sup>15</sup> See discussion regarding Mazzocchi's contradictory testimony and the alteration of the September 1997 report, *infra*.

<sup>16</sup> The Secretary did not petition for review of the judge's decision to vacate Item 2a.

made a decision to rely on Omni-Med to maintain the biological monitoring reports, and at no time did Mazzocchi inform CO Simpson that the company relied on Omni-Med for this purpose. Indeed, Mazzocchi herself testified that she maintained records of the employees' BLL reports in her office. Accordingly, we affirm Citation 2, Item 2b.<sup>17</sup>

### *B. Characterization*

#### Principles of Law

As the Commission has stated, “[t]he hallmark of a willful violation is the employer’s state of mind at the time of the violation — an ‘intentional, knowing, or voluntary disregard for the requirements of the Act or . . . plain indifference to employee safety.’” *Kaspar Wire Works, Inc.*, 18 BNA OSHC 2178, 2181, 2000 CCH OSHD ¶ 32,134, p. 48,406 (No. 90-2775, 2000) (citation omitted), *aff’d*, 268 F.3d 1123 (D.C. Cir. 2001) (“*Kaspar*”). This state of mind can be established by showing that “‘the employer was actually aware, at the time of the violative act, that the act was unlawful, or that it possessed a state of mind such that if it were informed of the standard, it would not care.’” *AJP Constr. Inc. v. Sec’y of Labor*, 357 F.3d 70, 74 (D.C. Cir. 2004) (citations omitted) (“*AJP*”).<sup>18</sup>

#### Analysis

The Secretary has maintained, either before the Judge or on review, that the violations at issue are willful because Mazzocchi (1) altered the September 10, 1997 report prior to faxing it to Hutchinson; (2) had actual knowledge that John Doe’s BLL

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<sup>17</sup> AGM also contends the judge erred in relying on Mazzocchi’s request for a subpoena and her failure to appear on the subpoena’s return date. Because we find the violation is established by the two instances we discuss in the text above, we need not address whether the judge’s conclusions in this regard were error.

<sup>18</sup> Both AGM and the cited worksite are located in the Third Circuit, which has worded its test for willfulness as an “obstinate refusal to comply” with safety and health requirements, but considers that test as “differ[ing] little from” the one used by the Commission and most circuits. *Universal Radiator Mfg. Co. v. Marshall*, 631 F.2d 20, 23 (3d Cir. 1980), *quoted in George Campbell Painting Corp.*, 17 BNA OSHC 1979, 1982, 1995-97 CCH OSHD ¶ 31,293, p. 43,978 (No. 93-984, 1997). *See also Vineland Fireworks Co., Inc. v. Bureau of Alcohol, Tobacco*, No. 07-2381, slip op. at 23 n.18, 2008 WL 4530536 (3d Cir., October 10, 2008) (rejecting view that Third Circuit’s willful test requires a “bad purpose” and noting that subsequent decisions from the court have endorsed the language of other Circuits that willful means “intentional disregard of, or plain indifference to” the Act’s requirements).

was dangerously elevated; and (3) knew she had an obligation to provide John Doe with written notice of his BLLs and to provide OSHA with the October 1997 and September 1997 reports, upon request. Yet, Mazzocchi admittedly gave John Doe no notice of his 64.8 µg/dl BLL—in writing or otherwise, nor did she provide the October or September reports to OSHA.

We affirm both violations as willful, as the judge did, but we do so for different reasons. As an initial matter, we must disagree with the judge’s finding that he was “unable on this record to find that AGM had altered the [64.8 µg/dl] report” because he could not identify a motive for Mazzocchi to have done so. We find that circumstantial evidence in the record supports a finding that sometime between Mazzocchi’s acknowledged receipt of the September 10, 1997 report showing that John Doe had a BLL of 64.8 µg/dl, and Mazzocchi’s delivery of the report to Hutchinson and AET, she altered John Doe’s 64.8 µg/dl result to 40.0 µg/dl.<sup>19</sup> Indeed, the details surrounding the September 10, 1997 report, particularly Mazzocchi’s testimony regarding the report, provide compelling evidence of this alteration.

We start with the copy of the September 10, 1997 report allegedly received by AGM showing a BLL of “40.0” µg/dl. (Exh. C-6.) This document was not available from AGM when OSHA asked for it. In attempting to explain why it was not available, Mazzocchi gave confusing and contradictory testimony. Initially, she claimed she did not receive the report with John Doe’s correct BLL of 64.8 µg/dl (a copy of which was admitted as Exhibit C-4) until sometime during the OSHA investigation, which began in March of 1998. (Tr. 264; Exh. C-4.) Mazzochi was unable to remember who gave the report to her at that time. (Tr. 264; Exh. C-4.) Yet, she later admitted receiving the 64.8 µg/dl report in the mail. (Tr. 364.)

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<sup>19</sup> We do not consider ourselves bound by the judge’s “conclusion” that the report was not altered because in arriving at that finding, the judge did not make any credibility findings or rely on other factors peculiarly observable only by him. *Cf. Hamilton Fixture*, 16 BNA OSHC 1073, 1085, 1993-95 CCH OSHD ¶ 30,034, p.41,180 (No. 88-1720, 1993), *aff’d without opinion*, 28 F.3d 1213 (6th Cir. 1994) (noting that we will normally defer to a judge’s credibility findings when properly explained and based on witness’s demeanor or other factors peculiarly observable by the judge). Moreover, we conclude that the stated basis for the judge’s finding—that AGM lacked a motive—is contrary to the record evidence. *See* discussion pp. 17-18 *infra*.



To explain the absence in her records of a copy of the report allegedly showing a 40.0 µg/dl, Mazzocchi claimed to have discarded that report after replacing it with the mailed copy of the 64.8 µg/dl report. (Tr. 371-72.) When asked when she received the mailed copy of the 64.8 µg/dl report, she said it usually took about a week or ten days from receipt of the faxed copy (Tr. 359), and indicated that in this case, it arrived after she had faxed the alleged 40.0 µg/dl report to Hutchinson—September 1997 at the latest—well before the OSHA investigation began.<sup>20</sup> Mazzocchi then claimed she did not remember when she got the 64.8 µg/dl report, or whether she got it from Quest or from Omni-Med, but that she received it by mail and “I know I gave it” to the CO. (Tr. 359-60.) This claim is directly at odds with the CO’s testimony that she never gave the report to him. Later, Mazzocchi appeared to contend that she had never received the 64.8 µg/dl BLL report. (Tr. 713.) Not surprisingly, AGM provided *neither* version of the September 10, 1997 report to OSHA.

In addition to this testimony, we find—unlike the judge—that it is abundantly clear from the record that Mazzocchi had a motive to alter the 64.8 µg/dl result stated in the September 10, 1997 report, albeit driven by somewhat lesser financial considerations than that posited by the CO at the hearing. The record shows that AET had previously halted AGM’s work on the Navy Yard project for a safety-related reason and warned AGM that it would do so again if AGM failed to comply with the lead in construction standard. AET had also informed AGM that, because John Doe’s BLL was 44.6 µg/dl on May 20, 1997, AGM was required not only to make follow-up blood sampling and analysis available to him within two months, but also to retest and possibly remove John Doe from the site if a follow-up report showed that his BLL exceeded 50 µg/dl.<sup>21</sup> Thus, if Mazzocchi had faxed the report indicating that John Doe’s BLL was 64.8 µg/dl to AET as requested, the subcontractor would have insisted that AGM retest and possibly remove

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<sup>20</sup> We note that the BLL which appears on the faxed report is not insignificant. The result was changed to exactly 40.0 µg/dl. Any higher BLL triggers the medical removal protection notification provision. *See* 29 C.F.R. § 1926.62(j)(2)(iv)(B). We also observe that the print of the “40.0” on the September report Mazzocchi faxed to Hutchinson is darker than, and—of most significance—angled differently from, the rest of the print that appears on the report.

<sup>21</sup> Indeed, during August 1997, AGM was resistant to the continual requests from Hutchinson and AET for updated BLL reports.

John Doe from the project. At this time, however, the Navy Yard project was nearing completion, and as John Doe was AGM's main torch-cutter, his removal from the project would have necessarily interrupted AGM's progress.<sup>22</sup>

In sum, when we consider Mazzocchi's motive, her conflicting testimony, the irregularities of the report showing a reading of 40 µg/dl, the failure to produce *any* version of the September 10, 1997 report, together with the fact that Mazzocchi had control of the report when the BLL result was changed, we draw the reasonable inference that Mazzocchi altered the report.<sup>23</sup> See generally 1 Clifford S. Fishman, *Jones on Evidence* §§ 1.5, 4.2 (7th ed. 1972) (drawing reasonable inferences from circumstantial evidence).

We also agree with the Secretary's claims that Mazzocchi knew not only that John Doe's BLL was dangerously elevated, but that she had an obligation to provide John Doe with his BLL result. With regard to Item 1, there is no question that Mazzocchi was deeply involved with the lead standard and solely responsible for ensuring her company's compliance with it. She was AGM's self-identified "point person" for lead safety, admitted having read the standard, and managed AGM's lead safety program. This responsibility included passing on the results of the BLL and ZPP testing done on AGM's employees to Hutchinson and AET. Mazzocchi had also taken a safety course on the lead standard prior to the commencement of the Navy Yard project at which she admits having learned of her specific responsibility to provide an employee with written notice of his or her BLL. Nevertheless, Mazzocchi admitted she failed to provide notice to John Doe—either in writing or otherwise—that his BLL had reached 64.8 µg/dl, and in fact, she altered the report. Under these circumstances, we conclude she made a conscious and deliberate decision to disregard her known obligation to notify John Doe under the standard. Accordingly, we affirm this item as willful.

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<sup>22</sup> By the time AGM claimed it "removed" John Doe in late October of 1997, the job at the Navy Yard was essentially over.

<sup>23</sup> AGM claims that Item 1 should not have been affirmed as willful because the judge had rejected the Secretary's claim that the September 10, 1997 report was altered, and having done so, was not at liberty to "fabricate" his own theory. This claim is rendered moot by our decision today to find that the September 10, 1997 report was altered, a conclusion we have reached from our review of the entire record.

As to Item 2b, even though we rely on only two occasions on which Mazzocchi failed to turn over the BLL reports to OSHA, we nonetheless affirm its willful characterization. The facts are as follows: the Secretary asked Mazzocchi at the opening conference for copies of the BLL reports for all employees who worked at the Navy Yard project, inquired of Mazzocchi after the conference by telephone about John Doe's elevated BLL reports, and requested copies from Mazzocchi of John Doe's BLL reports for the past two years in a subpoena duces tecum. Despite these requests, Mazzocchi never provided John Doe's critical September 1997 and October 1997 reports. Nor did she offer a colorable explanation for her failure to do so.

In assessing the willfulness of Mazzocchi's actions, we observe that not only was she the chief AGM employee with a complete grasp of the significance of employee BLLs in meeting the requirements of the lead standard, but as we have found above, she altered John Doe's critical BLL result on the September 1997 report that she never made available to the Secretary. Under these circumstances, we conclude Mazzocchi's failure to produce both the September 1997 and October 1997 reports, and her failure to explain the disappearance of the September 1997 report, demonstrate that she deliberately concealed the September 1997 report from OSHA.<sup>24</sup> Although Mazzocchi may not have been consciously aware that her failures to make these BLL reports available violated the cited standard, proof of actual knowledge is not necessary to a finding of willfulness where there is evidence that her state of mind was such that if she were informed of the rule, she would not care. *Brock v. Morello Bros. Constr.*, 809 F.2d 161, 164 (1st Cir. 1987).

Under the circumstances here, including Mazzocchi's alteration and deliberate concealment of the September 1997 report, we find that Mazzocchi "possessed a state of mind such that if [she] were informed of the standard, [she] would not care." *AJP*, 357 F.3d at 74. *See also Kaspar*, 18 BNA OSHC at 2181, 2000 CCH OSHD at p. 48,406. Given this state of mind, we conclude that Mazzocchi's plainly indifferent conduct supports affirming Item 2b as willful.

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<sup>24</sup> Indeed, given the alteration of the September 10, 1997 report, and its failure to take appropriate action with respect to John Doe's elevated BLL, AGM had a clear motive to conceal *both* "versions" of this report.



United States of America  
**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**  
1120 20th Street, N.W., Ninth Floor  
Washington, DC 20036-3419

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SECRETARY OF LABOR,	:	
	:	
Complainant,	:	
	:	
v.	:	OSHRC DOCKET NO. 98-1696
	:	
A.G. MAZZOCCHI, INC.,	:	
	:	
Respondent.	:	

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Appearances:

Barnett Silverstein, Esquire  
New York, New York  
For the Complainant.

Joseph P. Paranac, Jr., Esquire  
Newark, New Jersey  
For the Respondent.

Before: Chief Judge Irving Sommer

**DECISION AND ORDER**

This proceeding is before the Occupational Safety and Health Review Commission (“the Commission”) pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* (“the Act”). The Occupational Safety and Health Administration (“OSHA”) conducted an inspection of Respondent A.G. Mazzocchi (“AGM”) from March 27, 1998 until September 24, 1998, in regard to a site where employees had been engaged in crane dismantling work. As a result of the inspection, OSHA issued AGM a two-item serious citation, a two-item willful citation and a one-item “other” citation; the serious and willful citations alleged violations of the lead standard set out at 29 C.F.R. 1926.62 *et seq.*, while the “other” citation alleged a violation of the record-keeping standard set out at 29 C.F.R. 1904.2(a). AGM timely contested the citations, and the hearing in this matter was held on August 11-12, 1999 and October 5-6, 1999. Both parties have submitted post-hearing briefs.

**Background**

The subject site was the Pennsylvania Naval Ship Yard (“PNSY”), where AGM was a subcontractor responsible for dismantling a 350-ton crane and a 15-ton crane by means of torch cutting. Hutchenson Construction (“Hutchenson”) was the general contractor at the site, and Donald Lynch was Hutchenson’s site superintendent. AET Environmental (“AET”) was the subcontractor that developed the lead abatement plan for the job, as the cranes were painted with lead-based paint, and Tara Nace Lauer was AET’s on-site technician; AET conducted both personal and air sampling for lead, recommended appropriate respiratory protection, and monitored compliance with the plan.<sup>1</sup> AGM had various employees at the site, including Norman Russo, AGM’s job-site supervisor, and [REDACTED], one of the torch cutters. The job began with the dismantling of the 350-ton crane, which took from about mid-April to October of 1997, and ended with the dismantling of the 15-ton crane, which was completed by the end of October 1997.

Warren Simpson, the OSHA compliance officer (“CO”) who conducted the inspection, went to AGM’s office on March 27, 1998, pursuant to a report that an employee had had an elevated blood lead level (“BLL”). The CO met with Grace Mazzocchi, AGM’s vice-president, who told him the employee was [REDACTED], that the lead exposure had occurred in 1997 at the PNSY site, and that [REDACTED] had been transferred to another job due to his high BLL.<sup>2</sup> Mazzocchi gave the CO a file containing information on the site, including BLL analysis reports for the employees who had worked there; the CO noted there were three reports for [REDACTED], dated May 20, 1997, December 10, 1997, and February 18, 1998, showing BLL’s of 44.6, 56.7 and 32.3 µg/dl, respectively.<sup>3</sup> On April 2, 1998, the CO returned to interview the employees who had worked at the PNSY; however, [REDACTED] was on vacation, and the CO was unable to interview him until about a month later.

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<sup>1</sup>A lead abatement company worked on the cranes before the cutting work began; however, leaded paint nonetheless remained on the cranes, and in some areas the paint could not be removed at all. *See* C-10.

<sup>2</sup>[REDACTED] was the only employee at the site who had an elevated BLL. *See* footnote 3.

<sup>3</sup>The standard requires that a worker’s BLL be maintained at or below 40 micrograms per deciliter of whole blood (40 µg/dl). *See* Appendix A to 29 C.F.R. 1926.62, § II.B.(3).

Following his interview with [REDACTED], the CO went to Omni-Med, the clinic that had drawn the blood for the BLL tests of AGM's employees, and saw BLL reports for [REDACTED] that had not been in AGM's file; in particular, a September 10, 1997 report showed a BLL of 64.8 µg/dl, and an October 25, 1997 report showed a BLL of 61.2 µg/dl. The CO also went to Quest Diagnostics ("Quest"), the lab that had analyzed the blood samples, to verify the reports. On June 3, 1998, the CO called Mazzocchi to ask her about the additional BLL reports, and she told him he should get a subpoena or talk to her attorney. OSHA issued a *subpoena duces tecum* to Mazzocchi on June 11, 1998, but she did not appear on the appointed date of June 22, 1998, and while she did respond to the subpoena through her attorney at the end of July 1998, by supplying some of the requested documents, she did not provide the 64.8 and 61.2 µg/dl BLL reports. At some point during this period, the CO went to the PNSY site to review the records there, and, in so doing, he discovered a report for [REDACTED] dated September 10, 1997 that reflected a BLL of 40 µg/dl. The CO compared this report with the September 10 report he had gotten from Omni-Med, and, other than the BLL, the information on the reports was the same. OSHA subpoenaed Mazzocchi and [REDACTED] to appear in August of 1998, but neither one appeared. OSHA issued the citations on September 24, 1998.

**Serious Citation 1 - Item 1**

This item alleges a violation of 29 C.F.R. 1926.62(j)(2)(i), which states as follows:

(2) *Biological monitoring--(i) Blood lead and ZPP level sampling and analysis.* The employer shall make available biological monitoring in the form of blood sampling and analysis for lead and zinc protoporphyrin levels to each employee covered under paragraphs (j)(1)(i) and (ii) of this section on the following schedule:

(A) For each employee covered under paragraph (j)(1)(ii) of this section, at least every 2 months for the first 6 months and every 6 months thereafter.

(B) For each employee covered under paragraphs (j)(1)(i) or (ii) of this section whose last blood sampling and analysis indicated a blood lead level at or about 40 µg/dl, at least every two months. This frequency shall continue until two consecutive blood samples and analyses indicate a blood lead level below 40 µg/dl; and

(C) For each employee who is removed from exposure to lead due to an elevated blood lead level at least monthly during the removal period.

CO Simpson testified that the basis of this item was the fact that AGM did not have employee zinc protoporphyrin ("ZPP") levels analyzed as required. He noted that other than the analysis report dated May 20, 1997, none of [REDACTED] BLL tests included his ZPP levels as

prescribed by the standard, and that after the May 1997 analysis, a second analysis should have been done two months later in July. He also noted that ZPP analysis shows past exposure to lead and that the failure to make available biological monitoring as required could have resulted in serious injury, such as kidney, brain or reproductive system damage. (Tr. 403-15).

C-5, an August 20, 1998 letter to the CO from Quest, sets out the report dates and BLL results of [REDACTED] blood tests, as follows:

5/20/97	44.6 µg/dl
9/10/97	64.8 µg/dl
10/25/97	61.2 µg/dl
12/10/97	56.7 µg/dl
2/18/98	32.3 µg/dl
5/9/98	33.9 µg/dl
6/6/98	32.4 µg/dl

The foregoing establishes that no analysis was done in July of 1997, and C-2-4, which are copies of [REDACTED] BLL analysis reports dating from May 20, 1997, through February 18, 1998, establish that only C-3, the May 20 report, included his ZPP level. However, as a preliminary matter, AGM disputes the applicability of the cited standard to this case.

In view of C-3, the May 20, 1997 test revealing a BLL of 44.6, [REDACTED] situation would certainly appear to fall within the provisions of 29 C.F.R. 1926.62(j)(2)(i)(B), as set out above. However, based on the language of the standard, it would also appear that a predicate to its provisions is 29 C.F.R. 1926.62(j)(1)(i)-(ii), which states as follows:

(j) *Medical surveillance--(1) General.* (i) The employer shall make available initial medical surveillance to employees occupationally exposed on any day to lead at or above the action level. Initial medical surveillance consists of biological monitoring in the form of blood sampling and analysis for lead and zinc protoporphyrin levels.

(ii) The employer shall institute a medical surveillance program in accordance with paragraphs (j)(2) and (j)(3) of this section for all employees who are or may be exposed by the employer at or above the action level for more than 30 days in any consecutive 12 months.<sup>4</sup>

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<sup>4</sup>The “action level” is defined as “employee exposure, without regard to the use of respirators, to an airborne concentration of lead of 30 micrograms per cubic meter of air (30 µg/m<sup>3</sup>) calculated as an 8-hour time-weighted average (TWA).” See 29 C.F.R. 1926.62(b).



The basis of AGM's contention is that the Secretary has not proved that [REDACTED] was exposed to lead at or above the action level for more than 30 days. In light of the foregoing, it is clear the Secretary need only show that [REDACTED] *may have been* exposed to lead at or above the action level for more than 30 days. It is also clear that the Secretary has met her burden in this regard.

First, as the Secretary points out in her brief, the lead standard itself assumes high lead exposure levels during operations such as torch cutting and burning on structures covered with lead-based paint. *See* 29 C.F.R. 1926.62(d)(2)(iv)(C-D). Although a lead abatement company removed some of the lead from the cranes, C-10, a May 21, 1997 letter from AET to Hutchenson, specifically notes that the paint could not be removed from certain areas of the large crane and that even in the areas where abatement had occurred lead concentration levels were nonetheless 310 to 360  $\mu\text{g}/\text{m}^3$ .<sup>5</sup> C-10 also states that personal sampling conducted on [REDACTED] while he worked on "non-abated" areas of the large crane reflected lead concentrations of 1600 and 1300  $\mu\text{g}/\text{m}^3$ .

Second, Tara Nace Lauer, AET's industrial hygienist and on-site field technician, testified about the personal air sampling that she conducted of [REDACTED] and two other AGM employees who worked on the project; specifically, sampling of [REDACTED] on May 15, 1997, revealed concentrations of 1600 and 1300  $\mu\text{g}/\text{m}^3$ , sampling of [REDACTED], another torch cutter, on June 6, 1997, revealed concentrations of 540 and 450  $\mu\text{g}/\text{m}^3$ , and sampling of [REDACTED], an assistant torch cutter, on June 12, 1997, revealed a concentration of 47  $\mu\text{g}/\text{m}^3$ .<sup>6</sup> (Tr. 265-83; C-1; C-10). Although AGM suggests in its brief that Lauer's competence in lead sampling was questionable, I found her qualifications as stated on the record adequate; I also observed her demeanor as she testified and found her explanation about her sampling credible and convincing. (Tr. 274-79; 316-18). In addition, the Secretary presented the testimony of Frank Ehrenfeld, the director of the lab that analyzed Lauer's samples; he identified C-1 as the analysis of her samples of the three employees and noted that [REDACTED] results were 32 times higher than OSHA's permissible exposure level. (Tr. 6-26).

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<sup>5</sup>A copy of C-10 went to Norman Russo, and while the Secretary presented no corroborating evidence of these concentration levels, this monitoring was apparently conducted on the lead abatement workers by Tara Nace Lauer's predecessor on the site. (Tr. 269-70; 330-33).

<sup>6</sup>The 1600 and 1300  $\mu\text{g}/\text{m}^3$  results set out in C-10 were derived from Lauer's sampling.

Third, the evidence indicates that [REDACTED] performed torch cutting for the duration of the job, such that it is likely that he was exposed to lead at or above the action level for more than 30 days. As set out *supra*, the record shows the job began in mid-April and ended around the end of October, and Lauer, [REDACTED] and Donald Lynch, Hutchenson's site superintendent, all testified that he did torch cutting all day five days a week; Lauer and Lynch also testified he was the main torch cutter at the site, and Lauer indicated that other employees who did torch cutting were not there for the entire job, as [REDACTED] was. (Tr. 138-39; 144; 173-74; 268-73; 312-13; 322-33; 628).

In defense of the foregoing, AGM presented Norman Russo, its job-site supervisor. Russo testified that [REDACTED] was AGM's main torch cutter at the site, that [REDACTED] spent more time torch cutting than [REDACTED], and that the torch cutters spent only about 30 percent of any one day cutting due to the time it took to climb up with their equipment to the area of the crane where work was to occur, tie themselves off, and hook up the crane part that was to be cut to a tag line. Russo further testified that Lauer's sampling of [REDACTED] and [REDACTED] was during the dismantling of the crane's "machine house," which took place from about mid-May to mid-June. He said the machine house was enclosed and that lead removal could not be done in some parts of it, resulting in higher concentrations of lead in the air, and that the rest of the cutting work on the crane was done outside. He also said that of the 20 days it took to dismantle the machine house, cutting occurred on only 10 to 12 days; he said [REDACTED] in general spent over half his time on the job doing torch cutting and that the rest of his time was spent doing cleanup work. (Tr. 628-34; 638-47).

In regard to how much of [REDACTED] job involved actual torch cutting, Russo's testimony is directly contrary to that of Lauer, Lynch and [REDACTED] himself. I have already ruled on Lauer's credibility, *supra*. I also observed the demeanors of Lynch and [REDACTED] as they testified and found them equally credible and convincing. The testimony of these three witnesses is credited over that of Russo, and I find as fact that [REDACTED] was the main torch cutter on the job and that he did torch cutting on a full-time basis for essentially the duration of the project.

As to Russo's testimony about the machine house, [REDACTED] agreed that it took several weeks to dismantle it; he said they first had to dismantle the 70-ton crane that was inside the machine house, after which they cut off the machine house walls and roof. (Tr. 147-53). Lauer agreed that [REDACTED] sampling took place while he was working in the machine house and that

a substantial part of his cutting work was outside; however, she noted that one wall of the machine house was off on the day she conducted her sampling of [REDACTED] and that it was “breezy” that day. (Tr. 314-15). Moreover, C-10 belies Russo’s testimony indicating that the only area where lead abatement had not occurred was inside the machine house. (Tr. 646-47). While C-10 states on page 1 that [REDACTED] sampling was done in “non-abated” areas, it states on page 2 that there were other areas, such as the underside of the crane’s boom, where lead abatement could not be done. Based on the record, I do not agree with AGM that [REDACTED] sampling was done during atypical concentrations of lead. In any case, even if lead concentrations were higher that day than on some other days, it is undisputed that his BLL rose from 44.6 to 64.8 µg/dl from May to September of 1997, despite the fact that he wore a full-face respirator for his work at the site. (Tr. 144-46; 241-43; 307; 559; 635-36). The evidence persuades me that [REDACTED] was or may have been exposed to lead at or above the action level for more than 30 days, and AGM’s contention that the standard is inapplicable is rejected.

AGM also contends that it should not be held in violation due to Omni-Med’s failure to have [REDACTED] ZPP levels analyzed; in support of its contention, AGM presented R-1, R-2 and R-9. R-1 is a memo from Grace Mazzocchi (“Mazzocchi”) dated September 15, 1993, asking Omni-Med to include, *inter alia*, BLL and ZPP analyses in its examination of the two referenced employees. Judy Spinner, an RN with Omni-Med for ten years, testified that R-1 was in Omni-Med’s general file on AGM and that a copy was in Omni-Med’s file on [REDACTED] for informational purposes, although he was not one of the referenced employees; Spinner indicated that she and other Omni-Med employees had made the written notes on R-1, including the prices, code numbers and tubes used for the listed tests. (Tr. 27-29; 71-81; 732-51). R-2 is Omni-Med’s “chart” for [REDACTED] setting out the dates and tests for which his blood was drawn from July 20, 1995, through October 6, 1998; R-2 shows that on May 16, 1997, Mazzocchi called and requested Omni-Med to include BLL and ZPP analyses in [REDACTED] blood work. (Tr. 31-32; 43-46; 50-54; 81-85). R-9 is a February 10, 1997 fax from Mazzocchi to a doctor in a different facility, confirming appointments for that week

for ██████████ and another employee; sent along with the fax was AGM's "lead protocol," which states that the physical should include BLL and ZPP analyses.<sup>7</sup> (Tr. 675-80).

AGM asserts that the foregoing shows that it made available ZPP level analyses as required and that it was Omni-Med's error that the analyses were not done. I disagree. R-1 is dated over three years before the subject project began and does not refer to ██████████ and while Mazzocchi testified that she sent R-1 to make sure Omni-Med included those tests in the employees' physicals, there is nothing in the record to support AGM's suggestion that this created a fixed testing protocol. (Tr. 679). In fact, Spinner testified that Omni-Med drew blood for whatever tests an employer requested, that AGM at times requested a ZPP analysis for ██████████ and other times did not, and that the copy of R-1 was in ██████████ file so that Omni-Med would know the type of tubing to be used, and the codes and prices, for the various tests.<sup>8</sup> (Tr. 29-32; 49-54; 71-81; 92-94; 745-48). R-2, as noted above, shows the dates and tests for which ██████████ blood was drawn from July 20, 1995, through October 6, 1998; however, it is clear from R-2 and Spinner's testimony that on only two dates, May 16, 1997 and October 2, 1998, did AGM request that ██████████ blood work include his ZPP level in addition to his BLL. (Tr. 44-46; 82-85; 92-94). Finally, R-9 precedes the subject job by two months and was not sent to Omni-Med, and while Mazzocchi testified she sent a copy of the lead protocol that was attached to R-9 to Omni-Med, Spinner's testimony demonstrates that that protocol was not among the documents that Omni-Med had in its files. (Tr. 732-37; 746-51).

The record establishes that AGM did not make available ZPP analyses as required. The record also establishes that AGM knew or should have known that it was not complying with the cited standard. Grace Mazzocchi, AGM's vice-president since 1984, testified she was the highest-level person at AGM for lead issues, that she had had a course in the lead standard specific to the demolition industry in early 1994, and that she had drafted AGM's lead protocol. She also testified that she knew there would be lead on the project and that there was a lead plan, which included lead

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<sup>7</sup>R-10, the results of ██████████ blood work on this occasion, shows a BLL of 23 µg/dl but does not indicate his ZPP.

<sup>8</sup>Spinner said there was an individual charge for each test, including ZPP. (Tr. 52; 80).

awareness training, for the project.<sup>9</sup> Finally, she testified that she or her secretary called Omni-Med to schedule employees for blood tests and that Omni-Med relayed the results to her office by phone, fax and mail. (Tr. 208; 223-31; 240; 657-58; 678; 706-10; R-12-13). Although Mazzocchi indicated she had not been aware that [REDACTED] personal sampling results were more than 30 times over OSHA's permissible exposure level, a copy of C-10, as noted above, was given to Russo, AGM's job-site superintendent; further, she conceded she knew Hutchenson had requested AGM to forward to it updates of employee BLL's and ZPP levels. (Tr. 240-44; 257-60; 351-57; C-11). The Secretary has demonstrated the requisite knowledge, and this item is affirmed as a serious violation. The proposed penalty for this item is \$3,500.00, which, as the CO testified, took into account the employer's size, history and good faith, as well as the gravity of the violation.<sup>10</sup> (Tr. 415-19). I conclude that the proposed penalty is appropriate, and it is accordingly assessed.

**Serious Citation 1 - Items 2a and 2b**

Item 2a, as amended, alleges violations of 29 C.F.R. 1926.62(j)(3)(ii)(A), (B) and (D)(3), which require the employer to make available to any employee having a BLL at or above 40 µg/dl at any time in the preceding 12 months an annual medical examination that includes the following:<sup>11</sup>

(A) A detailed work history and a medical history, with particular attention to past lead exposure (occupational and non-occupational), personal habits (smoking, hygiene), and past gastrointestinal, hematologic, renal, cardiovascular, reproductive and neurological problems.

(B) A thorough physical examination, with particular attention to teeth, gums, hematologic, gastrointestinal, renal, cardiovascular, and neurological systems. Pulmonary status should be evaluated if respiratory protection will be used.

(D) A blood sample and analysis which determines....(3) Zinc protoporphyrin.

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<sup>9</sup>The lead plan that AET developed for the project required BLL and ZPP level testing of employees at least every 60 days. *See* R-13, p. 2, item 2.

<sup>10</sup>The CO testified that the penalty was reduced by 50 percent due to the employer's size and lack of history of violations but that no reduction was given for good faith because of the willful violations. (Tr. 419). For the reasons set out in the discussion following the Citation 2 items, I agree with the CO that a penalty reduction for good faith is not appropriate in this case.

<sup>11</sup>Item 2a initially alleged a violation of only 29 C.F.R. 1926.62(j)(3)(ii)(A).

Due to his BLL of 44.6 in May of 1997, AGM was required to make available to [REDACTED] within a year a medical exam that included the foregoing. CO Simpson testified that the basis of Item 2a was R-4, the form reflecting the medical exam an Omni-Med doctor did of [REDACTED] on December 6, 1997; he first saw the form in AGM's office on March 27, 1998, and he later spoke with Omni-Med personnel about it, although he was unable to speak to the doctor who had done the exam as he was no longer with Omni-Med. The CO further testified that the exam did not comply with the standard because it was for a commercial driver's license ("CDL"), not for lead, and did not address the items set out in the standard. The CO said that the violation was serious in that the Omni-Med doctor would not have known [REDACTED] medical and work history to enable him to do the appropriate tests and make an accurate diagnosis. (Tr. 420-45; 592-605).

After reviewing R-4, I find it does not meet the standard. R-4 does not mention lead at all, and while it touches on some items in the standard, *i.e.*, cardiovascular and gastrointestinal problems, it is clear that its focus is on general physical health, and, in particular, fitness for driving.<sup>12</sup> AGM's other documents likewise do not comply with the standard. R-5, R-7 and R-8 are forms relating to [REDACTED] first physical at Omni-Med. R-5 is an AGM medical questionnaire [REDACTED] filled out and gave to Omni-Med on July 20, 1995. Like R-4, R-5 has some questions touching on possible lead issues, *i.e.*, kidney disease and exposure to gas or chemical fumes; however, the form nowhere mentions lead, and the vast majority of its questions have to do with lung and respiratory problems. R-7 is the same form as R-4, R-8 is AGM's "Basic Medical Examination for Asbestos Workers" form, and both R-7 and R-8 are signed by an Omni-Med doctor and dated July 20, 1995.<sup>13</sup> R-9, as noted above, is a February 10, 1997 fax from Grace Mazzocchi to a doctor in a different facility, confirming appointments for [REDACTED] and another employee; sent along with the fax was AGM's lead protocol, which addresses the elements in the standard. Regardless, the form showing the results of that exam, which is an attachment to R-9, is the same form as R-8, and while both forms indicate the exam is for asbestos or other workers who may be

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<sup>12</sup>It is also clear that [REDACTED] blood analysis report dated December 10, 1997, which is included in C-4, discussed above, shows his BLL but not his ZPP level.

<sup>13</sup>[REDACTED] occupation on R-5 is shown as "truck driver," and Grace Mazzocchi indicated that while that had been his job he was just starting to do laborer work. (Tr. 664-65; 668).

required to wear respirators, they do not cover the elements of the cited standard.<sup>14</sup> The crux of AGM's contention would appear to be that all of these documents, together with [REDACTED] various blood tests, constituted compliance with the standard. I do not agree, and Item 2a is accordingly affirmed as a serious violation.

Item 2b alleges a violation of 29 C.F.R. 1926.62(j)(3)(iv)(A)(1-4), which requires the employer to provide the examining physician with the following information:

- (1) A copy of this regulation for lead including all Appendices.
- (2) A description of the affected employee's duties as they relate to the employee's exposure.
- (3) The employee's exposure level or anticipated exposure level to lead and to any other toxic substance (if applicable).
- (4) A description of any personal protective equipment used or to be used.

CO Simpson testified that the basis of Item 2b was AGM's failure to provide the lead standard, in addition to [REDACTED] job duties, his lead exposure levels and the personal protective equipment he used, to Omni-Med before a physical was conducted; he stated that without this information, the examining physician could have misdiagnosed [REDACTED] or not noticed a problem or condition that could have resulted in serious injury or death. (Tr. 440-45).

Grace Mazzocchi testified she had been sending employees to Omni-Med since 1993 and that in 1996 an Omni-Med representative met with her and told her the clinic did all kinds of OSHA-required physicals, such as exams for asbestos workers; he also told her they had the lead standard and showed it to her, and after that point, she started sending employees to Omni-Med for physicals. Mazzocchi discussed the medical questionnaire [REDACTED] had completed and the physicals he had had, both at Omni-Med and at the other clinic in February 1997. (Tr. 662-97; R-4-5; R-7-11).

Based on the foregoing, AGM contends it did not violate the cited standard. I disagree. First, the testimony of the CO and Judy Spinner shows that the lead standard was not in Omni-Med's files relating to [REDACTED] and AGM, that the only standard in Omni-Med's AGM files was the asbestos standard, and that the sole document about lead that Omni-Med had was a summary of the OSHA standard issued by the New Jersey Department of Health. (Tr. 605-06; 732-37; 746-51). Second, Spinner testified that while Omni-Med would do any exam an employer required, it did not have a

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<sup>14</sup>R-10, the analysis report from the exam, shows [REDACTED] BLL but not his ZPP level.

set-up procedure for lead examinations and did not do BLL tests very often.<sup>15</sup> (Tr. 745-48). Third, my review of R-4-5, R-7-8 and R-11, which are [REDACTED] medical questionnaire and the results of his physicals at Omni-Med, reveals nothing that reflects his job duties or lead exposure levels at the subject site, or the type of respiratory protection he wore. I have considered AGM's intimation that Omni-Med knew [REDACTED] was doing lead-related work due to the BLL results in his file and that its doctors thus took this fact into account when performing his physicals. The record does not support such a conclusion, and, for the reasons stated, Item 2b is affirmed as a serious violation.

The Secretary has grouped Items 2a and 2b and has proposed a single penalty of \$3,500.00 for these two items. (Tr. 438-39; 445). I find this penalty to be appropriate; it is therefore assessed.

**Willful Citation 2 - Item 1**

This item, as amended, alleges a violation of 29 C.F.R. 1926.62(j)(2)(iv)(A-B).<sup>16</sup> These provisions require that:

(A) Within five working days after the receipt of biological monitoring results, the employer shall notify each employee in writing of his or her blood lead level; and

(B) The employer shall notify each employee whose blood lead level exceeds 40 µg/dl that the standard requires temporary medical removal with Medical Removal Protection benefits when an employee's blood lead level exceeds the numerical criterion for medical removal under paragraph (k)(1)(i) of this section.<sup>17</sup>

The CO testified that the basis of this item was AGM's failure to give [REDACTED] written notice of his BLL report of 64.8 µg/dl, dated September 10, 1997, and medical removal protection ("MRP") benefits; the CO indicated that [REDACTED] was advised verbally of these matters, but not by AGM. The CO said the violations were serious because not receiving prompt written notice could result in an employee not obtaining necessary medical treatment. (Tr. 445-51; 457-59).

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<sup>15</sup>As noted in Item 1, *supra*, Grace Mazzocchi testified she had sent AGM's lead protocol to Omni-Med, but Spinner testified Omni-Med did not have it. (Tr. 680; 732-37; 746-51). Mazzocchi's testimony in this regard, and about Omni-Med having the lead standard, was not persuasive.

<sup>16</sup>As issued, the citation alleged a violation of 29 C.F.R. 1926.62(j)(2)(iv).

<sup>17</sup>The MRP provisions apply when an employee's BLL is at or above 50 µg/dl.



As noted at the outset of this decision, there were two different BLL reports for ██████ dated September 10, 1997; the one reflecting a 64.8 BLL is among the BLL reports in C-2 and C-4, and the one reflecting a 40 BLL is one of the documents in C-6. The CO testified that neither of these reports was in the file Grace Mazzocchi gave him to review on his initial visit to her office; he discovered the 64.8 report when he went to Omni-Med and to Quest, the diagnostic lab Omni-Med used, and he discovered the 40 report when he went to the PNSY site, where he was given the BLL reports AGM had faxed Donald Lynch pursuant to C-11, Lynch's memo of August 21, 1997, requesting, among other things, updated BLL tests for various employees. The CO learned during his inspection that neither Omni-Med nor Quest had a record of a BLL result of 40 for ██████; he thus concluded that AGM had provided an altered report to Lynch, which was the reason for the willful characterization of this item.<sup>18</sup> (Tr. 378-83; 389-90; 451-56; 621-24). Grace Mazzocchi, on the other hand, testified that the 40 BLL report was what Omni-Med had faxed her, that she did not recall getting the 64.8 BLL report until sometime during the OSHA inspection, and that if she had gotten that report she would have removed ██████ from the job at that time. She said she learned of ██████ elevated BLL when Omni-Med sent her his 61.2 BLL report, dated October 25, 1997, and that she called him at the PNSY and told him his BLL was high and that he would have to go to another job; she also said she informed ██████ of his BLL results by putting copies of the reports in his pay envelopes. (Tr. 221-26; 232-38; 262-64; 358-63; 713).

While I have concluded that AGM did not provide an altered BLL report to Lynch, as set out in the discussion following the Citation 2 items, I nonetheless find that AGM violated the above-cited standards. First, AGM presented no evidence that it had given ██████ written notice about MRP benefits, and ██████ testified that he was not told about such benefits and that he was not removed from the job; he said that he went on vacation at the end of October or in early November of 1997, when the job was over, and that when he returned to work it was at another site that did not involve torch cutting. (Tr. 153-54; 159-61). Second, ██████ also testified that he first learned that his BLL was elevated when an employee of the State of New Jersey called him at home and told him about it, although he did not remember the date of the call. (Tr. 143). Third, while ██████

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<sup>18</sup>C-5, the August 20, 1998 letter from Quest to the CO, specifically states that Quest had no record of a 40 µg/dl BLL result for ██████.

indicated that he could have gotten the BLL reports in his pay envelopes and thrown them away without realizing it, as other papers were often included along with his checks, other evidence in the record persuades me that this was not the case. (Tr. 139-43; 157). R-3, the subpoena that OSHA issued to Grace Mazzocchi in June of 1998, requested in paragraph 3 “[c]opies of any documents sent to [AGM] employees notifying them of their blood lead level results within the last two years.” In paragraph 3 of C-9, her July 28, 1998 response to R-3, Grace Mazzocchi stated as follows:

The employee who tested high was [REDACTED]. [REDACTED] was notified by telephone while he was on-site in Philadelphia. Since he was staying in the Philadelphia area and about to go on vacation, the letter form would not have been as timely.

In an attempt to explain this statement, Mazzocchi testified that she had believed at that time that the standard required her to send an actual letter to [REDACTED] notifying him of his BLL, rather than just providing him with a copy of his BLL report. (Tr. 219-24; 661; 704-05). However, this testimony was not convincing; although Mazzocchi indicated that her belief was based on a form letter she had received at a lead class she had attended, AGM presented no evidence of such a letter. (Tr. 661; 704-05). More significantly, it my conclusion that, if AGM had been providing [REDACTED] with copies of his BLL reports in his pay envelopes, Mazzocchi would have stated this fact in her response to the OSHA subpoena, even if she had believed that this action was not fully compliant with the standard. On the basis of the record, this item is affirmed. The characterization of this item, and the penalty assessed, is set out *infra*.

**Willful Citation 2 - Items 2a and 2b**

These items allege violations of 29 C.F.R. 1926.62(n)(2)(iii)(C) and (n)(5), which state, respectively, as follows:

The employer shall keep, or assure that the examining physician keeps, the following medical records: ... (C) A copy of the results of biological monitoring.

The employer shall make available upon request all records required to be maintained by paragraph (n) of this section to affected employees, former employees, and their designated representatives, and to the Assistant Secretary and the Director for examination and copying.

The CO testified that the basis of Item 2a was AGM’s failure to have all of [REDACTED] BLL reports. (Tr. 466-69). However, on cross-examination, he agreed that the standard provided for either the employer or the examining physician to keep such records. He also agreed that Omni-Med had

all of [REDACTED] BLL reports and that based on this fact and the language of the standard, there was no violation of the standard. (Tr. 510-11; 568). Item 2a is accordingly vacated.

The CO further testified that the basis of Item 2b was AGM's failure to make available to OSHA all of [REDACTED] BLL reports. On March 27, 1998, the CO asked to see the BLL records for the employees who had worked at the site, and Grace Mazzocchi gave him her PNSY file; upon reviewing the file, he saw three BLL reports for [REDACTED], dated May 20, 1997, December 10, 1997, and February 18, 1998, showing BLL's of 44.6, 56.7 and 32.3, respectively. After interviewing [REDACTED] and the other employees who had worked at the site, the CO went to Omni-Med, the clinic that had drawn the blood for the BLL tests of AGM's employees, where he saw BLL reports for [REDACTED] that had not been in AGM's file; specifically, a September 10, 1997 report reflected a BLL of 64.8, and an October 25, 1997 report reflected a BLL of 61.2. The CO learned that AGM had been given the results, and he went to Quest, the lab that had analyzed the blood samples, to verify the reports. On June 3, 1998, the CO called Mazzocchi and asked her about the additional BLL reports he had seen, at which time she told him to get a subpoena or talk to her attorney. OSHA issued a *subpoena duces tecum* to Mazzocchi on June 11, 1998, but she did not appear as requested on June 22, 1998, and although she responded to the subpoena through her attorney at the end of July 1998, by furnishing some of the documents OSHA had asked for, she did not provide the 64.8 and 61.2 BLL reports.<sup>19</sup> At some point during this period, the CO went to the PNSY site to review the records there, and, upon doing so, he discovered a BLL report for [REDACTED] dated September 10, 1997 that showed a BLL of 40. The CO compared this report to the September 10 report he had gotten from Omni-Med, and, other than the BLL, the information on the reports was the same. OSHA subpoenaed both Mazzocchi and [REDACTED] to appear in August of 1998; however, neither one appeared. (Tr. 377-90; 395; 470-85; 514-24; 539; 567-78; 620-25; C-8-9; R-3).

In defense of this item, Grace Mazzocchi testified that March 27, 1998, had been a very bad day, in that half of the office staff had been out with the flu, and that she had given the CO the entire PNSY file and left him on his own to review it; she did not represent that the file contained all the

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<sup>19</sup>Pursuant to conversations with AGM's then-attorney Stephen Dratch, OSHA agreed the subpoena would be limited to documents relating to [REDACTED]; among the documents provided were his BLL reports dated May 9, 1998 and June 6, 1998. (Tr. 567-69; 577-78; C-5; C-8-9; R-3).

medical records relating to the site, and while she did not tell him he could get those records from Omni-Med there were documents in the file that were clearly from that facility. Mazzocchi further testified that she did not recall receiving the 64.8 BLL report in September 1997 and that if she had she would have removed [REDACTED] from the job then. She said Omni-Med usually called her with the test results, faxed her a copy the same day, and then sent a “hard copy” by mail, after which she would discard the faxed copy; she also said that the 40 BLL report was the one that her office had faxed to the PNSY site. Mazzocchi indicated that she had not appeared when subpoenaed on the advice of counsel and that she had not told [REDACTED] not to talk to OSHA; she also indicated that although the two BLL reports she sent to OSHA through her attorney in June of 1998 were recent reports that she assumed the CO did not have, she had not actually known at that time which reports he had. (Tr. 217-19; 231-35; 250-57; 263-64; 358-72; 698-704; 713).

AGM contends that the CO’s assertion that the 64.8 and 61.2 BLL reports were not in the AGM file he reviewed is suspect because he did not make notes about or copies of the reports he saw. However, the CO testified that he did make notes of the BLL reports he saw on March 27, 1998, and that he was “absolutely positive” that he did not see the 64.8 and 61.2 BLL reports that day. (Tr. 494-500; 522-23). Moreover, Mazzocchi’s own testimony that she did not recall receiving the 64.8 BLL report until sometime during the inspection seriously undermines AGM’s contention. AGM’s contention is accordingly rejected.<sup>20</sup> (Tr. 234-35; 264; 713).

AGM further contends it complied with the standard, noting that Mazzocchi provided the CO on March 27 with her entire PNSY file, which included the 44.6, 56.7 and 32.3 BLL reports, and that the CO obtained the 64.8 and 61.2 BLL reports from Omni-Med. Regardless, on the facts of this case, I find that AGM did not make available [REDACTED] BLL records as required. First, the PNSY file the CO saw on March 27 contained only the 44.6, 56.7 and 32.3 BLL reports, and he had no reason to believe then that there were other BLL reports for [REDACTED]; in fact, as he stated, before he went to Omni-Med he had been ready to end his investigation based on the information he had. (Tr. 620-25). Second, even assuming that Mazzocchi was busy and distracted on March 27 due to

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<sup>20</sup>I also reject AGM’s suggestion that the Secretary’s case is somehow flawed because her citation includes two BLL reports that were in the AGM file, particularly since the CO’s testimony clearly establishes which reports he saw and which ones he did not.

the situation in her office and/or that she was unaware her PNSY file did not contain all of [REDACTED] BLL reports, she offered no such explanation when the CO called her on June 3 about the 64.8 and 61.2 BLL reports; instead, she told him to get a subpoena or speak to her attorney. Third, the CO did not find out about the 40 BLL report until after this conversation, when he went to the PNSY site itself, and Mazzocchi's testimony indicating that she gave the CO this report has no support in the record. (Tr. 358-60). Fourth, Mazzocchi did not appear pursuant to either the June or August subpoena, and although she sent in some documents in response to the June subpoena they did not include the BLL reports the CO had discovered on his own. On the basis of the record, AGM violated the standard. The characterization of this item, and the penalty assessed, is set out *infra*.

**Whether Items 1 and 2b of Citation 2 were Willful**

CO Simpson determined that Item 1 of Citation 2 was willful due to his belief that AGM had altered [REDACTED] September 10, 1997 report to reflect a BLL of 40.0 rather than the actual BLL of 64.8. The CO testified that neither Quest nor Omni-Med had any record of a 40 BLL for [REDACTED] and that he believed that AGM had altered the 64.8 report; he said that if AET and Hutchenson had received the 64.8 report [REDACTED] would have had to be retested in two weeks to confirm his BLL, after which he would have been removed from the site and the job stopped, which would have presented difficulties for AGM. (Tr. 380-83; 451-59; C-5).

In support of her assertion that the 64.8 report was altered, the Secretary presented the testimony of Omni-Med RN Judy Spinner. Spinner said Quest sent the results of tests it ran twice, first electronically, via a printer, and second, a "hard copy," via a lab tech or mail. She also said that she or another Omni-Med employee would call AGM with the results received over the printer and would then mail the company a duplicate of that copy; when the hard copy arrived it was compared to the printer copy to ensure they were the same. Spinner noted that she called Grace Mazzocchi about [REDACTED] BLL report, and also mailed AGM a copy, on September 10, 1997, as indicated on R-2, [REDACTED] chart; she further noted that in her ten years with Omni-Med, she had never known a printer copy result to be different from a hard copy result.<sup>21</sup> (Tr. 32-43; 59-70; 81-92).

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<sup>21</sup>Spinner stated that the printer sometimes did not print, in which case Omni-Med would send the hard copy to the client company. She first indicated both copies were kept, but then said that the printer copy, which had different paper, different print (*i.e.*, zeroes with slashes in them) and  
(continued...)

The Secretary also presented the testimony of Linda Van Kampen, Quest's quality assurance manager who signed C-5, the letter stating Quest had no record of a 40 BLL report for [REDACTED].<sup>22</sup> Van Kampen described Quest's procedure for analyzing blood specimens and transmitting results by printer and hard copy. She testified that Quest kept no hard copies of its results and that if a client received something different than what was in C-5, Quest would have only its electronic records; she also testified that in her experience there was no instance of a printer report being different from a hard copy report, but she could not say that it was "absolutely" not possible. (Tr. 100-33).

Despite the foregoing, I am unwilling to find on this record that the 64.8 report was altered. The 40 report, which is among the documents in C-6, is a copy of a fax and is consequently of poor quality. Although the "40.0" is somewhat darker than the other print, its type appears to be identical to the other numbers "4" and "0" in the report, even down to the slash in the zero, and the CO acknowledged that OSHA had not consulted a typewriting expert. (Tr. 540). Equally significantly, the record does not support the reasons the CO gave for the alleged alteration. Grace Mazzocchi testified that if she had received the 64.8 BLL report in September 1997 she would have replaced [REDACTED] with one of AGM's other torch cutters, some of whom had more experience than [REDACTED]. (Tr. 234-35; 263-64; 710-13). Donald Lynch, Hutchenson's superintendent, and Tara Nace Lauer, AET's on-site technician, indicated that while the job could have been shut down if AGM had not provided updated BLL reports for its employees, the only result of [REDACTED] BLL being over 50 µg/dl would have been to remove him from the job; in addition, Lauer testified that AGM employed various torch cutters who it "switched" off and on during the project, and Lynch testified that although Hutchenson's contract with the Navy had a liquidated damages clause that would have cost the company almost \$1,000.00 a day if the job were shut down, AGM's contract had no such clause. (Tr. 176-77; 190; 202-03; 307-09; 322-23).

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<sup>21</sup>(...continued)

perforated edges, was discarded upon receipt of the hard copy; in any case, the 40 BLL report, which OSHA provided her, was not in [REDACTED] file. (Tr. 60-70; 86-89; 95).

<sup>22</sup>Van Kampen, a 19-year Quest employee, is presently a quality control analyst. (Tr. 101-02).

The CO essentially conceded on cross-examination that his belief that [REDACTED] removal would have resulted in the job being stopped was incorrect, although he persisted in his opinion that the removal would have had financial consequences for AGM. However, the CO could not articulate any specific reasons for his opinion, and it is clear his testimony in this regard was speculative. (Tr. 525-40). In concluding that AGM did not alter the 64.8 report, I have carefully considered the testimony of Spinner and Van Kampen set out above and the fortuitous nature of the 40.0 report. Regardless, in view of the apparent lack of motivation on the part of AGM, and without more definitive evidence, I will not make the leap the Secretary urges, particularly since, for the reasons set out below, I have nonetheless found that the violations in Item 1 of Citation 2 were willful.

A violation is properly classified as willful if it was committed “with intentional, knowing, or voluntary disregard for the Act’s requirements, or with plain indifference to employee safety.” *Williams Enter., Inc.*, 13 BNA OSHC 1249, 1256 (No. 85-355, 1987). As *Williams* also states:

A willful violation is differentiated by a heightened awareness--of the illegality of the conduct or conditions--and by a state of mind--conscious disregard or plain indifference. There must be evidence that an employer knew of an applicable standard or provision prohibiting the conduct or condition and consciously disregarded the standard. Without such evidence of familiarity with the standard’s terms, there must be evidence of such reckless disregard for employee safety or the requirements of the law generally that one can infer that if the employer had known of the standard or provision, the employer would not have cared that the conduct or conditions violated it. It is therefore not enough for the Secretary simply to show carelessness or lack of diligence in discovering or eliminating a violation; nor is a willful charge justified if an employer has made a good faith effort to comply with a standard or eliminate a hazard, even though the employer’s efforts are not entirely effective or complete.

13 BNA at 1256-57 (citations omitted).

Grace Mazzocchi testified that she was the highest-level person for lead issues at AGM, that she had a copy of the lead standard in her office, and that she had attended a lead course in 1994; the course was specific to the demolition industry and covered medical surveillance of employees. She also testified that she knew there would be lead at the site, that AET had developed a lead abatement plan for the project, and that employees at the site were given lead awareness training; she herself had given some of this training, and Norman Russo, AGM’s supervisor at the site, was

responsible for ensuring employees complied with the lead plan.<sup>23</sup> (Tr. 223-24; 240; 657-58; 708-11; R-13).

In addition to the above, the record shows Mazzocchi had developed AGM's "lead protocol," contained in both C-8 and R-9, which sets out employee testing and examination requirements, and that in 1993 she had sent R-1, a letter specifying the tests to perform on two employees, to Omni-Med. (Tr. 71-81; 227; 675-80). The second and third paragraphs of R-1 state as follows:

Any employee whose blood level exceeds 40 micrograms per deciliter will not be permitted to work on a certain project; please call us as soon as results are available. We will need a copy of test results for our file.

The record also shows Mazzocchi or her secretary would call Omni-Med to schedule tests and physicals for employees and that Omni-Med would report the test results to Mazzocchi or her secretary by phone and then fax and/or mail the results to AGM. (Tr. 29-50; 230; 254; 358-72; R-2).

Despite the foregoing, and based on my findings in Item 1 of Citation 1, AGM did not provide BLL and ZPP testing as required. [REDACTED] only ZPP test was on May 20, 1997, and while his next BLL/ZPP test should have been on or about July 20, 1997, in view of the 60-day testing requirement in the standard and AET's lead plan, [REDACTED] did not have another BLL test until September 1997. Further, although Lynch sent AGM a letter on August 21, 1997, requesting updated BLL/ZPP testing for the employees at the site, AGM did not comply until September 17, 1997.<sup>24</sup> See C-6, C-11. The testimony of Lynch and Lauer shows that they had numerous contacts with AGM management in attempting to secure the updated tests and that on August 27 AGM sent copies of test results that Lynch already had; additionally, Lynch testified that Russo and Mazzocchi told him they did not believe updated tests were required. (Tr. 173-81; 190-93; 298-302).

Based on my findings set out in Items 2a and 2b of Citation 1, AGM also failed to provide [REDACTED] with the required annual medical exam and Omni-Med with the necessary information. That is, [REDACTED] had not had a medical exam that included a detailed work history, a detailed

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<sup>23</sup>As noted *supra*, a May 21, 1997 letter from AET to Hutchenson, a copy of which went to Russo, showed [REDACTED] lead exposure levels on May 15, 1997 to be 1600 and 1300  $\mu\text{g}/\text{m}^3$ . See C-10. In addition, AET's lead plan for the site required all personnel in the work area to have BLL and ZPP testing at least every 60 days. See R-13, § B.2.

<sup>24</sup>Grace Mazzocchi testified that she had been aware of the request. (Tr. 244).



medical history, and a thorough physical examination, with particular attention to matters relating to lead exposure; further, AGM did not provide Omni-Med with a copy of the standard or with a description of [REDACTED] job duties, his lead exposure levels, or the protective equipment he used.

Finally, based on my findings set out in Item 1 of Citation 2, AGM did not give [REDACTED] written notification of MRP benefits or his BLL test results. In fact, in view of [REDACTED] testimony that he first found out about his elevated BLL when an employee of the State of New Jersey called him, and that he left the site at the end of October because the job was over, and not because he was removed due to his elevated BLL, I conclude that AGM did not provide [REDACTED] with either oral or written notification of MRP benefits and BLL test results. (Tr. 139-43; 153-60).

In light of the record, I find that the Secretary has demonstrated that AGM acted with conscious disregard of the lead standard's requirements and/or with plain indifference to employee safety. Item 1 of Citation 2 is consequently affirmed as a willful violation. I further find that the Secretary's proposed penalty of \$49,000.00 is appropriate, based on the record and the considerations set out *supra*. (Tr. 464-65). The penalty as proposed is accordingly assessed.

Turning to Item 2b, I conclude that this violation was also properly characterized as willful. The circumstances of this item, set out *supra*, establish that the CO first requested BLL records for the employees who had worked at the site on March 27, 1998; upon reviewing AGM's PNSY file, he saw three reports for [REDACTED], dated May 20, 1997, December 10, 1997, and February 18, 1998, showing BLL's of 44.6, 56.7 and 32.3. Upon going to Omni-Med, the CO saw two BLL reports for [REDACTED] that had not been in AGM's file, that is, a September 10, 1997 report reflecting a BLL of 64.8 and an October 25, 1997 report reflecting a BLL of 61.2. On June 3, 1998, the CO called Mazzocchi and asked about these two BLL reports, and she told him to get a subpoena or talk to her attorney. OSHA issued a *subpoena duces tecum* on June 11, 1998, but Mazzocchi did not appear as requested on June 22, 1998, and while she responded through her attorney at the end of July 1998 by furnishing some of the documents OSHA had asked for, the 64.8 and 61.2 BLL reports were not provided. The CO also went to the PNSY site to review the records there, at which time he discovered the September 10, 1997 report showing a BLL of 40.0 µg/dl. OSHA subpoenaed both Mazzocchi and [REDACTED] to appear in August of 1998, but neither appeared.

Besides the above, the CO testified that after Mazzocchi did not appear on June 22, 1998, he called AGM's then-attorney Stephen Dratch on July 7, 1998, and left him a message asking about

the information he had agreed to furnish.<sup>25</sup> On July 8, 1998, an associate of Dratch called, and although he stated he would get back with the CO later that day he did not. The CO called Dratch again on July 14, 1998, and left another message about the information; however, Dratch apparently did not respond to the call, and the documents he sent in at the end of July did not include the 64.8 and 61.2 BLL reports. (Tr. 482-84; 567-69; 577-78). The CO further testified that when he tried to speak with ██████ in August of 1998, ██████ told him he would need to call his supervisor; after doing so, ██████ said his supervisor had told him he could not talk to the CO. (Tr. 386-89). In view of this testimony, and notwithstanding Mazzocchi's testimony that she did not tell ██████ not to speak to OSHA, I find as fact that an AGM management employee advised ██████ not to speak to the CO and not to appear pursuant to the August 1998 subpoena. (Tr. 251-52).

The language of the cited standard, set out *supra*, clearly required AGM to make available to OSHA, upon request, ██████ BLL reports for examination and copying. In light of the foregoing, OSHA requested ██████ BLL reports on eight separate occasions. However, AGM never provided the 64.8, 61.2 and 40.0 BLL reports. I have considered all of the evidence and all of AGM's assertions with respect to this item, and, based on the record, I conclude that AGM consciously disregarded the requirements of the standard. This item is consequently affirmed as a willful violation. I also conclude that the Secretary's proposed penalty of \$49,000.00 is appropriate for this item, despite the fact that Items 2a and 2b were grouped for penalty purposes and Item 2a has been vacated. (Tr. 484-85). A penalty of \$49,000.00 is accordingly assessed for this item.

**"Other" Citation 3**

This item alleges a violation of 29 C.F.R. 1904.2(a), which requires the employer to maintain a log of all recordable occupational injuries and illnesses and to enter all such occurrences on the log no later than six working days after learning of them. The CO testified that he reviewed C-7, AGM's OSHA Form 200, on the first day of his inspection and that there was nothing on it to reflect any of ██████ elevated BLL's. The CO further testified that any BLL over 50 µg/dl has to be noted on the form, that the form itself states on the back that lead poisoning has to be documented, and that AGM's failure to record ██████ elevated BLL's on its OSHA Form 200 was an "other-

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<sup>25</sup>The CO indicated that Dratch had spoken with OSHA before June 22, 1998, at which time it was agreed that AGM would provide documents relating only to ██████. (Tr. 482; 577-78).

than-serious” violation. (Tr. 390-99). The CO’s testimony and C-7 establish the alleged violation, and AGM presented nothing to rebut this evidence. This citation item is therefore affirmed as an “other” violation, and the Secretary’s proposed penalty of \$500.00 is assessed.

**Conclusions of Law**

1. Respondent, A.G. Mazzocchi, Inc., is engaged in a business affecting commerce and has employees within the meaning of section 3(5) of the Act. The Commission has jurisdiction of the parties and of the subject matter of the proceeding.

2. Respondent was in serious violation of 29 C.F.R. §§ 1926.62(j)(2)(i), 1926.62(j)(3)(ii)(A), (B) and (D)(3), and 1926.62(j)(3)(iv)(A)(1-4).

3. Respondent was in willful violation of 29 C.F.R. §§ 1926.62(j)(2)(iv)(A-B) and 1926.62(n)(5).

4. Respondent was not in violation of 29 C.F.R. § 1926.62(n)(2)(iii)(C).

5. Respondent was in “other” violation of 29 C.F.R. § 1904.2(a).

**Order**

On the basis of the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Items 1 and 2 of Citation 1 are AFFIRMED as serious violations, and a penalty of \$3,500.00 is assessed for each item.

2. Items 1 and 2b of Citation 2 are AFFIRMED as willful violations, and a penalty of \$49,000.00 is assessed for each item.

3. Item 2a of Citation 2 is VACATED.

4. Item 1 of Citation 3 is AFFIRMED as an “other” violation, and a penalty of \$500.00 is assessed for this item.

/s/

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Irving Sommer  
Chief Judge

Date: April 10, 2000