UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1825 K STREET NW
4TH FLOOR
WASHINGTON, DC 20006-1246

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

SECRETARY OF LABOR,

Complainant,

v.

MORRISON-KNUDSEN CO., INC./YONKERS CONTRACTING CO., INC., A JOINT VENTURE,

Respondent.

OSHRC Docket No. 88-572

## *DECISION*

BEFORE: FOULKE, Chairman, WISEMAN and MONTOYA, Commissioners.

BY THE COMMISSION:

In September 1987, a compliance officer of the Occupational Safety and Health Administration ("OSHA"), of the United States Department of Labor, inspected a bridge demolition project in New York City, where certain employees of a joint venture ("the employer"), comprised of Morrison-Knudsen Company, Inc., and Yonkers Contracting Company, Inc., were using cutting torches on structural steel to demolish a bridge that was covered with lead-based paint. The inspection disclosed that, although this cutting work was done in open air, it was generating hazardous levels of airborne lead to which the employees were being exposed. Accordingly, in March 1988, OSHA issued two citations pursuant to the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651 *et seq.* ("the Act").

Willful citation 1 alleged seven items of violation, one of which the Secretary of Labor ("the Secretary") withdrew prior to the hearing; therefore that item, item 4, was vacated by the Commission administrative law judge who heard the case. The judge affirmed the remaining six items, as well as nonserious citation 2, which alleged a single item of violation.

On review are numerous issues that we address in the sequence followed by the judge in his decision.

### *I. Citation 1, Item 6*

The Secretary cited two construction standards, 29 C.F.R. § 1926.55(a) and (b),[1] which the employer contends are preempted by more specifically applicable construction standards, 29 C.F.R. §§ 1926.353(c) and 1926.354(c).[2] The employer further contends that the construction standards as a whole were improperly promulgated.

---

[1] These standards state:

> **§ 1926.55 Gases, vapors, fumes, dusts, and mists.**
>
> (a) Exposure of employees to inhalation, ingestion, skin absorption, or contact with any material or substance at a concentration above those specified in the "Threshold Limit Values of Airborne Contaminants for 1970" of the American Conference of Governmental Industrial Hygienists[ ] shall be avoided.
>
> (b) To achieve compliance with paragraph (a) of this section, administrative or engineering controls must first be implemented whenever feasible. When such controls are not feasible to achieve full compliance, protective equipment or other protective measures shall be used to keep the exposure of employees to air contaminants within the limits prescribed in this section. Any equipment and technical measures used for this purpose must first be approved for each particular use by a competent industrial hygienist or other technically qualified person. Whenever respirators are used, their use shall comply with § 1926.103.

[2] The two standards state:

> **§ 1926.353 Ventilation and protection in welding, cutting, and heating.**
> . . . .
> (c) *Welding, cutting, or heating of metals of toxic significance.*
> . . . .
> (3) Employees performing such operations in the open air shall be protected by filter-type respirators in accordance with the requirements of Subpart E of this part, except that employees performing such operations on beryllium-containing base or filler metals shall be protected by air line respirators in accordance with the requirements of Subpart E of this part.
> . . . .
> **§ 1926.354 Welding, cutting, and heating in way of preservative coatings.**
> . . . .
> (c) *Protection against toxic preservative coatings:*
> . . . .
> (2) In the open air, employees shall be protected by a respirator, in accordance with requirements of Subpart E of this part.

*A. Preemption*

The judge rejected the employer's preemption argument, reasoning that the standards to which the employer refers are "additional requirements, rather than preemptive ones." In support of this reasoning, the judge stated in his decision:

> Section 1926.353(a) expressly states that compliance with § 1926.55(a) is required.[13] Also, both §§ 1926.353(c) and 354(c) expressly require compliance with the respirator requirements of Subpart E. . . . Those requirements in turn expressly incorporate the requirements of Subpart D, including § 1926.55(a).

---

[13]It requires that mechanical ventilation be sufficient to "maintain welding fumes and smoke within safe limits, as defined in Subpart D of this part [including § 1926.55(a)]."

On review, the employer asserts that there is no such thing as an additional requirement not preemptive in nature because, whenever another standard is specifically applicable, it is preemptive pursuant to 29 C.F.R. § 1910.5(c)(1).[3] The employer reasons that, inasmuch as sections 1926.353(c) and 1926.354(c) "provide particular means and methods of employee protection when they are engaged in cutting toxic preservatives or lead based metals in the open air," the standards preempt the more general standards cited by the Secretary.

The Secretary, agreeing with the judge, notes that sections 1926.353(c)(3) and 1926.354(c)(2) both require respirators "in accordance with the requirements of Subpart E"

---

[3] The Secretary's regulation on applicability states:

> **§ 1910.5 Applicability of standards.**
>
> . . . .
>
> (c)(1) If a particular standard is specifically applicable to a condition, practice, means, method, operation, or process, it shall prevail over any different general standard which might otherwise be applicable to the same condition, practice, means, method, operation, or process. For example, § 1501.23(c)(3) of this title prescribes personal protective equipment for certain ship repairmen working in specified areas. Such a standard shall apply, and shall not be deemed modified nor superseded by any different general standard whose provisions might otherwise be applicable, to the ship repairmen working in the areas specified in § 1915.23(c)(3).
>
> (2) On the other hand, any standard shall apply according to its terms to any employment and place of employment in any industry, even though particular standards are also prescribed for the industry, as in Subpart B or Subpart R of this part, to the extent that none of such particular standards applies. To illustrate, the general standard regarding noise exposure in § 1910.95 applies to employments and places of employment in pulp, paper, and paperboard mills covered by § 1910.261.

of Part 1926. Section 1926.103(a)(1) in Part 1926, Subpart E, states that, "[i]n emergencies, *or when controls required by Subpart D of this part either fail or are inadequate to prevent harmful exposure to employees*, appropriate respiratory protective devices shall be provided by the employer and shall be used" (emphasis added). Thus, the Secretary argues that, by the terms of the two standards to which the employer refers, the two cited standards apply to the type of work that the employer was doing in open air.

Because of these cross-references, we conclude that the cited standards do apply and are not preempted. The gravamen of the Secretary's case is that the employer, having employees exposed to airborne lead in concentrations above the threshold limit mentioned in section 1926.55(a), must implement administrative or engineering controls required by section 1926.55(b). But the standards to which the employer refers govern these matters only indirectly, through the cross-references; the explicit subject of sections 1926.353(c)(3) and 1926.354(c)(2) is the necessity for respirators in open air work. Some unstated assumptions in the employer's argument may be that open air is always adequate ventilation, that no other engineering controls are ever needed, and that respirators rather than administrative or engineering controls therefore constitute complete protection for open air work under sections 1926.353(c)(3) and 1926.354(c)(2). The cross-references to section 1926.55 indicate, however, that these assumptions are incorrect. The well-established rule of statutory construction is that "each part or section should be construed in connection with every other part or section so as to produce a harmonious whole." 2A *Sutherland Statutory Construction* § 46.05 (5th ed. 1992). *See, e.g., Richards v. United States*, 369 U.S. 1, 11 (1962), *cited in Simplex Time Recorder Co.* 12 BNA OSHC 1591, 1594 n.6, 1984-85 CCH OSHD ¶ 27,456, p. 35,569 n.6 (No. 82-12, 1985) (two paragraphs of National Fire Protection Association standard read to be consistent); *Spot-Bilt, Inc.*, 11 BNA OSHC 1998, 2000-01, 1984-85 CCH OSHD ¶ 26,944, p. 34,551 (No. 79-5328, 1984) (purpose of assuring adequate exits "pervades" section 1910.36, with section 1910.36(b)(4) construed accordingly). *See also General Motors Corp., Electro-Motive Div.*, 14 BNA OSHC 2064, 2066 & n.8, 1991 CCH OSHD ¶ 29,240, p. 39,165 & n.8 (No. 82-630, 1991) (statutes should be construed so as to avoid conflict between them). We conclude, therefore, that the judge was correct in regarding sections 1926.353(c)(3) and 1926.354(c)(2) as additional requirements that are not preemptive, and that the Secretary therefore cited the standards that apply to these facts.

***B. Promulgation***

The cited construction standards, section 1926.55(a) and (b), were originally promulgated pursuant to the Contract Work Hours and Safety Standards Act, 40 U.S.C. § 333 *et seq.* ("the Construction Safety Act"). They were later adopted as occupational safety and health standards pursuant to section 6(a), 29 U.S.C. § 655(a), of the Occupational Safety and Health Act. Section 6(a) of the Act states, in pertinent part:

> Without regard to [the Administrative Procedure Act] or to the other subsections of this section, the Secretary shall, as soon as practicable during the period beginning with the effective date of this Act and ending two years after such date, by rule promulgate as an occupational safety or health standard any national consensus standard, and any established Federal standard . . . .

The Act, at section 3(10), 29 U.S.C. § 652(10), provides a definition of an "established Federal standard." It states:

> The term "established Federal standard" means any operative occupational safety and health standard established by any agency of the United States and presently in effect, or contained in any Act of Congress in force on the date of enactment of this Act.

The Construction Safety Act was "in force on the date of enactment of this Act," which was December 29, 1970, but the construction safety standards promulgated pursuant to the Construction Safety Act did not become effective until thereafter, on April 27, 1971. Our Act became effective the next day, April 28, 1971. Thus, the "established Federal standards" were "operative" and "presently in effect" on the effective date of the Act but not on "the date of enactment," in the language of section 3(10) of the Act. The employer in this case argues that, therefore, the construction standards are invalid pursuant to sections 6(a) and 3(10) of the Act.

The judge rejected this argument on the basis of section 4(b)(2) of the Act, 29 U.S.C. § 653(b)(2). It states:

> The safety and health standards promulgated under the Act of June 30, 1936, commonly known as the Walsh-Healey Act (41 U.S.C. 35 et seq.), the Service Contract Act of 1965 (41 U.S.C. 351 et seq.), Public Law 91-54, Act of August 9, 1969 (40 U.S.C. 333), Public Law 85-742, Act of August 23, 1958 (33 U.S.C. 941), and the National Foundation on Arts and Humanities Act (20 U.S.C. 951 et seq.) are superseded on the effective date of corresponding standards, promulgated under this Act, which are determined by the Secretary to be more effective. *Standards issued under the laws listed in this paragraph*

> *and in effect on or after the effective date of this Act* shall be deemed to be occupational safety and health standards issued under this Act, as well as under such other Acts.

(Emphasis added.) In view of this provision, the judge concluded that "the procedure used to adopt the Construction Safety Act standards was expressly permitted under section 4(b)(2) of the OSH Act," for those "standards were in effect 'on or after' the effective date of the OSH Act."

On review, the employer insists that section 3(10) precludes adoption of any "established federal standard" not in effect on the enactment date of the Act and "submits that, so far as it is able to determine, the foregoing argument has never previously been before the Commission." The Secretary retorts that "[t]he argument now advanced by [the employer] was considered and rejected 17 years ago by the Commission in *Lance Roofing Co.*," 1 BNA OSHC 1501, 1973-74 CCH OSHD ¶ 17,101 (No. 1102, 1974), *rev'd on other grounds*, 528 F.2d 645 (5th Cir. 1976)("*Lance*").

The argument was rejected years ago, but in a different case, *Horne Plumbing and Heating Co.*, 2 BNA OSHC 1271, 1974-75 CCH OSHD ¶ 18,824 (No. 1096, 1974), *vacated on other grounds*, 528 F.2d 564 (5th Cir. 1976) ("*Horne*"), wherein the Commission "affirmed in all respects" a judge's decision rejecting the invalidity argument presented now.[4] The judge in *Horne* reasoned as follows:

> The employer's argument misconstrues the words "presently in effect." Section 4(b)(2) of the Act provides that standards issued under certain Federal laws and "in effect on or after the effective date of this Act" shall be standards under the Act. Thus Congress indicated that the effective date of the Act is to govern in determining whether established Federal standards are "established" within the meaning of the Act. Also, the language in Section 3(10) that standards contained in an Act of Congress in force on the date of enactment distinguishes such standards from those established by a federal agency and "presently in effect." Furthermore, Section 6(a), which contains that authority for the Secretary to promulgate established Federal standards

---

[4]A look at *Lance* will disclose that it is not precedent on the issue now before us. As the employer points out:

> That decision is inapplicable on its face. It was reviewed by the Commission and "adopted *only to the extent* it is consistent with this decision." . . . That *Commission* decision made *no mention whatsoever* of the matters upon which the Secretary places [his] reliance . . . .

(Case citation omitted).

> as standards under the Act states that he may do so starting with the effective date of the Act. Considering all these provisions together, it is clear that the words "presently in effect" in Section 3(10) must be construed to refer to the effective date of the Act. Therefore, the standards in question were validly promulgated.

2 BNA OSHC at 1273 (judge's decision); *see also* 1971-73 CCH OSHD ¶ 15,475 (judge's decision). The Commission applied essentially the same analysis in *Coughlan Constr. Co.*, 3 BNA OSHC 1636, 1975-76 CCH OSHD ¶ 20,106 (No. 5303, 1975), to reject an employer's argument that the Construction Safety Act's standards cannot be applied to employers whose work is not federally subsidized or assisted. The Commission stated:

> Congress itself prescribed that the Walsh-Healey standards "shall be deemed to be occupational safety and health standards issued under this Act."[2] The same is true of the Construction Safety Act standards.[3] Furthermore, the standard at issue is an "established Federal standard,"[4] and Congress authorized Complainant to promulgate such standards as standards of general applicability without further rulemaking proceedings.[5] Thus, the standard was validly promulgated and is enforceable against Coughlan.

---

[2]29 U.S.C. 653(b)(2).

[3]Ibid.

[4]29 U.S.C. 652(10).

[5]29 U.S.C. 655(a).

3 BNA OSHC at 1638, 1975-76 CCH OSHD at p. 23,923. On the basis of these case precedents alone, we could reject the employer's argument in this case. But, to ensure that this issue is entirely resolved, we provide the following, additional analysis.

The employer relies on a portion of the legislative history of the Occupational Safety and Health Act in which its "enactment" is mentioned as the time by which any established Federal standard must be in effect for the purpose of adoption pursuant to the Act's section 6(a). The portion of the legislative history states:

> During this two-year period, the Secretary has discretion to promulgate any standard which has been adopted by a nationally recognized standards-producing organization by other than a consensus method, *provided* that *such standard has been adopted on or before the enactment of this act.*
>
> . . . .
>
> The bill also provides for the issuance *in similar fashion* of those standards which *have been issued* under other Federal statutes and which under this act may be made applicable to additional employees who are not under the protection of such other Federal laws. *Such standards have already been*

> *subjected to the procedural scrutiny mandated by the law* under which they were issued; such standards, moreover, in large part, represent the incorporation of voluntary industrial standards.

S. Rep. 1282, 91st Cong. 2d Sess. 5-6 (1970), *reprinted in* Senate Comm. on Labor and Public Welfare, 92d Cong., 1st Sess., *Legislative History of the Occupational Safety and Health Act* of 1970, at 145-46 (1971) (emphasis added). We also find a comment, by an individual Senator, that interim occupational safety and health standards could include any established Federal standard in effect on the Act's date of "enactment." *Id.* at 421. The legislative history is inconsistent, however, inasmuch as the term "enactment" was not always used to refer to the date on which the Act would become law. In fact, the conference report used the term "enactment" when describing section 6(a), which as we have quoted actually uses the term "effective date," the date on which the Act would go into effect. Specifically, the conference report inaccurately stated: "These early standards could only be adopted pursuant to the authority in section 6(a) within the first 2 years following the day of *enactment* . . . ." Conf. Rep., 91st Cong., 2d Sess. 19 (1970), *id.* at 1217-18 (emphasis added). Earlier in the legislative proceedings, nevertheless, an individual Representative had commented accurately and explicitly that section 6(a) permits adoption of eligible established Federal standards on the Act's effective date rather than its enactment date. *Id.* at 978.

More importantly, the Act itself and the circumstances existing on the date of its enactment suggest that Congress intended to refer to the Act's effective date as the date by which established Federal standards must have been in effect for adoption pursuant to section 6(a). Section 4(b)(2) of the Act that Congress sent to the President for signature and that became law stated plainly that "standards promulgated under the . . . Act of August 9, 1969 (40 U.S.C. 333) . . . in effect on or after the effective date of this Act shall be deemed to be occupational safety and health standards issued under this Act . . . ." Thus the Act that Congress sent to the President for enactment looked forward to another date for the purpose of finding interim standards, and the reason is plain. On the date of enactment, no standards had been promulgated under "40 U.S.C. 333," popularly known as the Construction Safety Act. *See Daniel Intl. Corp. v. OSHRC*, 656 F.2d 925, 927-28 (4th Cir. 1981) (setting forth the history of the construction standards). We must not presume that Congress included meaningless instructions in the statute, but must presume that Congress intended standards to be promulgated under "40 U.S.C. 333" after the Act's enactment date

and in time to be adopted under sections 6(a) and 3(10) of the Act. Therefore, because the construction standards were effective on the Act's effective date, they are valid. Accordingly, the judge's decision affirming item 6 of citation 1 alleging noncompliance with section 1926.55 is affirmed.

### *II. Citation 1, Item 1*

Item 1 alleged, in the words of the Secretary's complaint, that the employer's respirators were "not cleaned or disinfected before or after use by . . . employees." The Secretary cited two standards, 29 C.F.R. § 1926.103(c)(3)[5] and 29 C.F.R. § 1910.134(b)(5).[6] The unrebutted testimony of the compliance officer was that, during his inspection, he saw two employees using dirty respirators which, the employees told him, were never cleaned. As well as arguing that the Secretary failed to establish the employer's knowledge of the violative condition, the employer argues that the Secretary failed to cite the specifically applicable standard and that the judge erred in correcting this fault by amending the pleadings *sua sponte* to allege the specifically applicable standard. We first isolate the specifically applicable standard, then address issues of amendment and of the employer's knowledge of the violative condition.

#### *A. Applicability*

The judge held section 1926.103(c)(3), the cited construction standard, inapplicable on a factual basis, finding no proof either that "the same respirator was issued to different

---

[5] The cited construction standard states:

> **§ 1926.103 Respiratory protection.**
> . . . .
> (c) *Selection, issuance, use and care of respirators.*
> . . . .
> (3) Respiratory protective equipment which has been previously used shall be cleaned and disinfected before it is issued by the employer to another employee. Emergency rescue equipment shall be cleaned and disinfected immediately after each use.

[6] The cited general industry standard states:

> **§ 1910.134 Respiratory protection.**
> . . . .
> (b) *Requirements for a minimal acceptable program.*
> . . . .
> (5) Respirators shall be regularly cleaned and disinfected. Those used by more than one worker shall be thoroughly cleaned and disinfected after each use.

employees" or that "the respirators were for emergency rescue." The judge regarded section 1910.134(b)(5), the cited general industry standard, as "clearly" applicable, but not as specifically applicable as another construction standard, 29 C.F.R. § 1926.103(c)(2).[7] The employer raised this standard in arguing that the Secretary's citation item should be vacated because of his failure to identify the specifically applicable standard that the employer had allegedly infringed. The employer also argued to the judge that the cited general industry standard merely covers what criteria must be included in an employer's written safety program. According to the employer, other provisions in 29 C.F.R. § 1910.134 pertain to the cleaning of respirators.[8]

On review, the employer has reversed direction, now arguing that the construction standard on which the judge focused, section 1926.103(c)(2), originally raised by the employer, is actually *not* applicable to the cited conditions. According to the employer, that standard "does *not* contain any specific guidelines or procedures concerning regular cleaning and disinfecting of respirators . . . ." The employer believes section 1910.134(f)(3) to be the applicable standard, *see supra* note 8, and would have us vacate the citation item on the basis

---

[7] This construction standard states:

> **§ 1926.103 Respiratory protection.**
> . . . .
> (c) *Selection, issuance, use and care of respirators.*
> . . . .
> (2) Respiratory protective equipment shall be inspected regularly and maintained in good condition. Gas mask canisters and chemical cartridges shall be replaced as necessary . . . . Mechanical filters shall be cleaned or replaced as necessary so as to avoid undue resistance to breathing.

[8] In particular, the employer cites 29 C.F.R. §§ 1910.134(f)(1) and (3), which state:

> (f) *Maintenance and care of respirators.* (1) A program for maintenance and care of respirators shall be adjusted to the type of plant, working conditions, and hazards involved, and shall include the following basic services:
> (i) Inspection for defects (including a leak check),
> (ii) Cleaning and disinfecting,
> (iii) Repair,
> (iv) Storage
> Equipment shall be properly maintained to retain its original effectiveness.
> . . . .
> (3) Routinely used respirators shall be collected, cleaned, and disinfected as frequently as necessary to insure that proper protection is provided for the wearer. Respirators maintained for emergency use shall be cleaned and disinfected after each use.

that, "if OSHA itself didn't know the applicable standard, [and] nor did the ALJ," the employer surely did not know either. According to the employer, the Secretary presumably has failed to provide adequate notice of the charge if he has failed to identify the applicable standard.

The Secretary asserts that these arguments about which standard applies, either a construction standard or a general industry standard, are "pointless" in the context of this case. Section 1926.103(c)(2)'s requirement that respirators be "maintained in good condition" amounts to the same thing in this case, the case of the never-cleaned respirators, as section 1910.134(b)(5)'s requirement that respirators be "regularly cleaned and disinfected," section 1910.134(f)(1)'s requirement that respirators be "maintained to retain [their] original effectiveness" by "[c]leaning and disinfecting," and section 1910.134(f)(3)'s requirement that "[r]outinely used respirators shall be collected, cleaned, and disinfected as frequently as necessary to insure that proper protection is provided for the wearer." In essence, the Secretary argues, under either body of standards respirators must be regularly cleaned, and an employer's failure to clean them is a violation.

We agree that construction industry employers must do essentially the same thing pursuant to section 1926.103(c)(2) that general industry employers must do pursuant to the general industry standards. The construction standard requires construction employers to inspect respirators "regularly" and assure that they are "maintained in good condition," which is what general industry employers must do under sections 1910.134(b)(5) ("regularly cleaned and disinfected"), 1910.134(f)(1)(ii) ("maintenance and care of respirators shall be adjusted to the type of . . . working conditions, and hazards involved, and shall include . . . [c]leaning and disinfecting"), and 1910.134(f)(3) ("[r]outinely used respirators shall be collected, cleaned, and disinfected as frequently as necessary to insure that proper protection is provided"). As the judge noted in his decision, section 1910.134(f)(1)(i) shows that "[c]leaning and disinfecting" are aspects of "maintenance and care." Therefore, section 1926.103(c)(2)'s reference to respirators being "maintained in good condition" means the same thing as the general industry standards governing the same matter, *i.e.*, that respirators must be cleaned to maintain their expected level of protection. We note that this employer has already demonstrated its understanding of these requirements by formulating a safety program that requires regular respirator cleaning and sanitization, *see infra* note 27.

In summary, a comparison of the construction standard to the general industry standards governing the same matter sheds light on the meaning and scope of the construction standard. But, although both bodies of standards establish the same duties, it is the construction standard that must be cited, inasmuch as the construction standard is preemptive pursuant to section 1910.5(c)(1), *see supra* note 3. *See also L.R. Willson and Sons, Inc. v. OSHRC*, 698 F.2d 507, 511-12 (D.C. Cir. 1983); *Dravo Corp. v. OSHRC*, 613 F.2d 1227, 1234 (3d Cir. 1980); *Lowe Constr. Co.*, 13 BNA OSHC 2182, 2183-85, 1987-90 CCH OSHD ¶ 28,509, pp. 37,796-98 (No. 85-1388, 1989); *Vicon Corp.*, 10 BNA OSHC 1153, 1156, 1981 CCH OSHD ¶ 25,749, pp. 32,158-59 (No. 78-2923, 1981), *aff'd*, 691 F.2d 503 (8th Cir. 1982).

***B. Amendment***

In his decision, the judge amended the pleadings *sua sponte* to allege a violation of section 1926.103(c)(2), the more specifically applicable standard. The judge reasoned that the employer, having raised the matter of this standard's possible applicability, "squarely recognized that the applicability question was in issue, and it could raise no defense under that standard that it could not raise under the general industry standard." The employer did therefore have "a full opportunity to present evidence rebutting this charge."

The employer takes exception to the judge's decision on the basis that the posthearing amendment *sua sponte* to an uncited standard, however applicable that standard may be, deprived the employer of a defense, *i.e.*, the inapplicability of the cited standard, and thereby produced prejudice to the employer. The employer also makes an argument suggesting that the amendment changed the factual nature of the charge and, by putting new facts in issue, prejudiced the employer. Exactly what new facts and sudden prejudice have been presented, however, the employer does not disclose, except in asserting the following, regarding only the characterization of this item:

> To prove a willful violation there must be evidence that establishes that the cited employer "knew of *the applicable standard* or provision prohibiting the conduct or condition and consciously disregarded *the standard*." *Secretary v. Williams Enterprises*, 13 BNA OSHC 1249, 1256 (1987), emphasis added. It seems self-evident that if OSHA itself didn't know the applicable standard, nor did the ALJ until after the completion of the trial and extensive post-trial briefing, the evidence at trial could hardly have established that Respondent knew. The ALJ did not specifically address that requirement in his discussion

> of willfulness and did not make any finding that Respondent knew the applicable standard. ALJ 40-52.

The Secretary argues in support of the judge's posthearing amendment on the basis that there could have been no prejudice to the employer because the amended standard's requirements do not differ from those of the cited standard. The factual issues, relating to proof of violation and any factual defense against it, are the same no matter which standard is cited. Both standards require the regular cleaning of respirators, which the employer altogether failed to perform.

For the procedural analysis upon which to evaluate the propriety of an amendment, we look to Rule 15 of the Federal Rules of Civil Procedure. *See* 29 C.F.R. § 2200.35(f)(3). Paragraph (a) of Rule 15 provides that, after the pleading stage of the proceedings, "a party may amend his pleading only by leave of court . . . and leave shall be freely given when justice so requires." Paragraph (b) of the rule elaborates on amendments after the hearing, stating:

> (b) AMENDMENTS TO CONFORM TO THE EVIDENCE. [1] When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. [2] If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

(Bracketed numbers added.)

More than fifteen years ago, the Second Circuit (covering New York City, the location where this case arose) decided, pursuant to Rule 15, to permit an amendment substantially similar to the one in this case. *Usery v. Marquette Cement Mfg. Co.*, 568 F.2d 902 (2d Cir. 1977)(*"Marquette"*). The amendment came into *Marquette* after the hearing had been completed; the Secretary wanted the amendment because the employer was arguing, in its brief to the judge, that the cited standard did not apply. The judge granted the amendment, a ruling which the Second Circuit upheld on the basis that the amendment did

not change any of the factual issues relating to the merits; it changed only the specific provision allegedly violated. The court recognized that the employer opposed the amendment on the ground that it would eliminate one of the defenses raised before the judge. That is, in the employer's brief to the judge, the employer objected to any change in the theory of the Secretary's case. The court held, however, that a change in legal theory is permissible even after the hearing is completed as long as the employer has not suffered any prejudice to its presentation of its case. In this regard, the court relied generally on Rule 15(a) and particularly on the second part of Rule 15(b), *i.e.*, its third and fourth sentences that we have designated [2] in the foregoing quotation of the rule. Inasmuch as the employer never argued that any evidence would have been relevant to the amended charge beyond that which had come in regarding the cited charge, the court found no prejudice.

The court's application of Rule 15(a) and Rule 15(b) is instructive; particularly instructive is the court's reliance on the second part of Rule 15(b). The court's analysis indicates that consent, express or implied, with which Rule 15(b)'s first part deals, is always out of the question where an employer defends on the ground that an uncited provision is applicable and that the cited charge should therefore be vacated. *Compare McWilliams Forge Co.*, 11 BNA OSHC 2128, 2130, 1984-85 CCH OSHD ¶ 26,979, p. 34,670 (No. 80-5868, 1984)("*McWilliams*") (no consent, express or implied, where parties explicitly disagreed, at trial, about cited provision's applicability). Obviously, when an employer argues that a citation item must be vacated because there is an uncited, more specifically applicable standard, the employer does not consent to affirm the citation on the basis of that uncited provision. Nor does such an employer consent to have the evidence used to establish a violation of the uncited provision. Here, then, is where the second part of Rule 15(b) comes into play. There having been, in effect, an express objection to any use of the evidence in support of an unpleaded charge, we must examine whether there is any prejudice. This is essentially what the Second Circuit decided in *Marquette. See also Dole v. Arco Chemical Co.*, 921 F.2d 484, 488 (3d Cir. 1990) (a discussion of "the required showing of prejudice, regardless of the stage of the proceedings" that indicates that prejudice arises only from changes in the facts and evidence, not from changes in the standard at issue). *Compare Morgan & Culpepper, Inc. v. OSHRC*, 676 F.2d 1065, 1068-69 (5th Cir. 1982) (no prejudice argued in response to an amendment that did not change the factual basis of the Secretary's

case), *with McLean-Behm Steel Erectors, Inc. v. OSHRC*, 608 F.2d 580, 582 (5th Cir. 1979) (amendment disallowed where it altered the abatement method at issue).[9]

We therefore turn to the question of whether the amendment in the case now before us gave rise to any prejudice to the employer. "To determine whether a party has suffered prejudice, it is proper to look at whether the party had a fair opportunity to defend and whether it could have offered any additional evidence if the case were retried." *ConAgra Flour Milling Co.*, 15 BNA OSHC 1817, 1822, 1992 CCH OSHD ¶ 29,808, p. 40,592 (No. 88-2572, 1992) (possibility of prejudice from lack of particularity), *citing Monad v. Futura, Inc.*, 415 F.2d 1170, 1174 (10th Cir. 1969). This is how the Commission essentially resolved *McWilliams*, our principal recent precedent regarding posthearing amendments. There, the Commission gave dispositive consideration to whether the amendment substantially altered the facts at issue. The Commission was applying only the first part of Rule 15(b), not the second part, *see* 11 BNA OSHC at 2130 n.5, 1984-85 CCH OSHD at p. 34,670 n.5. But pursuant to the rule's first part, the Commission examined whether substantive differences in the wording of the Secretary's allegations under the cited and amended provisions might have altered the factual issues and thus altered the evidence that the parties could have presented. *McWilliams*, 11 BNA OSHC at 2130-31, 1984-85 CCH OSHD at 26,979, pp. 34,670-71.

The fact that there were substantive differences in the standards, in the allegations, and in the evidence that could have been presented distinguishes *McWilliams* from *Marquette*, as well as the case now before us. The record in the case now before us reveals a clear and unrefuted noncompliance with all of the standards that have been raised in connection with item 1 of citation 1 in this case, and the terminology of the standards does not materially or substantively vary. In fact, in this case the employer's own respirator program called for cleaning, in virtually the same terminology as the standards raised in this case, *see infra* note 27. Thus, a perusal of the defenses raised in the employer's posthearing

---

[9] The Secretary went from a standard requiring safety belts to one requiring safety nets. The court regarded this alteration of the factual and legal issues as "a quick reversal of direction" that was impermissible after the close of the hearing. Not only was the employer denied the opportunity to present evidence in defense against the new requirement for safety nets instead of safety belts but the employer was denied the opportunity to defend against or object to some evidence presented at the hearing that was relevant to the safety belt charge originally at issue but that became relevant also to the safety net charge added by the amendment.

brief, to which the employer refers on review, discloses that they either apply equally as well to the amended standard or are essentially legal in nature, not factual (such as that the Secretary erroneously cited a general industry standard rather than the correct construction industry standard, or erroneously cited a general industry standard that pertains to an employer's safety program, only). We therefore, pursuant to the second part of Rule 15(b), uphold the judge's decision to amend the pleadings to allege a violation of section 1926.103(c)(2).

***C. Knowledge***

To establish a violation of a standard, the Secretary must show that the cited standard applies, its terms were not met, employees had access to the violative condition, and the employer knew or could have known of this fact with the exercise of reasonable diligence. *See, e.g., Astra Pharmaceutical Prod., Inc.*, 9 BNA OSHC 2126, 2129, 1981 CCH OSHD ¶ 25,578, pp. 31,899-900 (No. 78-6247, 1981), *aff'd in part*, 681 F.2d 69 (1st Cir. 1982). In this case, employee exposure to a condition that is violative of the amended standard is unrebutted, and applicability was examined above. The remaining issue involves the employer's knowledge of the violative condition, which the judge found established on the basis that the employer, having control of the worksite and authority over the employees and their equipment, and having articulated a safety program including a requirement that "a qualified individual" perform regular cleaning of respirators, could have examined the respirators at any time and could have seen their dirty condition.

The employer takes exception to the judge's decision in three respects. First, the employer asserts that the Secretary limited his case to two days in September 1987; the case did not concern"from June on," as the judge stated in finding that the employer could have known of the dirty respirators. This objection is, however, immaterial. As our preceding paragraph indicates, the evidence on which the judge relied concerning the period from June onward pertains equally as well to the two days in September, and the employer has neither argued nor shown otherwise.

Second, the employer asserts that the judge impermissibly "based his findings upon unidentified and unspecified 'employees.'" The employer has neither argued nor shown, however, that it was unable to identify the employees whom the compliance officer interviewed during the inspection and on whose statements the Secretary premised his case

of noncompliance. In fact, the Secretary named the employees in his responses to interrogatories, the compliance officer named them in his testimony, and the employer actually quoted this testimony in its posthearing brief. Furthermore, at no time did the employer ask for a postponement of the hearing or its continuance to prepare rebuttal testimony. Therefore, this objection is misleading and baseless.

Third, the employer objects that there ought to be further findings concerning what "regularly" means as it is used in section 1926.103(c)(2). In the context of this case, however, the employer's objection is frivolous and immaterial to the finding of a violation. The Secretary need not show how frequently an employer may do nothing, or that an employer could have recognized a necessity to do something other than nothing at specifically frequent intervals. Surely an employer contemplating the fact that there was nothing being done could have suspected a strong potential for liability; fair notice is obvious. *Cf. Ormet Corp.*, 14 BNA OSHC 2134, 2136, 1991 CCH OSHD ¶ 29,254, p. 39,200 (No. 85-531, 1991) (employers can be expected at least to apply reasonable judgment to indefinite terminology). Also, the employer is aware of section 1910.134(f)(3) which indicates that the cleaning would need to be frequent enough to ensure that the respirators continue to provide the expected protection. Accordingly, we affirm the judge's decision finding the employer in violation of section 1926.103(c)(2).

### *III. Citation 1, Item 2*

Item 2 alleged that the employer failed to store its respirators as required by 29 C.F.R. § 1910.134(b)(6).[10] The uncontradicted testimony of the compliance officer was that respirators either were stored in open milk containers inside a dusty storage trailer or were simply stowed inside the employees' automobiles. These practices were contrary to the employer's own safety program, which called for storage that would protect the respirators from dust, sunlight, extreme temperatures, moisture and chemicals, *see infra* note 27. On

---

[10]The cited general industry standard states:

> **§ 1910.134 Respiratory protection.**
>
> . . . .
>
> (b) *Requirements for a minimal acceptable program.*
>
> . . . .
>
> (6) Respirators shall be stored in a convenient, clean, and sanitary location.

review, the employer makes essentially the same arguments as we have addressed for item 1 -- applicability, amendment, and knowledge.

*A. Applicability*

As was the case for item 1, the employer argued to the judge that the Secretary cited the wrong standard for this item. The employer contended that the violative condition is addressed by section 1926.103(c)(2), *see supra* note 7. The judge agreed, reasoning that proper storage is an aspect of maintenance and care, as demonstrated by section 1910.134(f)(1), *see supra* note 8, and section 1910.134(f)(5)(i).[11]

On review, however, the employer asserts that the applicable standard is instead section 1910.134(f)(5)(i). The employer's arguments are those that we have already reviewed in connection with item 1. In response, the Secretary essentially repeats his arguments, asserting that the general industry standard and the construction standard impose the same requirement -- clean storage -- and that the employer violated both standards. For the reasons we have already given in connection with item 1, we hold that the applicable standard is section 1926.103(c)(2) and that it imposes materially the same requirements as the cited general industry standard and the related general industry standards that we mentioned at the end of the preceding paragraph.

*B. Amendment*

The judge amended the pleadings *sua sponte* to allege a violation of section 1926.103(c)(2). He reasoned that the employer "squarely recognized that the applicability of that standard was in issue" and "had a full opportunity to rebut this charge under either the cited standard or the amended standard." The employer takes exception on the same basis as we have already addressed with respect to item 1, and our analysis there applies here. Accordingly, we uphold the amendment.

---

[11]29 C.F.R. § 1910.134(f)(5)(i) states:

> After inspection, cleaning, and necessary repair, respirators shall be stored to protect against dust, sunlight, heat, extreme cold, excessive moisture, or damaging chemicals. . . . Routinely used respirators, such as dust respirators, may be placed in plastic bags. Respirators should not be stored in such places as lockers or tool boxes unless they are in carrying cases or cartons.

*C. Knowledge*

Employee exposure to a condition that is violative of section 1926.103(c)(2) was unrebutted, and we have decided that the standard applies. The judge inferred that the employer, having control of the worksite and authority over the employees and their equipment, and having even articulated a safety program including a requirement that "respirators shall be stored to protect against dust" and other specified agents of harm, could have scrutinized the existing storage practices at any time and could have seen the improper conditions. The employer makes the same arguments that we have rejected with respect to item 1. They are no more valid with respect to item 2. Thus we reject them and uphold the judge's decision finding a second violation of section 1926.103(c)(2).

*IV. Citation 1, Item 3*

Item 3 alleged that the employer did not use approved respirators, even though they were available. Rather, the employer allegedly fitted together the components of two different respirator brands, an action that "nullified" the governmental approval for the brands. The complaint cited 29 C.F.R. § 1910.134(b)(11), a general industry standard.[12] Then, in his posthearing brief, the Secretary moved to amend to a more specifically

---

[12]The cited general industry standard states:

> **§ 1910.134 Respiratory protection.**
>
> . . . .
>
> (b) *Requirements for a minimal acceptable program.*
>
> . . . .
>
> (11) Approved or accepted respirators shall be used when they are available. The respirator furnished shall provide adequate respiratory protection against the particular hazard for which it is designed in accordance with standards established by competent authorities. The U.S. Department of Interior, Bureau of Mines, and the U.S. Department of Agriculture are recognized as such authorities. Although respirators listed by the U.S. Department of Agriculture continue to be acceptable for protection against specified pesticides, the U.S. Department of the Interior, Bureau of Mines, is the agency now responsible for testing and approving pesticide respirators.

applicable construction standard, 29 C.F.R. § 1926.103(a)(2).[13] Before us for review are various issues regarding applicability, amendment, noncompliance, and seriousness.

*A. Applicability*

The judge held section 1926.103(a)(2) applicable in lieu of section 1910.134(b)(11) because, although "the standards both require that respirators be approved," the construction standard "is the more specifically applicable standard" for a construction industry employer. In response to our briefing notice, the Secretary emphasized that respirators composed of components from approved brands cannot be approved respirators:

> If employers could freely substitute parts from other manufacturers after purchasing an approved respirator, . . . there may as well have been no approval process in the first place. Respirators are approved as entire units and must be used as entire units. This means that substitute parts from different manufacturers cannot be permitted under section 1910.134(b)(11) or 1926.103(a)(2).

The employer, however, made only a general response to our briefing notice, only asserting that the Secretary ought to cite the correct standard when formulating his pleadings. The employer did not, however, specify which standard is applicable or argue that the construction standard affirmed by the judge is inapplicable. We therefore have before us now no apparent dispute between the parties as to the applicability of the construction standard to which the judge amended the pleadings. We will therefore assume, without deciding, that the construction standard applies for the purposes of further review in this case. *See Seward Motor Freight, Inc.*, 13 BNA OSHC 2230, 2232 n.5, 1987-90 CCH OSHD ¶ 28,506, p. 37,785 n.5 (No. 86-1691, 1989)("*Seward*") (assumption without decision that acquiescent employer violated general duty clause).[14]

---

[13]This construction standard states:

> **§ 1926.103 Respiratory protection.**
>
> . . . .
>
> (a) *General.*
>
> . . . .
>
> (2) Respiratory protective devices shall be approved by the U.S. Bureau of Mines or acceptable to the U.S. Department of Labor for the specific contaminant to which the employee is exposed.

[14]Also raised as an issue for review in our briefing notice is the applicability of 29 C.F.R. § 1910.134(f)(4), another general industry standard which the employer raised before the judge. In pertinent part, this general

(continued...)

***B. Amendment***

In his posthearing brief, the Secretary moved to amend his pleadings to allege a violation of section 1926.103(a)(2) rather than section 1910.134(b)(11). We have before us two issues on review: (1) whether the improper form of the motion warrants some sanction against the Secretary, such as disallowing the amendment; and, (2) if not, whether the amendment is nevertheless prejudicial to the employer.

***1. Improper Form of the Motion to Amend***

Our procedural rules prohibit a party from including a motion in its posthearing brief as the Secretary did; instead, any motion must be separately presented, *i.e.*, in a separate document entitled as a motion, to which the opposing party may file a separate response. 29 C.F.R. § 2200.40(a) and (c).[15] In this case, the employer did not file a response and the employer now asserts that the Secretary's procedural violation deprived it of an opportunity to respond. We see, however, from our review of the posthearing proceedings, that there actually was a sufficient opportunity. The judge here authorized the filing of reply briefs upon the employer's request, but in its reply brief the employer did not respond to the

---

[14](...continued)
industry standard states: "Replacement or repairs shall be done only . . . with parts designed for the respirator. No attempt shall be made to replace components . . . beyond the manufacturer's recommendations. . . ." Judge Sommer held section 1910.134(f)(4) inapplicable because there was no evidence that components had been removed or replaced. The Secretary further argues on review that section 1910.134(f)(4) is simply an additional requirement telling employers that replacement parts must "be both from the same manufacturer of the approved unit *and* be parts approved by the manufacturer of that unit." The employer, however, does not continue to argue that section 1910.134(f)(4) is applicable; in fact, on review the employer does not even mention the standard, despite its mention in our briefing order. We therefore find abandonment and decline to address the issue. *See Georgia Pacific Corp.*, 15 BNA OSHC 1127, 1130, 1991 CCH OSHD ¶ 29,395, p. 39,576 (No. 89-2713, 1991) (no review of issues on which a party expresses no interest); *Lone Star Steel Co.*, 10 BNA OSHC 1228, 1982 CCH OSHD ¶ 25,825 (No. 77-3893, 1981) (absent compelling public interest, abandoned issues are not addressed on review).

[15]These provisions state, in pertinent part, the following:

> (a) *How to make.* A request for an order shall be made by motion. Motions shall be in writing . . . . A motion shall not be included in another document, such as a brief or a petition for discretionary review, but shall be made in a separate document. Unless a motion is made by all parties, the moving party shall state in the motion any opposition or lack of opposition of which he is aware.
>
> . . . .
>
> (c) *Responses.* Any party or intervenor upon whom a motion is served shall have ten days from service of the motion to file a response. . . .

Secretary's motion.[16] That the employer did not object to the motion, after having had opportunity to do so, was one reason the judge granted the motion.

The employer's argument on review suggests a belief that the judge was required to sanction the Secretary for his error. We disagree, based on our procedural rules. Pursuant to Commission Rule 41(a)(2), 29 C.F.R. § 2200.41(a)(2),[17] a judge has "discretion" to hold a party in default for noncompliance with procedural rules and orders. In other words, whether to impose a sanction is explicitly a matter for the judge's sound exercise of "discretion" in the circumstances of the case. Also, a judge's failure to impose a sanction is only reviewable for abuse of discretion, and a sanction is justified only if the Secretary's misbehavior was contumacious or the employer suffered prejudice, or if other aggravating circumstances were present. *See Chartwell Corp.*, 15 BNA OSHC 1881, 1883, 1992 CCH OSHD ¶ 29,817, pp. 40,626-27 (No. 91-2097, 1992).

We conclude that the judge did not abuse his discretion in this case. The employer does not argue either contumacy or prejudice and we find neither contumacy, prejudice, nor

---

[16]Our rules allow -- though they do not encourage -- a judge to authorize such full briefing:

> Any party shall be entitled, upon request made before the close of hearing, to file a brief, proposed findings of fact and conclusions of law, or both, with the Judge.
>
> . . . Reply briefs shall not be allowed except by order of the Judge.

29 C.F.R. § 2200.74(a) & (b). In this case, the employer requested authorization to file a reply brief because the Secretary had submitted what amounted to a reply brief, a letter taking exception to portions of the employer's brief. Judge Sommer granted the employer's request and the employer duly filed its reply brief. Yet the employer did not include any objection whatsoever to the Secretary's improper footnote-made motion to amend, which began with language plain enough to alert a party to the need to respond: "The Secretary hereby moves to amend citation 1, item 3 to reflect a violation of § 1926.103(a)(2) instead of § 1910.134(b)(11)." Also, inasmuch as our rules expressly allow responses to motions, *see supra* note 15, they thereby give notice of the need to consider making a response.

[17]In full, 29 C.F.R. § 2200.41(a), states:

> **§ 2200.41 Failure to obey rules.**
>
> (a) *Sanctions.* When any party has failed to plead or otherwise proceed as provided by these rules or as required by the Commission or Judge, he may be declared to be in default either:
>
> (1) On the initiative of the Commission or Judge, after having been afforded an opportunity to show cause why he should not be declared to be in default; or
>
> (2) On the motion of a party. Thereafter, the Commission or Judge, in their discretion, may enter a decision against the defaulting party or strike any pleading or document not filed in accordance with these rules.

any other aggravating circumstance compelling the sanction of default. As a general rule, a lone instance of noncompliance with a procedural rule is not, in and of itself, a showing of contumacy, and there were no further instances of noncompliance by the Secretary. Additionally, the employer did not make a timely objection, did not request that the judge order the Secretary to put his motion into the proper form, did ask to file a reply brief, and thus was permitted to reply before the judge granted the Secretary's motion to amend. Accordingly, there was no prejudice.[18]

*2. Propriety of the Amendment*

The judge held that the amended standard established materially the same requirement as the originally cited standard and that, as a construction standard, the amended standard was more specifically applicable. He further held that the amendment did not prejudice the employer. The employer disagrees, asserting that the amendment eliminates a defense, *i.e.*, the inapplicability of the cited standards, and changes the factual nature of the charge. The employer further contends that the amended standard is unenforceably vague because it -- unlike the cited standard -- requires respirators to be "acceptable to the U.S. Department of Labor for the specific contaminant to which the employee is exposed." The employer also contends that the amendment alters the theory on willfulness, inasmuch as the Secretary cannot establish the characterization without establishing knowledge of the applicable standard.

The Secretary supports the judge's decision to allow the amendment, arguing that the employer did not object and was not prejudiced because the amended standard's essential requirements do not differ substantially from the cited standard. That is, both standards require employers to use approved respirators, which the employer did not do.

To a large extent, our analysis regarding item 1 applies to item 3, but the matter of prejudice from the portion of the amended standard that the employer regards as vague requires our further comment. For the reasons set forth in the next paragraphs, we find that

---

[18]We note that the employer too has placed a motion in a brief. The employer's request for a sanction against the Secretary under Commission Rule 41(a)(2) is, in essence, a motion. Of course, this kind of motion too, by an employer, should not be made in a brief. We only mention this circumstance in passing, however, and hereby essentially overlook the procedural infraction, because the briefing notice in this case apparently invited argument by this employer for a sanction against the Secretary. The briefing notice asked the following: "In particular, should the motion [to amend] have been denied on the ground of noncompliance with 29 C.F.R. § 2200.40(a)?"

portion of the amended standard on which the employer now focuses has no relationship to the facts of this case and that the amendment actually had no effect on the employer's defense of the case.

Our inquiry is focused on whether the amendment altered the factual and legal issues of the case at hand. If it did not, there cannot have been prejudice. Therefore, we must compare the provisions of the two standards that are now at issue, because of the motion to amend, with the factual and legal matters that were at issue throughout the case. The cited standard requires approval by "competent authorities." *See supra* note 12 ("[t]he respirator furnished shall provide adequate respiratory protection against the particular hazard for which it is designed in accordance with standards established by competent authorities," such as the U.S. Department of Agriculture or the U.S. Department of Interior, Bureau of Mines). More limited and quite different, apparently, is the standard to which the Secretary would amend, for it specifies approval by the "U.S. Bureau of Mines" or, as an alternative, the Labor Department. *See supra* note 13 (in the alternative, respirators shall be "acceptable to the U.S. Department of Labor for the specific contaminant to which the employee is exposed"). And, as the employer correctly points out, in some cases this alternative could be unenforceable; if the Labor Department were to grant or withhold approval arbitrarily, *i.e.*, not upon the basis of standards setting forth criteria for approval, employers could lack notice of what is required to gain approval and to avoid citation.

In this case, however, this alternative and the other differences between the two standards as to the authorities for respirator approval never came into play. The Secretary's compliance officer testified that governmental approval is based on entire units from individual respirator manufacturers, not on units composed of parts from two manufacturers; therefore, an employer such as the one in this case who was using composite respirators -- composed of parts from two manufacturers -- could not have been using approved respirators. Significantly, the employer in this case made no effort to show that any authority did in fact approve such respirators; the employer made no attempt to refute the Secretary's evidence that, under either standard, the cited one or the amended one, a composite respirator could not have been approved. The compliance officer also testified that he found, from a certification list compiled by the National Institutes of Safety and Health ("NIOSH"), that one manufacturer's face piece this employer was using on another manufacturer's respirator

was not approved for positive pressure use.[19] Also, as to this matter, the employer did not try to show, by way of rebuttal, any such respiratory approval by any governmental authority. In short, on the facts of this case the amendment has not worked any material alteration in the Secretary's case and has therefore produced no prejudice to the employer's defense.

*C. NIOSH Certification*

As the preceding discussion indicates, testimony regarding a certification list from NIOSH figured in the Secretary's case. The employer argues that the judge erred in premising a finding of violation on a lack of NIOSH approval inasmuch as no standard requires NIOSH approval. In particular, NIOSH approval cannot constitute Labor Department approval within the meaning of the amended standard, the employer asserts, because that standard does not give employers adequate notice (and there is no proof) that NIOSH approval really does constitute Labor Department approval. Therefore the item must be vacated, the employer submits, additionally pointing to testimony from the compliance officer admitting that he did not know whether the employer's respirators had been approved by authorities actually listed in the cited standard. The compliance officer, after admitting that he had not checked with the authorities listed in the cited standard, avowed that to the best of his knowledge NIOSH had taken over the approval function of

---

[19]The following passage from the judge's decision (transcript references omitted) summarizes the evidence:

> The evidence clearly establishes a violation, whether this item is considered under the cited standard or the amended standard. Respondent's office engineer in charge of safety, Norman Kramer, told [compliance officer] Bustria that as far as he knew, the air line respirators were "Willson 1820." However, during his inspection Bustria noticed that the air line respirators used by four employees had a face piece marked Pulmosan, and a specific face piece number. He searched for U.S. government approval for the Pulmosan face piece for use as an air line respirator, and found none.[31]
>
> Bustria testified that Federal approval of respirators is based on the entire unit. Thus, all parts of the air line respirator would have to be from one manufacturer. He explained that the entire unit must be approved so that a respirator system is not used that has both approved and unapproved parts. Thus, based on the evidence presented, the respirators were not approved because (1) they were a mixture of parts of different manufacturers, and (2) they had a face piece that is not approved as a positive pressure device.

---

[31]The certification list he consulted was by NIOSH (National Institute for Occupational Safety and Health, within the U.S. Department of Health and Human Services). He noted that the Pulmosan face piece had been approved for another use—as a negative pressure respirator.

MSHA, which in turn had taken over the approval function from the Interior Department's Bureau of Mines. Moreover, the employer argues, the Secretary's citation and complaint had relied on an entirely different theory, that creating a composite respirator from parts of two approved respirators nullifies their approval. All the same, the employer notes, the amended standard does not require that, for approval, all parts of a respirator must have been manufactured by one manufacturer. Accordingly, evidence regarding an employer's use of a composite respirator does not establish a violation.

The Secretary argues that the compliance officer's use of the NIOSH certification list was proper because, under the amended standard, the Labor Department has discretion to refer to any rational source of approval that it might choose, within the sound exercise of its discretion. And, in any event, the functions of the Interior Department's Bureau of Mines now belong to the Labor Department.

Our own research reveals that the respirator approval function delegated to the Interior Department's Bureau of Mines is now delegated to NIOSH. *See* 30 U.S.C. § 957 (pursuant to which the following regulations regarding respirator approval were promulgated); 30 C.F.R. § 11.10 (regarding respirator approval application procedures for and submissions to the Testing & Certification Laboratory of NIOSH); 30 C.F.R. § 11.2 (regarding use of approved respirators and indicating that approval functions were formerly performed by the Interior Department's Bureau of Mines). Moreover, the employer in this case evidently knew of NIOSH's authority, for the employer's own safety program required that "NIOSH/MSHA approved respirators" be used.[20] On these bases, then, we reject the argument against reliance on the NIOSH certification list and hold the Secretary's evidence sufficient to sustain his case, especially inasmuch as it is unrebutted. We do not hold here that composite respirators are *per se* a violation of these standards, only that the employer failed to present any evidence which would show that such respirators met the standards and requirements of approved respirators.

---

[20]In its arguments, the employer has not acknowledged this provision of its safety program and has not explained the reference to NIOSH rather than the Bureau of Mines.

*D. Seriousness*

The judge characterized the violations as serious based upon "the fact that employees were suffering serious symptoms as a result of their lead exposure," in that employees had suffered significant weakness, nausea, dehydration, and circulatory system changes. Some employees required several days of bed rest and medical treatment for recovery, and one employee actually required hospitalization to undergo chelation therapy, which is administered only for high blood lead levels because the therapy itself poses serious risks to the kidneys and the heart. The judge further found that the employer's use of unapproved respirators contributed to the excessive exposure.[21]

The employer asserts that the Secretary's proof of knowledge and serious harm is insufficient; in particular, as to serious harm, the employer believes there is insufficient evidence of a substantial probability of serious physical harm arising out of the employee exposure detected on the two days of the inspection. In response, the Secretary argues that the harm was surely serious inasmuch as this employer relied almost entirely on respiratory protection against exposure to lead, and unapproved respirators can malfunction or fail to provide the requisite protection, as the compliance officer testified.

We note that the compliance officer testified that, in general, an unapproved respirator may be ineffective and that the specific face piece on the employer's composite respirators was not approved for positive pressure use. This testimony raises an inference that these respirators were ineffective, and that they presented a serious hazard to this employer's employees. The employer has not provided rebuttal testimony to indicate that the composite respirators were effective despite being unapproved. Moreover, the employer does not argue that the judge overlooked any pertinent evidence about the instances of debilitation that occurred because of the exposure on the worksite and the serious risks to the employees that these instances of overexposure tend to establish. As will be discussed in greater detail with regard to item 5, persistent exposure to excessive levels of airborne lead is substantially likely to result in serious physical harm. *See Johnson Controls, Inc.*, 15 BNA OSHC 2132, 2139-42, 1993 CCH OSHD ¶ 29,953, pp. 40,969-73 (No. 89-2614, 1993)("*Johnson*"). Moreover, as the judge correctly reasoned, the employer could have

---

[21]On the same basis, the judge upheld the Secretary's characterization of all of the items of citation 1 as serious, but the briefing order raised the issue as to this one item, item 3, only.

known of the noncomplying condition through the exercise of reasonable diligence. Therefore, the use of unapproved respirators in this case was a serious violation.

### *V. Citation 1, Item 5*

This item concerns the employer's failure to require the wearing of protective work clothing, to be taken off at the end of work shifts, to eliminate or reduce the risks of inhaling and ingesting lead particles after work hours. The citation described the alleged violation as follows:

> Employees were exposed to concentrations of inorganic lead in excess of the OSHA PEL of 0.2 mg/M3 TWA over 8-hours and were not wearing protective work clothing. Lack of work clothing increases potential for lead exposure through inhalation and ingestion - 9/17/87 & 9/22/87.

The citation cited the personal protective equipment standard for construction, 29 C.F.R. § 1926.28(a).[22] The complaint amended the citation to allege in the alternative a violation of the Act's general duty clause, section 5(a)(1).[23] The judge found a violation of the general duty clause.

#### *A. Applicability*

The briefing notice raised two issues of applicability. First was whether the judge erred in holding section 1926.28(a) inapplicable. Both parties assume, however, that the judge correctly rejected section 1926.28(a),[24] as our next paragraphs reciting their

---

[22]This standard states:

> 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.

[23]The general duty clause, 29 U.S.C. § 654(a)(1), states:

> Each employer . . . shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees[.]

[24]As the judge stated:

> Under [our] precedent, the Secretary must prove that some other section of Part 1926 indicates the need for the particular personal protective equipment [he] advocates, to establish a violation of § 1926.28(a). *L.E. Myers Co.*, [12 BNA OSHC 1609, 1614, 1986-87 CCH OSHD ¶ 27,476, pp. 35,603-04 (No. 82-1137, 1986), *rev'd on other grounds*, 818 F.2d 1270 (6th Cir.), *cert. denied*, 484 U.S. 989 (1987)]. The only other section noted by the

(continued...)

arguments will show, and therefore we will not address the issue. *See Georgia Pacific Corp.*, 15 BNA OSHC 1127, 1130, 1991 CCH OSHD ¶ 29,395, p. 39,576 (No. 89-2713, 1991) (no review of issues on which a party expresses no interest); *Lone Star Steel Co.*, 10 BNA OSHC 1228, 1982 CCH OSHD ¶ 25,825 (No. 77-3893, 1981) (absent compelling public interest, abandoned issues are not addressed on review).

There remains, then, the second issue, whether the Act's general duty clause applied. The Secretary maintains that the general duty clause must have applied since section 1926.28(a) did not. The employer disagrees on the theory that the Secretary cannot use the general duty clause to impose a personal protective equipment requirement not found in the construction standards and thus not enforceable by section 1926.28(a). This broad construction standard is, the employer maintains, the one source of a construction employer's duties with regard to personal protective equipment.[25]

The employer relies on cases which indicate that section 5(a)(1) may be inapplicable in certain limited circumstances, amounting to unfairness, *i.e.*, where the Secretary has stated, or in a substantially clear way has implied, that an existing applicable standard or body of standards cover the hazard or hazards, and set forth the entire duty of employers and employees engaged in the particular operations or activities presenting such hazards. *See Amoco Chem. Corp.*, 12 BNA OSHC 1849, 1856 1986-87 CCH OSHD ¶ 27,621, p. 35,905 (No. 78-250, 1986) (general duty clause inapplicable to require disclosure of medical records to employees directly where standard on disclosure of medical records requires disclosure to governmental officials and employees' physicians upon request of employees); *Farthing & Weidman, Inc.*, 11 BNA OSHC 1069, 1070-71, 1983-84 CCH OSHD ¶ 26,389, p. 33,490 (No. 78-5366, 1982) (general duty clause inapplicable where non-mandatory standard

---

[24](...continued)
Secretary is § 1926.300(c), which does not specifically mention protective clothing. We are aware of no construction standard that specifically mentions protective clothing. In addition, Respondent argues that the employees' tools were not hand or power tools, which are the topic of § 1926.300. The Secretary does not address this objection. Thus, this item will be analyzed under § 5(a)(1) of the Act.

[25]The judge did not address this contention, for it was not argued before him. The employer's posthearing brief took virtually the opposite position, that the elements of the Secretary's case are essentially the same under the general duty clause and the personal protective equipment standard for construction, an argument which assumes that either provision applies in lieu of the other.

specifies abatement methods for hazardous condition of carrying loads over employees' heads); *Daniel Intl., Inc.*, 10 BNA OSHC 1556, 1558-59, 1982 CCH OSHD ¶ 26,033, p. 32,683 (No. 78-4279, 1982) (general duty clause inapplicable to add abatement method for hazards of falling materials during steel erection where steel erection standards address the abatement of such hazards).

These and other cases indicate, however, that the general duty clause is applicable to require a particular form of personal protective equipment to abate a hazardous condition where, as here, there is no standard, *i.e.*, no construction industry standard requiring protective clothing for employees exposed to airborne lead during welding or similar work, such as demolition. *See also International Union, United Auto Workers v. General Dynamics Land Sys. Div.*, 815 F.2d 1570, 1577-78 (D.C. Cir. 1987), *cert. denied*, 484 U.S. 976 (1987) (general duty clause applicable to require confined space entry procedure to prevent asphyxiation by toxic compounds used in military tank construction where no standard addresses short-term exposure in confined spaces). *Compare Donovan v. Adams Steel Erection, Inc.*, 766 F.2d 804, (3d Cir. 1985), *rev'g* 11 BNA OSHC 2073, 2076-78, 1984-85 CCH OSHD ¶ 26,976, pp. 34,647-49 (No. 77-4238 1984) (steel erection standards not preemptive regarding exterior fall hazards); *Bratton Corp.*, 14 BNA OSHC 1893, 1895-96, 1987-90 CCH OSHD ¶ 29,152, pp. 38,991-92 (No. 83-132, 1990) (same). Furthermore, Commission case law indicates that the mere lack of an applicable standard for a hazard to a segment of the construction industry would not render the general duty clause inapplicable also. *Compare Kastalon, Inc.*, 12 BNA OSHC 1928, 1929-30, 1986-87 CCH OSHD ¶ 27,643, pp. 35,971-72 (No. 79-3561, 1986) (dicta suggesting that OSHA's failure to bring rulemaking to completion after court ruled standard invalid might preclude resort to section 5(a)(1) to abate hazardous chemical exposure because of unfairness involved in Secretary's prosecutorial decision to rely primarily on general duty clause rather than standards). Accordingly, we cannot accept the employer's assumption in this case that OSHA, by promulgating various personal protective equipment requirements for construction (29 C.F.R. Part 1926) and by promulgating airborne lead hazard requirements for general industry but not for construction (29 C.F.R. § 1910.1025(a)(2)), has effectively indicated that these standards comprehensively cover the hazards and preclude resort to the general duty clause.

***B. Likelihood of Serious Physical Harm***

The judge explicitly found that the airborne lead particles generated by the bridge demolition work were "causing or . . . likely to cause serious physical harm" to the employer's employees. The Secretary contends that this finding is correct because, among other things, employee exposure to airborne lead at the excessive levels found in this case have already been documented, through OSHA's rulemaking regarding lead, as capable of causing serious physical harm. *See* 29 C.F.R. § 1910.1025 (airborne lead standards for general industry). The employer disagrees, asserting that the gravamen of the violation is the lack of protective clothing, and that there is no evidence its lack was "causing or . . . likely to cause serious physical harm" and its use would materially reduce any harm.[26]

To establish a violation of section 5(a)(1), the Secretary must show that the employer "failed to free the workplace of a hazard . . . that was causing or likely to cause death or serious physical harm, and that could have been materially reduced or eliminated by a feasible and useful means of abatement." *E.g., Pelron Corp.*, 12 BNA OSHC 1833, 1835, 1986-87 CCH OSHD ¶ 27,605, p. 35,871 (No. 82-388, 1986)("*Pelron*"). This formulation of

---

[26]The employer also asserts that the Secretary changed his theory on review, now arguing that the lack of protective clothing exposes the employees to lead after work hours, rather than during them. But there has been no change, as the following portions of the complaint show:

> Employees were exposed to inorganic lead at levels above the permissible exposure limit. There were inadequate or no feasible administrative or engineering controls in place. Employees wore street clothing while working on lead-painted steel structures and then wore the same clothing home and in their cars. This condition increased the potential for extended lead exposure through inhalation and ingestion.
>
> . . . .
>
> Employees were exposed to inorganic lead at levels above the permissible exposure limit in at least seven instances. Employees did not wear work clothing. They wore their own clothing at work and then wore it home, often without showering or washing up.

Also, the Secretary alleged in the complaint that the hazard was the excessive lead, not the lack of protective clothing:

> Section 5(a)(1) of the Act applies to respondent's operation because respondent's employees were exposed to the hazard of overexposure to inorganic lead. That hazard was [recognized] by respondent or generally within respondent's industry. That hazard was likely to cause death or serious physical harm, and there were feasible means by which respondent could have eliminated or materially reduced the hazard.

Furthermore, the hazard of wearing lead-contaminated clothing home was addressed in testimony at the hearing.

the law indicates that the hazard is not the absence of the abatement method; instead, a hazard must be defined in terms of a preventable consequence of the work operation. *Compare Pelron*, 12 BNA OSHC at 1835-36, 1986-87 CCH OSHD at pp. 35,871-72 (hazards defined in terms of operational conditions or workplace practices which employers can reasonably control because they do not constitute risks inherently necessary to production), *with Bethlehem Steel Corp.*, 11 BNA OSHC 1877, 1880 n.5, 1983-84 CCH OSHD ¶ 26,848, p. 34,392 n.5 (No. 76-5004, 1984) (hazards not defined in terms of abatement methods because general duty clause may be used to require upgraded methods that are feasible, not merely recognized methods). Moreover, as our formulation of the law indicates, the Secretary need only show that the abatement method would materially reduce the hazard, not that it would eliminate the hazard. The Secretary is therefore not required to show that the abatement method's absence was *the sole* likely cause of the serious physical harm. *See Chevron Oil Co., California Co. Div.*, 11 BNA OSHC 1329, 1331-32 & 1333, 1983-84 CCH OSHD ¶ 26,507, pp. 33,722-23 & 33,724 (No. 10799, 1983) (likely serious consequences analyzed separately from abatement method's effect, which need not be elimination of serious harm). In sum, when evaluating whether the *hazard* presented a likelihood of serious physical harm, we do not inquire into whether the absence of the *abatement method* was what presented the likelihood; we remain focused on the hazard alone, and a hazard is likely to cause serious physical harm if the likely consequences of employee exposure would be serious physical harm. *See Pratt & Whitney Aircraft,* 8 BNA OSHC 1329, 1335, 1980 CCH OSHD ¶ 24,447, p. 29,825 (No. 13591, 1980), *vacated in part on other grounds*, 649 F.2d 96 (2d Cir. 1981). *Compare Consolidated Freightways Corp.*, 15 BNA OSHC 1317, 1324, 1991 CCH OSHD ¶ 29,500, p. 39,813 (No. 86-351, 1991)("*Freightways*") (serious section 1910.132(a) violation if accident is possible and serious physical harm is substantially probable result); *Kaiser Aluminum & Chem. Co.*, 10 BNA OSHC 1893, 1896-97, 1982 CCH OSHD ¶ 26,162, p. 32,974 (No. 77-699, 1982) (serious section 1910.132(a) violation if disease could result from violative condition and serious physical harm is substantially probable from disease).

The hazard in this case is the excessive levels of airborne lead being generated by the ongoing bridge demolition work; these excessive levels endangered the employees at their work, were by no means inherently necessary to its accomplishment, could have been dis-

pensed with, and were thus preventable. The absence of protective clothing was not the hazard; its use would be but one way to reduce the hazardous exposure. In general, persistent exposure to excessive levels of airborne lead is substantially likely to result in serious physical harm. *See United Steelworkers v. Marshall*, 647 F.2d 1189, 1203-04 & n.7 (D.C. Cir. 1980), *cert. denied*, 453 U.S. 913 (1981) (citing cases); *Johnson*, 15 BNA OSHC at 2139-42, 1993 CCH OSHD at pp. 40,969-73. *See also* 29 C.F.R. § 1910.1025, Appendix A. Also, in this case there was undisputed evidence of serious harm having occurred to employees who had worked on the bridge demolition. *See Freightways*, 15 BNA OSHC at 1324, 1991 CCH OSHD at p. 39,813 (persistent debilitating effects such as gastric problems are serious); *ConAgra, Inc.*, 11 BNA OSHC 1141, 1145, 1983-84 CCH OSHD ¶ 26,420, p. 33,527 (No. 79-1146, 1983) (potential for kidney damage is serious); *Mahone Grain Corp.*, 10 BNA OSHC 1275, 1279, 1982 CCH OSHD ¶ 25,836, pp. 32,317-18 (No. 77-3041, 1981) (severely incapacitating illness commonly requiring hospitalization is serious; evidence of potential for permanent disability is unnecessary).

*C. Feasibility*

At the worksite, the compliance officer, who had a bachelors degree in chemical engineering and more than ten years experience as an industrial hygienist, measured the exposure of employees to airborne lead particles. From these measurements, he discovered that seven employees were being exposed to levels ranging from three to twenty times the permissible eight-hour time-weighted average limit. At the hearing, he testified, without rebuttal, that the lead particles had been accumulating on the employees' clothes and that, because the employees were wearing only street clothes rather than protective clothing such as coveralls which could be removed at the end of the work shift, the employees' exposure to excessive levels of lead particles was being prolonged beyond the work shift. Specifically, the compliance officer testified:

> If the employees do not wear protective clothing or they carry home their work clothes[,] . . . it increases their exposure to the lead dust. The lead fumes were condensed and go back to their work clothes and so while driving home they have this additional exposure. Also when they removed it at home, they contaminate their homes . . . increasing their exposure . . . .

The compliance officer further testified that "[t]his is a hazard which has been documented in the literature." He also testified that "it's basically an industrial hygiene . . . problem . . . which has to be addressed in order to minimize exposure." According to the compliance officer, health professionals recommend protective clothing. Notably, this employer had a requirement in its safety program for protective clothing and had purchased disposable coveralls, but had not enforced the wearing of them because the union had objected. *See infra* note 28.

From this evidence, the judge found that "[t]he failure to implement protective clothing significantly aggravated the excessive lead exposure that was causing serious harm . . . ." In view of the unrebutted evidence about the exposure and the rationale behind expert recommendations for protective clothing in the field of industrial hygiene, we regard the judge's statement as an implicit finding that protective clothing would have materially reduced the harm, and we uphold the finding. *See also* 29 C.F.R. § 1910.1025(g) (OSHA's lead standard for protective work clothing in general industry, discussed in paragraph V of Appendix B thereof).

### *VI. Citation 1, Item 7*

This citation item involves respirator inspection under section 1926.103(c)(2), the same standard cited in items 1 and 2, on respirator cleaning and respirator storage. *See supra* note 7. The complaint alleged in item 7 that "respirators were not inspected regularly and maintained in good condition as they were dirty, not disinfected, and were stored in open containers unprotected from dusts . . . ." The respirators at issue are the same ones involved in items 1 and 2. The judge affirmed item 7 as well as items 1 and 2.

On review, the employer asserts that item 7 is duplicative of items 1 and 2, and the Secretary essentially agrees, as shown by the following statement in his brief:

> The Secretary does not contend in this appeal that respondent violated the duty to inspect embodied in 29 C.F.R. § 1926.103(c)(2) and alleged in Item 7. Separate penalties for failure to clean the respirators under both Item 1 and Item 7 would, therefore, be inappropriate.

The Secretary's abandonment of his former contention "that the Respondent violated the duty to inspect" implies that the Secretary has withdrawn item 7. We therefore reverse the judge and vacate item 7.

*VII. Willfulness*

The judge found willful all six violations alleged in citation 1, but, grouping three of them, assessed only four penalties: $10,000 for items 1, 2, and 7 together; $10,000 for item 3; $10,000 for item 5; and $10,000 for item 6. Inasmuch as the Secretary implicitly withdrew item 7, we only have before us the classification of items 3, 5, and 6 separately, and items 1 and 2 together, for the Secretary does not ask that the latter two items be separately penalized.

Turning now to their classification as willful violations, we will first dispose of several minor and meritless arguments. Contrary to the employer's assertions, the judge did make separate analyses of the four willful violations and did correctly find constructive knowledge of the violative conditions on the basis that they were either readily visible or patently apparent to the employer; in fact, the employer does not point to any evidence undermining the judge's findings. Also, in analyzing willfulness, the judge correctly relied on evidence regarding conduct and occurrences prior to the inspection. *Tampa Shipyards, Inc.*, 15 BNA OSHC 1533, 1534 n.3, 1541, 1992 CCH OSHD ¶ 29,617, pp. 40,097 n.3, 40,104 (No. 86-360, 1992).

The employer's principal argument against willfulness is that the Secretary continuously vacillated as to which standard applied to the facts of each item and obviously failed to establish the employer's awareness of any duty from any applicable standard. The employer also argues that the Secretary failed to present sufficient evidence of the employer's awareness of its duties under applicable OSHA standards.

An employer's knowledge of a standard's requirement can be an important aspect of willfulness, inasmuch as a willful violation is differentiated from the other classifications of violation by the employer's state of mind toward the safety or health duty imposed by a standard. *Bay State Ref. Co.*, 15 BNA OSHC 1471, 1475, 1992 CCH OSHD ¶ 29,579, pp. 40,024-25 (No. 88-1731, 1992); *Seward*, 13 BNA OSHC at 2234, 1987-90 CCH OSHD at pp. 37,787-88. Willfulness can be established by evidence that an employer knowledgeable of a standard's requirement either intentionally disregarded it or showed plain indifference to it; that an employer harbored a "state of mind . . . such that, if he were informed of the [applicable standard], he would not care" demonstrates willfulness. *Brock v. Morello Bros. Constr.*, 809 F.2d 161, 164 (1st Cir. 1987)("*Morello*"). *Compare A. Schonbek & Co. v. Donovan*, 646 F.2d 799, 800 (2d Cir. 1981) (actual awareness of hazardous condition along

with failure to correct it or eliminate employee exposure to it demonstrates plain indifference for purposes of willfulness). Of course, an employer's mere familiarity with the applicable standard does not automatically establish willfulness. *See Wright and Lopez, Inc.*, 8 BNA OSHC 1261, 1265, 1980 CCH OSHD ¶ 24,419, p. 29,777 (No. 76-3743, 1980); *see also National Steel & Shipbuilding Co. v. OSHRC*, 607 F.2d 311, 315-16 n.6 (9th Cir. 1979) (willfulness characterized by a "particularly improper" state of mind in violating standard). If a willful violation did not additionally require a heightened knowledge, it would be indistinguishable from a serious infraction. *Morello*, 809 F.2d at 164. Familiarity with the applicable standard is not an essential aspect of willfulness. *See id.* (reckless state of mind "if he were informed of" the standard).

In defense against the state-of-mind aspect of willfulness, the employer in this case argues that it made significant efforts to comply with OSHA requirements by reducing and controlling the employee exposure to airborne lead. Willfulness is negated by evidence that the employer had a good faith opinion that the conditions in its workplace conformed to OSHA requirements. *E.g.*, *Calang Corp.*, 14 BNA OSHC 1789, 1791, 1987-90 CCH OSHD ¶ 29,080, p. 38,870 (No. 85-319, 1990). But the test of good faith is an objective one, *i.e.*, whether the employer's belief concerning the factual matters in question was reasonable under all of the circumstances. In other words, the employer's belief must have been "nonfrivolous." *See Secretary v. Union Oil*, 869 F.2d 1039, 1047 (7th Cir. 1989), *citing Morello*, 809 F.2d at 165.

*A. Facts*

The judge found that this employer knew of the duties stated in the applicable standards. He also, as a part of his finding of the requisite willful intent, rejected employer good faith. We turn now to the facts regarding these two issues, knowledge of duties and good faith, for each of the four alleged willful violations.

*1. Items 1 and 2*

As we have discussed, these two items involve the employer's duty to ensure that respirators are adequately cleaned and stored, so as to protect employees from day-to-day accumulations of lead. Several OSHA standards express the duty -- the general industry standard stating it in a particularized way, *see supra* notes 6 and 8, and the construction standard stating it in a generalized way, *see supra* note 7. Furthermore, there is no question

that one of these standards applied at the bridge demolition worksite involved in this case. Although the employer has quibbled about which standard the Secretary ought to have cited, never has the employer claimed that no standard imposed the alleged duty. Thus, unsurprisingly, we note that the employer's own safety program required, at the time of the inspection (and before the demolition project began), adequate cleaning and storage of respirators.[27]

Nevertheless, from the outset of the demolition project up to the inspection, the employer made no apparent efforts to ensure adequate cleaning and storage. The employer did make efforts to implement a respirator program for the demolition project, and the employer asserts that these efforts to provide necessary extra protection to employees resulted in costs exceeding the bid for the job. The whole course of the employer's efforts is well described and documented in the judge's decision, which carefully outlines the failure of the employer's on-site supervisors to implement measures that the employer's off-site managers had directed be implemented. The judge also documents the failure of all supervisory personnel, on-site and off-site alike, to use the employer's own written safety program as a mandatory outline of procedures and ensure implementation of the applicable measures described therein. The judge imputed to the employer the knowledge and actions of the lower level supervisors, *i.e.*, those who were on-site and were thereby responsible for, among other things, implementing changes in the use and maintenance of respirators. On

---

[27]The employer's safety program indicates that, whenever respirators are used, the selection, training, use, and care requirements of the program are mandatory:

> All operations where potential exposures to harmful dusts, fumes, mists, gases, or vapors cannot be controlled by accepted engineering control measures, and the use of respiratory protective devices is required, are subject to the provisions of this directive.

The following are the specific cleaning and storage requirements:

> Routinely used respiratory equipment shall be regularly cleaned, inspected, and sanitized by a qualified individual.
>
> . . . .
>
> Where respirators are assigned to individual employees, area management shall ensure compliance with cleaning and maintenance requirements by periodic inspection and field audits of respiratory equipment.
>
> . . . .
>
> When not in use, respirators shall be stored to protect against dust, sunlight, extreme temperatures, excessive moisture, or damaging chemicals.

review the employer does not take exception to any of the judge's determinations in this regard.

To summarize, from the judge's decision and the evidentiary record, the employer knew from the outset of the project that the bridge was covered with lead-based paint (although the employer may not have realized how "exceptionally high" the amount of lead was), and therefore the employer provided and required the wearing of respirators. The employer did not, however, explore feasible engineering controls and did not plan any administrative controls to preclude overexposure. Also, respirators soon proved inadequate; filters clogged and air lines carried contaminated air. The employer began the work with negative pressure respirators but, when they proved to be ineffective, the employer converted to positive pressure respirators with air lines from a compressor. With the employer's cooperation, the city health department conducted tests of employee blood lead levels and the employer then learned that some employees were absorbing lead particulate to such an extent that, despite the short time they had been working on the demolition project (1½ to 3 weeks) and despite wearing respirators, they exhibited unusually excessive blood lead levels. One employee even required hospitalization for doctor-supervised chelation, which can have harmful side effects, as we have already mentioned. The city's report regarding this overexposure explicitly informed the employer that its use of respirators required enhancement. Although the employer did hire a consultant to investigate the overexposure, the employer did not implement the consultant's recommendations for specific engineering controls. It also appears that the employer ignored recommended administrative controls; one of the employer's own officials recommended rotating employees between areas of high-lead levels and low-lead levels, but we do not see that this was ever done (other than for employees who had already developed excessive blood-lead levels, *i.e.*, medical removal). We should note, however, that the employer implemented medical removal even though the lead standard does not apply to construction. *See* 29 C.F.R. § 1910.25(a)(2)).

The consultant also recommended using NIOSH-approved respirators, but as we have found, the employer continued to use unapproved composite respirators. The recommendation that the employer did implement was for continued blood-lead testing; the employer even consulted a hospital to perform tests. The employer also acted on the one official's recommendations to conduct additional employee training about lead hazards and to move

the air compressor to a more remote, upwind area. We note, however, that the compressor was not moved as far away as recommended and the air lines were not tested for lead content until after the OSHA inspection, at which time they *were* found to be lead-contaminated. We should note also that, besides the additional training, the employer provided showers and instructed the employees to use them. Yet, even though medical tests were showing elevated and violative blood lead levels, the employer did nothing to implement the applicable requirements for respirator use, including cleaning and storage, that are the subject of this case and that were mandatory in the employer's own safety program. There was some testimony that the employer provided the employees with materials for cleaning their respirators, but the employer did not do anything more, such as supervise and enforce regular cleanings.

The employer asserts that it could do no more, because the union had responsibility for respirator care and because the union resisted the wearing of protective clothing. But the judge found against the employer on these matters,[28] and the employer does not point to anything in the record that would undermine these findings.

---

[28]The judge stated (transcript references omitted):

> As Respondent notes, its ironworkers were selected and provided by a union hiring hall, and its union contract stated:
>
> > On all jobs there shall be a foreman . . . and the foreman is the only representative of the Employer who shall issue instructions to the workmen.
>
> However, [compliance officer] Bustria testified that M-K's Vice President for the Eastern Region, Mr. Poteat, whom [project manager] Kassap and [regional safety coordinator] Dockery said was their boss, told Bustria that "the union did not run the job," (including safety) -- M-K did. Dockery knew that too. Union officials confirmed to Bustria that that was their understanding too. No witness testified inconsistently with that understanding.
>
> Bustria testified that [office engineer] Kramer and Kassap told him during his investigation that they thought the responsibility for cleaning, disinfecting and caring for respirators was on the employee and the union shop steward. However, their understanding is inconsistent with Respondent's respirator program, which states, "Routinely used respiratory equipment shall be regularly cleaned, inspected, and sanitized by a qualified individual." Respondent gave no indication that it had trained the shop steward or employees to be "qualified individuals."
>
> . . . .
>
> Bustria testified that Kassap told him that the union rejected the idea of requiring employees to wear coveralls. However, that does not rebut the feasibility or likely utility of Respondent enforcing their use. The union apparently was saying only that *it* would not attempt to require coveralls. Respondent knew, however, that enforcing safety was its own responsibility, not the union's. There was no evidence that employees would not have complied with orders from Respondent to wear coveralls.

*2. Item 3*

As we have discussed, this item involves the employer's duty to ensure that employees use only approved respirators, so as to ensure the maximum possible protection from daily exposure to excessive lead. Several OSHA standards express the duty, *see supra* notes 12, 13, and 14, and the employer does not question that one of these standards did apply at the bridge demolition worksite involved in this case. Thus the employer's own safety program required, at the time of the inspection (and before the demolition project began), the use of approved respirators.[29] Yet, as we discussed in regard to items 1 and 2, the employer continued to use unapproved composite respirators.

*3. Item 5*

As we have discussed, this item involves the employer's duty to ensure that employees wear protective clothing, to minimize the daily exposure to excessive lead, and in this item the Secretary relied on the general duty clause to impose the duty. Nevertheless, the employer's own safety program required, at the time of the inspection (and before the demolition project began), the use of protective clothing.[30] And as we discussed in regard to items 1 and 2, the employer took steps to provide protective clothing but not to require its use.

---

[29]The employer's mandatory program stated:

> The employer shall provide only that respiratory equipment that has been approved by the [M]ining Enforcement and Safety Administration or the National Institute for Occupational Safety and Health.

[30]This provision of the employer's program states:

> Protective clothing shall be provided to employees exposed to lead above the PEL. The clothing shall be cleaned, repaired or replaced when needed. Protective clothing is to be removed only in designated areas and immediately after use. Contaminated clothing and equipment must be placed in closed containers labeled: "CAUTION: CLOTHING CONTAMINATED WITH LEAD. DO NOT REMOVE DUST BY BLOWING OR SHAKING. DISPOSE OF LEAD CONTAMINATED WASTE WATER PROPERLY".

It comes from the employer's "Lead Procedures," the purpose of which the following:

> This procedure describes the minimum requirements for demolition, handling and installation of lead and lead-containing materials. Following this procedure will protect workers from the toxic effects of lead and assure compliance with the legal requirements of OSHA.

### *4. Item 6*

As we have discussed, this item involves the employer's duty to ensure that daily employee exposure to airborne lead is kept below excessive levels by means of all feasible engineering and administrative controls, and/or personal protective equipment, if necessary. The construction standards express the duty, *see supra* note 1, and the employer's own safety program required, at the time of the inspection (and before the demolition project began), compliance with these construction standards.[31]

There is no dispute that this employer did not implement the engineering controls and administrative controls that could have prevented excessive blood-lead levels from occurring. As we have discussed, the employer voluntarily implemented medical removal, but this measure only provided relief for employees who had developed high blood-lead levels; it did not prevent high blood-lead levels in the first place. As for the employer's use

---

[31]These provisions of the employer's lead procedures state:

> D. GENERAL PROCEDURES
>
> All OSHA requirements *that apply* to the job-site (manufacturing, construction, etc.) as found in 29 CFR 1910.1025, 29 CFR 1926 sections 55, 353 and 354 shall be followed.
>
> E. EXPOSURE MONITORING
>
> Employee exposures must be monitored by personal air sampling if any information exists that would indicate potential employee exposure to lead. This monitoring must be done regularly if concentrations are at or above the action level. Monitoring must be repeated if there are any changes which may result in additional exposure. The employee must be notified in writing of the results within 5 days of receipt of monitoring results.
>
> REDUCING EXPOSURE
>
> 1. Engineering and work control practices shall be used to reduce employee lead exposure to levels that are as low as reasonably achievable. While these controls are being implemented, or where they are found not feasible or not sufficient, the controls shall be supplemented with personal protective devices (e.g., respirator) to reduce the exposure to below the permissible exposure level (PEL).
>
> 2. The Morrison-Knudsen Company, Inc. Respiratory Protection Plan shall be followed if the use of respirators is required.

(Emphasis added).

of respirators, the most that can be said is that the employer provided them, and then provided some training after instances of overexposure occurred. The employer did not, however, take adequate steps to ensure that the respirators were the right type and that they functioned properly. The employer also failed to enforce applicable requirements for their maintenance in a clean condition.

***B. The Secretary's Case Regarding Willfulness***

This employer's safety program establishes awareness of the duties embodied in the cited standards or enforceable through the general duty clause. Plainly, this employer was aware of the utility of protective clothing and of the other abatement measures mentioned in the cited standards, inasmuch as the standards were cited and virtually quoted in the employer's own safety program. By reference to the standards themselves, the employer could have determined the standards' applicability to the demolition work. Furthermore, the employer had urgent reason to make such determinations of applicability since employees were quickly becoming seriously ill. Also, as we stated in our recitation of the facts relevant to willfulness, the employer had been warned to implement some of the measures contained in the applicable standards, such as engineering and administrative controls and improved overall implementation of respiratory protection. Yet, the employer apparently ignored its own safety program -- its mandatory requirements were not implemented and the employer did not determine which OSHA standards mentioned therein were legally applicable to the worksite involved in this case. On the basis of this record, then, we decide that the judge was justified in finding willful violations.

Because the employer did not entirely sit idly by while employees continued to fall ill, the case may seem close, but the evidence regarding the employer's response shows that it was unreasonably limited. The employer's own safety program indicated that engineering controls could be appropriate for demolition work, *see supra* note 31, yet the employer chose to rely entirely on respirators. Even so, much of the employer's own respiratory program was ignored and, once it was clear that employees were being affected, the employer concentrated on providing treatment for those who had fallen ill rather than on making a stronger effort to prevent further illness. To reiterate, the employer could at least have implemented its own program. The employer's persistent failure either to take reasonable

steps toward accomplishing the already-prescribed measures for abatement or, at least, to make a careful determination that they were unnecessary shows a willful state of mind. That is, to paraphrase *Morello*, the employer's on-site supervisors harbored a "state of mind . . . such that, if [they had been specifically reminded] of the [applicable standards], [they] would not [have] care[d]." After all, persons had reminded the employer's officials of the duties embodied in the standards, but the employer did not implement the suggested abatement methods, such as engineering controls and a proper respiratory protection program. This evidence indicates that this employer either intentionally violated the standards or showed plain indifference to them. Accordingly, we affirm the judge, who heard the witnesses, in his finding of the requisite willful intent.

The employer argues that it is being impermissibly held in willful violation for failure to adhere to its own safety program rather than OSHA standards. This is not the case. The safety program is evidence that the employer was aware of the cited standards and their requirements, and further shows awareness of the utility of protective clothing, which was the subject of the general duty clause violation in this case. Moreover, contrary to the employer's assertions, case law holds that abatement measures taken by an employer prior to an inspection may be considered in conjunction with other evidence demonstrating that an employer or its industry recognized a hazard. *See, e.g., Trinity Indus., Inc.*, 15 BNA OSHC 1481, 1485 n.8, 1992 CCH OSHD ¶ 29,582, p. 40,035 n.8 (No. 88-2691, 1992) (cases cited). Accordingly, the employer's safety program in this case may be considered, along with the evidence of warnings from other sources regarding the applicable occupational safety and health duties, to establish a willful awareness of responsibilities.

*C. Good Faith*

The foregoing indicates that the employer knowingly disregarded the consultant's advice and warnings corresponding to plainly written and applicable portions of the safety program, which closely tracked the language of applicable and related standards. This indicates that the employer's efforts were not reasonable. Inasmuch as an unreasonable belief that abatement efforts were sufficient cannot constitute good faith, we conclude that the judge correctly rejected the employer's good faith defense and held the employer accountable for the four willful violations.

The employer claims a good faith belief that it complied with all applicable standards. Pointing out that its safety program only mandated compliance with OSHA standards if they were applicable, *see supra* note 27 (emphasized words), the employer argues that the program cannot give rise to any inference of awareness of the applicable duties on this worksite. Furthermore, pointing to some evidence suggesting that one or more of the employer's officials only accepted one small part of the OSHA standards as applicable, *i.e.*, section 1926.353(c) and section 1926.354(c), *see supra* note 2, the employer claims that there was not "any indication of bad faith" in disregarding the rest of the OSHA standards referenced in the safety program.

We are mindful, however, that the employer has the burden of proof on good faith. A finding of objective good faith is not possible in light of the cross-references from the above-mentioned standards to the others that were applicable, *i.e.*, the standards in section 1926.55 and section 1926.103. *See supra* notes 2 and 1 (in that order) and our discussion regarding the employer's preemption argument for item 6 (to which the footnotes pertain). A reasonably diligent employer whose safety program referred to several possibly applicable standards, and whose consultants had been pointing to the need for better abatement measures, surely would have taken careful note of the cross-references in the standards thought to be applicable, and surely would have made a careful evaluation regarding the applicability of other standards. In this case there is no evidence that the employer exercised this necessary level of care.

### *VIII. Penalties*

As we have mentioned, the judge assessed four $10,000 penalties based on the employer's willful disregard of its occupational safety and health duties and serious harm that had been resulting to employees. In view of the gravity of the exposure to airborne lead, we affirm the judge's assessments.

### *IX. Citation 2*

The standard cited in the one item of nonserious citation 2 is 29 C.F.R.

§ 1904.2(a).[32] The judge found that the employer failed to record one elevated blood-lead level, 54 μg/dl (micrograms per deciliter); the employer had been recording test results at levels above 50 μg/dl and simply failed to record this one test result. The Secretary's record-keeping guidelines speak in terms of μg/100g (micrograms per 100 grams), requiring that levels above 50 μg/100g be recorded. *See Johnson*, 15 BNA OSHC at 2137, 1993 CCH OSHD at p. 40,966 (quotation from recordkeeping guidelines). The appendix to the lead standard states, however, that 1 deciliter equals 100 grams.[33] Accordingly, the test result involved in this case comes within the recordkeeping guidelines with which we dealt in *Johnson*, 15 BNA OSHC 2136-43, 1993 CCH OSHD at pp. 40,965-73, and with which the employer in this case seems to have no dispute. The employer only argues, inaccurately, the lack of evidence that the blood-lead level involved in this case came within OSHA's record-keeping guidelines. We therefore affirm this nonserious item. The Secretary has proposed no penalty and we assess none.

### *X. Order*

We affirm five of the six items on review from willful citation 1 -- items 1, 2, 3, 5, and 6. We classify them as willful violations, but for penalty purposes we combine items 1 and

---

[32]This standard requires employers to log "recordable occupational injuries and illnesses." It states, in pertinent part:

> Each employer shall . . . (1) maintain . . . a log and summary of all recordable occupational injuries and illnesses . . . and (2) enter each recordable injury and illness on the log and summary . . . . For this purpose form OSHA No. 200 or an equivalent . . . shall be used. The log and summary shall be completed in the detail provided in the form and instructions on form OSHA No. 200.

A related definitional regulation, 29 C.F.R. § 1904.12(c) defines "recordable occupational injuries or illnesses" as "[n]onfatal cases without lost workdays which result in transfer to another job" and "any diagnosed occupational illnesses which are reported to the employer but are not classified as fatalities or lost workday cases."

[33]Appendix A, II.B(3), states (in pertinent part):

> The measurement of your blood lead level is the most useful indicator of the amount of lead being absorbed by your body. Blood lead levels (PbB) are most often reported in units milligrams (mg) or micrograms (μg) of lead (1 mg=1000 μg) per 100 grams (100g), 100 milliter (100 ml) or deciliter (dl) of blood. These three units are essentially the same.

2 and assess four $10,000 penalties. We vacate item 7 of willful citation 1. Finally, we affirm the one item of nonserious citation 2, with a $0 penalty.

Edwin G. Foulke, Jr.
Chairman

Donald G. Wiseman
Commissioner

Velma Montoya
Commissioner

Dated: April 20, 1993

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1825 K STREET NW
4TH FLOOR
WASHINGTON, DC 20006-1246

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

| | | |
|---|---|---|
| SECRETARY OF LABOR,<br><br>Complainant,<br><br>v.<br><br>MORRISON-KNUDSEN CO./ YONKERS CONTRACTING CO., INC., a Joint Venture,<br><br>Respondent. | : | Docket No. 88-0572 |

## NOTICE OF COMMISSION DECISION

The attached decision by the Occupational Safety and Health Review Commission was issued on April 20, 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.

April 20, 1993
Date

Ray H. Darling, Jr.
Executive Secretary

Docket No. 88-0572

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

Patricia Rodenhausen, Esq.
Regional Solicitor
Office of the Solicitor, U.S. DOL
201 Varick St., Room 707
New York, NY 10014

Robert D. Moran, Esquire
919 18th Street N. W.
Suite 800
Washington, D. C. 20006

Irving Sommer
Administrative Law Judge
Occupational Safety and Health
Review Commission
Room 417B
1825 K Street, N.W.
Washington, D.C. 20006-1246

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

March 28, 1990

IN REFERENCE TO SECRETARY OF LABOR v.
Morrison-Knudsen Co., Inc./ Yonkers Contracting Co., Inc.,
A Joint Venture and its Successors

OSHRC
DOCKET NO. 88-572

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

Patricia M. Rodenhausen, Regional Solicitor
U. S. Department of Labor
Office of the Solicitor
201 Varick Street, Room 707
New York, New York 10016

Robert D. Moran, Esquire
Cooter & Gell
1201 New York Avenue, N. W.
Suite 900
Washington, D. C. 20005

Irving Sommer, Judge
Occupational Safety & Health Review Commission
1825 K Street, N. W.
Washington, D. C. 20006

## NOTICE OF DOCKETING

Notice is given that the above case was docketed with the Commission on March 28, 1990. The decision of the Judge will become a final order of the Commission on April 27, 1990 unless a Commission member directs review of the decision on or before that date.

Petitions for discretionary review should be received on or before April 17, 1990 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 addresses 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

| | | |
|---|---|---|
| SECRETARY OF LABOR<br>Complainant | : | |
| v. | : | Docket No. 88-0572 |
| MORRISON-KNUDSEN CO., INC./<br>YONKERS CONTRACTING CO., INC.<br>Respondent | : | |

ORDER OF CORRECTION

On page 31 of the decision dated March 7, 1990, in the first complete paragraph the last sentence should read as follows:

He testified that proper storage would include placing the respirators, after cleaning, in sealed plastic bags, and then putting them where they would not be exposed to the sun.

IRVING SOMMER
Judge, OSHRC

DATED: MAR 15 1990
Washington, D.C.

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | |
|---|---|
| SECRETARY OF LABOR,<br><br>Complainant,<br><br>v.<br><br>MORRISON-KNUDSEN CO., INC./YONKERS CONTRACTING CO., INC., a Joint Venture and its Successors,<br><br>Respondent. | OSHRC DOCKET NO. 88-572 |

APPEARANCES: Diane Wade
Office of the Solicitor
U. S. Department of Labor
201 Varick Street
New York, New York 10014
for the Secretary

Robert D. Moran
Cooter & Gell
1201 New York Avenue, N.W.
Suite 900
Washington, D. C. 20005
for the Respondent

DECISION AND ORDER

SOMMER, J.:

This decision resolves the merits of a willful Citation containing six items, and an other than serious Citation, issued by the Secretary to the Respondent concerning its bridge demolition project in Brooklyn, New York. Proposed penalties totalling $60,000 are at issue.

All the alleged willful violations are of OSHA requirements relating to employee lead exposure. Respondent's employees were exposed to fumes of lead-based paint on the old Greenpoint Avenue

Bridge while cutting sections of it with oxygen propane torches.[1/] The demolition project began in late April, 1987, and finished at the end of October, 1987. (Tr. 67, 74)

OSHA inspected the worksite on September 17 and 22, 1987. It issued its Citations on March 4, 1988. After protracted pleading and discovery disputes, a hearing on the merits of the Citations was held in New York City on July 11, 12, 13 and 14, 1989. The parties have briefed the issues exhaustively.

The alleged willful violations (Citation 1) are as follows:

Item 1 -- Respirators were not regularly cleaned and disinfected, in violation of 29 CFR § 1910.134(b)(5) and/or § 1926.103(c)(3);

Item 2 -- Respirators were not stored in a convenient, clean and sanitary location in violation of § 1910.134(b)(6);

Item 3 -- Approved or accepted respirators were not used, in violation of § 1910.134(b)(11) and/or § 1926.103(a)(2);

Item 4 -- [Withdrawn by the Secretary before hearing]

Item 5 -- Protective work clothing was not worn by employees where there was exposure to lead in excess of the permissible exposure limit ("PEL"), in violation of § 1926.28(a), or, in the alternative, § 5(a)(1) of the Act;

Item 6 -- (a) Employees were exposed to lead at levels above the PEL, in violation of § 1926.55(a);
(b) Feasible administrative or engineering controls were not used to reduce employee exposures to lead, in violation of § 1926.55(b);
(c) Use of respiratory protective devices was not enforced when required, in violation of § 1926.103(a)(1);

Item 7 -- Respirators were not inspected regularly and

---

[1/] A new bridge was built adjacent to the old one. The Greenpoint Avenue Bridge spans Newtown Creek and connects the Boroughs of Queens and Brooklyn.

maintained in good condition, in violation of § 1926.103(c)(2).

Citation 2 alleged a nonserious failure to record a case of elevated blood lead level as required by § 1904.2(a).

To summarize the discussion below, the evidence amply supports the Secretary's claims in general, including the willfulness of the violations. Respondent called no witnesses and produced very little evidence. It has made a great array of legal and procedural arguments, many of which are unworthy of serious attention. The statements of fact and of legal authority supporting those arguments are generally without serious merit. A few arguments have technical merit, but they do not affect the outcome.

In particular, Respondent has called attention to a construction provision (§ 1926.103(c)(2)) that is more specifically applicable than the general industry standards cited in Item 1 and 2 of Citation 1.[2/] However, amendment of the pleadings is appropriate. Respondent squarely recognized even before the hearing that the applicability question was in issue. The evidence overwhelmingly establishes the violation under either the general industry or the construction standard. The pleading problems do not warrant dismissal of any charges.

---

[2/]The general industry standards cited in this case are among those identified as applicable to construction in OSHA Program Directive # 200-88 (October 10, 1978). 1978-79 CCH Employment Safety and Health Developments ¶ 11,473. That Directive was prepared in response to requests for guidance on the subject by both labor and industry groups. However, it did not constitute formal incorporation of those standards into the construction standards.

## A. JURISDICTION

The Commission has jurisdiction over the case and the parties. Respondent filed a timely notice of contest to the Citations. It admits that it is "a corporation engaged in commerce and is subject to the Act and the jurisdiction of the Commission." (Answer, ¶ 1) Respondent is engaged in a business affecting commerce within the meaning of §§ 3(3) and 3(5) of the Act and is an employer within the meaning of § 3(5) of the Act.

## B. FINDINGS OF FACT AND CONCLUSIONS OF LAW

### CITATION 1

To put the other issues in perspective, it seems best to start with Item 6, which addresses the levels of lead to which employees were exposed, and countermeasures generally. Then, the other items will be discussed in the order that they were cited. The alleged willfulness will be discussed last.[3]

---

[3]Respondent argues that the Citations must be vacated because they were not issued with reasonable promptness, as required by § 9(a) of the Act. However, it has presented no evidence that it was adversely affected (prejudiced) by the fact that the Citations were issued almost 6 months after the inspection. Absent such evidence, its claim must be rejected, under Commission precedent. E.g., Stripe-A-Zone, Inc., 10 BNA OSHC 1694 (Rev. Comm No. 79-2380, 1982).

Respondent notes a recent decision by a Commission judge, not reviewed by the Commission, which vacated a Citation for lack of reasonable promptness without finding prejudice to the employer. A. O Smith Corp., 13 BNA OSHC 1095 (Rev. Comm No. 86-548, 1987). However, that case concerned equitable considerations not present here. The Secretary's local officials had entered into an informal agreement to settle a Citation, and subsequently issued another one on the same subject.

Item 6(a): Alleged exposure to lead at levels above the PEL

The cited standard provides:

> **§ 1926.55 Gases, vapors, fumes, dusts, and mists.**
>
> (a) Exposure of employees to inhalation, ingestion, skin absorption, or contact with any material or substance at a concentration above those specified in the "Threshold Limit Values [TLVs] of Airborne Contaminants for 1970" of the American Conference of Governmental Industrial Hygienists [ACGIH], shall be avoided.

The TLV for lead in the 1970 ACGIH document is 0.2 $mg/M^3$. (Ex. C-27 at 11)

1. The Secretary's measurements

OSHA's air samples were taken on September 17 and 22, 1987. They indicated that one employee was exposed to about 20 times the limit permitted under the ACGIH document; that three others were exposed to about 15 times the limit; and that the other was exposed to about 3 times the limit, on at least one day.[4]

---

[4]Specifically, OSHA's results were:

| EMPLOYEE | DATE | LOCATION | 8-HOUR TWA ($mg/m^3$) |
|---|---|---|---|
| M. Horn | 9/17/87 | Queens side | 3.21 |
| M. Jackson | 9/17/87 | Queens side | 3.45 |
| J. Mullen | 9/17/87 | Brooklyn side | 0.65 |
| J. Curtis | 9/22/87 | Brooklyn side | 2.95 |
| D. D'Constanzo | 9/22/87 | Brooklyn side | 4.05 |
| M. Horn | 9/22/87 | Queens side | 2.98 |
| H. Jackson | 9/22/87 | Queens side | 1.44 |

(Ex. C-17, C-18).

Based on the evidence, OSHA's sampling techniques were proper, and its results reliable (with the possible exception of certain samples for Horn and Jackson discussed below). OSHA's industrial hygienist (IH) in charge of the inspection, Jesus Bustria, and his assistant, IH Alvaro Mora, testified in detail about the standard procedures under which the air samples were collected, sealed and calculated. (Tr. 126-31, 673; Ex. C-17, C-18)

Respondent does not attack the IHs' procedures generally. However, it argues that certain samples taken from Horn and Jackson were invalid, because Jackson left the site for lunch on both days without removing the samplers, and Horn lay his pump next to him while eating lunch at the site on September 17. There is no need to evaluate this objection, because other samples showed comparable levels of lead exposure (see n. 4 supra) and were not affected by those factors.

Respondent has not found fault with the handling of the samples after they were collected, or with the laboratory analysis. Bustria sealed the samples and sent them by certified mail to OSHA's Salt Lake City laboratory for analysis. Philip Giles, a biochemist at the laboratory, testified about the detailed measures used to assure accurate measurements. Giles performed some of the tests and supervised the other tests. (Tr. 213-23, 227-31)

OSHA's sampling results are corroborated by air sampling done for Respondent in July, 1987, by a private consultant,

Enviro-Probe, Inc. That sampling showed that the four ironworkers sampled were exposed to between 14 and 42 times the ACGIH TLV for lead.[5/] Enviro-Probe was a laboratory accredited by the American Industrial Hygiene Association. Id. at 10. Respondent produced no contrary sampling results.

2. Respondent's validity arguments regarding sampling results generally

Nevertheless, Respondent raises a plethora of objections to relying on OSHA's and Enviro-Probe's results. It argues that the Secretary failed to prove the propriety of her sampling technique in light of comments by the D. C. Circuit on the limitations of lead monitoring on some construction sites. United Steelworkers of America v. Marshall, 647 F.2d 1189, 1309-10 [8 BNA OSHC 1810, 1900-01] (D. C. Cir. 1980), cert. denied, 453 U .S. 913 (1981) ("Steelworkers"). There, the court upheld OSHA's decision to exclude the construction industry from the general industry lead standard, § 1910.1025. It termed OSHA's decision adequately explained.

Respondent relies on the court's statements that OSHA had decided that applying § 1910.1025 and its environmental monitoring requirements to the construction industry would be highly impractical. 647 F.2d at 1309-10 [8 BNA OSHC at 1900-01].

---

[5/]Specifically, Enviro-Probe found:

| EMPLOYEE | 8-HOUR TWA ($mg/M^3$) |
|---|---|
| Edward Solomon | 4.99 |
| Terry Conish | 2.87 |
| Robert Hill | 3.41 |
| Harold Jackson | 8.54 |

However, OSHA's preamble to the lead standard shows that it did not draw those conclusions. OSHA did not resolve the feasibility of the lead standard for construction generally. It decided that further study was appropriate, and it left Part 1926 intact. 43 Fed. Reg. at 52,986 col. 3. It specifically noted that there was no claim that environmental monitoring is infeasible except on very short projects:

> Environmental monitoring is not claimed to be infeasible other than where the length of the job could be shorter than the time it could take for air samples to be taken and analyzed.[4]

[4]The Council of Construction Employers states that "large construction companies use air monitoring techniques to determine toxic concentrations of airborne contaminants. There is no doubt that such techniques are available and can readily provide useful information . . ."

43 Fed. Reg. at 52,986 col. 2 (citations omitted). M-K is one of the nation's largest construction firms. In fact, Respondent's argument is disingenuous because M-K's written lead procedures require environmental monitoring:

> Employee exposures must be monitored by personal air sampling if any information exists that would indicate potential employee exposure to lead. This monitoring must be done regularly if concentrations are at or above the action level.

(Ex. C-5 at 2) Also, the court in Steelworkers noted with approval OSHA's existing protections for construction workers against air contaminants including lead exposure, under § 1926.55:

> Of course, OSHA would be shirking its statutory responsibilities if it made no effort to protect workers in the construction industry from lead exposure. But we construe OSHA's decision here as only to exempt the construction industry form this particular standard, not from OSHA jurisdiction generally. . . . [O]ther OSHA regulations now in effect will protect construction workers against general air contamination through engineering, work practice, and respirator controls. E.g., 29 C.F.R. §§ 1926.55, 1926.57, 1926.103, 1926.354(c) (1979).

647 F.2d at 1310 [8 BNA OSHC at 1901]. OSHA's reliance on air samples under § 1926.55 was appropriate.

Respondent also argues that OSHA's measurements are invalid because they were not taken inside the employees' respirators. This objection is unfounded. Section 1926.55 makes clear that the employees' exposure to air contaminants is to be determined initially without regard to respirators. Only in that way can it be determined whether there is a need for engineering or administrative controls, respirators or other protective measures. Thus, the Secretary properly measured the lead levels outside the respirators in order to determine whether any controls were warranted.[6/]

Respondent argues that the Secretary did not prove that the measurements were solely of "inorganic lead" as she defined it. However, the evidence is sufficient, and Respondent's attack on

---

[6/]On the other hand, it may duplicative to find a violation of both § 1926.55(a), for excessive exposure, and of § 1926.55(b), for failure to properly reduce that exposure. This question need not concern us here, however, because the Secretary has treated all the subitems of Item 6 as a single violation for penalty purposes.

that evidence misses the mark. Even if Respondent were correct in its argument, an amendment of the pleadings would be appropriate, and a violation still would be found.7/

To explain, the Secretary defines "inorganic lead" in this case as it is defined in the general industry lead standard (§ 1910.1025(b)) and the "NIOSH Criteria for a Recommended Standard -- Occupational Exposure to Inorganic Lead, 1972." (Tr. 234-38)8/ On cross-examination of Giles, Respondent

---

7/The Secretary argues that this line of defense should not be permitted because Respondent refused to respond during discovery to her request for "All facts upon which Respondent relies for its defense that it 'did not violate either the Act or any provision thereof or the cited standards as alleged.'" (Ex. C-28, C-29, ¶ 3) Because Respondent's argument does not affect the case, there is no need to evaluate this counter-argument.

8/The definition in § 1910.1025(b) states:

> "Lead" means metallic lead, all inorganic lead compounds, and organic lead soaps. Excluded from this definition are all other organic lead compounds.

The NIOSH definition states:

> "Inorganic lead" means lead oxides, metallic lead, and lead salts (including organic salts such as lead soaps but excluding lead arsenate).

(Ex. R-2 at 5 and Attachment at p. I-1) Respondent's written lead procedures defined lead in substantially identical terms to § 1910.1025(b). (Ex. C-5 at 1)

Respondent appears to argue that by relying on the definition of "lead in § 1910.1025(b), the Secretary is impermissibly attempting to apply the lead standard to it. There is no basis for that argument. The Secretary merely replied to Respondent's request during discovery for a specific definition of the "lead" regulated by § 1926.55(a). As noted above, Respondent's understanding of the definition of "lead" for purposes of its construction work was the same.

specifically raised the question whether there was present in the substance analyzed any lead chromate, lead arsenate, tetramethyl lead or tetraethyl lead. (Tr. 237-39) Giles testified that OSHA did not make those determinations. Respondent notes that lead arsenate is excluded from the NIOSH definition of "inorganic lead." It also notes that tetraethyl lead is an organic lead compound and excluded from the definition of lead in § 1910.1025(b). (Tr. 236-37)

However, Giles also testified that the filters were analyzed for "inorganic lead" as defined in § 1910.1025. Giles had performed that analysis at least 5000 times in his 9½ years as an OSHA chemist. Never had an error been found in his methods, to his recollection. (Tr. 222) Respondent's cross-examination did not establish that Giles incorrectly measured the amount of "inorganic lead." Respondent merely showed that he did not know whether the other lead substances it mentioned also were present in the substance analyzed before the "inorganic lead" was separated out. (Tr. 237-39) Respondent did not show that the portion separated out as "inorganic lead" was erroneous.

Even if Respondent were correct that the measurement of "inorganic lead" in the substance analyzed was erroneous, that would not change the outcome. Each of the four lead substances for which OSHA did not test is regulated by the same ACGIH document as "inorganic lead." In fact, each has a lower TLV than

"inorganic lead."[9/] Thus, if any of those substances were measured as "inorganic lead," the overall TLV would be lower than 0.2 mg/$M^3$. Respondent still would be in violation of § 1926.55(a), and its violations would be more severe. Amendment of the pleadings would be appropriate in that event to include in the charge a violation as to any or all of the lead substances Respondent has raised. Thus, a violation still would be found.[10/]

---

[9/]Lead arsenate has a PEL of .15 mg/$M^3$. Tetraethyl lead has a PEL of .1 mg/$M^3$. Tetramethyl lead has a PEL of .15 mg/$M^3$. (Ex. C-27 at 11, 14) (The latter two substances are followed by the notation "-Skin." That notation is intended to alert the reader that the substance may be readily absorbed by the skin (including mucous membranes and eyes), as well as inhaled. The notation is to suggest that appropriate skin protection be afforded in addition to keeping the amount in the air below the PEL. (Ex. C-27 at 3))

Respondent asserts that the parties stipulated that lead arsenate is not regulated by § 1926.55(a). This assertion is frivolous. There was no such stipulation. Also, Respondent's claim is flatly contrary to the ACGIH document incorporated in the cited standard.

[10/]The Secretary has not moved for an amendment. However, she objected at the hearing and still objects to the introduction of the evidence Respondent relies on. Her grounds are that Respondent failed to plead the issue or mention it during discovery. (E.g., Tr. 234-37; see n. 7 supra)

Thus, amendment would be proper in the circumstances under the second part of Fed. R. Civ. P. 15(b), which applies in our proceedings under 29 U.S.C. § 661(g). The Secretary objected to the introduction of the evidence adduced by Respondent on cross examination of Giles. and both parties squarely recognized that it went to the issue Respondent presses here. That issue is whether a violation may be found even though OSHA does not know whether lead chromate, lead arsenate, tetraethyl lead and tetramethyl lead was present in the samples. The parties' counsel discussed the relevance of that line of questioning at the hearing. (Tr. 234-35) The Secretary would not be prejudiced by the amendment because she would prevail even if the new issue

(continued...)

Respondent also complains that OSHA's results are invalid because Giles testified that its analysis did not determine whether the lead was in the form of fumes or dust, and whether it was metallic or non-metallic lead. (Tr. 239) However, Respondent did not show why these distinctions would make a difference. The samples were analyzed for "inorganic lead" as defined under the general industry lead standard. (Tr. 233-36; Ex. C-18) There was no showing that further specificity was required. Respondent's argument is unsupported.

Respondent argues that the samples were invalid because the evidence did not show that the air sampled "was confined to Respondent's worksite or to employee working hours." It notes that the worksite was in the open air in the heart of an industrial area with a great deal of vehicular traffic and other potential lead sources. However, there also was no evidence that the air sampled was not basically the product of the work. Indeed, OSHA's analysis of the paint on the bridge showed that it contained 52% lead, and the evidence showed that the lead exposure would have been basically to fumes of that paint. (Tr. 408-12; Ex. C-26 at 140) Respondent's own sampling by Enviro-Probe did not suggest that lead in the air from causes other than Respondent's operations was wholly or partly responsible for the excessive exposures. (Ex. C-27) Respondent's argument also must

---

10/ (...continued)
is considered. Nor would Respondent have reason to complain, because it consciously introduced the issue. Amendment would be proper.

be rejected because even if off-site sources had contributed to the lead exposure, Respondent still would be legally responsible for its employees' exposure that it reasonably could have known about.

Respondent argues that because lead was not the only substance found on the filters, the Secretary was under a duty to determine the other substances and their amounts and calculate the TLV to the mixture of substances. This "mixtures" argument is unfounded. Nowhere in the ACGIH document incorporated by reference in the cited standard (Ex. C-27) is such a procedure required.[11/]

Respondent argues that the cited standard is preempted by certain specifically applicable standards not cited by the Secretary -- §§ 1926.353(c) and 354(c).[12/] Those standards

---

11/ In fact, the ACGIH document makes clear that it frequently is not feasible to measure for multiple contaminants which are known to exist. In such cases, according to the document, the PEL for the substance measured actually should be reduced. (Ex. C-27, Appendix B, p. 20)

12/ **§ 1926.353 Ventilation and protection in welding, cutting, and heating.**

* * *

(c) Welding, cutting, or heating of metals of toxic significance.

* * *

(3) Employees performing [welding, cutting, or heating of metals coated with lead-bearing materials] in the open air shall be protected by filter-type respirators in accordance with the requirements of Subpart E of this part, except that employees

(continued...)

relate to respiratory protection during welding of toxic metals and preservative coatings like lead-based paint. However, both those provisions are additional requirements, rather than preemptive ones. Section 1926.353(a) expressly states that compliance with § 1926.55(a) is required.[13] Also, both §§ 1926.353(c) and 354(c) expressly require compliance with the respirator requirements of Subpart E, including § 1926.103. Those requirements in turn expressly incorporate the requirements of Subpart D, including § 1926.55(a). Respondent's preemption argument is unfounded.

Respondent also argues that OSHA's construction standards are invalid on two grounds. The first ground is that they were

---

[12] (...continued)

> performing such operations on beryllium-containing base or filler metals shall be protected by air line respirators in accordance with the requirements of Subpart E of this part [including § 1926.103].
>
> * * *
>
> **§ 1926.354 Welding, cutting, and heating in way of preservative coatings.**
>
> * * *
>
> (c) Protection against toxic preservative coatings:
>
> * * *
>
> (2) In the open air, employees shall be protected by a respirator, in accordance with requirements of Subpart E of this part [including § 1926.103].

[13] It requires that mechanical ventilation be sufficient to "maintain welding fumes and smoke within safe limits, as defined in Subpart D of this part [including § 1926.55(a)]."

adopted from standards under the Construction Safety Act, and were not in effect when the Occupational Safety and Health Act ("OSH Act") became law (Dec. 29, 1970). The second ground is that they were issued without the required notice-and-comment rulemaking. The Secretary objects to considering these arguments now because Respondent failed to state them in response to the Secretary's discovery request. Because neither of Respondent's arguments has merit, it is unnecessary to consider the Secretary's procedural objection.

As to the first argument, the procedure used to adopt the Construction Safety Act standards was expressly permitted under § 4(b)(2) of the OSH Act. The Construction Safety Act standards became effective on April 27, 1971, under § 107 of the Contract Work Hours and Safety Standards Act, Pub.L. 91-54, 40 U.S.C. § 333. 36 Fed. Reg. 7340 (April 17, 1971). Section 4(b)(2) provides:

> . . . Standards issued under the laws listed in this paragraph [including Public Law 91-54] and in effect on or after the effective date of this Act shall be deemed to be occupational safety and health standards issued under this Act, as well as under such other Acts.

(Emphasis added.) The effective date of the OSH Act was April 28, 1971, 120 days after its enactment. Pub. L. 91-596, § 34. 1970 U. S. Code Cong. & Admin. News (84 Stat.) 1887. The Construction Safety Act standards were in effect "on or after" the effective date of the OSH Act and are properly considered OSHA standards.

Respondent's second invalidity argument has been rejected in persuasive opinions by the Commission and by the court of appeals that has reviewed the issue. E.g., Daniel International Corp. v. OSHRC, 656 F.2d 925, 930-31 [9 BNA OSHC 2102, 2105-06] (4th Cir. 1981); Daniel Construction Co., 9 BNA OSHC 1854, 1855-56 (Rev. Comm. No. 12525, 1981), aff'd on other grounds, 705 F.2d 382 (10th Cir. 1983). I am constrained to follow Commission precedent in any event.

Thus, Respondent's arguments against the validity and accuracy of the Secretary's air lead measurements must be rejected. The Secretary has made out the necessary elements of a violation: (1) the standard applies to the conditions; (2) it was not complied with; (3) employees had access to the hazards; and (4) Respondent had the required knowledge of the violation. It reasonably should have known of the violative conditions, even if it did not actually know. E.g., Dun-Par Engineered Form Co., 12 BNA OSHC 1962, 1965 (Rev. Comm. No. 82-928, 1986). A violation of 29 C.F.R. § 1926.55(a) was proven.

Item 6(b): Engineering and administrative controls

The evidence shows that Respondent failed to use feasible engineering controls to reduce the amount of lead fumes to which employees were exposed. The cited standard, § 1926.55(b), provides:

> To achieve compliance with paragraph (a) of this section, administrative or engineering controls must first be implemented whenever feasible. When such controls are not feasible to achieve full compliance, protective equipment or other

> protective measures shall be used to keep the exposure of employees to air contaminants within the limits prescribed in this section. Any equipment and technical measures used for this purpose must first be approved for each particular use by a competent industrial hygienist or other technically qualified person. Whenever respirators are used, their use shall comply with § 1926.103.

Enviro-Probe's report of its July 24 survey made the following recommendations for use of engineering controls to reduce lead exposure:

> The surface paint removal from the steel beams by scraping and sanding of the work area prior to torch cutting will help in reducing the airborne lead levels.
>
> The concentration levels of lead in the air approaching the iron workers can be reduced by diverting fumes away from the breathing zone by the use of fan blower or exhaust . . . .

(Ex. C-7 at 8) Nothing was done between the time Enviro-Probe got involved and OSHA's September inspection in the way of engineering controls. August Manz, a private consultant in welding technology and safety, testified that engineering controls such as those suggested by Enviro-Probe were feasible. There was no testimony to the contrary.

Manz was well-qualified to speak to the subject. He was, among other things, chairman of the American National Standards Institute (ANSI) committee on Safety in Welding and Cutting; chairman of the American Welding Society's Committee on Labeling and Safe Practices; and chairman of the National Fire Protection

Association (NFPA) committee on Cutting and Welding Safety. (Tr. 634; Ex. C-31)

Manz described how the bridge paint could be removed from the areas to be torch-cut, by using "needle scalers" or abrasive blasting. Most of the dust and debris generated by that operation could be removed from the air by a vacuum system. That system would be portable, using flexible hose similar to that on a household vacuum cleaner, attached to a stationary canister devise. (Tr. 637-40)

Manz reviewed hundreds of pictures of the work, and testified that at least one of the devices he described could be used in each location pictured. (Tr. 634-35, 641, 649) He noted that such devices are readily available commercially. (Tr. 642-43) He also testified that those devices are not unreasonably expensive and that he did not believe they would cost more money than the technology Respondent was using. (Tr. 655) Bustria's testimony was consistent with Manz's on costs.[14/]

Also, Manz noted that their use likely would eliminate the need for the air line respirators, resulting in much lower respirator costs. (Tr. 657-58) He testified that he would expect a reduction in lead exposure "a great deal more than" 50%,

---

[14/]When asked how much extra cost there would be due to exhaust blowers, Bustria testified, "I have no idea, sir, but probably it would not have been prohibitive." (Tr. 569, emphasis added) The typed transcript did not include the word "not," but the Secretary moved to correct the transcript. (Doc. J-57) That unopposed motion is granted.

although he could not state what the specific exposure level would be. (Tr. 657, 659)[15/]

He acknowledged that using needle scalers might add time to the job, and thus extra labor cost. He was unable to estimate the extra time and cost. However, he testified that the equipment is "well known, readily available, widely used," and that he would expect that in bidding for the job, Respondent would have taken the cost of using needle scalers into consideration. (Tr. 661-64)

Moreover, § 1926.354(d), specifically raised by Respondent at the hearing and on brief, requires removal of toxic preservative coatings like the lead paint here before torch-cutting.[16/] Respondent clearly failed to comply with that requirement.[17/]

---

15/ Respondent's arguments about inadequacies in Manz's testimony regarding the costs and benefits of his suggested engineering controls are based on inaccurate and incomplete statements of that testimony.

16/ **§ 1926.354 Welding, cutting, and heating in way of preservative coatings.**

* * *

(d) The preservative coatings shall be removed a sufficient distance from the area to be heated to ensure that the temperature of the unstripped metal will not be appreciably raised. Artificial cooling of the metal surrounding the heating area may be used to limit the size of the area required to be cleaned.

17/ Respondent does not argue that § 354(d) is more specifically applicable than the cited standard. Even if it

(continued...)

Respondent called no witness to present a contrary view to Manz's. It notes, however, that some debris would fall during paint removal, even if a vacuum system is used. The bridge spanned Newtown Creek. Respondent questions whether lead-based materials falling into the water would violate environmental laws.

Manz testified, however, that falling debris could be caught by a number of means, such as a barge beneath the work. He noted that the photographs indicated that the lead fumes were not being dispersed by the wind. Even if there were legal obstacles to using the techniques he described over water, he noted that much of the cutting was done on land, where those problems would not obtain. (Tr. 652-53)[18] Thus, the Secretary established all the

---

[17] (...continued)
were, an amendment would be appropriate because Respondent consciously injected the issue into the case. A violation would be found because the evidence is uncontradicted that it failed to remove the paint before torch-cutting.

Also, as noted above, § 1926.353, also raised by Respondent, discusses general mechanical ventilation systems and local exhaust systems. Section 353(a) provides that they that meet Subpart D requirements (including §§ 1926.55(a) and (b)).

[18] Bustria mentioned that certain officials of Respondent had questioned the feasibility of surface paint removal and portable exhaust blowers, which Bustria explained to them. (The exhaust blowers he discussed apparently would act like a fan, blowing the lead fumes upwards and away from the employees. Tr. 139) Bustria testified (1) that Kramer had said those methods would be impossible and would create hazards from falling or dripping debris; (2) that Dockery had said those methods were not practical or cost effective; and (3) that Schoenewaldt had said hydro blasting and abrasive blasting could be used. (Tr. 140)

Whatever opinions Kramer, Dockery or Schoenewaldt held, none of them testified on the subject, and there was no showing that
(continued...)

elements of a violation: the standard applies, Respondent failed to use feasible engineering controls to reduce the excessive lead exposure, the employees were exposed to the violative conditions, and Respondent had the requisite knowledge of the violation.

As to knowledge, Respondent's written lead procedures state in part, "Engineering and work control practices shall be used to reduce employee lead exposure to levels that are as low as reasonably achievable." (Ex. C-5 at 2) It had to know the importance of stripping the lead paint, because it has consistently pointed to § 1926.354 as an applicable standard.[19/] Stripping the lead-based paint is required by § 1926.354(d). Section 1926.353, also raised by Respondent, discusses exhaust systems. Its agent, Enviro-Probe, also knew about those methods and recommended them. Respondent had a great deal of notice of what was required.[20/] A violation of 29 C.F.R. § 1926.55(b) was proven.

---

18/(...continued)
any of them were unavailable to testify. Kramer testified on other matters, in fact. The reported statements of those three were unexplained factually, except for the problem of dripping debris, and Manz explained how that problem feasibly could be solved, as discussed above. Thus, the reported statements of Respondent's officials do not rebut Manz's expert testimony.

19/E.g., Ex. R-4; Respondent's brief at 50.

20/Respondent argues generally that the abatement dates listed in the Citations for the various alleged violations are unreasonable. The Citations called for immediate abatement of the violations. However, the abatement requirement is tolled by a timely notice of contest. § 10(b) of the Act. The evidence indicates that each of the violations found in this decision could reasonably be abated by this time. Respondent has presented no evidence to the contrary. Its argument is moot.

Item 6(c): Failure to wear respirators at certain times

The factual basis of this item was that ironworkers and other employees of Respondent were observed not wearing respirators when torch-cutting for short periods of five to fifteen minutes. (Tr. 674-78; Ex. C-20, C-33) The cited standard is § 1926.103(a)(1), which provides:

> In emergencies, or when controls required by Subpart D of this part [including § 1926.55] either fail or are inadequate to prevent harmful exposure to employees, appropriate respiratory protective devices shall be provided by the employer and shall be used.

Because Respondent failed to comply with §§ 1926.55(a) and (b), as alleged in subitems 6(a) and (b), and because the full proposed penalty ($10,000) for Item 6 is appropriate on that basis, as discussed below, it is unnecessary to resolve this subitem. Respondent's gave employees certain warnings to wear respirators. It is unnecessary to determine whether those efforts were sufficient to comply with the standard.

Item 1: Cleaning of respirators

The basis of this item is that Respondent's "respirators were not cleaned or disinfected before or after use by . . . employees." Complaint, ¶ V(c). The evidence fully supports the charge. The complicated aspect of this item is finding the most specifically applicable standard.

The Secretary cited a construction standard and a general industry standard in the alternative. The cited construction standard, § 1926.103(c)(3), was not shown to be applicable

because there was no evidence (1) that the same respirator was issued to different employees, or (2) that the respirators were for emergency rescue.[21] The cited general industry standard provides:

> **§ 1910.134 Respiratory protection.**
>
> * * *
>
> (b) Requirements for a minimal acceptable program.
>
> * * *
>
> (5) Respirators shall be regularly cleaned and disinfected. Those used by more than one worker shall be thoroughly cleaned and disinfected after each use.

That standard clearly is applicable.[22] Respondent argues, however, that the same hazard is covered by a construction industry respirator provision that was not cited regarding this item -- § 1926.103(c)(2). Thus, it argues, that construction

---

[21] That standard provides:

> **§ 1926.103 Respiratory protection.**
>
> * * *
>
> (c) Selection, issuance, use and care of respirators.
>
> * * *
>
> (3) Respiratory protective equipment which has been previously used shall be cleaned and disinfected before it is issued by the employer to another employee. Emergency rescue equipment shall be cleaned and disinfected immediately after each use.

[22] As noted above (n. 2), § 1910.134 is one of the standards the Secretary identified in 1978 as applicable to construction, pursuant to requests for guidance from industry and labor groups. Respondent's respirator program referred its personnel to both § 1910.134 and § 1926.103, and reiterated their requirements.

provision is more specifically applicable than the cited standard. Section 1926.103(c)(2) states:

> (c) Selection, issuance, use and care of respirators.
>
> * * *
>
> (2) Respiratory protective equipment shall be inspected regularly and maintained in good condition. Gas mask canisters and chemical cartridges shall be replaced as necessary . . . . Mechanical filters shall be cleaned or replaced as necessary so as to avoid undue resistance to breathing.

Respondent is correct. It is clear from § 1910.134(f)(1) that cleaning is an aspect of respirator maintenance. "Cleaning and disinfecting" are expressly listed as required maintenance items under that section.[23/] The same conclusion may be drawn from the last sentence of § 1926.103(c)(2), which speaks of filter cleaning as an aspect of maintenance. Cf., Brown & Root, Inc., 9 BNA OSHC 1833, 1839 (Rev. Comm. No. 76-190, 1981) (§ 1910.134 applies to hazard of failure to test and clean filters on air

---

[23/] § 1910.134(f)(1) provides:

> (f) Maintenance and care of respirators. (1) A program for maintenance and care of respirators shall be adjusted to the type of plant, working conditions, and hazards involved, and shall include the following basic services:
>
> (i) Inspection for defects (including a leak check),
> (ii) Cleaning and disinfecting,
> (iii) Repair,
> (iv) Storage
>
> Equipment shall be properly maintained to retain its original effectiveness.

compressors on construction sites, because § 1926.103 does not cover inspection and testing of air compressor filters).[24/]

The pleadings will be amended to allege a violation of § 1926.103(c)(2) regarding the alleged cleaning problems. Respondent raised the applicability of § 1926.103(c)(2) and the inapplicability of the cited general industry standards in its discovery responses. (Ex. C-29, ¶ 4(a)) It squarely recognized that the applicability question was in issue, and it could raise no defense under that standard that it could not raise under the general industry standard. Thus, it had a full opportunity to

---

[24/]Respondent argues that all the other Citation items are duplicative of the § 1926.55(b) item because that provision covers all the other protective devices at issue, in a general way. The practical benefit to Respondent of a favorable ruling in this assertion might be a reduction of the number of items and penalties. However, there is no merit to the argument. Section 1926.55(b) (quoted in full, pp. 17-18 supra) states in part:

> When [engineering or administrative] controls are not feasible to achieve full compliance, protective equipment or other protective measures shall be used to keep the exposure of employees to air contaminants within the limits prescribed in this section.

However, it also states that "Whenever respirators are used, their use shall comply with § 1926.103." Thus, respirator violations like this item properly may be cited under § 1926.103, or under more specifically applicable provisions of § 1910.134.

The only items affirmed under provisions other than § 1926.103 are violations of § 5(a)(1) of the Act and § 1904.2(a). The latter section concerns recordkeeping, which is not covered in § 1926.55(b). Also, Respondent cannot claim that § 1926.55(b) preempts § 5(a)(1) in this case. The § 5(a)(1) item is analyzed under that section because of Respondent's claim that under current Commission precedent, the construction standards do not provide adequate notice that protective clothing is required in the circumstances.

present evidence rebutting this charge. Cf., McWilliams Forge Co., 11 BNA OSHC 2128.[25]

The evidence overwhelmingly establishes a violation, regardless whether the case is analyzed under § 1926.103(c)(2) or § 1910.134(b)(5). IH Bustria testified that late on September 17, he observed the "extremely dirty" respirators of two employees who were about ready to leave the site. There was dust both inside and outside the face piece of the air line (positive pressure) respirators. (Tr. 103-04, 106-07) One of the employees indicated to the inspector that the respirators were never cleaned, and the inspector saw the other employee nod his head in agreement with that statement. (Tr. 103)

Also, Bustria saw no facilities available on the Queens side of the bridge, where the employees were, suitable for cleaning the respirators. He testified that the respirators must be cleaned with a germicide or disinfectant, brushed, and then rinsed in clean water, air dried and then placed in sealed containers. (Tr. 103-05) (The manual which Respondent maintained regarding the air line respirators contained similar

---

[25]Even if the issue Respondent raised in its brief had not been squarely recognized at the hearing stage, it could not gain dismissal of the charge on that basis. It bore the burden of raising the more specific applicability of § 1926.103(c)(2), once the Secretary proved the applicability of § 1910.134(b)(5). If Respondent claimed that the issues regarding § 1926.103(c)(2) were not sufficiently raised at the hearing stage, it would bear any adverse consequences.

instructions. (Ex. C-16 at 3)) There was no contrary evidence on these points.[26]

Respondent knew, or had reason to know, of the extremely dirty condition of the respirators. They were available for inspection each day. Respondent argues essentially that knowledge was not shown because the respirators were locked in a trailer when in use, and only certain employees had the key. However, they still could have been inspected during the workday. In any event, the evidence does not establish that Respondent had no access to the trailer. (cf., Tr. 533) To the contrary, the evidence establishes that Respondent retained full control over employee safety matters.[27]

---

[26]Respondent argues, regarding this and other items, that because the interrogatories and responses of both parties were stipulated into evidence, those responses control the case, and that other evidence may not be used against it. However, Respondent did not object to any evidence at the hearing because it went beyond the responses to interrogatories. At the very least, a timely objection was necessary. Fed R. Evid. 103(a)(1). The interrogatories and responses do not control the evidence in this case. Also, the Secretary's interrogatory response regarding this item (Ex. R-2 and R-3) put Respondent on notice of the issue it claims lack of notice of -- that it reasonably should have known from June on that its employees wore "extremely dirty" respirators.

[27]As Respondent notes, its ironworkers were selected and provided by a union hiring hall, and its union contract stated:

> On all jobs there shall be a foreman . . . and the foreman is the only representative of the Employer who shall issue instructions to the workmen.

(Ex. C-21, p. 37, § 25) However, Bustria testified that M-K's Vice President for the Eastern Region, Mr. Poteat, whom Kassap and Dockery said was their boss, told Bustria that "the union did not run the job," (including safety) -- M-K did. (Tr. 159-60) Dockery knew that too. (Ex. C-3 p. 200 -- letter of IH Fadel to

To avoid a finding of knowledge and seriousness as to various items including this one, Respondent also asserts that the Secretary restricted her case to the exposures on the two inspection days. This argument is baseless. Clearly, the Secretary relied throughout the case and the hearing on several months of inadequate protection against lead fumes. E.g., Complaint. A violation of 29 C.F.R. § 1926.103(c)(2) was proven.[28]

---

Kassap). Union officials confirmed to Bustria that that was their understanding too. (Tr. 488-89) No witness testified inconsistently with that understanding. (Cf., Tr. 50-54)

Bustria testified that Kramer and Kassap told him during his investigation that they thought the responsibility for cleaning, disinfecting and caring for respirators was on the employee and the union shop steward. (Tr. 109, 154) However, their understanding is inconsistent with Respondent's respirator program, which states, "Routinely used respiratory equipment shall be regularly cleaned, inspected, and sanitized by a qualified individual." (Ex. C-2 at 5) Respondent gave no indication that it had trained the shop steward or employees to be "qualified individuals."

[28]Respondent complains that the Secretary did not call the employees as witnesses, and argues that an adverse inference regarding their testimony is appropriate as a result. This argument is unfounded. The inspector identified the employees by name, and his account of what they told him is admissible and not hearsay. See Fed. R. Evid. 804(d)(2)(D), which is applicable in Commission proceedings under 29 C.F.R. § 2200.71. Respondent had an equal opportunity to call those employees as witnesses. It cannot complain that they were not called.

Respondent's argument that none of the standards provide fair notice that it did not ensure proper cleaning is frivolous. Its own respirator program describes proper cleaning in comparable terms to the OSHA standard. (Ex. C-2 at 2, 4-5)

Respondent's claim that courts have found OSHA's general industry or construction industry respirator standards unclear or confusing is unfounded. The decisions it cites do not criticize those standards.

Item 2: Storage of respirators

The basis for this item is that "respirators were stored unprotected from dust in open plastic containers along with other equipment in a truck trailer." Complaint ¶ VI(c). The cited standard, § 1910.134(b)(6), provides:

> (b) Requirements for a minimal acceptable program.
>
> * * *
>
> (6) Respirators shall be stored in a convenient, clean, and sanitary location.

Respondent argues again that the cited hazard is addressed by § 1926.103(c)(2) (quoted in full above, p. 25), which requires that respirators be "maintained in good condition." Again, Respondent is correct. Proper storage of respirators is an aspect of "maintenance and care" under the general industry respirator standard. See §§ 1910.134(f)(1), (f)(5)(i).

The pleadings will be amended to allege a violation of § 1926.103(c)(2). As discussed above (pp. 26-27), Respondent squarely recognized that the applicability of that standard was in issue. It has had a full opportunity to rebut this charge under either the cited standard or the amended standard.

The evidence indubitably establishes a violation, no matter whether the cited standard or the amended standard is considered. IH Bustria testified that the two employees on the Queens side put their respirators in open milk container crates at the end of the day, and put those containers in a storage trailer overnight. (Tr. 111) Project Manager Kassap told Bustria that the respirators normally were stored this way. (Tr. 112)

Bustria testified that the storage trailer was "full of dust on the floor and on the walls." (Tr. 111)[29]

Bustria saw no respirator storage facility on the Brooklyn side. When he observed the employees there at the end of the day, they removed their equipment in the vicinity of their cars and left soon afterwards. He inferred that they probably stored their respirators in their cars. (Tr. 112-13) He testified that proper storage would include placing the respirators, after cleaning, in silk plastic bags, and then putting them where they would not be exposed to the sun. (Tr. 112)

Respondent had the requisite knowledge of the lack of proper storage facilities. Common sense indicates that storing respirators in a dusty trailer without plastic bags or other sealed containers does not maintain them in good condition. Respondent knew that because its respirator program repeated the specific guidance of § 1910.134(f)(5)(i):

> When not in use, respirators shall be stored to protect against dust, sunlight, extreme temperatures, excessive moisture, or damaging chemicals.

(Ex. C-2 at 5) Section 1910.134(f)(5)(i) also indicates, "Routinely used respirators, such as dust respirators, may be placed in plastic bags." The violation of § 1926.103(c)(2) is established.

---

[29]Bustria testified consistently on that point, as the Secretary notes in her motion to correct the transcript, which has been granted. (E.g., Tr. 529)

Item 3: Use of Approved Respirators

The Complaint stated the basis for the alleged violation as follows:

> . . . Respondent provided respirators of the brand "Willson Model 1820 Continuous Flow Arline [sic, Airline] Respirator." The face pieces were from a different manufacturer; they were "Pulmosan Part No. 10924." These respirators' approval was nullified because components of different type or manufacture were mixed. Approved respirators were available to respondents.

The Citation and Complaint alleged a violation of § 1910.134(b)(11).[30] The Secretary has moved for an amendment to charge a violation of § 1926.103(a)(2), which provides:

> (a) General.
>
> * * *
>
> (2) Respiratory protective devices shall be approved by the U.S. Bureau of Mines or acceptable to the U.S. Department of Labor for the specific contaminant to which the employee is exposed.

---

[30]That provision states:

> (b) Requirements for a minimal acceptable program.
>
> * * *
>
> (11) Approved or accepted respirators shall be used when they are available. The respirator furnished shall provide adequate respiratory protection against the particular hazard for which it is designed in accordance with standards established by competent authorities. The U. S. Department of Interior, Bureau of Mines, and the U. S. Department of Agriculture are recognized as such authorities. . . .

As the Secretary acknowledges, the standards both require that respirators be approved for the specific hazard involved. Section 1926.103(a)(2) is the more specifically applicable standard in this case because it is a construction standard. Respondent has not objected to amending the charge, and no potential prejudice to its defense is apparent. An amendment to charge a violation of § 1926.103(a)(2) is appropriate.

The evidence clearly establishes a violation, whether this item is considered under the cited standard or the amended standard. Respondent's office engineer in charge of safety, Norman Kramer, told Bustria that as far as he knew, the air line respirators were "Willson 1820." However, during his inspection Bustria noticed that the air line respirators used by four employees had a face piece marked Pulmosan, and a specific face piece number. He searched for U. S. government approval for the Pulmosan face piece for use as an air line respirator, and found none. (Tr. 116-17)[31]

Bustria testified that Federal approval of respirators is based on the entire unit. Thus, all parts of the air line respirator would have to be from one manufacturer. (Tr. 116-17) He explained that the entire unit must be approved so that a respirator system is not used that has both approved and unapproved parts. (Tr. 118) Thus, based on the evidence

---

[31]The certification list he consulted was by NIOSH (National Institute for Occupational Safety and Health, within the U. S. Department of Health and Human Services). (Tr. 540-41) He noted that the Pulmosan face piece had been approved for another use--as a negative pressure respirator. (Tr. 546)

presented, the respirators were not approved because (1) they were a mixture of parts of different manufacturers, and (2) they had a face piece that is not approved as a positive pressure device.

The requisite knowledge of the violative conditions also was shown. Respondent's respirator program provided, for example, "Properly cleaned, maintained NIOSH/MSHA approved respirators shall be used at all times." (Ex. C-2 at 3; see Id. at ¶ VI.A.1.b.; Ex. C-7 at 8) The conditions were in plain sight, including the Pulmosan labels on the face pieces. Respondent could have detected the problem when they were put into service, or during safety inspections, using reasonable diligence.[32] A violation of 29 C.F.R. § 1926.103(a)(2) was proven.

Item 5: Lack of protective clothing

The Citation alleged a violation of § 1926.28(a) in that:

> Appropriate personal protective equipment was not worn by employees in all operations where there was exposure to hazardous conditions as required by 29 CFR 1926.300(c); . . . Employees were exposed to concentrations of inorganic lead in excess of the OSHA PEL . . . and were not wearing protective work clothing. . . .

---

[32]Respondent argues that § 1910.134(f)(4), which addresses replacement of respirator parts, preempts the cited standard. However, it presented no evidence that parts had actually been removed and replaced. Thus, it failed to show that that standard applies to this situation.

Respondent argues that it was confused and denied due process because the Secretary stated that the respirators were "Willson 1820," whereas at the hearing Bustria testified that Pulmosan made the face pieces. However, what Bustria testified to is exactly what the Complaint (quoted above) indicated.

Section 1926.28(a) provides:

> The employer is responsible for requiring the wearing of appropriate personal protective equipment in all operations where there is an exposure to hazardous conditions [and][33] where this part indicates the need for using such equipment to reduce the hazards to the employees.

The Complaint amended this charge to allege a violation of § 5(a)(1) of the Act in the alternative. That section provides that the employer:

> shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.

Section 1926.28(a) does not appear to be the appropriate section to cite here, under current Commission precedent.[34] If it is the appropriate section, the evidence establishes that it was

---

[33]The Commission recently held that the Secretary impermissibly changed the meaning of the standard by changing the conjunctive word "and" to "or" without notice and comment rulemaking. L. E. Myers Co., High Voltage Systems Div., 12 BNA OSHC 1609, 1611-14, (Rev. Comm. No. 82-1137), rev'd on other grounds, 818 F.2d 1270 [13 BNA OSHC 1289] (6th Cir.), cert. denied, 484 U.S. 989 (1987).

[34]Under that precedent, the Secretary must prove that some other section of Part 1926 indicates the need for the particular personal protective equipment she advocates, to establish a violation of § 1926.28(a). L. E. Myers Co., 12 BNA OSHC at 1614. The only other section noted by the Secretary is § 1926.300(c), which does not specifically mention protective clothing. We are aware of no construction standard that specifically mentions protective clothing. In addition, Respondent argues that the employees' tools were not hand or power tools, which are the topic of § 1926.300. The Secretary does not address this objection. Thus, this item will be analyzed under § 5(a)(1) of the Act.

violated.[35] However, this item will be analyzed under § 5(a)(1) of the Act.

To prove a violation of § 5(a)(1), the Secretary must prove (1) that a condition or activity in the employer's workplace presented a hazard to employees, (2) that the cited employer or the employer's industry recognized the hazard, (3) that the hazard was causing or likely to cause death or serious physical harm, and (4) that feasible means existed to eliminate or materially reduce the hazard. E.g., Connecticut Light & Power Co., 13 BNA OSHC 2214, 2217 (Rev. Comm. No. 85-1118, 1989).

The failure to implement the use of protective clothing to reduce lead exposure was a preventable hazard recognized by Respondent. For example, Dockery wrote Kassap on June 19, "disposable coveralls should be implemented in the [lead exposure abatement] program." (Ex. C-3, p. 171) Respondent's written lead procedures stated, "Protective clothing shall be provided to employees exposed to lead above the PEL." (Ex. C-5, p. 2) Respondent's on-site managers were repeatedly made aware of the need to follow those procedures. For example, Dockery reminded Kassap by memo on July 29, "The lead exposure problem must be addressed by implementing the various elements of the preventive program as we discussed." (Ex. C-3, p. 144) None of the

---

[35]Under current Commission precedent, the Secretary must prove two elements in addition to the one discussed in the preceding note. Those elements are that an employee was exposed to the hazard, and that the employer failed to require the wearing of the necessary equipment when needed. L. E. Myers Co., 12 BNA OSHC at 1614-15. The evidence summarized below establishes these elements.

employees wore protective clothing over their regular clothes on the days of the inspection. Thus, the Secretary proved the existence of a recognized, preventable hazard.

The evidence also establishes that the lack of protective clothing was "causing or . . . likely to cause serious physical harm" to Respondent's employees. Certain employees clearly were suffering serious physical harm due to their lead exposure. A published scientific report on this project, admitted in evidence, documents serious symptoms that were occurring. 44 Archives of Environmental Health No. 3, pp. 140-45 (Society for Occupational and Environmental Health, May/June 1989). (Ex. C-26) The report was written by physicians at the Mount Sinai School of Medicine, whom Respondent hired to analyze the employees' blood lead levels. One case was reported as follows:

> A 44-y-old ironworker . . . had onset of symptoms on Friday, July 10, 1987, 2 wk after he had started this job. Muscle soreness, weakness, and anorexia were his major complaints. He felt ill all weekend and remained at bed rest. On Monday, July 13, 1987, he became nauseated, vomited, was able to drink only fluids; he had no bowel movement for 2 d. He presented to clinic on Tuesday, July 14, 1987. On physical examination he appeared dehydrated; he had a 10 mm Hg decrease in systolic blood pressure and a 40 beat increase in heart rate on standing.

Id. at 141 col. 1. That ironworker's blood level rose from 83 ug/dl to 120 ug/dl during approximately his first two weeks on the job. Id. (see also Ex. C-6, p. 2)

Also, two of the ironworkers were hospitalized for chelation

therapy to reduce their blood lead levels.[36] Chelation has serious health risks and is administered only to persons with high levels of blood lead, as a general rule. It is a medication that usually is administered intravenously. The subject generally must be kept hospitalized throughout the procedure (usually five to seven days) because the therapy can cause kidney damage, irregular heart beat, and allergic reactions. Life support equipment should be readily available. (Tr. 396-98) The failure to implement protective clothing significantly aggravated the excessive lead exposure that was causing serious harm to certain of Respondent's ironworkers. Thus, the failure to implement protective clothing is properly characterized as "causing or . . . likely to cause serious physical harm" to the employees.

As to feasibility, Respondent's internal correspondence, summarized above, clearly indicates that protective clothing was feasible and useful on the jobsite. Bustria testified that Kassap told him that Respondent in fact had bought some disposable coveralls as Fadel and Dockery recommended, and had suggested to the union that they be worn.[37] However, Respondent

---

[36]Kramer knew this even before M-K's IH Fadel wrote him about it on September 14, 1987. (Tr. 30; Ex. C-3, p. 200)

[37]Bustria testified that Kassap told him that the union rejected the idea of requiring employees to wear coveralls. (Tr. 121-22) However, that does not rebut the feasibility or likely utility of Respondent enforcing their use. The union apparently was saying only that it would not attempt to require coveralls. Respondent knew, however, that enforcing safety was its own responsibility, not the union's. There was no evidence that employees would not have complied with orders from Respondent to

admittedly did not enforce its lead protection policies on the jobsite -- it merely made suggestions. (Tr. 109) As noted above, Respondent retained authority and responsibility for enforcing safety requirements on the job. The evidence shows also that the union expected Respondent to exercise that authority. The Secretary has proved that protective clothing was feasible and useful on the jobsite. Thus, the elements of a § 5(a)(1) violation have been established.

Item 7: Failure to inspect and maintain respirators properly

As noted above, this item involves § 1926.103(c)(2), the same standard that has been found most specifically applicable to Items 1 and 2. As the Secretary argues, it is clear that regular inspections were not made of the respirators, because they were extremely dirty and never had been cleaned. Respondent presented no evidence contradicting this conclusion. Respondent had the requisite knowledge of the failure to inspect. For example, its safety program requires regular inspections of respirators.[38] A violation of 29 C.F.R. § 1926.103(c)(2) was proven.

---

wear coveralls.

[38]Respondent's respirator program stated:

> a. All respirators shall be inspected routinely before and after each use.
>
> b. Routinely used respiratory equipment shall be regularly cleaned, inspected, and sanitized by a qualified individual.

(Ex. C-2 at 5)

Seriousness

That each of the violations discussed above was serious is evident from the fact that employees were suffering serious symptoms as a result of their lead exposure, and that each violation contributed to the already-excessive exposure. As discussed above, Respondent had the requisite knowledge of each violation under 29 U.S.C. § 666(k).[39]

Respondent argues that the Secretary was required to show a "significant risk of harm" to establish each violation. The Commission and the Second Circuit require such a showing for standards under which the Secretary must prove the existence of a hazard. E.g., Anoplate Corp., 12 BNA OSHC 1678, 1690-91 (Rev. Comm. No. 80-4109, 1986). Here, the abundant evidence of serious health problems that employees were suffering due to lead exposure clearly establishes a significant risk of harm.[40]

Willfulness

1. Legal standards

Under Commission precedent, a willful violation is one committed with intentional, knowing or voluntary disregard for the requirements of the Act, or with plain indifference to employee safety. E.g., Williams Enterprises, Inc, 13 BNA OSHC

---

[39]Respondent's assertion that the Secretary restricted her case to the exposures on the two inspection days is baseless, as discussed above under Item 1.

[40]It also bears noting that most of the provisions found specifically applicable in this case, including § 1926.103(c)(2), presume the existence of a hazard unless their terms are met. They are not the kind of regulations which require proof of a "significant risk of harm."

1249, 1256-57 (Rev. Comm. No. 85-355, 1987). Accord, S. Zara & Sons Contracting Co. v. OSHRC, 697 F.2d 297 [11 BNA OSHC 1121] (2d Cir. 1982).

A willful violation is differentiated from other types of violations by a "heightened awareness -- of the illegality of the conduct or conditions -- and by a state of mind -- conscious disregard or plain indifference." Williams Enterprises, 13 BNA OSHC at 1256-57. A finding of willfulness is not justified if an employer has made a good faith effort to comply with a standard, even though the employer's efforts are not entirely effective or complete. Id. Also:

> A violation is not willful if the employer had a good faith opinion that the violative conditions conformed to the requirements of the cited standard. However, the test of good faith for these purposes is an objective one -- whether the employer's belief concerning a factual matter or concerning the interpretation of a standard was reasonable under the circumstances.

Id., 13 BNA OSHC at 1259.[41]

2. Evidence

Respondent's management took a number of steps to protect employees from the ill-effects of lead exposure. However, its jobsite officials were fully informed about other steps that were needed for compliance with OSHA's requirements. The jobsite

---

[41]As Respondent notes, The Seventh Circuit recently held, "A violation is not willful when it is based on a nonfrivolous interpretation of OSHA's regulations." McLaughlin v. Union Oil Co. of California, 869 F.2d 1039, 1047 [13 BNA OSHC 2033, 2039] (7th Cir. 1989). An opinion that may not be held in objective good faith is frivolous.

official with overall responsibility for implementing Respondent's safety program ignored the need for those measures, including the ones at issue here. The conscious failure to take the needed additional steps is properly termed willful -- it was "intentional, knowing or conscious disregard for the requirements of the Act." Respondent must bear the responsibility for those actions, notwithstanding the commendable efforts of its safety advisors offsite to improve the situation.[42]

To understand what happened, it is important to understand Respondent's supervisory structure during the relevant period (April-September, 1987). Project Manager David Kassap had ultimate responsibility for jobsite operations, including safety

---

[42]Under Commission precedent, a foreman's or supervisor's knowing and voluntary violations of the Act are properly imputed to the employer. E.g., C. N. Flagg & Co., 2 BNA OSHC 1195, 1196 (Rev. Comm. No. 1734, 1974). The First and Tenth Circuits have addressed the issue and they hold to the same effect. E.g., Central Soya de Puerto Rico, Inc., 653 F.2d 38, 39-40 [9 BNA OSHC 1998, 1999] (1st Cir. 1981); Kent Nowlin Construction Co. v. OSHRC, 648 F.2d 1278, 1280-81 [9 BNA OSHC 1709, 1710-11] (10th Cir. 1981).

The Tenth Circuit has held that the Secretary retains the burden of proof throughout the case that the supervisor's actions were foreseeable and preventable. E.g., Capital Electric Line Builders of Kansas, Inc. v. Marshall, 678 F.2d 128 [10 BNA OSHC 1593] (10th Cir. 1982). But see L. E. Myers Co., 818 F. 2d at 1273 [13 BNA OSHC at 1293] (claim of unforeseeable supervisory misconduct properly is affirmative defense). The evidence supports the Secretary even under the Tehth Circuit's test. The knowledge that M-K's offsite safety officials had of the jobsite officials' failure to carry out the lead procedures and respirator program, despite knowledge of the requirements, shows that those willful violations were foreseeable by the joint venture's officials above Kassap. The suggestions by those safety officials over a long period of time shows that the violations were preventable.

(Tr. 6-7, Ex. C-1). Respondent relied on Kassap and his subordinates to make its safety decisions.[43]

Kassap's second-in-command was General Superintendent Al L'Eplattenier.[44] Project Engineer Art Schoenewaldt and Office Engineer Norm Kramer also had safety responsibilities. Kramer was the first-line safety supervisor. Kramer had had no courses in construction safety or industrial hygiene. The only safety course he had taken was in underground fire safety, from MSHA. (Tr. 38)

Although there was no formal safety committee, the four officials just mentioned had safety meetings. (Tr. 4-5, 7)[45] M-K safety officials off-site who provided assistance included Lionel Dockery, regional safety coordinator for the Eastern Region; Mark Fadel, an M-K IH; and Ben Rietze, M-K's Director of Safety.

a. Notice to jobsite officials of requirements and problems from M-K safety officials offsite

---

[43]The only authority above Kassap on Respondent's organizational chart was the joint venture operating committee, composed of a representative from Yonkers Contracting and several representatives from M-K. (Ex. C-1, Tr. 6-7) (M-K, one of the nation's largest construction firms, clearly was the dominant member of the joint venture.) That committee did not make safety decisions directly. It acted through Kassap and his subordinates. (Tr. 6-7)

[44]Both Kassap and L'Eplattenier had been M-K employees prior to this job. Both left M-K's employ after the job.

[45]Those officials' initials on safety memos are as follows: "NK" is Kramer; "ALE" is L'Eplattenier; "DK" is David Kassap; "AS" is Art Schoenewaldt. (Tr. 6-7, 14)

M-K's offsite safety officials made the on-site managers aware of their safety responsibilities, and provided back-up. The jobsite officials were aware from the outset that the bridge contained lead-based paint. (Tr. 16, 577) It is common knowledge that bridges built more than 10 years ago generally contain lead-based paint. (Tr. 635-36) Against that background, Dockerty wrote Kassap on April 24:

> As discussed at the weekly supervisory meeting elements of the respiratory program must be implemented for comformance [sic] to OSHA requirements. Attached is a copy of the program requisites also presented to Norm [Kramer] for guidance.

(Ex. C-3, p. 163 -- pages are in chronological order) As noted above, Respondent's respiratory program required regular inspection, proper cleaning and storage of respirators, and use of government-approved respirators. It also required the use of feasible engineering and administrative controls to combat excessive exposure to air contaminants. It specifically referred the officials to § 1910.134 and 1926.103 for further guidance. (Ex. C-2) On July 29, Dockery wrote to Kassap:

> The lead exposure problem must be addressed by implementing the various elements of the preventive program as we discussed.

(Ex. C-3 p. 144) Respondent's written lead procedures stated:

> All OSHA requirements that apply to the job-site (manufacturing, construction, etc.) as found in 29 CFR 1910.1025, 19 CFR 1926 sections 55, 353 and 354 shall be followed.

(Ex. C-5 at 1) Those procedures also required use of feasible engineering and work practice controls, protective clothing, and

proper hygiene. Id. at 2-3. General concern about the priority being given safety on the project was expressed by Dockery to Kassap on July 7:

> The impression that may be conveyed [from the numerous safety violations on the Greenpoint Ave. Bridge site] is that safety is secondary to the field forces, especially with foremen and superintendents not enforcing the safety regulations, which is not the policy of M-K. . . .

(Ex. C-3, p. 150) Dockery and Fadel reminded jobsite officials about the need for employees to wear protective clothing, in letters of June 19 and September 4. (Ex. C-3, pp. 171, 199) Fadel expressed strong concerns to Kramer about inadequate respiratory protection in his memo of September 14. (Ex. C-3, p. 200)

b. Other notice of requirements and problems to jobsite officials

Originally, the ironworkers were provided merely with filter (negative pressure) respirators. The filters became clogged and they were found inadequate. (Tr. 17-18) By May 15, a positive pressure respiratory system for the ironworkers was under discussion by Kassap and his subordinates. (Tr. 17; Ex. C-3) Air line respirators were in use by mid-June. (Tr. 21)

However, it soon was apparent that Respondent's air line respirator system was not solving the problem. On July 23, Kramer spoke with Dr. Lilis of Mt. Sinai Hospital, which had conducted blood lead tests on numerous ironworkers. His report of that conversation to Kassap, L'Eplattenier and Schoenewaldt stated:

> [Dr. Lilis] indicated that the levels of lead in the blood of some of our ironworkers is [sic] unusually high. Further, that because the high levels were obtained over a short period of time we were doing something wrong. She said that she had a lot of experience with other workers on similar jobs and that our job was unusual.

(Ex. C-3, p. 183) NYC DOH sent Kramer the results of its June blood tests on 15 of Respondent's ironworkers on July 24. Its report indicated that two had blood levels of 50 or more ug/dl, and that three others had levels of 40-49 ug/dl. (Ex. C-6) The report, written by Dr. Andrew Goodman, Director of the Environmental Epidemiology Unit, also noted symptoms of lead poisoning reported by the ironworkers tested.[46] The report offered a free workplace health evaluation. It also recommended ongoing medical evaluation of employees and employee training in the hazards. Further, it stated:

> It is apparent from the blood lead tests that the current respiratory protection is not adequate. Immediate steps should be taken to provide appropriate respiratory protection.

On July 24, Enviro-Probe, a private consulting firm hired by Respondent to investigate the lead exposure, surveyed the

---

[46]The report stated:

> Eight of the sixteen employees reported one or more of the following symptoms: Inability to sleep (4), muscle aches and pain (4), joint pain (3), anorexia (4), constipation (2), abdominal pain (3), headache (3), clumsiness (1), nervousness (1), dizziness (1), vomiting (1) and blurred vision (1). These symptoms may be associated with increased lead absorption. . . .

(Ex. C-6 at 2)

conditions, including air sampling and blood testing.[47] Its report has been mentioned above. (Ex. C-7) In summary, it indicated that ironworkers were being exposed to between 14 and 42 times the TLV for lead. It also suggested specific engineering controls, administrative controls, use of NIOSH-approved respirators, and ongoing blood lead testing.

On August 12, NYC DOH notified Kramer that two ironworkers had blood lead levels above 80 ug/dl. It again offered assistance in reducing the lead exposure on the site. (Ex. C-6 p. 6) The reports of July 24 and August 12 were reviewed by all the on-site managers with safety responsibilities during July or August. Based on the results of Enviro-Probe's August 12 blood tests, Kramer notified Kassap, L'Eplattenier and Schoenewaldt and

---

[47]There is some dispute about when Respondent received that report. Kramer testified that to the best of his recollection, he did not receive Enviro-Probe's July 24 air sampling results by telephone, but "I can't swear to that." (Tr. 30) It is not credible, however, that there was no communication between Enviro-Probe and Respondent's management about the results until September 11. The report states:

> The results of the survey show that the workers exposure to lead is higher than the permissible exposure levels established by the Occupational Safety & Health Administration (OSHA).
>
> It is recommended that all employees in this area must wear supplied air respiratory protection, particularly the workers engaged in cutting of steel beams and their blood lead levels be monitored immediately.

(Ex. C-7 at 3, emphasis added) That information hardly would have gone unreported for six weeks. Even if it had, Respondent's management would be responsible for the knowledge that its agent, Enviro-Probe, had.

others on August 21 that certain ironworkers should be removed from the worksite immediately. (Ex. C-3 p. 198)[48] On September 11, NYC DOH notified Kramer that another ironworker had a blood lead level above 80 ug/dl. (Ex. C-6 p. 7)

b. Response by jobsite officials to lead exposure problems

Respondent's jobsite officials took a number of steps to reduce employee lead exposure.[49] As discussed above, however, those steps proved inadequate. Jobsite officials were fully informed about the inadequacies and the further steps that were required.

No initiative was ever taken regarding engineering controls (stripping the lead-based paint before torch cutting, or providing a vacuum system). This is inexplicable in view of the fact that the applicable OSHA standards specifically referenced in its lead procedures discussed them, and that Enviro-Probe

---

[48]Those tests showed that four ironworkers had blood lead levels above 50 mg/dl. Kramer stated, "The doctor advises that the above employees should not work until their blood lead content falls below 40 mg/l [sic]." Id.

[49]In addition to the steps noted above, Respondent cooperated with NYC DOH in having ironworkers' blood lead levels tested. It also hired Mt. Sinai Hospital to perform similar work, at the suggestion of NYC DOH.

Also, Kramer made some useful suggestions following his conversation with Dr. Lilis. He recommended (1) moving the air compressor on the Brooklyn side upwind and farther away from the workers, (2) holding another class on lead hazards and use of respirators, and (3) rotating workers into other jobs to reduce their lead exposure. Id. He gave a safety briefing to the ironworkers about lead hazards on July 29. (Tr. 27-28, Ex. C-3 p. 184) Also, lead fumes were discussed by all the on-site managers again on July 31. (Ex. C-3 p. 86)

recommended them. Also, no initiative was taken to inspect or clean the respirators, provide proper storage, assure that the air line system was government-approved, or require protective clothing. This is essentially unexplained in view of the fact that Respondent's safety program required those steps and referenced the applicable OSHA standards, as discussed above. In light of the ongoing, high blood lead levels which were being reported, Respondent must be held accountable for the knowing failure of jobsite officials to take these steps.

3. Respondent's arguments

Respondent's arguments against finding willfulness are legalistic and fail to supply a reasonable basis for Respondent's failure to implement its respirator program. They lack legal merit also.

The linchpin of Respondent's defense to willfulness is a letter consisting of unsworn and self-serving hearsay statements by Kassap, long after OSHA's inspection began. (Ex. R-4)[50] Kassap's letter is of no help to Respondent. It is an argument for more money, made to an official of New York State's Department of Transportation, on the basis that the high levels of lead in the bridge paint resulted in increased costs. Kassap

---

[50]Respondent was permitted to file the letter at the end of the hearing without having the author called as a witness. This permission was granted on the representation of Respondent's counsel that Kassap was in Egypt and unavailable to testify. (Tr. 701-06)

argued that the conditions "were not contemplated under the terms of this contract" and entitled Respondent to extra pay.

That assertion is not credible because, as noted above, it is common knowledge in the industry that older bridges, like the old Greenpoint Avenue Bridge, are coated with lead-based paint. Also not credible is Kassap's assertion on which Respondent pins its defense here -- that the only portion of OSHA's construction standards that applied to the cutting work is "Section 1926.354 (2) [sic]." (Presumably he meant § 354(c)(2), the respirator requirement quoted above, n. 12.) Kassap provided no reasoning to support that assertion, and it is flatly contrary to Respondent's written lead procedures. That document states:

> All OSHA requirements that apply to the job-site (manufacturing, construction, etc.) as found in 29 CFR 1910.1025, 29 CFR 1926 sections 55, 353 and 354 shall be followed.

(Ex. C-5 at 1, ¶ D) As noted above, numerous other provisions of Part 1926 in addition to § 354(c)(2) clearly apply to the work. For example, Respondent acknowledges that § 1926.354 applied. (E.g., Ex. C-29, ¶ 4(a); Respondent's Brief at 50). Section 1926.354(d) (n. 16 supra) requires removal of preservative coatings such as bridge paint from the area to be heated, prior to cutting. Respondent's failure to do that is inexplicable.

Also, Respondent submitted no evidence establishing that Kassap or anyone else in its management actually believed his unexplained, self-serving assertion. It bears the indicia of a

mere negotiating ploy. It is frivolous and could not have been held in objective good faith.[51]

Respondent also asserts that somehow all the OSHA requirements and standards at issue here are so vague that Respondent had no fair notice of what it was supposed to do. The absurdity of this idea is illustrated by the fact that M-K's own respirator program restated many of them in identical language and referenced the OSHA requirements as guidance on what to do.

Respondent asserts that because it took some safety measures, it cannot be found in willful violation for failure to take the ones at issue here. This assertion falls of its own weight. The "good faith safety efforts" that avoid a finding of wilfulness are objectively reasonable efforts to meet the known requirements at issue. The responsible officials ignored the need for each of the measures at issue under Citation 1. That conscious disregard for known requirements is inconsistent with a finding of "good faith."[52]

The Second Circuit, which has jurisdiction over the workplace, has upheld findings of willfulness in similar

---

[51]Respondent's assertion that Manz "believed similarly" to Kassap is baseless. Manz merely acknowledged that Subpart Q of Part 1926, including § 1926.353(c), applied to Respondent's work. (Tr. 646-49)

[52]Respondent asserts that to justify more than one willful violation, separate acts of willfulness must be found for each instance. The evidence shows separate acts of willfulness. Each separate instance of conscious disregard for part of Respondent's safety program, and for advice from M-K safety officials and others, is a separate instance of willfulness.

circumstances. For example, in one case it held that the Commission's "conclusion was correct" that the employer willfully violated a standard despite certain safety measures the employer took after being notified of the hazard. A. Schonbek & Co. v. Donovan, 646 F.2d 799, 800 [9 BNA OSHC 1562, 1563] (2d Cir. 1981).

The standard at issue there requires protective guarding devices at the point of operation of machines. An employee had had two fingers partially amputated by one of the machine's dies a month before OSHA's inspection. After the accident, the company had taken that die out of use, placed a plexiglass barrier in front of it and had made safety records concerning the press. However, it had not guarded the other four dies on the press, which were still in use at the time of the inspection. Because it did not address the safety of the dies other than the accident die, the violation was willful.

The credible evidence shows clearly that the violations found above regarding Citation 1 were willful as alleged.

CITATION 2

The only item of this Citation alleged that an elevated blood level of employee Harold Jackson on June 30 (of 54 ug/dl), reported to it by NYC DOH on July 24 was not recorded in its OSHA-required records until September 17, when OSHA began its inspection. The evidence supports this conclusion. (Tr. 167-68; Ex. C-3 at 3; Ex. C-24) The cited standard, § 1904.2(a), provides in pertinent part:

> Each employer shall . . . enter each recordable injury and illness on the [OSHA-required Form 200] as early as practicable but no later than 6 working days after receiving information that a recordable injury or illness has occurred.

In mitigation of the situation, however, it should be noted that the various other elevated blood lead levels communicated to Respondent were recorded in a timely manner. Bustria testified that Kramer, the manager responsible for keeping the records, told him that he merely overlooked that blood lead test. (Tr. 598-99) A violation of 29 C.F.R. § 1904.2(a) was proven.

PENALTIES

For penalty purposes, due consideration should be given to the conscious disregard of OSHA's requirements by jobsite officials. Also, consideration should be given to mitigating circumstances such as the safety efforts of M-K safety officials offsite, and the information about the program that Respondent gave to the union.

Considering all the circumstances, the gravity of the willful violations, including the serious harm they were producing, warrants the proposed penalty ($10,000) for each violation, despite the mitigating factors. As the Second Circuit has noted regarding serious violations, "As for the penalties, we are amazed at their paucity, reflecting more of a license than a penalty." Olin Construction Co. v. OSHRC, 525 F.2d 464, 467 [3 BNA OSHC 1526, 1528] (2d Cir. 1975).

Thus, as to Citation 1, Items 1, 2 and 7, which have been affirmed as willful violations of § 1926.103(c)(2), will carry a

combined penalty of $10,000. (They relate to the failure to inspect, clean and properly store respirators.) Item 6 will be affirmed as a combined willful violation of § 1926.55(a) and (b) (failure to avoid excessive exposure to lead by engineering and administrative controls). A combined penalty of $10,000 will be assessed for that violation. Item 3, a willful violation of § 1926.103(a)(2) (failure to use approved respirators), merits a $10,000 penalty. Item 5, a willful violation of § 5(a)(1) of the Act for failure to provide protective clothing, also merits a $10,000 penalty. Thus, a total penalty of $40,000 will be assessed. No penalty has been proposed for the violation of 29 C.F.R. § 1904.2(a) -- Citation 2 (nonserious recordkeeping violation) -- and none will be assessed.

C. ORDER

The following items of Citation 1 are affirmed as willful violations:

Items 1, 2 and 7 (combined) -- § 1926.103(c)(2)
Item 3 -- § 1926.103(a)(2)
Item 5 -- § 5(a)(1) of the Act
Item 6 -- § 1926.55(a) and (b) (combined)

For Items 1, 2 and 7 of that Citation, a combined penalty of $10,000 is assessed. For Item 3, a penalty of $10,000 is assessed. For Item 5, a $10,000 penalty is assessed. For Item 6, a $10,000 penalty is assessed (based on the combined violation of §§ 1926.55(a) and (b)). Citation 2 is affirmed as a nonserious violation with no penalty. A total penalty of $40,000 is assessed.

55

IRVING SOMMER, JUDGE

DATE: MAR 27 1990

Washington, D. C.