UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1825 K STREET N.W.
4TH FLOOR
WASHINGTON D.C. 20006-1246

FAX:
COM (202) 634-4008
FTS 634-4008

SECRETARY OF LABOR, Complainant, v. McGRAW CONSTRUCTION COMPANY, Respondent.	OSHRC Docket No. 89-2220

DECISION

Before: FOULKE, Chairman; WISEMAN and MONTOYA, Commissioners.

BY THE COMMISSION:

The primary issue in this case is whether the Administrative Law Judge (the "judge") erred in determining that McGraw Construction Co. ("McGraw," or the "company") failed to comply with 29 C.F.R. § 1926.51(f) by not providing "adequate washing facilities" for those of its employees who worked in the regulated area of a coke oven battery owned by another company. We find that the judge did not err and affirm his finding of a serious violation and $800 penalty assessment.

Facts

For the past sixty years, McGraw, a Middletown, Ohio-based company, has regularly performed construction and maintenance work at the Middletown (Ohio) Works of Armco Steel Company ("Armco"). McGraw maintains shops and an employee trailer near Armco's coke oven battery. Its employees worked throughout the Armco facility, and -- for at least 16 years prior to the commencement of this case -- it was not unusual for McGraw's employees to work in the area of the coke oven battery. Posted in the coke oven battery were signs that read "Danger," "Regulated Area," "Respirator Required," and signs that warned of a potential health hazard that may be present. McGraw General Superintendent

for Maintenance Calvin Wayne Campbell testified on cross-examination that the meaning of the signs was explained to him by members of Armco's safety department and by members of upper management of the coke oven plant.

In April 1989, McGraw had five employees working at the Armco coke oven batteries. Two of these employees worked within the regulated area[1] of the coke oven batteries welding supports for the gas main on coke oven battery #2. McGraw employees had been working at that job on-and-off for at least two months.

Testimony reveals that two to three inches of spilled coal had accumulated atop the ovens where the employees worked. On windy days, the accumulated debris was carried into the air. Employees working in the area wore coveralls that generally became covered with ash, soot, grease, tar, and coal dust during the workday.

The trailer McGraw maintained at the Armco plant site was located about 100 yards outside the regulated area of the coke ovens. One of the trailer's functions was to serve as a place for employees to wash. A water barrel was supplied to provide for that purpose. The employees also had the opportunity to wash at lavatory facilities located in Armco's restrooms. Although Armco had shower facilities on the site and Armco employees working in regulated areas of the coke oven battery were required to take showers at the end of each shift,[2] McGraw employees were not allowed to use the Armco shower facilities.

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[1] The regulated area of a coke oven battery includes "topside and its machinery, pushside and its machinery, coke side and its machinery, and the battery ends . . . ." 29 C.F.R. § 1910.1029(d)(2)(i). According to OSHA supervisory industrial hygienist Richard Gilgrist, the regulated area is the area of greatest exposure to coke oven emissions.

[2] The requirement appears in the coke oven emissions standard at 29 C.F.R. § 1910.1029(i)(2):

> **§ 1910.1029 Coke oven emissions.**
> . . . .
> (i) *Hygiene facilities and practices--*
> . . . .
> (2) *Showers.* (i) The employer shall assure that employees working in the regulated area shower at the end of the work shift.
> (ii) The employer shall provide shower facilities in accordance with § 1910.141(d)(3) of this part.

Armco employees were also required to wear respirators and coveralls while working in regulated areas of the coke oven battery.

On April 3 and 4, 1989, senior industrial hygienist William John Wilkerson of the Occupational Safety and Health Administration ("OSHA") conducted an inspection of McGraw's jobsite at Armco's Middletown Works coke oven batteries. OSHA subsequently issued citations to McGraw alleging violations of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (the "Act") for its failure to comply with various provisions of the coke oven emissions standard at 29 C.F.R. § 1910.1029. Those citations were withdrawn after OSHA determined that the coke oven standard was not applicable to construction industry employers like McGraw. OSHA then issued a citation alleging violations of the construction standards in 29 C.F.R. Part 1926, including the allegation that McGraw failed to comply with section 1926.51(f).[3] The citation stated:

> Adequate washing facilities were not provided for employees engaged in the application of paints, coating, herbicides, or insecticides, or in other operations where contaminants might have been harmful to the employees:
>
> (a) McGraw employees working in regulated areas as defined in 29 CFR 1910.1029 on Armco's Middletown Coke Oven Battery No. 2 were not provided shower facilities in order to wash the coke oven emissions, substances known to cause cancer, off their bodies.

Judge's Decision[4]

Based on testimony from OSHA supervisory industrial hygienist Richard T. Gilgrist and the language of the coke oven emissions standard at section 1910.1029(i)(2), the judge found that the Secretary had established a violation of section 1926.51(f). He found that, for employees working within the regulated area of a coke oven facility, section 1926.51(f)'s requirement for "adequate washing facilities" would include showers that would prevent contaminated particulate matter from being carried out of the workplace in the hair or on

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[3] Section 1926.51(f) provides:

> **§ 1926.51 Sanitation.**
>
> . . . .
>
> (f) *Washing facilities.* The employer shall provide adequate washing facilities for employees engaged in the application of paints, coating, herbicides, or insecticides, or in other operations where contaminants may be harmful to the employees. Such facilities shall be in near proximity to the worksite and shall be so equipped as to enable employees to remove such substances.

[4] The hearing in the case was conducted on January 23, 1989, before Judge Joe D. Sparks. Due to his illness, however, and without objection from the parties, the case was decided by Judge Edwin G. Salyers.

the skin. Although the judge noted that section 1910.1029 may be inapplicable to non-coke oven employers under the terms of the decision by the Third Circuit in *American Iron & Steel Institute v. OSHA*, 577 F.2d 825 (3d Cir. 1978), *cert. dismissed*, 448 U.S. 917 (1980)("*AISI*"), he found that "the provisions of the standard are indicative of accepted hygiene practices where employees are exposed to coke oven emissions."

In characterizing the violation as serious, the judge relied on the uncontroverted testimony of industrial hygienist Gilgrist that coke oven emissions are a carcinogen and that exposure to such emissions is known to cause lung and kidney cancer. The judge found the gravity of the violation to be high because five employees had been exposed to such cancer hazards while working in the regulated area of the battery for approximately two months. He affirmed the $800 penalty proposed by the Secretary.

Argument of McGraw

McGraw argues that the terms "adequate washing facilities" in the cited standard reasonably involve the ability of employees to wash their hands and faces. It claims that employees could do this by using the water barrel it provided for them at the trailer or by using the washing facilities in Armco's restrooms. McGraw contends that the failure of OSHA's industrial hygienist Wilkerson to shower or wash on the site after the inspection supports its argument that its washing facilities were adequate.

McGraw argues that in finding that it had inadequate washing facilities under section 1926.51(f), the judge wrongly relied on the coke oven emission standard at section 1910.1029(i)(2), which requires showers, even though he acknowledged that under *AISI* the standard is inapplicable to non-coke-oven employers like McGraw. McGraw relies on *AISI* and *J.L. Manta Plant Serv.*, 10 BNA OSHC 2162, 2163 n.2, 1982 CCH OSHD ¶ 26,303, p. 33,266 n.2 (No. 78-4923, 1982), to support its claim that section 1910.1029 does not apply to employers in construction. It contends that the Secretary is attempting to do indirectly what he cannot do directly, that is, cite a non-coke oven employer under the coke oven standard. McGraw points out that where the Secretary has chosen to require showers, he has stated so expressly, as at 29 C.F.R. §§ 1910.1001(i)(2), 1910.1011(c)(4)(vii), 1910.1015(c)(4)(vii) and (5)(iii), 1910.1018(m)(2), and 1910.1029(i)(2).

McGraw contends that the judge also erred in finding that there were "harmful contaminants" present at the jobsite and points out that industrial hygienist Wilkerson did not conduct a sampling to measure coke oven emissions.[5] The company argues that the judge based his finding of a violation upon "the hazards presented by coke dust," even though coke dust is not a coke oven emission, and its unmeasured presence is not sufficient to sustain the citation. McGraw also points out that the judge specifically found, in vacating item 2 of the citation, that the Secretary had failed to prove that coke dust is a "toxic material." That being the case, the company argues, it should not have been cited for the presence of coke dust. McGraw contends that a similar citation was vacated in *Keco Indus.*, 13 BNA OSHC 1161, 1987 CCH OSHD ¶ 27,860 (No. 81-263, 1987), because the Secretary failed to prove the effects of exposure, even though he had proven employee exposure. Here, McGraw claims that the Secretary failed to establish either exposure to harmful contaminants or the effects of the alleged exposure.

Argument of the Secretary

The Secretary contends that in light of the Act's broad remedial purpose, the Act and regulations issued pursuant to it should be liberally construed to afford the broadest possible protection to workers, citing *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 12 (1980) and section 2 of the Act, 29 U.S.C. § 651. The Secretary argues that the "adequate washing facilities" required by the cited standard in this case are showers that would enable an employee to wash his entire body so that harmful contaminants from the coke ovens may be removed.

The Secretary points out that industrial hygienist Wilkerson testified that coke oven emissions potentially contaminate "not just the hands and face but also the entire body" and that it is important for employees to thoroughly cleanse themselves before leaving the jobsite "because . . . material can be taken home and transmitted to other clothing or perhaps furniture, car seats, and so forth, and the material is, in fact, a cancer-causing substance."[6]

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[5] Coke oven emissions are defined at 29 C.F.R. § 1910.1029(b) as "the benzene-soluble fraction of total particulate matter present during the destructive distillation or carbonization of coal for production of coke."

[6] The Secretary disputes McGraw's claim that industrial hygienist Wilkerson's failure to shower after the inspection suggested that he thought McGraw's washing facilities were adequate; the Secretary contends that Wilkerson's testimony only establishes that McGraw treated him as it did its own employees by not providing a shower.

The Secretary also relies on the testimony of industrial hygienist Gilgrist that it was hazardous for McGraw employees not to shower at the end of the work day "[b]ecause of the potential for particulate being implanted, impinged on the skin surface of the employees, skin and/or hair, and then unnecessary exposure continuing until such time as it was either knocked off or washed off in some shape or form."

The Secretary argues that no distinction need be made in this case between exposure to coal dust or to coke oven emissions. He contends that it is widely recognized that "the ambient atmosphere of coke ovens is a carcinogenic[-]rich environment" and that employees working in the vicinity of a coke oven battery are exposed to a mixture of particulates, vapors, and gases emitted by the coke ovens which cause multiple types of cancer. *See AISI*, 577 F.2d at 831; 41 Fed. Reg. 46,744, 46,756, 46,760-61, 46,765-66 (1976). McGraw's argument that its employees working in the coke oven area were not exposed to harmful particulates is contrary to the record, the Secretary argues. He contends that uncontroverted testimony establishes that coke oven emissions contain carcinogens and that the working conditions on top of the ovens were dirty and smoky as a result of coke oven operations. Indeed, the Secretary points out, "signs posted on top of the battery warned of the presence of a cancer hazard and stated 'Danger -- Respirator Required.'"

The Secretary rejects McGraw's argument that showers are purposely excluded from the cited standard because they are not specifically mentioned in it. He claims that a standard may be interpreted by referring to other relevant standards or codes within the industry and that a construction standard like the cited standard may be interpreted by reference to the general industry standards in 29 C.F.R. Part 1910, citing *Pace Constr.*, 14 BNA OSHC 2216, 2221-22, 1991 CCH OSHD ¶ 29,333, p. 39,431 (No. 86-758, 1991)(Commission may look to OSHA's general industry standards to interpret a term found in OSHA's construction industry standard), and other Commission cases. The use of the general industry coke oven standard is appropriate in interpreting cited section 1926.51(f), the Secretary argues, because section 1910.1029 specifically deals with the substance to which McGraw employees were exposed. Section 1910.1029 requires that employers provide employees with showers because of the pervasive and carcinogenic nature of coke oven emissions. McGraw employees, the Secretary argues, should have been provided with the

same protection afforded Armco's coke oven workers because they were exposed to much of the same hazards. In addition, the Secretary contends that the coke oven standard may be used to define an employer's duty under section 1926.51(f) because on October 17, 1978, he published in the Federal Register a list of general industry standards, including section 1910.1029, that he deemed applicable to construction work. 44 Fed. Reg. 8577 (1978). *See AISI*, 577 F.2d at 840. The Secretary claims that a "reasonably prudent employer would have known . . . that it should look to that standard to determine the appropriate standard of conduct."

The Secretary points out that it would not have been unreasonable for McGraw to provide showers for its employees at the Armco location in light of its long-time presence of at least 60 years at Armco's mill, its established on-site trailer and shop areas there, and the fact that its employees routinely worked on the coke oven batteries.

Analysis

The resolution of this case is dependent upon how two sets of terms in the cited standard are construed: (1) "contaminants [that] may be harmful" and (2) "adequate washing facilities."

(1) "Contaminants [that] May Be Harmful"

In arguing that the Secretary failed to show that harmful contaminants were present at the worksite, the company relies on the Secretary's failure to establish that the coke oven emissions levels in the coke oven battery were higher than those permitted by the coke oven emissions standard and on the judge's finding that the Secretary did not establish that coke dust is a "toxic material" under section 1926.141(a)(2)(viii). McGraw's argument is misplaced. The cited standard refers to neither "toxic materials" nor "coke oven emissions," but to "contaminants [that] may be harmful". There is ample evidence of record to establish that the contaminants in the regulated area of the coke oven battery *may* have been *harmful* within the meaning of the standard. It is undisputed that employees working in the vicinity of coke ovens are exposed to a mixture of gases, vapors, and particulates that are carcinogenic. 41 Fed. Reg. 46,744. Here, there was testimony that on windy days the emissions escaping from Armco's coke ovens "hung around" in the form of thick smoke and "gritty dirt." The tops of the ovens themselves were covered with two or three inches of

material like coke breeze or spilled coke. McGraw's employees were welding in this area. Based on the hazards associated with regulated areas and the presence here of an accumulation of coke oven debris, we conclude that the Secretary has established the existence of contaminants that may be harmful to employees.

We next consider whether the washing facilities provided by McGraw were *adequate* within the meaning of the cited standard.

(2) "Adequate Washing Facilities"

That the cited standard does not explicitly require showers, while other standards do, does not dispose of our issue of interpretation. Under Commission case law, we may reasonably determine what washing facilities are "adequate" for employees working in the carcinogen-containing atmosphere surrounding coke ovens by looking to the circumstances of this particular case. *See Ormet Corp.*, 14 BNA OSHC 2134, 2136, 1991 CCH OSHD ¶ 29,254, p. 39,200 (No. 85-531, 1991)(standard using "near" not vague, since word's meaning can reasonably be determined based on language and purpose of standard and applicable physical conditions). *See also Faultless Div., Bliss and Laughlin Indus. v. Secretary of Labor*, 674 F.2d 1177, 1185 (7th Cir. 1982); *PBR, Inc. v. Secretary of Labor*, 643 F.2d 890, 897 (1st Cir. 1981); *Brennan v. OSHRC (Santa Fe Trail Transp. Co.)*, 505 F.2d 869, 872 (10th Cir. 1974).

OSHA supervisory industrial hygienist Gilgrist and senior industrial hygienist Wilkerson both testified what "adequate washing facilities" were required to cleanse McGraw's employees of harmful contaminants. Gilgrist testified that McGraw's employees who do not shower after each workday in the coke oven area could have the potential skin-cancer-producing agents contained in coke oven emissions implanted on their skin or in their hair. This could subject the employees to continued exposure to the particulates until they were either knocked off or washed off. Wilkerson testified that coke oven emissions have the potential to contaminate not just the hands and faces of employees but their entire bodies; it was, therefore, important for employees to thoroughly clean themselves before leaving the facility because otherwise it was possible that contaminants could be taken home and transmitted to family members or objects there. Wilkerson also testified that the hazards of working in the regulated area of the coke ovens were the same to McGraw's con-

struction workers as they were to Armco's general industry employees. However, he pointed out that because Armco's employees worked in a regulated area, they were required by section 1910.1029(i)(2)(i) of the coke oven emissions standard to shower after each shift, independent of whether they were exposed to any particular level of emissions. Yet, to clean themselves off after their shifts, McGraw employees had access only to a barrel of water and lavatory sinks. Based on the fact that McGraw's employees were exposed to harmful contaminants, we conclude that the cited standard requires more than McGraw provided here. The barrel of water and lavatory sinks were not "adequate washing facilities" within the meaning of section 1926.51(f). The record shows that one way McGraw could have complied with the standard was by providing its employees with shower facilities.

McGraw does not claim that it was unaware of the hazards of working in the regulated area, and indeed the evidence shows that the company knew of the extent of the hazards and knew that its employees were exposed to those hazards. Nevertheless, McGraw argues that "adequate washing facilities" "reasonably involves the ability of employees to wash their hands and faces." This takes too narrow a view of the requirements of the cited standard. The adequacy of McGraw's washing facilities is judged under cited section 1926.51(f) by determining whether those washing facilities are "so equipped as to enable employees to remove" the contaminants to which the employees are exposed. Based on the testimony of OSHA's supervisory industrial hygienist, Gilgrist, we find that washing facilities that are equipped only with a barrel of water and lavatory sinks would not enable McGraw's employees to knock imbedded particulate matter off their bodies and out of their hair.[7] McGraw should have known this because it knew that the Armco employees working in the regulated area had showers with which to clean themselves and were required to use those showers at the end of each workday. The McGraw employees worked in the same general area of the coke oven battery as the Armco employees and were subjected to the same dirty,

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[7] We categorically reject McGraw's argument that their washing facilities were adequate because the compliance officer failed to shower after the inspection. McGraw did not provide its own employees with shower facilities and therefore had none to offer the compliance officer. Besides, we see no need for any strict parallelism in the protective measures adopted by the compliance officer during the limited time that he was at the worksite for his inspection and those required by McGraw employees to protect themselves while working there on an ongoing basis.

smoky atmospheric conditions that resulted in substantial accumulations of particulate matter on the coke ovens and on the employees' bodies and clothing.

Order

For the reasons given above, we affirm the judge's finding that McGraw violated section 1926.51(f) and that the violation was serious.[8] After a consideration of the penalty factors in section 17(j) of the Act, 29 U.S.C. § 666(j), we assess a penalty of $800.

Edwin G. Foulke, Jr.
Chairman

Donald G. Wiseman
Commissioner

Velma Montoya
Commissioner

Dated: February 1, 1993

[8] We need not address McGraw's argument that the Secretary's reliance on the coke oven standard here is improper; we have not relied on the requirements of the coke oven standard in deciding this case.

UNITED STATES OF AMERICA
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1825 K STREET NW
4TH FLOOR
WASHINGTON, DC 20006-1246

FAX
COM (202) 634-4008
FTS (202) 634-4008

SECRETARY OF LABOR,	:	
Complainant,	:	
v.	:	Docket No. 89-2220
MCGRAW CONSTRUCTION CO., INC.,	:	
Respondent.	:	

NOTICE OF COMMISSION DECISION

The attached decision by the Occupational Safety and Health Review Commission was issued on February 1, 1993. **ANY PERSON ADVERSELY AFFECTED OR AGGRIEVED WHO WISHES TO OBTAIN REVIEW OF THIS DECISION MUST FILE A NOTICE OF APPEAL WITH THE APPROPRIATE FEDERAL COURT OF APPEALS WITHIN 60 DAYS OF THE DATE OF THIS DECISION.** See Section 11 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 660.

FOR THE COMMISSION

Ray H. Darling, Jr.

February 1, 1993
Date

Ray H. Darling, Jr.
Executive Secretary

Docket No. 89-2220

NOTICE IS GIVEN TO THE FOLLOWING:

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

William S. Kloepfer, Esq.
Associate Regional Solicitor
Office of the Solicitor, U.S. DOL
Federal Office Building, Room 881
1240 East Ninth Street
Cleveland, OH 44199

Robert A. Dimling, Esq.
Frost & Jacobs
2500 Central Trust Center
201 East Fifth Street
Cincinnati, OH 45202

Edwin G. Salyers
Administrative Law Judge
Occupational Safety and Health
Review Commission
Room 240
1365 Peachtree Street, N.E.
Atlanta, GA 30309-3119

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1825 K STREET, N.W.
4TH FLOOR
WASHINGTON, D.C. 20006-1246
FAX 8/ (202) 634-4008

December 12, 1990

IN REFERENCE TO SECRETARY OF LABOR v.

McGraw Construction Co., Inc. OSHRC DOCKET NO. 89-2220

NOTICE IS GIVEN TO THOSE LISTED BELOW:

Daniel J. Mick, Esq.
Counsel for Regional Trial Litigation
Office of the Solicitor, USDOL
200 Constitution Ave., N. W., Room S-4004
Washington, D. C. 20210

William S. Kloepfer
Associate Regional Solicitor
Office of the Solicitor, USDOL
Federal Office Bldg., RM 881
1240 East Ninth Street
Cleveland, Ohio 44199

Robert A. Dimling, Esq.
Frost & Jacobs
2500 Central Trust Center
201 East Fifth Street
Cincinnati, Ohio 45202

Judge Edwin G. Salyers
OSHRC
1365 Peachtree Street, N.E.
Suite 240
Atlanta, GA 30309

NOTICE OF DOCKETING

Notice is given that the above case was docketed with the Commission on December 12, 1990. The decision of the Judge will become a final order of the Commission on January 11, 1991 unless a Commission member directs review of the decision on or before that date.

Petitions for discretionary review should be received on or before January 2, 1991 in order to permit sufficient time for their review. See Commission Rule 91, 29 C.F.R. sec. 2200.91. Under Rule 91(h) petitioning corporations must also file a declaration of parents, subsidiaries, and affiliates.

All pleadings or other documents that may be filed shall be addressed as follows:

Executive Secretary
Occupational Safety and Health
Review Commission
1825 K St., N.W., Room 401
Washington, D. C. 20006-1246

A copy of any petition for discretionary review must be served on the Counsel for Regional Trial Litigation, Office of the Solicitor, USDOL, 200 Constitution Ave., N.W., Room S4004, Washington, D. C. 20210. If a Direction for Review is filed the Counsel for Regional Trial Litigation will represent the Department of Labor.

FOR THE COMMISSION

Ray H. Darling, Jr.

Ray H. Darling, Jr.
Executive Secretary

(3/90)

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1365 PEACHTREE STREET, N.E., SUITE 240
ATLANTA, GEORGIA 30309-3119

PHONE:
COM (404) 347-4197
FTS 257-4086

FAX
COM (404) 347-0113
FTS 257-0113

SECRETARY OF LABOR,	)	
	)	
Complainant,	)	
	)	
v.	)	OSHRC Docket No. 89-2220
	)	
McGRAW CONSTRUCTION CO., INC.,	)	
	)	
Respondent.	)	

APPEARANCES:

Bruce Scott Goldstein, Esquire, Office of the Solicitor, U. S. Department of Labor, Cleveland, Ohio, on behalf of complainant.

Robert A. Dimling, Esquire, Frost and Jacobs, Cincinnati, Ohio, on behalf of respondent.

DECISION AND ORDER

SALYERS, Judge:[1] This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C. § 651, et seq., hereafter referred to as the "Act").

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[1] This case was originally assigned to Judge Joe D. Sparks who heard the case on January 23, 1990. Judge Sparks suffered a heart attack/stroke before a decision could be rendered and is presently incapacitated. The parties were advised by order dated September 21, 1990, that this case had been reassigned for decision and were afforded an opportunity to request a de novo hearing with respect to any factual dispute which involved a credibility determination. Since no request has been received from the parties, the case will be decided upon the record developed at the hearing.

Respondent, McGraw Construction Company ("McGraw"), is a maintenance and construction firm with its principal offices on Canal Street in Middletown, Ohio. At all times relevant to this action, McGraw maintained a work site at the Middletown Works of Armco Steel Company, L.P., where it provided general construction services. McGraw admits it is engaged in a business affecting commerce and is an employer subject to the requirements of the Act.

On April 3-4, 1989, the Occupational Safety and Health Administration ("OSHA") conducted an inspection of respondent's Armco workplace. As a result of that inspection, respondent was issued a number of citations with penalties pursuant to the Act. By filing a timely notice of contest, respondent brought this proceeding before the Occupational Safety and Health Review Commission.

On January 23, 1990, a hearing was held in Cincinnati, Ohio. At the hearing, the Secretary withdrew serious citations 1, 3, and 4(b). The parties have submitted briefs on those matters remaining at issue, and this matter is now ready for decision.

ALLEGED VIOLATIONS

Citation 1, item 2 states:

> 2
> 29 CFR 1910.141(g)(2): Employees were permitted to consume food or beverage in area(s) exposed to toxic materials:

(a) Employees were permitted to eat their lunches in the McGraw job trailer located south of the No. 2 battery at Armco Inc's Coke Oven plant job where work coveralls worn on the Coke oven and contaminated with coke oven emissions, a known carcinogen, were stored in open piles within the trailer.

Citation 1, item 4(a), states:

4
29 CFR 1926.21(b)(2): The employer did not instruct each employee in the recognition and avoidance of unsafe condition(s) and the regulation(s) applicable to his work environment to control or eliminate any hazard(s) or other exposure to illness or injury:

(a) The ironworker crew, including the foreman were not trained or instructed in the recognition of the hazard of a lack of constant communication with the operator of a door machine at Armco' Middletown Coke Plant Stille, Battery 2 during the time employees were welding above the door machine. The door machine was permitted to pass under the employee doing the welding and so exposed the employee to contact with the moving machine and stationary rails and support structures.

Citation 1, item 5, states:

5
29 CFR 1926.28(a): Appropriate personal protective equipment was not worn by employees in all operations where there was exposure to hazardous conditions:

(a) Protective clothing contaminated with coke oven emissions was stored in the open at the McGraw Job trailer at Armco's No. 2 Stille Battery and appropriate personal protective equipment or other equivalent means were not utilized to prevent contact of employees with the contaminant, a known carcinogen, during employee breaks or clothes changes.

Citation 1, item 6, states:

6
29 CFR 1926.51(f): Adequate washing facilities were not provided for employees engaged in the application of paints, coating, herbicides, or insecticides, or in other operations where contaminants might have been harmful to the employees:

(a) McGraw employees working in regulated areas as defined by 29 CFR 1910.1029 on Armco's Middletown Coke Oven Battery No. 2 were not provided shower facilities in order to wash the coke oven emissions, substances known to cause cancer, off their bodies.

Citation 1, item 7, states:

7
29 CFR 1926.59(h): Employees were not provided information and training as specified in 29 CFR 1926.59(h)(1) and (2) on the hazard communication regulation, the company's program of compliance with such, and hazardous chemicals encountered in their work area at the time of initial assignment and when new hazards are introduced into the work area:

(a) Information and training on the hazard communication standard, 1926.59, the company's hazard communication program and the hazards of chemicals in the employees' work area such as welding fumes, benzene and coke oven emissions.

Citation 1, item 8, states:

8
29 CFR 1926.451(a)(4): Standard guardrails and toeboards were not installed on all open sides and ends of platforms more than 10 feet above the ground or floor:

(a) On March 24, 1989 and for the previous six months, employees were working at Armco's Middletown Coke Plant on Stille Battery No. 2 off of a 2" X 12" wood plank without proper guardrails and were exposed to a fall of twenty seven feet, ten inches to the coke side bench level below.

STATEMENT OF FACTS

On the date of the inspection, Compliance Officer William Wilkerson viewed and photographed the Number 2 Stille Battery at Armco (Exs. C-4 through C-9; Tr. 88). The coke battery houses a row of coke ovens 27 to 28 feet high separated by gas heaters (Tr. 89). The ovens are loaded with coal from "larry cars" or "charge cars" which run along the top of the battery (Tr. 90). A horizontal "bench," approximately eight feet wide, runs the length of the battery on the "push side" of the ovens. The bench is electronically operated and rides back and forth perpendicular to the battery (Tr. 90). The bench is used to push a "leveler bar" over the top of the coal prior to baking or distillation and to operate a ram which is used to force converted coal, now coke, out of the oven. A "door machine" runs along a second bench on the opposite side of the battery (Tr. 92). The door machine is 27 feet, 10 inches, high and approximately 50 feet long (Tr. 92). Following distillation, an operator maneuvers the door machine to the oven door. The machine removes the door and positions a chute in its place (Tr. 27). The ram pushes the coke through the chute and into a waiting rail car, or "hot quench car" below (Tr. 90-91).

At the time of the inspection, five McGraw employees had been working on the coke oven for about two months on welding projects (Tr. 9, 49). McGraw employees were provided with a daily schedule listing the order of oven door removals and

approximate times; however, doors were not actually removed at the scheduled times. Moreover, McGraw employees had no visual or audio communication with the door machine operator (although larry car operators did have radio communication) (Tr. 31-31, 34, 54). A "safety man," therefore, was assigned to watch for the door machine and let the welder know when to move out of the way (Tr. 31).

On March 24, 1989, two of McGraw's employees, Tom Reid and David Hicks, were working from the top of the stille battery, adding weld to the support members of gas mains above Oven B-34 (Tr. 25, 101). According to Mr. Reid, the safety man, Hicks was welding on a 2-x-12-inch plank which spanned a 33-inch space between the edge of the oven and a metal "cleat" or "riser" which was welded to the top side of the "guide bar" for the door machine. The door machine was directly below him and stationary (Tr. 101, 104). Reid stated that he became ill from the heat and fumes and stepped back between the standpipes to get some air. From there he saw the door machine start to move. He pulled his respirator down and called to Hicks. The door machine "grabbed" Hicks' leg and he fell backwards between the machine and the ovens (Tr. 102).

The plank was not guarded, and Mr. Hicks was not wearing a safety belt. The use of safety belts and the hazards presented by moving machinery, specifically the door machine, had both been topics of weekly safety meetings (Tr. 24-27, 34). After discussing the best way to perform the welding job on the

collector mains, the McGraw employees had decided that the welding job was not accessible from any location capable of being guarded (Tr. 179) and could best be performed using the plank (Tr. 182). They further determined that using safety belts on the door side of the battery would create a greater hazard, since a fallen employee suspended by a safety harness could be caught and mangled in the door machine (Tr. 30, 53-54, 60, 189). At the hearing, Compliance Officer Wilkerson admitted that it would be infeasible to guard the 2-x-12-inch plank (Tr. 126).

Mr. Wilkerson also observed McGraw's job trailer located across the road approximately 100 yards from the coke plant (Tr. 11, 89, 176). McGraw's employees used the job trailer for storing tools and taking breaks, including lunch breaks (Tr. 11-12, 175-176). Employees also used the job trailer to change into coveralls provided by McGraw (Tr. 12-13).

Employees had enough coveralls to change into a clean one every few days though on some days the coverall could be covered with ash, soot, grease, and tar (Tr. 13, 21, 52). Soiled coveralls were left in the trailer and gathered up once a week for laundering (Tr. 14). At the time of the inspection, used coveralls were tossed on benches and hung from pegs in the trailer (Tr. 107). Clean coveralls were bundled, half out of a plastic bag, on a bench (Ex. C-2; Tr. 17-18, 51). Compliance Officer Wilkerson stated that benches were coated with coal or coke dust, tar and grease (Exs. C-2, C-3; Tr. 107). Both Hicks

and Arndts testified that, although the trailer was swept once a week, it was nonetheless dirty and covered with soot and coke dust (Tr. 12-13, 50).

Shower facilities were available to Armco Steel employees but not to the employees of outside contractors such as McGraw (Tr. 35, 57). McGraw employees used the lavatory sinks and a water barrel in the job trailer to wash up (Tr. 55, 176-177).

David Hicks testified that McGraw held weekly safety meetings during which employees discussed, among other things, the proper use of respirators (respirators were supposed to be worn whenever working where coke was being pushed but in actuality were not); however, McGraw provided no training identifying chemical hazards peculiar to the coke plant (Tr. 24-25, 35, 37-39, 52). It had no hazard communication program at this point (Tr. 113, 209). Material safety data sheets ("MSDS") were not provided (Tr. 36). The only information provided to McGraw workers were signs posted by Armco Steel stating that the battery is a "regulated area," that cancer causing agents may be present, and that respirators are required (Tr. 59, 98, 164, 205-206).

Richard Gilgrist, an industrial hygienist with the Department of Labor trained in air pollutants (Tr. 153-155), testified that coke oven emissions are a known carcinogen primarily affecting the lung and kidneys (Tr. 156). The route of entry is inhalation and/or ingestion (Tr. 156). Mr. Gilgrist testified that, in a regulated area, the hands, face, and neck

should be washed prior to leaving the area and prior to eating (Tr. 157). Clothing coming out of a regulated area should be changed daily, put in a sealed container, and laundered by people who are aware of the potential for contamination (Tr. 159-160, 162). Because particulate matter may cling to the skin or hair and be carried out of the workplace contaminating the employees other clothing, car, and home; employees working in a regulated area should shower at the end of each work day (Tr. 122, 162-163). Armco employees working in the regulated area of the battery were required to follow all the procedures listed by Mr. Gilgrist (Tr. 74-75).

The established permissible exposure level ("PEL") for coke oven emissions is 150 micrograms of total particulate (Tr. 156-157). The inspecting compliance officer noted puffs of emissions from the coke ovens during his inspection but took no air or wipe samples of the work area or of the job trailer (Tr. 95, 131-132).

ALLEGED VIOLATION OF § 1910.141(g)(2)

The cited standard provides that "[n]o employee shall be allowed to consume food or beverages in a toilet room nor in any area exposed to a toxic material." "Toxic material" is defined by § 1910.141(a)(2)(viii) as:

> [A] material in concentration or amount which exceeds the applicable limit established by a standard, such as § 1910.1000 and § 1910.1001 or, in the absence of an applicable standard, which is of such toxicity so

as to constitute a recognized hazard that is causing or is likely to cause death or serious physical harm.

It is clear from the record that employees were permitted to eat and drink in McGraw's job trailer, which was exposed to and contaminated with coke dust and soot. It is not clear, however, that coke dust, in the amount present in the job trailer, constitutes "toxic material" as defined by the cited standard.

Section 1910.1029(c) establishes a PEL for coke oven emissions of 150 micrograms per cubic meter of air averaged over an eight-hour period. Coke oven emissions is a defined term, i.e., "the benzene-soluble fraction of total particulate matter present during the destructive distillation or carbonization of coal for the production of coke." See § 1910.1029(b). The Secretary admits that her compliance officer conducted no sampling of the particulate matter in the job trailer but argues the presence of coke dust and soot constitutes a recognized hazard, because there is no recognized "safe" level of exposure to carcinogens.[2]

Section 1910.141 clearly limits the application of the cited standard to circumstances where a material's established PEL is exceeded. Only "in the absence of an applicable

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[2] The Secretary produced no evidence on this issue but relies on findings by the third circuit in American Iron & Steel Inst. v. OSHA, 577 F.2d 825 (3rd Cir. 1978), cert. dismissed, 448 U. S. 917 (1980).

standard" is additional inquiry into the hazardous nature of a material warranted.

The Secretary failed to establish by a preponderance of the evidence the applicability of the cited standard. Serious citation 1, item 2, is, therefore, vacated. See Astra Pharmaceutical Products, Inc., 82 OSAHRC 55/E9, 9 BNA OSHC 2126, 1981 CCH OSHD ¶ 25,578 (No. 78-6247, 1981).

ALLEGED VIOLATION OF § 1926.21(b)(2)

Citation 1, item 4(a), states that the movement of the door machine presented a hazard to McGraw's welding crew working directly over the machine's guiderail. The citation alleges that the crew should have been instructed that the lack of constant communication with the door machine operator constituted a hazard.

Section 1926.21(b)(2) requires only that the employer inform its employees of safety hazards, specifically it states that:

> The employer shall instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control or eliminate any hazards or other exposure to illness or injury.

The cited standard does not require a formalized safety program. Rather employers need only provide instructions that are reasonable under the circumstances. See Pratt & Whitney Aircraft Group, Div. of United Technologies Corp., 86 OSAHRC

16/A3, 12 BNA OSHC 1770, 1986-87 CCH OSHD ¶ 27,564 (No. 80-5830, 1986), (vacating a citation based on a similar standard, the Commission adopted Chairman Buckley's view of § 1926.21(b)(2) set forth in Rochester Products Div., General Motors Corp., 85 OSAHRC 23/A3, 12 BNA OSHC 1324, 1984-85 CCH OSHD ¶ 27,257 [No. 80-5439, 1985]).

It is clear from the record that McGraw's welding crew had discussed the door machine in safety meetings and were aware that its possible sudden movement was hazardous. Moreover, they were aware that they had no direct communication with the door operator. Together with their on-site foreman, Mr. Arndts, the crew decided, therefore, to assign Mr. Reid to act as safety man, to warn Mr. Hicks of any movement of the door machine.

This judge is satisfied that McGraw's supervisory personnel on site, Mr. Arndts, provided the welding crew with instructions that were adequate under the circumstances to apprise the crew of the hazards involved in working near the door machine and of the methods selected to minimize those hazards.

In her brief, however, complainant argues that the methods chosen to control the hazard were inadequate, stating that, if Hicks and Reid had been provided with a radio receiver, the door operator could have warned them when the door was about to move and the incident leading to this citation could have been avoided. While her contention may have some merit, citation of the respondent on that basis clearly goes beyond the scope of the cited standard. Section 1926.21(b)(2) was not intended to

provide the Secretary with unlimited authority to establish and enforce safety rules not promulgated pursuant to formal rulemaking procedures.

Citation 1, item 4(a) must, therefore, be vacated.

ALLEGED VIOLATION OF § 1926.28(a)

The cited standard provides that:

> The employer is responsible for requiring the wearing of appropriate personal protective equipment in all operations where there is an exposure to hazardous conditions or where this part indicates the need for using such equipment to reduce the hazards to the employees.

Serious citation 1, item 5, alleges that McGraw violated the cited standard in that it failed to provide personal protective equipment for employees exposed to coke dust and soot in the McGraw job trailer while changing or on breaks. In her brief, the Secretary acknowledges that McGraw did provide protective clothing, and does not advocate any additional equipment. Instead, she argues that McGraw has an additional duty under the standard to establish and enforce proper storage and laundering practices to ensure the effectiveness of the equipment provided.

That § 1926.28(a) was not intended to address the care and maintenance of personal protective equipment required thereunder is clearly demonstrated by § 1926.28(b), which states that "[r]egulations governing the use, selection, and maintenance of

personal protective and lifesaving equipment are described under Subpart E of this part."

The Secretary has failed to demonstrate the applicability of the cited standard. Citation 1, item 5, will, therefore, be dismissed.

ALLEGED VIOLATION OF 29 C.F.R. § 1926.51(f)

The cited standard requires employers to provide adequate washing facilities for employees engaged in operations where contaminants may be harmful to the employees. Such facilities are required to enable employees to remove harmful substances before leaving the workplace.

McGraw employees were provided with a water barrel in their job trailer and had access to Armco lavatories, where they could wash their hands and faces. However, the testimony of Mr. Gilgrist, supported by the coke oven emissions standards at § 1910.1029(i)(2),[3] establishes that "adequate washing facilities" for employees working within a regulated area in a coke facility would include showers, to prevent contaminated

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[3] Section 1910.1029(i)(2) states:

> Showers. (i) The employer shall assure that employees working in the regulated area shower at the end of the work shift.

Although § 1910.1029 may be inapplicable to non-coke oven employers due to the Secretary's failure to provide adequate notice, American Iron & Steel Institute v. OSHA, supra, the provisions of the standard are indicative of accepted hygiene practices where employees are exposed to coke oven emissions.

particulate matter from being carried out of the workplace in the hair or on the skin.

The Secretary has established the cited violation.

According to section 17(k) of the Act, a violation is considered serious if the violative condition or practice gives rise to a substantial probability of death or serious physical harm. The uncontroverted testimony of Mr. Gilgrist establishes that coke oven emissions are a carcinogen. Exposure to same is known to cause lung and kidney cancer in humans. It is, therefore, concluded that the violation was serious.

The Secretary has proposed a penalty of $800.00. Although the Secretary was unable to sustain her burden of proof in regards to a number of the citations in this case, the record is replete with evidence of McGraw's complete lack of concern towards the environmental hazards presented by coke dust. Coke dust was present in quantity in areas where employees ate, clean protective clothing was stored in contaminated areas, required respirator usage was not enforced, and employees were not provided with toxic hazard training. McGraw may not ignore known hazards relying on the inapplicability of the coke oven emissions standard to exempt it from safe hygiene practices employed by coke oven employees working side by side with its own employees.

The gravity of this violation is high. Five employees had been exposed to cancer hazards, working in the regulated area on the battery for approximately two months.

A penalty of $800.00, as proposed by the Secretary, is found to be appropriate.

ALLEGED VIOLATION OF § 1926.59(h)

The cited standard requires employers to provide employees with information and training on hazardous chemicals in their work area at the time of their initial assignment and whenever a new hazard is introduced into their work area. Employees must be provided with, inter alia, a list of the hazardous materials in their area and MSDS's for those materials.

It is undisputed that, at the time of the inspection, McGraw's employees were engaged in welding collector mains atop coke ovens in operation. The conclusion is inescapable that the welding crew was exposed to some level of coke oven emissions and welding fume. The information relating to those chemicals and required by the standard was not provided to respondent's employees.

Respondent defends its failure to comply with the cited standard on grounds that the cited standard only requires training at the time of "initial assignment." The Hazard Communication Standard ("HCS") was not enforced in the construction industry until March 17, 1989, about two weeks prior to McGraw's inspection. At that point, McGraw employees had already been assigned to the coke oven battery for some months.

Adoption of respondent's position would deny the protection of the HCS to all construction workers with continuous employment. Such interpretation contravenes the purpose of the Act and cannot be accepted.

Respondent's other defenses are equally without merit.

The Secretary has established the violation. For the reasons discussed above, the violation was properly classified as serious and the proposed penalty of $900.00 is appropriate.

ALLEGED VIOLATION OF § 1926.451(a)(4)

Section 1926.451(a)(4) requires guardrails and toeboards be installed on all open sides and ends of platforms more than ten feet above the ground.

It is uncontested that the 2-x-12 inch plank used by respondent was 27 feet, 10 inches, above the ground and unguarded. At the hearing, however, complainant's compliance officer admitted that guarding the plank itself was infeasible. Where compliance with a standard's literal requirements is not possible or would preclude performance of the employer's work, the burden shifts to the Secretary to show that practical and realistic alternative means of protection were available to the employer. Dun-Par Engineered Form Co., 86 OSAHRC 38/A3, 12 BNA OSHC 1949, 1953, 1986-87 CCH OSHD ¶ 27,650 (No. 79-2553, 1986), rev'd, 843 F.2d 1135 (8th Cir. 1988).[4]

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[4] On remand, the Commission specifically held that the rule established in Dun-Par, supra, remained valid Commission

The Secretary made no attempt to prove the availability of alternative means of protection, and so has failed to carry her burden of proof on this item. Citation 1, item 8, will, therefore, be dismissed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

ORDER

It is ORDERED:

1. Serious citation 1, item 2, alleging violation of §1910.141(g)(2), is VACATED.

2. Serious citation 1, item 4(a), alleging violation of §1926.21(b)(2), is VACATED.

3. Serious citation 1, item 5, alleging violation of §1926.28(a), is VACATED.

4. Serious citation 1, item 6, alleging violation of §1926.51(f), is AFFIRMED and a penalty of $800.00 is ASSESSED.

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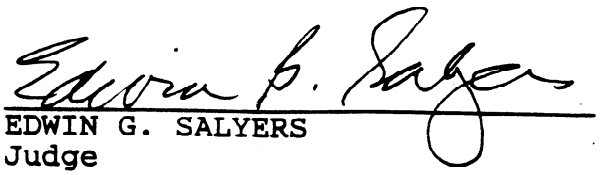
precedent, adopting the eighth circuit ruling only as the "law of the case." Dun-Par Engineered Form Co., 89 OSAHRC 16/A3, 13 BNA OSHC 2147, 2150, 1988 CCH OSHD ¶ 28,495 (No. 79-2553, 1988).

5. Serious citation 1, item 7, alleging violation of §1926.59(h), is AFFIRMED and a penalty of $900.00 is ASSESSED.

6. Serious citation 1, item 8, alleging violation of §1926.451(a)(4), is VACATED.

Dated this 5th day of December, 1990.



EDWIN G. SALYERS
Judge