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

SECRETARY OF LABOR, Complainant, v. MANGANAS PAINTING CO., INC., Respondent.	OSHRC Docket Nos. 95-0103 & 95-0104

APPEARANCES:

Jordana Wilson, Attorney; Kenneth A. Hellman, Senior Trial Attorney; Joseph M. Woodward, Associate Solicitor; Howard M. Radzely, Solicitor; U.S. Department of Labor, Washington, DC
For the Complainant

Roger L. Sabo, Esq., and Denise L. Hanson, Esq.; Schottenstein, Zox & Dunn, Columbus, OH
For the Respondent

DECISION

Before: RAILTON, Chairman; ROGERS and THOMPSON, Commissioners.

BY THE COMMISSION:

This case involves citations issued to the Manganas Painting Co., Inc. ("Manganas") by the Occupational Safety and Health Administration ("OSHA") following a 1994 inspection of a worksite on the Jeremiah Morrow Bridge in Lebanon, Ohio. In the citations, OSHA alleged numerous violations of the Occupational Safety and Health Act of 1970 ("OSH Act" or "Act"), 29 U.S.C. §§ 651-678, under various provisions of the Lead in Construction Standard at 29 C.F.R. § 1926.62 as well as a number of fall protection standards. The Secretary proposed a total penalty of $2,452,500.

Manganas contested the citations and a hearing was held before Administrative Law Judge James Barkley, who affirmed the majority of the citation items and assessed a total penalty of $239,650. On review are numerous challenges, including those related to the validity of the

inspection, OSHA's lead sampling results, the willful characterization of various citations items, and the propriety of per-employee citations.

For the following reasons, we affirm the judge's decision in part and reverse it in part.[1]

BACKGROUND

Manganas' work at this site began in 1993 when it entered into a contract with the Ohio Department of Transportation ("ODOT") to remove lead-based paint from two parallel bridges in preparation for repainting. Sections of the bridge were encapsulated in large canvas containments inside which Manganas' employees blasted steel grit against the bridge surface to remove the paint. Another group of employees then vacuumed up the grit for re-use as the work progressed. OSHA inspected the bridge worksite on two occasions that predate the inspections at issue here, and the resulting citations are the subject of two prior Commission decisions. *See Manganas Painting Co*., OSHRC No. 94-588 (Comm'n March 23, 2007); *Manganas Painting Co*., 19 BNA OSHC 1102, 2000 CCH OSHD ¶ 32,202 (No. 93-1612, 2000) (consolidated), *aff'd per curiam*, 273 F.3d 1131 (D.C. Cir. 2001).

In March and April of 1994, after Manganas had resumed work on the bridge following a hiatus during the winter months, OSHA contacted Manganas and also issued subpoenas to gather information, as well as documentary evidence, about working conditions for the 1994 painting season. On June 17, 1994, OSHA initiated concurrent safety and health inspections of the bridge worksite, which were conducted pursuant to a warrant and continued through July 1994. In addition to observing conditions while on the worksite, two compliance officers observed the worksite from a nearby wooded area for a period of at least three days in July. The subject citations were issued to Manganas on December 14, 1994.[2]

DISCUSSION

I. Inspection Challenges

In a pre-hearing order, the judge denied Manganas' motion to suppress evidence, in which it argued, *inter alia*, that OSHA's inspection of the bridge worksite was barred by section

[1] We deny Manganas' July 31, 1996 motion for oral argument, as we find that the record and briefs provide a sufficient basis upon which to decide this matter. *See AAA Delivery Servs., Inc*., 21 BNA OSHC 1219, 1221 n.4, 2005 CCH OSHD ¶ 32,796, p. 52,449 n.4 (No. 02-0923, 2005).

[2] Upon contest, these citations were assigned separate docket numbers, Docket No. 95-0103 for the safety inspection and OSHRC Docket No. 95-0104 for the health inspection. On April 12, 1995, the matter was consolidated for disposition purposes.

10(b) of the Act, 29 U.S.C. § 659(b), and also violated the Fourth Amendment. On review, Manganas contends that the judge erred in denying its motion and maintains its claims that the inspection was invalid.[3] For the following reasons, we agree with the judge that Manganas' contentions lack merit.[4]

A. Section 10(b) of the Act

Under section 10(b) of the Act, an employer who has contested a violation is not required to take corrective action until the entry of a final order by the Review Commission.[5] In its pre-hearing motion, Manganas argued that under section 10(b), the 1994 inspection was an unauthorized reinspection of fall protection and lead hazards previously cited in 1993, which were still under contest when OSHA initiated the 1994 inspection. The judge rejected Manganas' claim, finding that the 1994 inspection was neither a reinspection nor a follow-up inspection, but was a separate or new "inspection of the same worksite for additional violations of standards previously cited and under contest."

Manganas' claim is without merit. Section 10(b) does not preclude the Secretary from performing an inspection under section 8(a) of the Act. Section 10(b) merely tolls the beginning

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[3] The judge also issued a pre-hearing order denying Manganas' motion for partial summary judgment, in which it claimed that the Lead in Construction Standard was invalidly promulgated. We affirm that denial for the reasons stated in our decision in *Manganas Painting Co.*, OSHRC No. 94-588, slip op. at 3-8 (Comm'n March 23, 2007).

[4] Manganas also argues on review that the part of OSHA's inspection conducted from an off-site location was "unreasonable" under both the Fourth Amendment and section 8 of the OSH Act, 29 U.S.C. § 657, and, therefore, the five fall protection citation items on review that are based on this part of the inspection should be vacated. For reasons discussed below with regard to the fall protection citations, Chairman Railton and Commissioner Thompson agree to vacate these five citation items on other grounds and, therefore, find it unnecessary to reach the issue of whether OSHA's off-site inspection was unreasonable. For the reasons stated in her partial concurrence and dissent with respect to the fall protection items in Docket No. 95-0103, Commissioner Rogers would reject Manganas' challenge to the off-site inspection.

[5] Section 10(b) provides, in pertinent part:

> If the Secretary has reason to believe that an employer has failed to correct a violation for which a citation has been issued within the period permitted for its correction (which period shall not begin to run until the entry of a final order by the Commission in the case of any review proceedings under this section initiated by the employer in good faith and not solely for delay or avoidance of penalties), the Secretary shall notify the employer by certified mail of such failure and of the penalty proposed to be assessed under section 17 by reason of such failure . . . .

29 U.S.C. § 659(b).

of the abatement period for a contested violation until the entry of a final order. 29 U.S.C § 659(b). "Manganas erroneously equates the statutory moratorium on requiring corrective action with a ban on inspections. . . ." *See Reich v. Manganas*, 70 F.3d 434, 437 (6th Cir. 1995). Accordingly, we reject Manganas' contention that section 10(b) of the Act barred the Secretary from conducting the 1994 inspection, although we will consider whether section 10(b) bars citation pursuant to the 1994 inspection of specific conditions that had been cited in the 1993 inspections and remained under contest. Manganas' claim that this prohibition specifically requires the Commission to vacate items at issue under the fall protection citations is addressed in our discussion of those individual citations below.

B. Fourth Amendment

Prior to commencing the subject inspection, the Secretary obtained a warrant, under section 8(a) of the Act, which was presented by OSHA Assistant Area Director ("AAD") Richard Gilgrist to the ODOT project engineer assigned to the bridge project upon their arrival at the worksite. In the affidavit that AAD Gilgrist filed in support of the warrant application, he outlined Manganas' prior inspection history at the bridge worksite and also identified the documentary evidence OSHA had obtained by subpoena from Manganas' contractors—Helix Environmental ("Helix") and Bethesda Share Occupational Health ("Bethesda Share")—regarding air sampling and blood monitoring conducted in 1994. On review, Manganas renews the arguments it raised before the judge in its suppression motion, *i.e.*, that the inspection violated the Fourth Amendment because the warrant lacked probable cause and that OSHA obtained evidence outside the scope of the warrant. In his pre-hearing order denying Manganas' motion, the judge rejected both of these claims and upheld the validity of the warrant. For the following reasons, we agree the warrant was properly obtained and executed.[6]

In reviewing a magistrate's determination that a warrant application was supported by probable cause, the Commission will "undertake a *de novo* inquiry to ascertain whether the Secretary's inspection conformed with the [F]ourth [A]mendment standards of probable cause and reasonableness." *Sarasota Concrete Co.*, 9 BNA OSHC 1608, 1611, 1981 CCH OSHD ¶ 25,360, p. 31,534 (No. 78-5264, 1981), *aff'd*, 693 F.2d 1061 (11th Cir. 1982) (citation

[6] Because we find the warrant to be valid, we need not reach the Secretary's arguments on review that Manganas lacked a reasonable expectation of privacy in the bridge worksite or that she had obtained valid consent to conduct the inspection from the ODOT project engineer.

omitted). *Cf. Sterling Plumbing Group Inc.*, 17 BNA OSHC 1914, 1916-17, 1995-97 CCH OSHD ¶ 31,214, p. 43,943 (No. 95-580, 1997) (relying on circuit court cases which give "great deference" to magistrate's determination of probable cause unless arbitrary or clearly erroneous).[7]

We find no basis on which to question the magistrate's determination that OSHA had established sufficient probable cause for the issuance of the 1994 inspection warrant. According to AAD Gilgrist's affidavit, the documents OSHA obtained from Bethesda Share pursuant to the Secretary's subpoena showed "dramatic increases in blood lead concentration levels" for fourteen Manganas employees working at the bridge worksite in June 1994, all of whom had blood levels above 50 μg/dl. The veracity of this evidence, obtained from Manganas' own contractor, is not disputed by Manganas on review. Thus, we find that the increased blood lead levels reliably documented by Bethesda Share constituted sufficiently specific evidence to support "a reasonable belief that a violation ha[d] been or [was] being committed" at the bridge worksite. *Id.*; *see also Sterling Plumbing*, 17 BNA OSHC at 1916-17, 1995-97 CCH OSHD at p. 43,943 (finding proof of elevated blood lead levels from state health department to be reliable, as well as "sufficiently specific to identify the nature of the violation and the evidence of its existence").

We also reject Manganas' contention that the warrant authorized the Secretary to conduct only a health inspection relating to lead exposure at the bridge worksite and, therefore, any evidence OSHA gathered with regard to fall hazards exceeded the scope of the warrant.[8] The

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[7] We reject Manganas' contention that under *Marshall v. Barlow's Inc.*, 436 U.S. 307 (1978), the Secretary was limited to establishing probable cause with proof of a general administrative plan when she relied on section 8(a) of the Act as the source of her inspection authority. As the Third Circuit—a circuit to which this case could be appealed—has held, "[n]othing in *Barlow's* . . . supports the district court's conclusion that the only means for the Secretary to establish probable cause for an administrative warrant to search under section 8(a) is by an administrative plan containing specific criteria. Rather, . . . this means of establishing probable cause is available to the Secretary in addition to the conventional means of establishing probable cause, that is, by specific evidence of a violation." *Martin v. Int'l Matex Tank Terminals—Bayonne*, 928 F.2d 614, 621-22 (3d Cir. 1991), and cases cited therein.

[8] We also find no merit to Manganas' assertion that any violations alleged to have occurred after the date of the warrant's return to the magistrate exceeded the scope of the warrant. Manganas cites no authority to support this claim, and the information on which the citation items in question are based was obtained from a third party pursuant to a subpoena, the issuance of which Manganas never challenged.

warrant obtained by the Secretary not only authorized OSHA to investigate lead exposure, but also "any hazardous work areas, procedures and/or working conditions *in plain view* of the compliance officer." (Emphasis added.) The record establishes that all of the fall protection conditions observed by OSHA were in plain view. Thus, we find that the Secretary's observations of fall hazards at the bridge worksite were well within the scope of the warrant.

Accordingly, we reject Manganas' challenges to the validity of the warrant.

II. Lead Citation (Docket No. 95-0104)

Under Willful Citation 2, eighteen items involving alleged violations of various provisions of § 1926.62 are at issue on review.[9] The judge affirmed all of these citation items, but recharacterized six of them as serious. For the following reasons, we affirm all but one of the eighteen items and find that all of these items are properly characterized as willful.

A. Threshold Issues

Section 9(c) of the Act

Manganas claims that section 9(c) of the Act, 29 U.S.C. § 658(c), bars "certain violations . . . including [Willful] Lead Citation 2, Items 1 through 14" because they are based on information which predates the six months prior to the issuance of the citations. Section 9(c) of the Act provides that "[n]o citation may be issued under this section after the expiration of six months following the occurrence of any violation." According to Manganas, it was unreasonable for the Secretary to have waited until June 1994 to obtain information about air sampling procedures at the bridge worksite when OSHA was aware in April 1994 that such sampling had been conducted. Thus, Manganas contends that any citation items which rely upon the April sampling fall outside the six-month period preceding December 14, 1994, the date on which OSHA issued the citations. The judge rejected this argument, finding that the citations were "issued six months from the time the Secretary discovered the continuing condition[s.]" With the exception of one item, we agree with the judge.

We see no basis on which to conclude that the Secretary acted unreasonably in obtaining the air sampling information in June 1994. On the contrary, the record shows the Secretary first attempted to obtain the sampling information through an administrative subpoena served in May 1994 to Andrew Manganas, the company vice-president and co-owner who was in charge of the

[9] Item 1 of Serious Citation 1 is also on review, but only with regard to the penalty assessed. We address this item below in our penalty discussion.

bridge project. Only after this attempt proved to be unsuccessful did the Secretary request the information by subpoena in June from Manganas' contractor, Helix. In this respect, we find the Secretary acted with "reasonable diligence once the facts pertaining to the conduct in question [came] to her attention. . . ." *Safeway Store No. 914*, 16 BNA OSHC 1504, 1509, 1993 CCH OSHD ¶ 30,300, p. 41,742 (No. 91-373, 1993). Moreover, all but one of the violations in question remained uncorrected when OSHA first learned of the violative conditions upon receipt of the air sampling data from Helix on June 16, 1994, less than six months before the citations issued. *See Gen. Dynamics Corp., Elec. Boat Div.*, 15 BNA OSHC 2122, 2128-29, 1991-93 CCH OSHD ¶ 29,952, p. 40,957-59 (No. 97-1195, 1993) (finding a violative condition that remains unabated within six months of citation's issuance not barred by section 9(c) regardless of when condition first occurred).

One citation item arising under 29 C.F.R. § 1926.62(d)(4)(i), however, was in fact abated prior to the six-month issuance period. Under Item 1 of Willful Citation 2, the Secretary alleged that Manganas failed to conduct initial monitoring "which was representative of the exposure" for employees performing blasting work at the bridge worksite. Section 1926.62(d)(1)(ii) defines employee exposure as that "which would occur if the employee were not using a respirator." In conducting air sampling at the worksite in April 1994, Helix representative Jeff Cooper attached the sampling cassettes to the lapels of employees before they entered the containment area and placed blasting hoods over their heads, covering the sampling cassette. After a failed attempt to convince Andrew Manganas that sampling should be conducted from outside the blasting hoods, it is undisputed by the Secretary that Cooper was finally permitted for the first time to monitor the lead exposure of two blasting employees from both inside and outside their blasting hoods on June 9, 1994. Thus, the initial monitoring performed by Cooper in June served to abate Manganas' failure to have performed the required monitoring up until then and, therefore, that failure no longer constituted a continuing violation. Further, the initial monitoring performed on June 9, 1994 occurred more than six months before the citation was issued on December 14, 1994. Accordingly, we find that Item 1 of Willful Citation 2 is barred by section 9(c) of the Act and vacate the item. *Gunite Corp.*, 20 BNA OSHC 1983, 1992, 2005 CCH OSHD ¶ 32,762, p. 52,130 (No. 98-1986, 2004) (consolidated), *rev'd & remanded on other grounds*, 442 F.3d 550 (7th Cir. 2006).

Validity of OSHA's Air Sampling

Manganas argues that the air sampling conducted at the bridge worksite by OSHA during the 1994 inspection was inaccurate because AAD Gilgrist and the OSHA industrial hygienist failed to follow a number of procedures and protocol for conducting personal sampling of air contaminants. These alleged shortcomings raise the question of whether OSHA established that lead levels at the worksite exceeded both the action level of 30 μg/m³ and the permissible exposure level (PEL) of 50 μg/m³, each of which are prerequisites for the requirements of the provisions cited under Items 3 through 14 of Willful Citation 2 to apply.[10]

We do not find it necessary in this case to resolve the dispute over alleged shortcomings in OSHA's sampling. Manganas concedes that its blasting operations at the bridge worksite generated lead levels in excess of both the action level and the PEL, thereby triggering application of the Lead in Construction Standard's requirements. As the judge observed, Manganas' own expert, industrial hygienist Daniel Adley, testified that the amount of lead generated by abrasive blasting inside a containment would clearly exceed the assigned protection factor of the blasting hoods worn by Manganas' employees. According to Adley, there is "no question" the exposure levels for employees doing blasting work inside the containment would exceed the PEL.

Moreover, Manganas does not dispute the validity of personal sampling conducted by Helix representative Cooper on June 9, 1994—the only date on which sampling cassettes were placed both inside and outside each employee's blasting hood, which establishes that both the action level and the PEL were exceeded. Indeed, two personal samples taken on that day from outside the blasting hood showed airborne levels of 1412 $\mu g/m^3$ (28 times the PEL) and 9486 $\mu g/m^3$ (nearly 190 times the PEL). Under these circumstances, we find that credible evidence in the record establishes that both the action level and the PEL were exceeded during blasting operations at the bridge worksite in 1994. Accordingly, we need not determine whether OSHA's sampling methods were deficient or whether its sampling results were valid.

[10] Item 3 of Willful Citation 2 alleges a violation of § 1926.62(i)(3)(ii), which requires an employer to assure that employees whose airborne lead exposure is above the PEL shower at the end of their shift. Items 4 through 14 allege per-employee violations of § 1926.62(j)(2)(i)(A), (B), and (C), which requires an employer to make biological monitoring available at varying intervals to employees who are exposed to lead at or above the action level for more than 30 days in any consecutive twelve months.

B. Merits of Willful Citation Items

Item 2: 29 C.F.R. § 1926.62(d)(4)(i) (initial monitoring for grit vacuumers)

Under this item, the Secretary alleges that Manganas failed to conduct initial monitoring "which was representative of the exposure" of employees performing grit vacuuming work at the JMB worksite.[11] The record establishes that, when Helix representative Cooper sampled the lead exposure of two grit vacuuming employees on two dates in April 1994, the sampling cassettes were placed on employees prior to their entry into the containment where blasting hoods were placed over the cassettes. The judge affirmed this item, based on the specific language of § 1926.62(d)(1)(ii) that defines employee exposure as that "which would occur if the employee were not using a respirator[.]"

Manganas contends that it was appropriate to sample inside the blasting hoods because its employees essentially wore two respirators—the half mask respirator and the blasting hood. According to Manganas, the Lead in Construction Standard simply does not contemplate a two-respirator scenario.[12] Manganas also relies on testimony from its expert, industrial hygienist Adley, that sampling inside the blasting hood but outside the half mask respirator was the "generally accepted method" of testing lead exposure in June 1994 on projects where employees wore a combination of respirators.

We disagree. Not only does § 1926.62(d)(1)(ii) plainly define employee exposure as that which occurs without use of a respirator, but the definition of action level also includes the phrase "without regard to the use of respirators" to qualify what is meant by employee exposure. 29 C.F.R. § 1926.62(b). Further support for this requirement is found in the preamble to

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[11] Section 1926.62(d)(4)(i) provides:

> (4) *Positive initial determination and initial monitoring*. (i) Where a determination conducted under paragraphs (d)(1), (2) and (3) of this section shows the possibility of any employee exposure at or above the action level the employee shall conduct monitoring which is representative of the exposure for each employee in the workplace who is exposed to lead.

[12] In support of its position, Manganas contends that it was forced to use two levels of respiratory protection when "NIOSH erroneously reduced the protective factor of the [blasting] hood." *See Manganas Painting Co.*, OSHRC No. 94-588, slip op. at 9 (Comm'n March 23, 2007). However, Manganas provides no explanation of how the hood's lower protective factor overrides the standard's express requirement that sampling be conducted without regard to respiratory protection, nor does the record show that this protective factor played any part in the company's decision to sample from inside the blasting hood.

§ 1926.62, which states that exposure monitoring "must be taken within the employee's breathing zone . . . and must reflect the employee's exposure, without regard to the use of respirators. . . ." 58 Fed. Reg. 26,590, 26,599 (May 4, 1993). The requirement is also expressly set out in a 1993 OSHA compliance directive addressing the Lead in Construction Standard: "Air samples collected **inside** of a respirator (i.e., Type CE, abrasive blast respirator with hood/helmet) do **not** meet the requirement of (d)(1)(ii) and shall **not be used** for determining compliance to the PEL, although such samples may be useful in evaluating the respiratory protection program."[13] *29 CFR 1926.62, Lead Exposure In Construction; Interim Final Rule—Inspection and Compliance Procedures CPL 2.258*, App. A, "Exposure Assessment" (Dec. 13, 1993) (emphasis in original). *See also Dec-Tam Corp.*, 15 BNA OSHC 2072, 2077-78, 1993 CCH OSHD ¶ 29,942, p. 40,919 (No. 88-523, 1993) (measuring exposure to asbestos based on asbestos standard's definition of exposure as that which would occur if the employee were not using respiratory protective equipment) (citing 29 C.F.R. § 1910.1001(b)). *Cf. Equitable Shipyards, Inc.*, 13 BNA OSHC 1177, 1179-80, 1986-87 CCH OSHD ¶ 27,859, p. 34,466 (Nos. 81-1685, 81-1762 & 81-2089, 1987) (finding sampling outside welding hood inappropriate where OSHA and industry practice expressly requires sampling cassette to be placed *under* welding hood). Accordingly, we find the sampling conducted for Manganas' grit vacuuming employees to be inadequate under the cited provision and therefore, affirm this citation item.

Item 3: 29 C.F.R. § 1926.62(i)(3)(ii) (showers)

Under this item, the Secretary alleges that Manganas failed to "require and enforce employees who were exposed significantly above the permissible exposure limit to take showers

[13] Manganas points out that in 1993 both OSHA and Rust Environmental ("Rust"), the first air monitoring contractor Manganas hired, conducted personal sampling at the bridge worksite from inside the blasting hood. The OSHA compliance officer who conducted the 1993 sampling testified that he sampled inside the hood only at the request of Andrew Manganas, but he also sampled outside the hood because "sampling outside the protective clothing and equipment being worn by employees is mandatory." Contrary to Manganas' claims, Rust's sampling report does not identify where it placed sampling cassettes. Some of the employees who were sampled at this time by both Rust and OSHA testified that they recall sampling cassettes being placed both inside and outside of their blasting hoods but were unable to differentiate who had tested where. Under these circumstances, we attach no significance to the fact that sampling was previously conducted at the worksite inside the blasting hood.

at the end of the work shift."[14] The judge affirmed this citation item based on testimony from various witnesses who had observed employees leaving the worksite without showering. He also rejected Manganas' claim of unpreventable employee misconduct, concluding that even though Manganas "knew employees were not showering and at least on some occasions attempted to police the employees to ensure compliance[,] [t]here is no evidence that any employee was ever disciplined for breaking the rule . . . and the infractions continued."

Although the record suggests that Manganas' lead program contained a "policy" that required employees to shower, the company concedes on review that its employees were not in practice required to do so. As the judge found, the evidence shows that employees were observed by OSHA on the first day of the inspection leaving the shower trailer provided by Manganas without having showered at the end of their shift. Indeed, three Manganas employees testified that while they themselves usually showered at the end of each day, some containment employees would leave the worksite without doing so. Moreover, testimony from Manganas job superintendent Joe Lang and vice president Andrew Manganas establishes that the company was aware that not all of its exposed employees were showering.

Manganas argues that it made reasonable efforts to ensure employees did shower and, therefore, any violation of its shower "policy" was due to unpreventable employee misconduct. We disagree. According to Andrew Manganas, either he or superintendent Lang would stand at the end of the bridge and watch as employees exited the shower trailer to see if they had showered; if not, the employee would be told to go back to shower. Three Manganas employees who worked on the bridge project in 1994 confirmed that both Andrew Manganas and Lang made an effort to catch those who did not shower. As the judge found, however, there is nothing in the record to show that Manganas actually disciplined the employees who failed to shower pursuant to its own enforcement program for safety infractions, despite its awareness of continuing violations of the company's policy. The only mention of discipline for failing to

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[14] Section 1926.62(i)(3)(ii) provides:

> (i) *Hygiene facilities and practices*.
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> . . . .
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> (3) *Showers*.
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> . . . .
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> (ii) The employer shall assure, where shower facilities are available, that employees shower at the end of the work shift and shall provide an adequate supply of cleansing agents and towels for use by affected employees.

shower appears in the testimony of a blasting employee who stated that a grit vacuumer who "was told a couple times about taking a shower" was given an "oral reprimand" by either Andrew Manganas or superintendent Lang. Based on Manganas' lack of enforcement, we agree with the judge that Manganas failed to make out the affirmative defense. *See, e.g.*, *Centex Rooney Constr. Co.*, 16 BNA OSHC 2127, 2130, 1993-95 CCH OSHD ¶ 30,621, p. 42,410 (No. 92-0851, 1994) (unpreventable employee misconduct not established where employer failed to "take effective measures to enforce the rules when they were violated"). Accordingly, we affirm this citation item.

Items 4 through 18: 29 C.F.R. § 1926.62(j)(2)(i)(A)-(C) (medical surveillance)

Under these items, the Secretary alleges that Manganas violated provisions of § 1926.62(j)[15] by failing to make follow-up biological monitoring available to fifteen of its employees.[16] These items fall into the following three groups:

- Items 4 through 9 allege per-employee violations of § 1926.62(j)(2)(i)(A), which requires an employer to make biological monitoring available "at least every 2 months for the first 6 months and every 6 months thereafter" for an employee covered by a medical surveillance program.
- Items 10 through 14 allege per-employee violations of § 1926.62(j)(2)(i)(B), which requires an employer to make biological monitoring available "at least every two months . . . until two consecutive blood samples and analyses indicate a blood lead level below 40 µg/dl[.]"

[15] Section 1926.62(j)(2)(i) provides:

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

[16] Section 1926.62(j)(1)(ii) requires an employer to "institute a medical surveillance program in accordance with paragraphs (j)(2) and (j)(3) . . . for all employees who are or may be exposed by the employer at or above the action level for more than 30 days in any consecutive 12 months[.]" Manganas does not dispute that the cited requirements were triggered for all fifteen employees identified under these citation items based upon their actual or potential exposure to lead above the action level during the 66 days between April 9, 1994, and July 23, 1994, that abrasive blasting took place at the bridge worksite.

- Items 15 through 18 allege per-employee violations of § 1926.62(j)(2)(i)(C), which requires an employer to temporarily remove an employee from work involving lead exposure at or above the action level each time the employee's blood sampling shows a blood lead level at or above 50 µg/dl. An employer must make biological monitoring available "at least monthly during the removal period."

Each of the fifteen employees identified under these items was last tested by Bethesda Share in either June or July 1994. In a July 22, 1994 letter to Manganas, Bethesda Share's occupational health program director, Linda Ford, informed the company that eight of these fifteen employees were scheduled to have repeat blood tests drawn on August 12, 1994, and three additional employees of the fifteen were due for repeat testing the week of August 19, 1994. The remaining four employees were identified in Ford's letter as requiring only "Respiratory Clearance and Lead Exams as soon as possible[,]" but other records in evidence show that these employees were covered by Manganas' medical surveillance program and, based upon their last test dates and blood lead levels, were in fact due for follow-up testing in mid-August 1994.

It is undisputed that Bethesda Share performed no biological monitoring for any Manganas employees in August 1994. According to director Ford, Andrew Manganas cancelled the August testing and was "very, very angry" at her insistence that the employees in question be retested. Ford testified that Nick Manganas also contacted her about the matter, and he too was "very angry and wanted to make it very clear that [Bethesda] stop insisting that they do testing; they were finished with our company, wanted no more to do with us." Nick Manganas denied ever speaking with Ford, and Andrew Manganas testified that Ford had in fact agreed with him that no further monitoring of these employees was necessary as long as they did not return to abrasive blasting work.

In affirming each of these citation items, we note that the judge credited the testimony of director Ford over that of Andrew Manganas: "I resolve the contradictory testimony in favor of Ms. Ford. Based on my observation of both Ms. Ford's and Andrew Manganas' demeanor and character during the hearing, I find her testimony more credible." The Commission generally gives great deference to the judge's credibility findings. *C. Kaufman, Inc.*, 6 BNA OSHC 1295, 1297, 1977-78 CCH OSHD ¶ 22,481, p. 27,099 (No. 14249, 1978). On review, Manganas has provided us with no reason to disturb the judge's credibility findings and our review of the record has not revealed any basis for doing so. *See Hamilton Fixture*, 16 BNA OSHC 1073,

1085, 1993-95 CCH OSHD ¶ 30,034, pp. 41,180-81 (No. 88-1720, 1993), *aff'd without published opinion*, 28 F.3d 1213 (6th Cir. 1994) (Commission will defer to judge's credibility determinations where they are properly explained and based on witness' demeanor or other factors peculiarly observable by judge in presiding over hearing). Accordingly, we reject Manganas' contention that its decision to cancel the follow-up testing was made with Ford's blessing.[17]

The judge also rejected Manganas' argument that its monitoring obligation to the employees in question ended when blasting operations at the bridge worksite ceased on July 23, 1994. Specifically, the judge considered the language of § 1926.62(j)(2)(i)(A) to be "unclear as to when the employer's obligation to conduct blood monitoring ends" but he found the Secretary's interpretation of this provision to be reasonable—i.e., that "the surveillance requirements, once triggered, do not cease until the covered employee has completed a full monitoring cycle without a single full shift exposure above the action level or that employee leaves that employer." In contrast, the judge found the language of cited paragraphs (B) and (C) of § 1926.62(j)(2)(i) to be "clear and unambiguous" in identifying when an employer's monitoring obligation comes to an end—e.g., only once the employee's blood lead level falls below 40 μg/dl for the purposes of paragraph (B), and only once the employer has two consecutive tests showing blood levels for the purposes of paragraph (C).

On review, Manganas claims that the judge's interpretation of the cited provisions will require employers "to follow-up with any employee who quits" and "perform another blood test at the employee's next job." We disagree. Unlike the judge, we find it unnecessary to determine as a general matter the point at which an employer's monitoring obligation ends under the cited provisions. The only question at issue with regard to these citation items is whether Manganas was specifically required to make follow-up testing available for fifteen employees who, Manganas does not dispute, remained in the company's employ in August 1994 when their next testing dates came due. Thus, to resolve this inquiry, we need only determine whether the cessation of action-level exposure during an employee's current monitoring cycle serves to

[17] Manganas also claims on review that Bethesda Share provided the company with incomplete documentation regarding the tests it conducted. We find no support in the record for such a claim. In fact, Manganas' counsel specifically stipulated to the fact that the company had received all of the results for the blood sampling conducted by Bethesda Share, though he could not precisely identify when.

terminate the employer's obligation to make the next round of follow-up testing available pursuant to the cited provisions.

In determining the meaning of a standard, the Commission and the courts consider the language of the standard, the legislative history, and if the drafter's intent remains unclear, the reasonableness of the agency's interpretation. *See Oberdorfer Indus., Inc.*, 20 BNA OSHC 1321, 1328-29, 2002 CCH OSHD ¶ 32,697, pp. 51,637-45 (Nos. 97-0469 & 97-0470, 2003) (citing *Arcadian Corp.*, 17 BNA OSHC 1345, 1346, 1995-97 CCH OSHD ¶ 30,856, p. 42,916 (No. 93-3270, 1995)), *aff'd*, 110 F.3d 1192 (5th Cir. 1997). There is nothing in the language of § 1926.62(j) that provides an answer to the narrow inquiry before us. However, the Lead in Construction Standard's preamble makes clear that the purpose of the medical surveillance provisions is to prevent lead-related diseases. "[T]he measurement of blood lead levels provides a true indicator of health risk and, in the case of high blood lead levels, a course of action to address the risk." 58 Fed. Reg. at 26,596. To accomplish this, "it is important to keep track of the [blood lead] levels . . . because [a] worker exposed at high levels for only a few days can still incur a large lead burden." *Id.*

The record here establishes that all eleven of the employees identified under Items 4 through 14 were exposed to lead at the bridge worksite at levels above the action level for more than two weeks past their last monitoring dates. Specifically, eight employees were exposed above the action level for a period of 19 days past June 10, 1994, the date of their last blood test. The remaining three employees were exposed above the action level for a period of 24 days past June 15, 1994, the date of their last blood test. Under these circumstances and the specific facts of this case, we find that the purpose of the medical surveillance provisions is served by finding Manganas responsible for making follow-up tests available to all eleven employees in August 1994 because they had experienced more than two weeks of exposure above the action level beyond their last monitoring date. That this exposure ended before the employees' next round of testing came due does not mean an employer can simply disregard exposures above the action level that occur after an employee's last monitoring date and terminate further medical surveillance under the Lead in Construction Standard. Such an interpretation, as the judge himself concluded, is "a result the drafters cannot have intended." Accordingly, we affirm Items 4 through 14.

We also affirm Items 15 through 18, but on slightly different grounds than the judge. Based on monitoring results from June and July 1994, Manganas had placed the four employees at issue under these items on medical removal as required by § 1926.62(j)(2)(i)(C). Therefore, unlike the group of employees identified under Items 4 through 14, none of these employees had experienced lead exposure above the action level since being removed from abrasive blasting work, let alone since their last monitoring dates. Manganas contends with regard to this group of employees that "[i]f blasting ceased there can be no requirements for retesting to determine if the employee can return to lead exposure. There is no lead [exposure job] to return to."

We note that cited paragraph (C) of § 1926.62(j)(2)(i) requires an employer to make monitoring available on a monthly basis "during the removal period." Here, abrasive blasting at the bridge worksite continued for four days past the last monitoring dates of three of the removed employees and twelve days past the last monitoring date of the fourth employee. In this regard, without deciding the outer limits on the duration of the removal period, the removal periods for all four employees at least extended into their next monitoring cycle. Just as continued exposure above the action level for the employees identified under Items 4 through 14 required Manganas to complete their respective monitoring cycles by making the next series of monitoring available, the continuation of the removal periods for each of these four employees at least into their next monitoring cycles, coupled with the language of paragraph (C), likewise required Manganas to make the next series of monitoring available to the removed employees. Accordingly, we affirm Items 15 through 18.

C. Willful Characterization

Of the lead citation items on review, the judge affirmed all but Items 4 through 9 as willful. In the briefing notice, the Commission specifically asked the parties to address the willful characterization of these items, but Manganas made no arguments in response despite having raised the issue in its petition for discretionary review. We have treated similar failures to address willfulness raised by a party as an abandonment of the issue. *See Bay State Refining Co.*, 15 BNA OSHC 1471, 1475-76, 1992 CCH OSHD ¶ 29,579, pp. 40,024-25 (No. 88-1731, 1992) (finding employer who raised willful characterization in petition abandoned issue by failing to address it in brief to Commission). Notwithstanding the fact that Manganas has apparently abandoned its argument regarding the characterization of the lead citation items on

review, we conclude that the record evidence establishes all of the violations of the Lead in Construction Standard affirmed herein are properly characterized as willful.

Willfulness is characterized by an intentional, knowing failure to comply with a legal duty. *See Am. Wrecking v. Sec'y of Labor*, 351 F.3d 1254, 1264 (D.C. Cir. 2003) (a showing of willfulness requires "an intentional or conscious disregard for the applicable safety standard or for employee safety"). "[T]o sustain a willful violation, '[t]he Secretary must show that the employer was actually aware, at the time of the violative act, that the act was unlawful, or that it possessed a state of mind such that if it were informed of the standard, it would not care.'" *AJP Constr. Inc. v. Sec'y*, 357 F.3d 70, 75 (D.C. Cir. 2004) (emphasis and citations omitted). The courts and the Commission recognize that willfulness "will be obviated by a good faith, albeit mistaken, belief that particular conduct is permissible." *Froedtert Mem'l Lutheran Hosp., Inc*., 20 BNA OSHC 1500, 1510, 2002-2004 CCH OSHD ¶ 32,730, p. 51,911 (No. 97-1839, 2004) (citations omitted) (affirming violations as non-willful where facts established employer's good faith belief that it owed no legal duty to temporary workers).

At the outset, we note that by the start of the 1994 painting season, Manganas was, or should have been, fully aware of its compliance obligations under the Lead in Construction Standard. Indeed, before resuming operations in 1994, Manganas took positive steps towards meeting those obligations by hiring two contractors—Helix and Bethesda Share—to conduct both the air sampling and medical surveillance required by § 1926.62. Both companies worked closely with Manganas to monitor lead exposure levels, measure the blood lead levels of exposed employees and recommend further action when necessary. Manganas also purchased portable shower facilities for exposed employees to use before leaving the worksite at the end of their shift. Despite these initial promising steps at compliance, Manganas engaged in a pattern of deliberate disregard of the specific requirements for which it was cited, consciously ignoring not only its compliance obligations, of which it was aware, but also the recommendations of the very companies it had hired to assist its compliance efforts. Equally troubling is that Manganas' conduct occurred against the backdrop of the company's awareness, based on its experiences during the 1993 painting season, of the serious consequences associated with the high lead levels generated by its abrasive blasting work.

With regard to Item 2, the cited standard requires initial monitoring representative of exposure, which includes paragraph (d)(1)(ii), that is exposure which would occur without regard

to the use of respirators. As the judge found in affirming this violation as willful, Manganas "knew what was required, through its prior contact with OSHA and from conversations with Helix, . . . [yet] deliberately chose to ignore the requirements of the standard, and to use its own monitoring methods." Indeed, when Helix representative Cooper attempted to take samples outside the blasting hood in accordance with the standard, Andrew Manganas specifically ordered him to sample only from inside the hood.

With regard to Item 3, the cited standard clearly places the burden of seeing that employees shower at the end of their work shift on the employer: "[t]he employer shall assure, where shower facilities are available, that employees shower at the end of each work shift . . . ." 29 C.F.R. § 1926.62(i)(3)(ii). Manganas purchased shower facilities and also had a company policy requiring that showers be taken at the end of the work shift, but failed to take steps to "assure" that showers were taken by disciplining those employees it knew were not showering. In fact, Manganas concedes that use of its shower facilities was "not mandatory."[18]

Manganas took a similar approach in its compliance with the medical surveillance required by § 1926.62(j)(2)(i). The three provisions at issue under Items 4 through 18 all require that the employer make biological monitoring available to: (1)employees exposed at or above the action level; (2) employees who are covered by a medical surveillance plan; and (3) employees who are under a removal order. Manganas knew its employees were exposed to lead above the action level for up to three weeks after they were last tested for blood lead levels. Nonetheless, and contrary to the expert advice of its own consultant, Manganas made a deliberate decision not to provide further blood tests because it deemed such testing unnecessary.

With regard to Items 4 through 9, we disagree with the judge and discern no basis for finding these items not willful. Contrary to the judge's analysis, the fact that the language of cited paragraphs (B) and (C) may more clearly identify the outer bounds of an employer's obligation than cited paragraph (A) is of no moment for the purposes of deciding the narrow issue presented in this case. More importantly, Manganas' state of mind with respect to medical surveillance for these six employees was the same as it was for those at issue under the remaining citation items, which we agree with the judge, are properly characterized as willful.

[18] Commissioner Thompson believes the willful characterization of this citation item presents a close question on the record. However, he concurs in finding willfulness based on Manganas' failure to address the characterization of the lead citation items on review. Chairman Railton concurs.

Accordingly, we affirm the judge's characterization of Items 2, 3, and 10 through 18 as willful, but reverse his characterization of Items 4 through 9 as serious and affirm those items as willful.

D. Penalties

The Secretary proposed the maximum penalties of $7,000 for each serious citation item and $70,000 for each willful citation item. After an initial discussion of the events surrounding the 1994 inspection of the bridge worksite, the judge set aside each of the Secretary's proposed penalties as follows:

> Based on the testimony and demeanor of the witnesses at [the] hearing, it is clear that the [proposed] penalty assessments were driven by personalities rather than by the statutory criteria. Manganas took a highly aggressive, sometimes questionable, approach to the 1994 inspection. OSHA responded with what appears to be vindictive assessments, assessing the maximum penalty without any real regard for the gravity of the underlying violations, or Manganas' history, size and good faith. Accordingly, all proposed penalties are set aside, and new penalties assessed according to the statutory criteria.

The judge then made findings regarding all four statutory penalty factors—size, gravity, good faith, and history. Section 17(j) of the Act, 29 U.S.C. § 666(j). With regard to size, he gave Manganas credit for being a small employer, with approximately 40 employees. With regard to history, the judge correctly concluded that the 1993 citations stemming from OSHA's first lead inspection of the bridge worksite could not be considered for purposes of establishing a prior citation history of prior OSHA violations because those citations were still pending before another Commission judge and, therefore, were not yet final orders of the Commission. Accordingly, the judge gave some credit for history. With regard to gravity, the judge made specific findings, which we discuss below as relevant, with regard to the citation items in question. Finally, in giving Manganas credit for good faith with regard to those items he characterized as serious, the judge stated as follows:

> Complainant ignores positive steps taken by Manganas prior to the inspection which show a significant level of acceptance of the Act's purposes. Manganas had provided employees with respirators, air supplied hoods, and air vacuums with filtration systems for the containment area. It purchased a lead safety program, and contracted for biological and air monitoring services to comply with the lead standard, and conducted the required monitoring for all but two of the job classifications cited here. While Manganas at times exhibited less than wholehearted good faith, its positive steps were significant and should be credited.

Contrary to the judge, we find that Manganas' prior citation history warrants no reduction in penalty. Specifically, the judge failed to take into account evidence in the record showing that the company had a prior history of uncontested fall protection citations in December 1991 and September 1992. *See Orion Constr. Co. Inc.*, 18 BNA OSHC 1867, 1868, 1999 CCH OSHD ¶ 31,896, p. 47,222 (No. 98-2014, 1999) (finding "[history] penalty factor encompasses all of an employer's prior violations, not just those of the same standard.") (emphasis in original). We also disagree with his decision to apply, without explanation, his findings regarding Manganas' good faith only to those items he affirmed as non-willful. Good faith can be a mitigating factor in determining the penalty to assess a willful violation. *See Aviation Constructors Inc.*, 18 BNA OSHC 1917, 1922, 1999 CCH OSHD ¶ 31,933, p. 47,378 (No. 96-0593, 1999). On review, the Secretary claims only that Manganas was not entitled to a good faith credit for a willful violation where "abatement is prompted . . . by the threat of a citation after the inspection has begun." This argument, however, focuses on Manganas' conduct after the 1994 inspection began, while the judge specifically relied upon the global compliance efforts Manganas made before the inspection. *Cf. Superior Elec. Co.*, 17 BNA OSHC 1635, 1638, 1995-97 CCH OSHD ¶ 31,060, pp. 43,323-24 (No. 91-1597, 1996), *rev'd on other grounds*, 124 F.3d 199 (6th Cir. 1997) (unpublished) (finding good faith credit inappropriate where employer aware of hazard but made no efforts to correct it). While Manganas' specific conduct as to the cited provisions at issue on review supports a finding of willfulness in this case, we conclude that the company's overall efforts at compliance—as identified by the judge—warrant giving consideration for good faith credit in assessing the penalties for all of the affirmed citation items.

We turn first to Serious Citation 1, Item 1, at issue on review only as to penalty. The judge assessed a penalty of $1,050 for this item, which he affirmed based on Manganas' failure to conduct full shift personal samples for two job classifications. He reduced the penalty from the $7,000 proposed by the Secretary based on size, lack of prior history, good faith and lower gravity. While we disagree with the judge's finding that the violation is of a lower gravity simply because one of the employees who was not sampled wore a respirator, we also—for the reasons discussed above—find a credit for prior history to be inappropriate under the circumstances. Because these two conclusions offset each other for the purposes of assessing a penalty, we find that the $1,050 penalty assessed by the judge to be appropriate, albeit on different grounds.

With regard to Willful Citation 2, Item 2, based on Manganas' failure to conduct representative monitoring for grit vacuuming employees, the judge assessed a single penalty of $5,000 for this item and Willful Citation 2, Item 1, which alleged a violation of the same provision with regard to blasting employees. We have already vacated Item 1 as time-barred under section 9(c) of the Act. Accordingly, we find $5,000, the statutory minimum for a willful violation, to be an appropriate penalty for Item 2. *See Chao v. Saw Pipes USA, Inc.*, Nos. 05-61089 & 05-61087, 2007 WL 519865 (5th Cir. Feb. 21, 2007) (rejecting single penalty for multiple willful violations where total amount failed to satisfy statutory minimum penalty for each violation). Because the judge assessed the statutory minimum, consideration of a further reduction for good faith is not appropriate.

With regard to Willful Citation 2, Item 3, based on Manganas' failure to ensure that exposed employees showered, the judge assessed a penalty of $20,000 based on high gravity and credits for size and history. Because the record reflects that Manganas made some efforts to comply with this requirement, we find the gravity of this violation to be moderate. For the reasons discussed above, we also find a credit for good faith, but not history, to be appropriate under the circumstances. Accordingly, we find a penalty of $10,000 to be appropriate for Item 3.

With regard to Willful Citation 2, Items 4 through 18, we must first determine whether these items were properly cited on a per-employee basis. The judge affirmed each item and assessed separate penalties for each, without any discussion of whether per-employee citations were appropriate here. As with the characterization issue, the Commission's briefing notice specifically asked the parties to address the propriety of per-employee citation, but Manganas provided little discussion of the issue in its brief to the Commission, stating only that "Items 4 through 18 all involve one condition; a failure to test employees after blasting had stopped."

It is well-settled that the Commission has the authority to assess separate penalties for separate violations of a single standard. *Sanders Lead Co.*, 17 BNA OSHC 1197, 1993-95 CCH OSHD ¶ 30,740 (No. 87-260, 1995) (citing *Caterpillar, Inc.*, 15 BNA OSHC 2153, 2172-73, 1991-93 CCH OSHD ¶ 29,962, p. 41,005 (No. 87-922, 1993)). The Commission has emphasized that, "[t]he test under *Caterpillar* for the appropriateness of instance-by-instance penalties is whether the language of the standard prohibits individual acts or a single course of action." *Sanders Lead Co.*, 17 BNA OSHC at 1203, 1993-95 CCH OSHD at p. 42,695. In

differentiating between those standards that permit multiple units of prosecution, and those that do not, the Commission has stated:

> Some standards implicate the protection, etc. of individual employees to such an extent that the failure to have the protection in place for each employee permits the Secretary to cite on a per-instance basis. However, where a single practice, method or condition affects multiple employees, there can be only one violation of the standard.

Hartford Roofing Co., 17 BNA OSHC 1361, 1365, 1995-97 CCH OSHD ¶ 30,857, p. 42,935 (No. 92-3855, 1995). *See Eric K. Ho*, 20 BNA OSHC 1361, 1370-71, 2002-04 CCH OSHD ¶ 32,692, pp. 51,580-81 (No 98-1645, 2003) (consolidated) (Commission noting it was "not persuaded . . . to depart from [per-employee] precedent[]" and that "[t]he key to all these decisions was the language of the statute or the specific standard or regulation cited."), *aff'd in relevant part sub. nom.*, *Chao v. OSHRC*, 401 F.3d 355 (5th Cir. 2005).

Based on this precedent, we find that the Secretary properly cited the medical surveillance provisions of § 1926.62(j)(2)(i) on a per-employee basis. This provision states that biological monitoring is to be made available to "each employee covered under paragraphs (j)(1)(i) and (ii)." These two triggering provisions require an employer to determine whether an employee is or may be exposed to action-level lead and if so, the duration of that employee's exposure. Furthermore, all three of the cited paragraphs set forth the frequency for biological monitoring on the basis of each employee's individual exposure and blood lead level—paragraph (A) for "each employee" covered by a medical surveillance program based on the employee's 30-day exposure to action-level lead; paragraph (B) for "each employee" whose BLL is at or above 40 μg/dl; and paragraph (C) for "each employee" removed from lead exposure due to a BLL at or above 50 μg/dl.

Because this language requires an employer to act "under certain unique circumstances peculiar to each employee[,]" we reject Manganas' claim that its decision to cancel the follow-up testing can be viewed as a single managerial act, not an individual act as to each of the fifteen employees. *See Eric K. Ho*, 20 BNA OSHC at 1372, 2002-04 CCH OSHD at p. 51,582 (noting that "some standards must of necessity be individualized—such as recording an entry in an OSHA log, fitting a respirator to an employee, and *determining an employee's blood lead level*") (emphasis added); *Sanders Lead Co.*, 17 BNA OSHC at 1200, 1993-95 CCH OSHD at p. 42,692 (footnote omitted) ("It is not the single decision by an employer not to remove employees, but

the language of the standard that is determinative."). Accordingly, we find that the cited provisions permit per-employee citation.

With regard to penalty, the judge ranked the gravity of the three groups of medical surveillance items as follows: "those without elevated blood lead [items 4 through 9], those with elevated blood lead [items 10-14], and those whose blood lead was so elevated that they were placed on medical removal [items 15-18]." For Items 4 through 9, which he affirmed as serious, the judge assessed a penalty of $1,200 for each violation. For Items 10 through 14, which he affirmed as willful, the judge assessed a penalty of $15,000 for each violation. For Items 15 through 18, which he also affirmed as willful, the judge assessed a penalty of $20,000 for each violation.

We agree with the judge's findings regarding the overall gravity of these items. As he noted, "Manganas' failure to provide the required testing could have prevented the early detection of anemia, and damage to the kidney and/or peripheral and central nervous systems." In addition, for the reasons discussed above, we find a credit for good faith, but not history, to be appropriate under the circumstances. Because we affirm Items 4 through 9 as willful, we find that a penalty of $10,000 for each violation is appropriate given their lower gravity, and a credit for good faith. For these reasons and those discussed above, we also find that the $15,000 penalty assessed by the judge for each violation under Items 10 through 14, and the $20,000 penalty assessed by the judge for each violation under Items 15 through 18, to be appropriate.

III. Fall Protection Citations (Docket No. 95-0103)

Under these citations, the Secretary alleged both serious and willful violations of various provisions regarding fall protection hazards observed at the bridge worksite. At issue on review are two serious citation items and fifteen willful citation items. The judge affirmed eleven of these items, and vacated six items. For the following reasons, we affirm the judge in part, but reverse in part.

A. Serious Citation Items

Item 1: 29 C.F.R. § 1926.500(d)(1) (1994) (unguarded pier cap)

Under this item, the Secretary alleges that Manganas failed to guard an open-sided pier cap exposing three of its employees to a 60-foot fall.[19] These employees, who were wearing

[19] At the time of the inspection in 1994, this standard provided as follows:

safety belts and lanyards, were observed stepping onto the pier cap from a ladder and then unhooking their lanyards in order to access the structural steel of the bridge. The judge vacated this item based on his finding that the pier cap was not used as a working space and, therefore, did not constitute a "platform" as defined in 1994 under 29 C.F.R. § 1926.502(e): "a working space for persons, elevated above the surrounding floor or ground, such as a balcony or platform for the operation of machinery and equipment."[20]

We affirm the judge. As the Sixth Circuit, a relevant circuit here, has held, "[t]he mere fact that an employee momentarily stepped onto an elevated open sided surface while discharging his employment duties does not necessarily transmute that surface into a 'working space' under OSHA regulations. . . ." *Superior Elec. Co. v. OSHRC*, 18 BNA OSHC 1001, 1003 (6th Cir. 1997) (unpublished). *See also* OSHA Instruction, STD 1-1.13 (Apr. 16, 1984) (under general industry standards, a platform is "any elevated surface designed or used primarily as a walking or working surface, and any other elevated surfaces upon which employees are required to walk or work while performing assigned tasks on a predictable and regular basis"). The record here supports the judge's finding that Manganas' employees performed no work on the unguarded pier cap but merely stood on it "briefly" before stepping over onto the structural steel of the bridge. Under these circumstances, we find that the pier cap cannot be considered a "working space" under the definition of a "platform" set forth in 1994 at § 1926.502(e). *See*

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§ 1926.500 Guardrails, handrails, and covers.

. . . .

(d) *Guarding of open-sided floors, platforms, and runways.* (1) Every open-sided floor or platform 6 feet or more above adjacent floor or ground level shall be guarded by a standard railing, or the equivalent, as specified in paragraphs (f)(1)(i) of this section, on all open sides, except where there is entrance to a ramp, stairway, or fixed ladder. The railing shall be provided with standard toeboard wherever, beneath the open sides, persons can pass, or there is moving machinery, or there is equipment with which falling materials could create a hazard.

On August 9, 1994, the Secretary substantially revised the fall protection standards governing the construction industry (29 C.F.R. Part 1926, Subpart M). *See* 59 Fed. Reg. 40,672 (Aug. 9, 1994). The revised standards became effective on February 6, 1995. Therefore, at the time the subject citation was issued (December 14, 1994) and the notice of contest was filed (January 5, 1995), the cited provision remained in effect.

[20] We note the definition set forth at § 1926.502(e) was eliminated when the fall protection standards were revised and a definition of "walking/working surface" was added. *See* 59 Fed. Reg. 40,672 (Aug. 9, 1994) (new definition to be codified at 29 C.F.R. § 1926.500(b)).

Donovan v. Williams Enter., Inc., 744 F.2d 170 (D.C. Cir. 1984) (finding interlocking sheets of decking used as makeshift bridge to move material not a "working space" and therefore not a "platform" under § 1926.500(d)(1)). *Cf. Armstrong Steel Erectors*, 17 BNA OSHC 1385, 1390, 1995-99 CCH OSHD ¶ 30,909 (No. 92-262, 1995) (affirming violation of § 1926.500(d)(1) based on finding that unguarded concrete piers were used as working surfaces because employees were required to "squat, kneel, or even lie on the piers, sometime with their bodies extended over the edge" while performing welding work). Accordingly, we vacate this item.

Item 2: 29 C.F.R. § 1926.1053(b)(1) (extending portable ladder)

Under this item, the Secretary alleges that Manganas failed to extend a portable ladder at least three feet above the upper landing surface.[21] Two Manganas employees who were not tied off were observed climbing down a portable ladder from the bridge deck to a catwalk located below. The ladder hung from a sky hook attached to the bridge's "parapet"—the concrete barrier or wall lining the bridge deck. It is undisputed that the distance from the top of the ladder to the top of the parapet was 22 ½ inches. The judge affirmed this item based on his finding that Manganas employees utilized the top of the parapet as a landing surface, yet the ladder did not extend 36 inches above that surface as required by the standard. On review, Manganas contends that the bridge deck, not the parapet, served as the "upper landing surface" for employees using the ladder. In addition, Manganas maintains that the ladder was otherwise secured as permitted by the cited standard in that a "grasping device and lifelines were provided."

We disagree on both counts. First, several photographs in the record support the Secretary's contention on review that "the regular practice of employees was to use the [parapet]

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[21] The standard provides:

> **§ 1926.1053 Ladders.**
>
> . . . .
>
> (b) *Use.* The following requirements apply to the use of all ladders, including job-made ladders, except as otherwise indicated:
>
> (1) When portable ladders are used for access to an upper landing surface, the ladder side rails shall extend at least 3 feet (.9 m) above the upper landing surface to which the ladder is used to gain access; or, when such an extension is not possible because of the ladder's length, then the ladder shall be secured at its top to a rigid support that will not deflect, and a grasping device, such as a grabrail, shall be provided to assist employees in mounting and dismounting the ladder. In no case shall the extension be such that ladder deflection under a load would, by itself, cause the ladder to slip off its support.

wall as the upper landing surface by either sitting or standing on it when stepping on or off the ladder." Although these photographs do not appear to depict the ladder in question, we find this evidence sufficient to undermine Manganas' claim that employees "don't stand on the parapet" but simply "stand on the deck and . . . put [their] foot over" to access any of the ladders hung from the bridge. Indeed, Andrew Manganas himself acknowledged that sitting on the parapet was "the proper procedure" for employees to access a ladder.

Second, Manganas does not dispute the judge's finding that even if a grab rail or "grasping device" was present, "it was inadequate to assist employees mounting and dismounting the ladder, in that it was mounted at the level of employees' feet while standing on the parapet." Moreover, the cited standard expressly provides that securing the ladder and providing a grasping device is a means of alternative compliance permitted only when a three-foot extension is not possible due to the ladder's length. Manganas does not claim that the ladder in question could not have been extended the required distance and in fact, it appears that the ladder was eventually "reset" to the proper height. Accordingly, we affirm this item as serious.[22]

C. Willful Citation Items

Items 1, 2, & 4 through 12: 29 C.F.R. § 1926.95(a) (personal fall protection)

Under each of these items, the Secretary alleges that Manganas' employees failed to use adequate fall protection while engaged in various activities such as climbing portable ladders to access work areas and working from scaffolds. The employees in question were exposed to fall hazards that ranged from 30 to 140 feet. Based on these conditions, the Secretary claims that § 1926.95(a), the personal protective equipment standard for the construction industry, required

[22] Manganas does not dispute the serious characterization of this citation item on review and we see no basis in the record to reverse the judge in affirming the item as serious. With regard to penalty, the judge assessed a penalty of $500, finding the violation to be low-gravity and giving credit for good faith, size, and prior history. We agree with the judge's finding of low gravity based on the fact that the portable ladder did extend almost two feet above the parapet and also that personal fall protection equipment was available for use by employees. However, for the reasons discussed above with regard to the lead citation items, we find that credits for size and good faith, but not prior history, are appropriate here and therefore, assess a penalty of $600 for this violation.

the use of personal fall protection.[23] For various reasons, the judge vacated two of these citation items (Items 2 and 6), and affirmed nine (Items 1, 4, 5 and 7 through 12).

On review, Manganas contends as a threshold matter that all of these citation items should be vacated because § 1926.95(a) "does not apply to fall protection, nor does it require fall protection equipment." According to Manganas, § 1926.95(a) is preempted by the application of 29 C.F.R. § 1926.105(a) to the cited conditions.[24] In his pre-hearing order denying Manganas' motion for partial summary judgment, the judge concluded that § 1926.95(a) applied to the cited fall hazards, but he never directly addressed Manganas' preemption claims regarding § 1926.105(a). For the following reasons, Chairman Railton and Commissioner Thompson agree with Manganas that § 1926.105(a) is more specifically applicable to the cited conditions and, therefore, vacate all of these items.

The specific issue of whether § 1926.95(a) applies to fall hazards has never been decided by the Commission. In fact, the provision has been previously cited for fall hazards in only three cases before the Commission and its judges, and its applicability was apparently never raised or in dispute. *See Danis Shook Joint Venture XXV*, 19 BNA OSHC 1497, 1501 n.4, 2001 CCH OSHD ¶ 32,397, pp. 49,863-64 n.4 (No. 98-1192, 2001), *aff'd*, 319 F.3d 805 (6th Cir. 2003) (§ 1926.95(a) cited for failure to use safety harnesses and lifelines to protect employees from engulfment hazard); *Meridian Contractors, Inc.*, 17 BNA OSHC 2105, 2106 n.2, 1995-97 CCH OSHD ¶ 31,347, p. 44,222 (No. 94-1305, 1997) (violation of § 1926.95(a) alleged in alternative

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[23] The standard provides:

> **§ 1926.95 Criteria for personal protective equipment.**
> (a) *Application*. Protective equipment, including personal protective equipment for eyes, face, head, and extremities, protective clothing, respiratory devices, and protective shields and barriers, shall be provided, used, and maintained in a sanitary and reliable condition wherever it is necessary by reason of hazards of processes or environment, chemical hazards, radiological hazards, or mechanical irritants encountered in a manner capable of causing injury or impairment in the function of any part of the body through absorption, inhalation or physical contact.

[24] That standard provides:

> **§ 1926.105 Safety nets.**
> (a) Safety nets shall be provided when workplaces are more than 25 feet above the ground or water surface, or other surfaces where the use of ladders, scaffolds, catch platforms, temporary floors, safety lines, or safety belts is impractical.

to general duty clause for failure to use safety equipment such as safety belts); *A.J. McNulty & Co, Inc.*, 1996 WL 735955 (94-1758, Dec. 30, 1996) (ALJ), *aff'd in part, vacated in part*, 19 BNA OSHC 1121, 2000 CCH OSHD ¶ 32,209, p. 48,807 (94-1758, 2000) (judge affirmed fall protection violations involving lack of safety nets arising under § 1926.95(a) and § 1926.105(a); Commission referred to, but did not address, items as violations of § 1926.105(a)).

As the judge noted, the Commission has specifically held that 29 C.F.R. § 1910.132(a), the general industry counterpart to § 1926.95(a), is applicable to fall hazards. *See, e.g.*, *Cleveland Elec. Illuminating Co.*, 16 BNA OSHC 2091, 2094 n.8, 1993-95 CCH OSHD ¶ 30,590, pp. 42,362-63 (No. 91-2198, 1994) (rejecting Secretary's alternative allegation of general duty clause violation as inappropriate due to availability of § 1910.132(a)). *See also Bethlehem Steel Corp.*, 10 BNA OSHC 1470, 1471-73, 1982 CCH OSHD ¶ 25,982, p. 32,591 (No. 79-310, 1982) (finding phrase "hazards of processes or environment" in § 1926.95(a) covers fall hazards); *Hackney Inc.*, 16 BNA OSHC 1806, 1807-09, 1993-95 CCH OSHD ¶ 30,486, p. 42,111 (No. 91-2490, 1994) (reaffirming *Bethlehem* and finding Secretary's interpretation of § 1910.132(a) as applicable to fall hazards to be reasonable). However, Chairman Railton and Commissioner Thompson find it unnecessary to resolve whether § 1926.95(a)—like its general industry counterpart—applies to fall hazards because, even if such an application was assumed, § 1926.95(a) is preempted by § 1926.105(a).

Under 29 C.F.R. § 1910.5(c)(1), a general standard "which otherwise might be applicable" will be preempted by a particular standard that is more specifically applicable.[25] *See L.R. Willson & Sons, Inc. v. Donovan*, 685 F.2d 664, 669 (D.C. Cir. 1982) (specific standard preempts a general one only if condition, means, method, operation or process is already dealt with by a specific standard). In this case, both of the relevant provisions were available for citation by the Secretary at the time the conditions were cited, but only § 1926.105(a) had a history of application to fall hazards. Indeed, there is a long line of decisions by both the courts and the Commission interpreting § 1926.105(a) as requiring the use of one of the listed types of

[25] Section 1910.5(c)(1) states in relevant part:

> 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.

personal fall protection when employees are exposed to a fall hazard in excess of twenty-five feet. *See, e.g.*, *Brock v. L.R. Willson & Sons, Inc.*, 773 F.2d 1377, 1383-84 (D.C. Cir. 1985) (discussing history of interpretation); *Nat'l Indus. Constructors, Inc.*, 9 BNA OSHC 1871, 1973 (Nos. 76-891 & 76-1535, 1981) (citing cases). Not surprisingly, therefore, the Secretary cited Manganas under § 1926.105(a) for the alleged personal fall protection violations observed during the first OSHA inspection of the bridge worksite in April 1993. In fact, one such condition cited under § 1926.105(a) in the 1993 case is identical to one cited here under § 1926.95(a), specifically Manganas' practice of allowing its employees to attach their lanyards to the round openings or "portholes" of the bridge such that the lanyard clip did not fully close. *See Manganas Painting Co.*, 19 BNA OSHC at 1105-06 (affirming violation of § 1926.105(a) for failure to use adequate fall protection by allowing employees to attach lanyard clips to bridge openings).

Under these circumstances and based upon the specific conditions alleged in this case, Chairman Railton and Commissioner Thompson conclude that § 1926.105(a) is more specifically applicable to the fall hazards cited here than the general personal protective standard set forth at § 1926.95(a). Section 1926.105(a) identifies a discrete hazard—falls of over 25 feet—and provides specific examples of the type of equipment an employer can use to eliminate that hazard.[26] As noted, the fall distances at issue here ranged from 30 to 140 feet and Manganas did, in fact, use safety nets at the bridge worksite. Section 1926.95(a), on the other hand, does not specifically identify fall hazards, and while it references a range of personal protective equipment for eyes, head, and extremities, none refer specifically fall protection.

[26] According to OSHA interpretive documents, relevant at that time, addressing steel erection, where a fall is over twenty-five feet, the condition should be cited under § 1926.105(a). Section 1926.95(a) should only be cited for falls of less than twenty-five feet. OSHA Interim Enforcement Policy for Steel Erection Standards, Feb. 22, 1994, *reprinted in* New Developments 1994-95 CCH OSHD ¶ 11,972, pp. 16,795-94 ("[t]he safety net requirement under [§] 1926.105(a) also will be used in other steel erection situations where the fall hazard is 25 feet or more," "§ 1926.95(a) should be cited "where it would be appropriate to issue citations for fall hazards from 10 to 25 feet."); Memorandum from Patricia K. Clark, Director, to Harvey E. Harris, Director, regarding Construction Interpretation Issues (May 21, 1992), *at* 1992 WL 12146526 (in steel erection context, if a hazard is addressed by another standard, such as § 1926.105(a) for a fall greater than 25 feet, the other standard should be cited instead of § 1926.28(a), a general personal protective equipment standard). We note that since the time those interpretative documents were written in 1994, the Secretary has revised the steel erection standard (Subpart R). 66 Fed. Reg. 5196 (Jan. 18, 2001).

For all of these reasons, Chairman Railton and Commissioner Thompson conclude that § 1926.105(a) preempts § 1926.95(a) and, accordingly, vacate Items 1, 2, and 4 through 12.

Items 13a, 13b, & 13c: 29 C.F.R. § 1926.451(a)(4) (1994) (unguarded scaffolds)

Under these grouped items, the Secretary alleges that Manganas failed to provide guardrails on painters' pick scaffolds in three locations at the bridge worksite.[27] For various reasons, the judge vacated all three items. Chairman Railton and Commissioner Thompson also vacate these items but do so on different grounds than the judge. Specifically, they agree that section 10(b) of the Act prohibited the Secretary from citing Manganas for failing to guard pick scaffolds at the bridge worksite because a citation for the same condition was still pending before the Commission at the time these alleged violations were cited in December 1994.

Under section 10(b) of the Act, an employer who has filed a notice of contest in good faith is not required to abate a cited condition in the absence of a final Commission order. *See, e.g.*, *Power Fuels Inc.*, 14 BNA OSHC 2209, 2214 n.7, 1991 CCH OSHD ¶ 29,304, p. 39,348 n.7 (No. 85-166, 1991); *Seattle Crescent Container Serv.*, 7 BNA OSHC 1895, 1899, 1979 CCH OSHD ¶ 24,002, p. 29,132 (No. 15242, 1979). Thus, in *Hamilton Die Cast*, 12 BNA OSHC 1797, 1986-87 CCH OSHD ¶ 27,576 (No. 83-308, 1986) ("*Hamilton*"), the Commission concluded that section 10(b) prohibited the Secretary from issuing an employer a second citation for a violation that was identical to one that was still pending on review before the Commission. Hamilton had previously been cited for failing to require its employees to wear "eye and face gear to protect against molten aluminum" as required by § 1910.133(a)(1). *Id.* at 1798, CCH OSHD at p. 35,820. The alleged violation was ultimately affirmed by a Commission judge, and

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[27] At the time of the inspection in 1994, this standard provided as follows:

> **§ 1926.451 Scaffolding.**
> (a) *General requirements*.
>
> . . . .
>
> (4) Guardrails and toeboards shall be installed on all open sides and ends of platforms more than 10 feet above the ground or floor, except needle beam scaffolds and floats (see paragraphs (p) and (w) of this section). Scaffolds 4 feet to 10 feet in height, having a minimum horizontal dimension in either direction of less than 45 inches, shall have standard guardrails installed on all open sides and ends of the platform.

On August 30, 1996, the Secretary revised the scaffolding standards (29 C.F.R. Part 1926, Subpart L). *See* 61 Fed. Reg. 46,026 (Aug. 30, 1996).

the case was directed for review by the Commission after Hamilton petitioned. *Id.* Almost three years later, while that case was still pending before the Commission, the Secretary inspected Hamilton's plant again and issued another citation to the company for a violation of § 1910.133(a)(1), again based on the employer's failure to require the use of eye and face equipment to protect against the same hazard. *Id.* The Commission concluded that "the item in *Hamilton I* covered the same condition as the face protection item" in the second case and, therefore, vacated the second citation. *Id.*

Chairman Railton and Commissioner Thompson find this precise situation to be present here. As a result of the April 1993 inspection of the bridge worksite, OSHA cited Manganas for a violation of § 1926.451(a)(4), the same scaffolding standard cited here. The 1993 citation was based on Manganas' failure "to install guardrails on a painter's pick." *Manganas Painting Co*., 19 BNA OSHC at 1103, 2000 CCH OSHD at p. 48,767. It is undisputed that at the time OSHA initiated the 1994 inspection and issued the resulting citations, the 1993 citation had been timely contested by Manganas and a hearing in the matter had yet to commence. In fact, the judge who presided over the 1993 matter did not issue his decision until after a decision was issued in the current cases, and his decision did not become a final order of the Commission until 2000.

While the alleged scaffolding violations cited in 1993 and 1994 were observed at what we find to be essentially two different worksites, the citations "covered the same condition" in that each item was based on Manganas' failure to guard the same type of pick scaffold used throughout the bridge worksite during both painting seasons. *Hamilton*, 12 BNA OSHC at 1798, 1986-87 CCH OSHD at p. 35,820. As a result, Manganas' defense to these allegations did not vary from 1993 to 1994, but continued to be that the scaffolds in question were in fact "catenary" scaffolds as defined at 29 C.F.R. § 1926.450(b) and, therefore, the guarding requirements of the cited provision did not apply. *Cf. Andrew Catapano Enter. Inc.*, 17 BNA OSHC 1776, 1778-79, 1995-97 CCH OSHD ¶ 31,180, p. 43,604 (No. 90-0050, 1996) (consolidated) (affirming multiple violations occurring at nine different trench worksites where "[t]he facts cited in support of these allegations are peculiar to the worksite where they were observed . . . [and] [t]he employer's defense to each allegation also would vary with the worksite."); *Simmons, Inc.*, 6 BNA OSHC 1157, 1977-78 CCH OSHD ¶ 22,387, p. 26,987 (No. 12862, 1977) (finding second citation received during eight-day abatement period for first citation to be different violations because the citations contained specifications of different compressed air hazards in two different areas of

plant); *Northern Metal Co.*, 3 BNA OSHC 1646, 1649, 1975-76 CCH OSHD ¶ 20,105, p. 23,918 (No. 3821, 1975) (finding employer "citable" for additional hard hat violations even though final order not yet entered for prior hard hat violation because allegations rested on specific failure of individual employees to wear hard hats).

Under these circumstances, Chairman Railton and Commissioner Thompson conclude that in the absence of a final order in the 1993 case at the time the 1994 citation was issued, the Secretary was prohibited under section 10(b) of the Act from citing Manganas for a violation of the same condition still pending before the Commission. Accordingly, Items 13a, 13b, and 13c are vacated.

Items 14, 15, & 16: 29 C.F.R. § 1926.500(d)(2) (1994) (unguarded catwalk)

Under these items, the Secretary alleges that Manganas failed to adequately guard the bridge's permanent catwalk (Items 14 and 16), as well as a pick scaffold used as a runway to access the catwalk (Item 15).[28] Items 14 and 16 are based on separate incidents in which Manganas employees were observed walking over two different sets of three or four pick scaffolds stacked on the bridge's catwalk without using personal fall protection. The permanent catwalk was equipped with guardrails but the top rail was only about 20 inches above the top of the stack on which the employees were walking, thus exposing them to a 30-foot fall to the structural steel. Item 15 is based on the observation of several Manganas employees walking up a "runway" pick scaffold that lacked guardrails on one side and had a 41-inch gap in the guardrails installed on the other side.

The judge vacated Items 14 and 16 based on his finding that § 1926.500(d)(2), the guardrail provision in effect at the time of the 1994 inspection, did not apply because "Manganas was cited not for a violation of the guardrail requirements but for storing material on the catwalk

[28] At the time of the inspection in 1994, this standard provided as follows:

> **§ 1926.500 Guardrails, handrails, and covers.**
>
> . . . .
>
> (d) *Guarding of open-sided floors, platforms, and runways*.
>
> . . . .
>
> (2) Runways shall be guarded by a standard railing, or the equivalent, as specified in paragraph (f) of this section, on all open sides, 4 feet or more above floor or ground level. Wherever tools, machine parts, or materials are likely to be used on the runway, a toeboard shall also be provided on each exposed side.

which made the guardrails ineffective." However, he affirmed Item 15 based on his finding that Manganas had failed to establish an exception to the standard's guardrail requirements for runways. For the following reasons, we reverse the judge as to Items 14 and 16, but affirm as to Item 15.

Regarding Items 14 and 16, the Secretary cited Manganas for the failure to have guardrails on open sides of a runway. Under the provision cited at the time, § 1926.500(d)(2), runways were required to have guardrails 48 inches (four feet) above the floor or ground level. Although the catwalk itself was equipped with standard guardrails as required by that provision, the stack of picks on the catwalk used by Manganas employees as a runway to access the containment area, effectively raised, albeit unevenly, the "floor" of the catwalk. Thus, the picks which were used as the runway floor level had inadequate guardrails because they were not 48 inches above the stacked picks. For Item 14, the guardrails were only 22 inches above the picks and for Item 16, the guardrails were 18 to 20 inches above the picks. Although, as the judge concluded, Manganas' practice of storing picks on the catwalk seems to implicate the general storage provisions, e.g., 29 C.F.R. § 1926.250(b)(5) ("Materials shall not be stored on scaffolds or runways in excess of supplies needed for immediate operations."), we agree with the Secretary that the storage provision is directed at preventing stored materials from moving unexpectedly, not protecting employees from the type of fall hazard cited here. Accordingly, we reverse the judge, and affirm Items 14 and 16.

With regard to Item 15, Manganas does not dispute that the runway used to access the bridge's catwalk lacked adequate guardrails. Manganas contends only that it qualified for the exception set forth at that time under 29 C.F.R. § 1926.500(d)(3), which allowed an employer to remove the railing on one side of a runway "used exclusively for special purposes . . . where operating conditions necessitate such omission, provided the falling hazard is minimized by using a runway not less than 18 inches wide." In rejecting Manganas' claims regarding this exception, the judge found the company had "failed to make any showing that the cited runway was used exclusively for special purposes [and] . . . [t]he evidence establishes . . . that the runway was routinely used for employee access."

We agree with the judge. On review, Manganas' arguments focus solely on testimony from various employees, including Andrew Manganas, that the guardrails had to be removed from the 20-inch wide runway in order to allow equipment to be carried up to the catwalk.

However, according to undisputed testimony from one of the compliance officers, the runway was also used by employees as a primary means of accessing the containment. According to the compliance officer, he observed six to eight employees walking on the unguarded runway during the inspection. Thus, the record supports the judge's finding that Manganas failed to prove the runway was "used exclusively for special purposes" as required by the terms of the claimed exception. Accordingly, we affirm Item 15.

Turning to characterization, Commissioner Rogers and Commissioner Thompson find two of these violations are properly characterized as willful. For Items 14 and 16, the Secretary based willfulness on what she considered to be Manganas' conscious disregard for the requirements of the cited standard despite repeated warnings from OSHA during the inspection about the fall hazard the stack of picks on the catwalk posed to employees. Indeed, the record shows that between June 18 and 22, 1994, AAD Gilgrist and the two compliance officers assigned to the inspection each spoke at various times—and with increased urgency—to Andrew Manganas, superintendent Lang, and/or Nick Manganas about removing the stack of picks observed on the catwalk. Specifically, one of the compliance officers testified that on June 18, the second day of the inspection, he told Andrew Manganas and superintendent Lang that "they needed to remove the pick stack because of the potential hazard involved here of someone falling over the guardrailing." On the same day, AAD Gilgrist told Andrew Manganas that the condition was a "potential violation[,]" and he "became more insistent" about the issue on June 20, when Manganas employees were again observed walking over the stack without fall protection. The second compliance officer also testified that he spoke to both Andrew and Nick Manganas about the fact that "people were going over [the stack of picks] not protected."

At the hearing, Andrew Manganas acknowledged that on the first or second day of the inspection, OSHA brought the stack of picks on the catwalk to his attention. Although he claims the two compliance officers led him to believe the condition was not a violation—a claim both men denied on rebuttal—his testimony shows he was aware AAD Gilgrist believed otherwise: "It got a little worse and worse as the days went on. [OSHA] got more excited about the picks being on the walkway. And Mr. Gilgrist said it was going to be a violation." Despite these clearly repeated admonitions, Manganas did not remove the stack until June 21, only after OSHA Area Director William Murphy intervened and contacted Nick Manganas directly about the problem. Four days after removing the stack, Manganas placed a second stack of picks on the

catwalk over which Manganas employees were again observed walking without personal fall protection.

Taken as a whole, Commissioner Rogers and Commissioner Thompson agree with the Secretary that Manganas' actions demonstrate a conscious disregard for the guarding requirements of the standard.[29] *See Williams Enter.*, 744 F.2d at 180 (finding willful violation where employer's failure to heed Secretary's repeated warnings and compliance advice sufficient to establish intentional disregard); *Calang Corp.*, 14 BNA OSHC 1789, 1791-92, 1990 CCH OSHD ¶ 29,080, p. 38,870 (No. 85-319, 1990) (finding willful violation where company consciously disregarded OSHA requirements after compliance officer had correctly explained trenching standard's requirements). *See also Am. Wrecking*, 351 F.3d at 1264 (finding willfulness requires showing of "intentional or conscious disregard for the applicable safety standard or for employee safety").

For the same reasons discussed above with regard to the lead citations, Commissioner Rogers and Commissioner Thompson find the Secretary's proposed penalty of $70,000 for each of these willful violations to be inconsistent with the section 17(j) factors. In terms of gravity, the evidence shows that multiple employees were exposed to 30-foot falls over a period of several days, which Commissioner Rogers and Commissioner Thompson agree supports a

[29] Chairman Railton would characterize Items 14 and 16 as serious rather than willful. While Manganas' placement of the pick stacks on the catwalk rendered its guardrails ineffective, this failure did not constitute a conscious disregard for the cited provision's fall protection requirements or the safety of its employees. *See Am. Wrecking*, 351 F.3d at 1264 (a showing of willfulness requires "an intentional or conscious disregard for the applicable safety standard or for employee safety"). On the contrary, the record establishes Manganas had an extensive fall protection program at the bridge worksite that included the installation of safety nets, approximately 50,000 feet of cable for use as lifelines when tying off, and rope grabs at every portable ladder. Manganas not only provided employees with safety belts and lanyards, but also had a specific work rule requiring the use of this personal fall protection equipment. In addition, testimony from several employees establishes they received fall protection training and understood if they violated fall protection rules, they would be subject to Manganas' progressive disciplinary program. Indeed, the record shows employees caught violating these rules were given verbal reprimands, and in some instances, written warnings. Under these circumstances, Manganas' failure to promptly heed the advice of OSHA personnel regarding the removal of the pick stacks from a catwalk already equipped with guardrails establishes nothing more than negligence and therefore, cannot support a finding of willfulness. *Id.* ("Mere negligence or lack of diligence is not sufficient to establish an employer's intentional disregard for or heightened awareness of a violation.").

finding of moderate to high gravity. Therefore, giving credit for both size and good faith, but not prior history, a penalty of $10,000 is assessed for each citation item.

With regard to Item 15, we affirm the judge's characterization of the violation as serious. In rejecting the Secretary's willful characterization, the judge found that Manganas "cannot be characterized as indifferent to its employee's safety, where guardrails were originally provided [on the scaffold] and then removed for a specific purpose." On review, the Secretary disputes this finding, claiming Manganas was informed by Helix prior to the OSHA inspection that fall protection was a problem at the bridge worksite and also informed by OSHA that the unguarded runway posed a hazard, yet the company "intentionally ignored [these] warnings and guidance."

We disagree. Although Helix representative Cooper confirmed that he had observed the runway's lack of guardrails when he visited the worksite in May 1994, he also stated that he never spoke to Manganas about the condition and guardrails were eventually installed on the runway. One of the compliance officers testified that he spoke to Andrew Manganas about the runway's inadequate guardrails on June 18, 1994, and on June 20, Manganas installed the missing guardrails, but did not correct the gap on the other side of the runway. Moreover, as the judge noted, Manganas removed the guardrails on one side of the runway for what it believed in good faith was an acceptable reason under the terms of the standard's exception. *See Froedtert Mem'l Lutheran Hosp.*, 20 BNA OSHC at 1510, 2002-2004 CCH OSHD at pp. 51,911 (Commission majority found willfulness "obviated by a good faith, albeit mistaken, belief that particular conduct is permissible").

Finally, we find the $500 penalty assessed by the judge for this violation to be appropriate. We agree with the judge's finding that this violation is of low gravity given that employees were exposed to falls of only four to ten feet. For the reasons discussed above, we also find it appropriate to give credit for size and good faith, but not prior history.

ORDER

In the lead case (Docket No. 95-0104), we vacate Willful Citation 2, Item 1, and affirm Willful Citation 2, Items 2, 3, and 4 through 18, as willful. We assess the following penalties: Serious Citation 1, Item 1 – $1,050; Willful Citation 2, Item 2 – $5,000; Willful Citation 2, Item 3 – $10,000; Willful Citation 2, Items 4 through 9 – $10,000 for each item; Willful Citation 2, Items 10 through 14 – $15,000 for each item; Willful Citation 2, Items 15 through 18 – $20,000.

In the fall protection case (Docket No. 95-0103), we vacate Serious Citation 1, Item 1, and Willful Citation 2, Items 1, 2, 4 through 12, 13a, 13b, and 13c. We affirm Serious Citation 1, Item 2, and Willful Citation 2, Item 15, as serious, and also affirm Willful Citation 2, Items 14 and 16 as willful. We assess the following penalties: Serious Citation 1, Item 2 – $600; Willful Citation 2, Item 14 – $10,000; Willful Citation 2, Item 15 – $500; Willful Citation 2, Item 16 – $10,000.

SO ORDERED.

/s/_____
W. Scott Railton
Chairman

/s/_____
Thomasina V. Rogers
Commissioner

/s/_____
Horace A. Thompson III
Commissioner

Dated: April 25, 2007

ROGERS, Commissioner, concurring in part and dissenting in part:

With respect to Docket Number 95-0103 (the fall protection items), I concur in the vacation of Serious citation 1, Item 1. I also concur in affirming Serious Citation 1, Item 2 as serious, with a penalty of $600; Willful Citation 2, Items 14 and 16 as willful, with penalties of $10,000 each; and Item 15 as serious, with a penalty of $500.

With respect to the other items, I would first reject Manganas' argument that the off-site inspection that led to Willful Citation 2, Items 1, 2, 11, 13a, and 13b, was unreasonable. Furthermore, I dissent from my colleagues' decision to vacate Willful Citation 2, Items 1, 2, and 4 though 12 on a technicality and not even attempt to reach the underlying merits of the Secretary's allegations. I also must dissent from my colleagues' misapplication of section 10(b) of the Act that avoids reaching the merits of Willful Citation 2, Items 13a, 13b, and 13c. Indeed, their misuse of section 10(b) serves only as an inappropriate restraint on the Secretary's ability to enforce the Act and a free pass to bad actors to continue to violate the Act—and endanger their employees.

A. The Off-Site Inspection is Valid

Manganas claims that certain off-site observations by OSHA compliance officers were unreasonable and thus proscribed by both the Fourth Amendment and section 8(a) of the Act.[30]

During their off-site inspection, the compliance officers saw what was only in public view. Manganas had no reasonable expectation of privacy in the areas of its worksite open to public observation. *See L.R. Willson & Sons Inc.*, 17 BNA OSHC 2059, 2060, 1995-97 CCH OSHD ¶ 31,262, p. 43,887, (No. 94-1546, 1997), *rev'd & remanded on other grounds*, 134 F.3d 1235 (4th Cir. 1998) *cert. denied*, 525 U.S. 962 (1998) ("*L.R. Willson*"). Accordingly, there is no Fourth Amendment bar to the off-site inspection.

[30] Section 8(a) of the Act provides as follows:

> (a) In order to carry out the purposes of this Act, the Secretary, upon presenting appropriate credentials to the owner, operator, or agent in charge, is authorized –
>
> (1) to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer; and
> (2) to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein, and to question privately any such employer, owner, operator, agent or employee.

Consistent with Commission precedent in *L.R. Willson*, since section 8(a) of the Act does not reach off-site observations, there is no bar under section 8(a) to the off-site inspection. *L.R. Willson*, 17 BNA OSHC at 2061, 1995-97 CCH OSHD at pp. 43,888-89 (section 8(a) applies only to physical inspections on the worksite). As the Fourth Circuit pointed out in *L.R. Willson*, "[n]othing in the statute or its legislative history indicates that section 8(a)'s requirements apply to nontrespassory observations of worksites." *L. R. Willson and Sons, Inc. v. OSHRC*, 134 F.3d 1235, 1239 (4th Cir. 1998), *cert. denied*, 525 U.S. 962 (1998). *See also Dow Chemical Co. v. United States*, 476 U.S. 227, 233-34 (1986) (regulatory and enforcement agency needs no explicit statutory provision to employ methods of observation commonly available to the public at large).

Furthermore, the legislative history of the Act indicates that Congress, in enacting this provision, was concerned with on-site inspection activity, but there is nothing to indicate Congressional concern with off-site observation. Particularly instructive is an explanation of the precursor of section 8(a) by Congressman Steiger, the sponsor of the prevailing Steiger substitute in the House, during debate on the substitute on the House floor:

> As to what is meant by a 'reasonable time and manner' in connection with inspections, this I believe will have to be left to the interpretation of the Secretary and of the courts. This test of reasonableness will be applied on a case-by-case basis. But we could say that, in general, the term means during regular working hours and *in a manner which does not unnecessarily disrupt normal business procedures*.

116 Cong. Rec. H16785 (Nov. 24, 1970) (statement of Rep. Steiger), *reprinted in* Senate Comm. on Labor and Public Welfare, 92nd Cong., 1st Sess., Legislative History of the Occupational Safety and Health Act of 1970, at 1077 (emphasis added).

Accordingly, I would find that Congress never intended section 8(a) to apply to off-site observations or to otherwise restrict OSHA from using "methods of observation commonly available to the public at large." *See Dow Chemical*, 476 U.S. at 234. Thus, I would reject Manganas' challenges to the off-site observations.

B. My Colleagues Should Not Rely on a Technicality that Avoids the Merits of Various Items

My colleagues vacate Willful Citation 2, Items 1, 2, and 4 through 12 on the basis that the cited provision, § 1926.95(a), is preempted by a more specifically applicable standard, § 1926.105(a). In my view, § 1926.95(a) could, by its terms, be applied to fall hazards, given the

precedent with respect to its general industry counterpart, § 1910.132(a). *See* discussion in majority opinion, *supra*. While the preemption question is very close, § 1926.105(a), given its enforcement history, appears to be more specifically applicable to the cited conditions here.

However, both standards have similar substantive effect in the context of the cited conditions and their fall hazards. Thus, I would not rely on a technicality that unnecessarily short circuits a decision on the merits of this decade-old case. It appears that Manganas has raised defenses to the conditions cited under § 1926.95(a) as if they were cited under § 1926.105(a). Yet my colleagues do not even discuss whether an amendment to the correct standard is appropriate under Fed. R. Civ. P. 15(b) and whether Manganas would be prejudiced by such an amendment. Given the apparent lack of prejudice that would result, I would be inclined to follow the lead of the D.C. Circuit and amend the respective citations to reflect the more specifically applicable standard, and then consider these items on the merits.[31] *See Donovan v. Williams Enter., Inc.*, 744 F.2d 170, 176-77 (D.C. 1984) (reversing Commission's decision vacating citation because employer cited under wrong standard and then amending *sua sponte* to correct standard).

C. My Colleagues Misapply Section 10(b) as an Inappropriate Restraint on the Secretary

My colleagues have vacated Willful Citation 2, Items 13a, 13b, and 13c, alleging violations of § 1926.451(a)(4) for Manganas' failure to provide guardrails on painters' pick scaffolds in three locations. My colleagues argue that a "citation for the same condition was still pending before the Commission at the time these alleged violations were cited in December

[31] While it could be argued that *Northwood Stone & Asphalt, Inc. v. OSHRC*, 82 F.3d 418 (6th Cir. 1996) (*per curiam*) (unpublished) teaches that such *sua sponte* amendments are not allowed in the Sixth Circuit, the better view is that the Sixth Circuit, like other Circuits, allows amendments consistent with Fed. R. Civ. P. 15(b). First, *Northwood* is an *unpublished* decision. In addition, the language in that case discussing amendments is *dicta*, since the issue of whether the judge in that case was *sua sponte* amending Northwood's answer was actually controlled by a specific Commission rule. As the Court noted, "Rule 15(b) . . . is not applicable in this proceeding because it has no 'gap-filling' role to serve in light of the Commission's procedural rules." 17 BNA OSHC at 1573, 1995-97 CCH OSHD at 43,297. Furthermore, an earlier *published* decision of the Sixth Circuit, *Carlisle Equipment Co. v. Sec'y of Labor*, 24 F.3d 790, 795 (6th Cir. 1994), discussed Rule 15(b) and noted that amendment by a judge to conform to the evidence was allowable provided there was no surprise or prejudice - a position consistent with other Circuits. *See also Sasse v. U.S. Dep't of Labor*, 409 F.3d 773, 781 (6th Cir. 2005) (post-*Northwood* case citing *Carlisle Equipment* for determining when an amendment is permissible under Fed. R. Civ. P. 15(b)).

1994" and that accordingly the citation was barred under section 10(b) of the Act.[32] I agree that if a citation for a violative condition is pending before the Commission, section 10(b) of the Act precludes an abatement obligation for that *same* condition until the entry of a final order in the earlier matter. However, in this case, the violative condition for which Manganas was previously cited is *different* from those pending before the Commission. Unfortunately, my colleagues are defining "condition" in such a broad manner as to give bad actors free passes to continue to violate the law (and endanger employees) with impunity. In so doing, my colleagues yet again impose an inappropriate restraint on the Secretary's ability to enforce the Act and protect workers from dangerous working conditions, consistent with the purposes of the Act.[33]

My colleagues concede that the violations cited in 1993 (on the northbound bridge) and 1994 (on the southbound bridge), occurred at "essentially two different worksites." Further, an examination of the citation for the condition cited in 1993 and resolved in the 2000 Commission case,[34] *Manganas Painting Co.*, 19 BNA OSHC 1102, 1103-04, 2000 CCH OSHD ¶ 32,202, p.

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[32] The first sentence of section 10(b) of the Act provides as follows:

> If the Secretary has reason to believe that an employer has failed to correct a violation for which a citation has been issued within the period permitted for its correction *(which period shall not begin to run until the entry of a final order by the Commission in the case of any review proceedings under this section initiated by the employer in good faith and not solely for delay or avoidance of penalties)*, the Secretary shall notify the employer by certified mail of such failure and of the penalty proposed to be assessed under section 17 by reason of such failure, and that the employer has fifteen working days within which to notify the Secretary that he wishes to contest the Secretary's notification or the proposed assessment of penalty.

(Emphasis added.)

[33] *See Beverly Healthcare-Hillview*, 21 BNA OSHC 1684, 1688, 2006 CCH OSHD ¶ 32,845, p. 52,839 (No. 04-1091, 2006) (consolidated) (Rogers, Commissioner, partial concurrence and dissent), *appeal docketed*, No. 06-4810 (3d Cir. Nov. 17, 2006); *Cagle's Inc.*, 21 BNA OSHC 1738, 1746, 2006 CCH OSHD ¶ 32,846, p. 54,842 (No. 98-0485, 2006) (Rogers, Commissioner, partial concurrence and dissent), *appeal docketed*, No. 06-16172 (11th Cir. Nov. 28, 2006); *U.S. Postal Serv.*, 21 BNA OSHC 1767, 1776 (No. 04-0316, 2006) (Rogers, Commissioner, dissent).

[34] The citation item in the 1993 case referred to the following violative condition:

> Located under the I-71 Bridge deck approximate Bay 31 an employee was working from a pick scaffold without standard guardrails and/or adequately secured lanyard/safety in that, the lanyard hook was just clipped to a column flange exposing the employee to a potential [fall] in excess of 200 feet.

48,766 (No. 93-1612, 2000) (consolidated), *aff'd* 273 F.3d 1131 (D.C. Cir. 2001), and the citation for the currently pending conditions[35] indicates that the citation items were for specific and disparate physical conditions and were based on specific employees not being protected from falls hazards of varying heights at different times and locations. The Secretary was not citing Manganas for a "practice," but rather for specific employees being exposed to fall hazards under discrete physical conditions. *See Alden Leeds, Inc. v. OSHRC*, 298 F.3d 256, 262 (3rd Cir. 2002) (court looked to wording of citation to determine if citation was based on discrete physical conditions as opposed to practice). I see no basis to consider these disparate citation items as being the "same condition." In addition, my colleagues' decision is clearly contrary to Commission precedent in *Major Construction*, where the Commission specifically affirmed the Secretary's ability to cite "multiple instances of violation of the same [fall protection] standard based on *different times* or *different places* of occurrence." *Major Constr. Corp.*, 20 BNA OSHC 2109, 2111, 2005 CCH OSHD ¶ 32,860, p. 53, 041 (No. 99-0943, 2005) (emphasis added).

Indeed, let's assume that Manganas had settled the first citation item, from the 1993 inspection, and agreed to abate it instead of litigating it. Let's also assume the Secretary subsequently initiated a failure to abate action under the same section 10(b) with respect to the three physically differentiated conditions pending here (instead of merely citing them as violations). Would my colleagues find that failure to abate action by the Secretary appropriate? Or would they indeed find these three pending items were *different* conditions from that cited in 1993? Given the facts and the case law, it would be hard to conclude the three pending items

[35] The citation items in this case referred to the following three violative conditions:

> Item 13a. Located under and along the east side of the south bound bridge deck, approximate panel point between U38-L38, an employee was observed working from a pick scaffold spray painting a column and the upper cord or steel area without standard guardrails or equivalent, exposing the employee to perimeter exterior falls in excess of 100' and interior falls of approximately 30'.
>
> Item 13b. Employees were exposed to a fall in excess of 140' while using the scaffold pick adjacent to the ladder suspended over the side of the bridge outside the containment area south of pier 4 in that there were no guard rails on the pick.
>
> Item 13c. Located under and along the east side of the south bound bridge deck approximate panel point U34, employees were working from a pick scaffold without standard guardrails or equivalent exposing employees to perimeter exterior falls in excess of 100' and interior falls in excess of 30'.

were not different conditions from that cited earlier and, accordingly, that a failure to abate action was not appropriate. *See Alden Leeds*, 298 F.3d at 262 (Secretary could cite for practice instead of discrete physical condition, but citation must provide adequate notice to that effect but did not do so because citation referred to individual infractions rather than collective requirements). Seen through that prism, my colleagues' approach here would apply section 10(b) inconsistently, yielding an illogical result, depending on whether the Secretary sought to use the statutory provision as a basis for a failure to abate action or an employer sought to use it to bar a subsequent citation.

My colleagues cite to *Hamilton Die Cast, Inc.*, 12 BNA OSHC 1797, 1804, 1986-87 CCH OSHD ¶ 27,576, p. 35,819 (No. 83-308, 1986) ("*Hamilton II*"), as support. But *Hamilton II* is distinguishable; it involved a face protection citation at a fixed facility and not a fall protection citation at a constantly changing construction site. *Id.* at 1798, 1986-87 CCH OSHD at 35,820. While the text of the face protection citation item in the first Hamilton case, *Hamilton Die Cast, Inc.*, 11 BNA OSHC 2169, 1984-85 CCH OSHD ¶ 26,983, p. 34, 688 (No. 79-1686, 1984), *rev'd & remanded*, 785 F.2d 308 (6th Cir. 1986)("*Hamilton I*"), is apparently unavailable, the citation item in the second Hamilton case specifically referred to an allegedly violative practice." *See Hamilton II* (ALJ), available at http://www.oshrc.gov/decisions/html_1986/83-0308.html. Furthermore, *Hamilton II's* broad reading of "condition" seems at odds with both earlier Commission decisions such as *Northern Metal Co.*, 3 BNA OSHC 1645, 1649, 1975-76 CCH OSHD ¶ 20,105, p. 23,921 (No. 3821, 1975) (consolidated) (respondent properly citable for additional hard hat violations even though final order not entered for alleged hard hat violation pending before Commission), and *Simmons, Inc.*, 6 BNA OSHC 1157, 1159 n.4, 1977-78 CCH OSHC ¶ 22,387, p. 26,987 n.4 (No. 12862, 1977) (Commissioner Barnako noting that a contest of a citation does not suspend employer's duty to comply with a standard cited in other areas of its operation) and a subsequent Commission decision, *Andrew Catapano Enter. Inc.*, 17 BNA OSHC 1776, 1778, 1995-97 CCH OSHD ¶ 31,180, p. 43,604 (No. 90-0050, 1996) (consolidated) (noting that ensuring a hardhat be worn one day does not ensure it was worn a month later), thus suggesting that *Hamilton II* may be inconsistent with Commission precedent.

The irony of my colleagues' "free pass" approach is richly illustrated by the fact that the condition cited in 1993 was subsequently affirmed as a violation by the Commission in 2000 (and by the D.C. Circuit in 2001). *Manganas Painting Co.*, 19 BNA OSHC at 1103-04, 2000

CCH OSHD at p. 45,767. Thus, we now know that Manganas' failure to guard the pick scaffolds in 1993 was a violation, but under my colleagues' reasoning, Manganas could suffer *no additional penalty* for any future failures to guard pick scaffolds—no matter at how many different times and places—until the entry of the Commission's final order on September 27, 2000. My colleagues have effectively given Manganas a seven-year free pass to do as they wish, and imperil employees in the meantime.[36] The potential future consequences of this decision—free passes for future violations - are extraordinarily troubling for enforcement of the Act and for worker safety.[37]

This application of section 10(b) in such a broad manner advocated by my colleagues serves only as an inappropriate restraint on the Secretary's authority under the Act and a free pass to bad actors to continue to violate the Act—and endanger their employees. I would reach the merits of these items and accordingly I must dissent.

/s/_____
Thomasina V. Rogers
Commissioner

Dated: April 25, 2007

[36] An employer would have a legitimate concern about potentially being subject to conflicting abatement obligations or large multiple penalties for the same type of violation when citation items alleging similar violations were pending before the Commission in different cases, especially where close questions of standard validity or applicability were at issue. As Commissioner Barnako pointed out in *Simmons, Inc.*, 6 BNA OSHC 1157, 1159 n.4, 1977-78 CCH OSHD ¶ 22,387, p. 26,987 n.4 (No. 12862, 1977), such concerns can be addressed procedurally through stay or consolidation of related cases at the Commission and the assessment of appropriate penalties. In contrast, however, an employer has no legitimate reason to avoid suffering *some* consequences for *multiple* violations of the same standard at different times and places, unless it wishes to act with impunity—a concept apparently endorsed by my colleagues.

[37] For reasons similar to those discussed above, I would take issue with my colleagues describing the condition cited in the 1993 fall protection case, with respect to the attachment of lanyards, as being "identical" to the one cited here.

SECRETARY OF LABOR, Complainant, v. MANGANAS PAINTING CO., INC., Respondent.	OSHRC DOCKET NO. 95-0103 & 95-0104 Consolidated

APPEARANCES:

For the Complainant:
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For the Respondent:
Robert L. Sabo, Esq., Robert H. Nichols, Esq., Schottenstein, Zox & Dunn, Columbus, Ohio
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Before: Administrative Law Judge: James H. Barkley

DECISION AND ORDER

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C. Section 651 *et seq.*; hereafter called the "Act").

Respondent, Manganas Painting Co., Inc. (Manganas), at all times relevant to this action maintained a place of business at the Jeremiah Morrow Bridge project, Lebanon, Ohio where it was engaged in abrasive blasting and painting. Respondent admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

Beginning June 17 through December 8, 1994, the Occupational Safety and Health Administration (OSHA) conducted an inspection of Manganas' Lebanon, Ohio worksite. As a result of that inspection, Manganas was issued citations alleging violations of the Act together with proposed penalties. By filing

a timely notice of contest Manganas brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

In an October 25, 1995 Order, in response to Manganas' motion to suppress, this judge rejected Respondent's challenges to the validity of OSHA's 1994 inspection of its work site. On October 31, 1995 this judge, in response to Manganas' motion for partial summary judgment, rejected Manganas' arguments regarding 1) the invalidity of the Lead Exposure in Construction Standard, 2) preemption of §1926.95(a), and 3) the availability of instance by instance penalties. Those issues, though revived in Manganas' brief, will not be addressed again here.

Prior to the hearing in this matter the parties reached a partial settlement agreement resolving Docket No. 95-0104, "serious" citation 1, items 2 through 9 (Tr. 13). That settlement has been submitted and is approved. The terms are adopted as Final Orders of the Commission. On December 8 - 13, 1995 and January 16 - 19, 1996, a hearing was held in Columbus, Ohio on the items remaining at issue. The parties have submitted briefs on the issues and this matter is ready for disposition.

DOCKET NO. 95-0104

Statement of Facts

Andrew Manganas, Respondent's vice-president, testified that at the time the OSHA inspection began, Manganas was engaged in removing lead based paint from the Jeremiah Morrow Bridge prior to repainting (Tr. 162). The lead based paint was removed by blasting the bridge with steel pellets, or "grit," propelled by compressed air within a containment area constructed of tarpaulins hung from both sides of the bridge and forming the floor of the containment area (Tr. 163-66, 536). Painters did the abrasive blasting (Tr. 164). The steel grit was then vacuumed up into "guzzler trucks" and dumped onto a conveyor leading to a recycling machine to be cleaned for reuse. The clean grit was then transferred to a "grit pot" and sent back to the containment area (Tr. 165-66, 537-38, 568). The grit was recycled by apprentices (Tr. 163). Upon completion of blasting in each area, a new containment area would be built; the old tarps salvaged or disposed of if torn (Tr. 170).

During blasting, the abrasive media, or grit, is propelled through a blast nozzle at extremely high velocities, striking the painted surface and stripping and pulverizing the coating (Tr. 831). The pulverized coating releases lead emissions into the atmosphere (Tr. 832).

Employees working within the containment area wore a Bullard 88 hood (Tr. 173, 394, 425). The Bullard hood provided protection from the grit ricochetting off the steel as well as supplying compressed air to the wearer (Tr. 173, 406, 575, 673, 834-35; Exh. R-51). A knitted collar fits around the workers

neck, providing a seal. The air is delivered in excess of 6 and less than 15 cubic feet per minute to maintain the helmet under positive pressure (Tr. 835).

Daniel Adley, an industrial hygienist testifying for Manganas (Tr. 828), testified that in abrasive blasting the likely concentration of lead generated in a containment area during abrasive blasting would unquestionably exceed the assigned protection factor for the Bullard 88 hood (Tr. 841, 862). Employees in the industry wear a half mask respirator underneath to provide additional protection (Tr. 841). Manganas employees wore a half mask respirator with a high-efficiency particulate HEPA air filter with an efficiency rating of 99.97% for removing particles .3 microns and above, in addition to a Bullard 88 hood (Tr. 173, 394, 425).

Abrasive blasting began on April 9, 1994 and shut down on June 28th for the July 4th holiday (Tr. 709). With the exception of July 14, blasting did not resume again until July 18th, continuing until, and concluding on July 23, 1994 (Tr. 710-11). Grit vacuuming and tarp removal continued a day or two after completion of blasting (Tr. 193, 217, 589-90).

Alleged Violation of §1926.62(d)(1)(iii)

Serious citation 1, item 1 alleges:

29 CFR 1926.62(d)(1)(iii): Full shift personal samples for lead were not collected including at least one sample for each shift for each job classification in each work area:

(a) No air sampling was conducted by the employer to determine the employee's personal exposure level to lead for the following jobs: 1) Tarp handling, 2) Housekeeper, and 3) Foreman working in and near containment.

Facts

Both painters/blasters and apprentices/grit suckers handled tarps (Tr. 171-72, 654, 856-57; Exh. C-23). Richard T. Gilgrist, an assistant area director in OSHA's Cincinnati area office (Tr. 526), testified that employees engaged in loading tarpaulins for disposal would disturb any particulate matter on the tarps, causing it to become airborne (Tr. 557-58; Exh. C-33, C-34). The resulting dust could potentially expose the employees to impermissible concentrations of lead (Tr. 557).

In the same way, the housekeeper, [redacted], was potentially exposed to lead when she moved and cleaned clothes worn by workers from the containment area (Tr. 560; Exh. C-35). Gilgrist stated that [redacted] was also potentially exposed to lead while cleaning the decontamination and changing trailers (Tr. 561). Foreman [redacted] worked in and around the containment area supervising

painters/blasters, and was potentially exposed to lead in excess of the action level (Tr. 162-68, 562, 857; Exh. C-13, p. 67).

Statute of Limitations

As a preliminary matter Manganas argues that the alleged violations took place more than six months prior to the date the citation was issued. Manganas states that the citation is barred by the statute of limitations set forth in §9(c) of the Act. Manganas does not dispute, however, that the citation was issued within six months of the time the Secretary received information establishing the existence of the alleged violation.

The Commission has recognized that employers have a continuing obligation to correct errors or omissions in their safety programs. *Safeway Store No. 914*, 16 BNA OSHC 1504, 1991-93 CCH OSHD ¶30,300 (No.91-373, 1993). Any failure to conduct required monitoring, therefore, constitutes an ongoing noncomplying condition, or violation, until such time as the required monitoring is corrected. In *Safeway Store No. 914,* the Commission held that §9(c) "merely requires that the Secretary act with reasonable diligence once the facts pertaining to the conduct in question come to the Secretary's attention." *Id. at* 1509. Because this citation was issued six months from the time the Secretary discovered the continuing condition, the fact that the alleged violation sprang into being prior to that period cannot act as a §9(c) bar.

Discussion

The cited standard provides:

> With the exception of monitoring under paragraph (d)(4), where monitoring is required under this section, the employer shall collect personal samples representative of a full shift including at least one sample for each job classification in each work area either for each shift or for the shift with the highest exposure level.

Manganas argues that the cited standard is not applicable in instance a)1) because "tarp handler" is not a separate job classification. This judge agrees. Complainant identifies no employees occupying the job classification of tarp handler. The record indicates that tarp handling was not a job classification, but was a task performed by both painters/blasters and apprentices/grit suckers, and which occupied only a small portion of their time. Tarp handling is subsumed under the painter and apprentice classifications; the standard does not require separate full shift monitoring for that specific task.

Housekeeper and containment area foreman, however, are specific job classifications occupied by identified employees, [redacted]. Manganas argues that industry standard does not require monitoring for these job classifications, because the employees occupying these positions can be

adequately protected by providing them with levels of protection equal to that of employees with higher potential levels of exposure. Daniel Adley, a certified industrial hygienist testifying for Respondent (Tr. 823-24), stated that it is standard in the industry not to test individuals whose potential exposure is less than that of other tested categories working in the same area (Tr. 857-58).

The standard unambiguously states that the employer *shall* collect *at least one full shift sample for each job classification in each work area*. Compliance with industry practice, in contravention of the clear language of the standard, is not a recognizable defense to violation of the standard. The violation is established for the job classifications of housekeeper and containment area foreman.

Penalty

A penalty of $7,000.00 was proposed for this item. The Secretary's proposed penalty does not take into account the statutory factors the Commission is required to consider in assessing a penalty, i.e. size of the employer, the gravity of the violation, and the employer's good faith and history of previous violations. *Nacirema Operating Co*., 1 BNA OSHC 1001, 1972 CCH OSHD ¶15,032 (No. 4, 1972). Rather Complainant proposes that the maximum penalty allowed for each violation be assessed, based on the Secretary's 1993 citations. (Tr. 615-616)[1], and on Manganas' refusal to cooperate in OSHA's attempts to sample employees during the 1994 inspection.

For the reasons set forth below, the Secretary's proposed penalty is set aside.

OSHA's 1994 Inspection

COs Gilgrist and Salsbury-Anderson testified that on June 17, they were able to conduct very little personal sampling (Tr. 236, 539). Although Manganas directed OSHA to employees for sampling, employees refused to wear the pumps, returning the pumps and sampling media in their hands; or claiming samples were lost (Tr. 237, 539).

On June 18, 1994 Manganas employees entered the containment area before OSHA was able to put pumps and sampling media into place (Tr. 545). Manganas refused to bring the men out of containment until lunch because of the expense involved (Tr. 546). OSHA then summoned federal marshals, who arrived on the site with the highway patrol around 11:30 a.m. (Tr. 547, 899).

During the lunch break on the 18th, Gilgrist asked Joseph Lang, foreman and superintendent for Manganas and Andrew Manganas' brother-in-law (Tr. 888, 890), about interviewing Manganas' employees

[1] A portion of the CO's testimony regarding the penalty criteria relied on by Complainant was stricken at the hearing upon Manganas' objection. Because of the testimony's probative value, however, that ruling is reconsidered and Manganas' objection overruled.

(Tr. 896). Lang admits that he told four or five employees, including Ron Acie and Joseph DiPaolo (Tr. 905), that they could talk to Gilgrist if they wanted, but that they didn't have to. Lang told them that as far as he was concerned, OSHA was "a bunch of f___ parasites" (Tr. 898, 905). Lang testified he didn't believe OSHA was there to protect the workers "They were there to hurt the contractor and fine the contractor" (Tr. 899). Lang testified that he was Acie and DiPaolo's supervisor and had the authority to fire and to discipline them (Tr. 912-13). Gilgrist testified that the employees consistently refused to talk to him following Lang's speech (Tr. 555, 615).

Salsbury-Anderson stated that Andrew Manganas made employees available for sampling in the afternoon of June 18, but that the employees refused to wear the pumps (Tr. 298). At Andrew Manganas' direction, three employees were sampled on June 19 (Tr. 298-99). OSHA personnel were unable to obtain any personal samples after June 19th (Tr. 238, 555).

Joseph DiPaolo, a blaster with Manganas, testified that he wouldn't talk to OSHA because "I worked for Manganas. They weren't there for us. . .I felt they were there hurting us more than they were trying to help us" (Tr. 801-02). Bill Miller, stated that he refused to talk to OSHA because they arrived on the site with marshals. "They acted like they were coming here to close the job down. It was like they were out there to hurt the company" (Tr. 817). Miller stated that Andrew Manganas told him to talk to OSHA if he wanted (Tr. 818). Alan Trevino, also a blaster, testified that he would not talk to OSHA personnel because they had "twisted my last interview all around to make it seem like I was saying something that I really wasn't saying" (Tr. 786). Trevino stated that no one from the company had ever told him not to speak with OSHA (Tr. 786). Trevino's last day on the Jeremiah Morrow bridge project was in May, 1994, before the OSHA investigation began. His testimony referred to a phone call he received from OSHA a week or two before he left (Tr. 787-89).

Di Paolo and Trevino both stated that they had trouble with the sampling pumps because the hoses weren't long enough and weren't securely fastened to the sampling media (Tr. 783). Both agreed that the pumps were cumbersome and kept falling off (Tr. 783, 799).

OSHA argues that Manganas' lack of good faith, typified by Joe Lang's remarks, prevented employees, who would otherwise have been cooperative, from cooperating with OSHA's air sampling. There is no evidence, however, that any resistance from employees resulted from Lang's remarks. There is ample evidence from which this judge could find instead that employee attitudes were generated by OSHA's investigative techniques in this case (*see* Tr. 1643-45).

While employers, and their foremen, are required to submit to OSHA inspections, they are neither required to like them or to conduct themselves in a manner that comports with the inspector's sensibilities. There is a distinction between the employer's or its employees' freedom of expression, and comments that rise to the level of impermissible interference or bad faith. In this case, OSHA has failed to establish that Lang's comments exceeded permissible individual expression and rose to the level of interference with OSHA's enforcement of the Act. Lang's comments are disregarded as evidence of Manganas' bad faith.

In addition, there is insufficient evidence that Manganas' attitude was entirely responsible for OSHA's inability to obtain representative breathing samples during their inspection. For instance, Jeffrey Cooper testified that during sampling conducted in April 1994 by his employer, Helix Environmental (Tr. 187, 385), one sample taken from a Mr. Hansen was invalidated when the sampling cassette was found in his breast pocket at the end of the day (Tr. 408-09; Exh. C-6). During Helix's May 19 sampling, one cassette from inside the hood was lost (Tr. 411). As noted above, Manganas employees testified that the sampling media were cumbersome, and kept falling off. Sampling difficulties were also experienced by OSHA. Such difficulties were not due solely to an uncooperative attitude by Manganas.

Finally, the undersigned finds the Secretary's reliance upon the 1993 inspection improper, as the citations subsequently issued were contested and the existence of any alleged violations have yet to be determined. It is well settled that for a respondent to be denied credit for a prior history of violations, the violation must have become a final order of the Commission. *See, S.G. Loewendick & Sons, Inc.*, 16 BNA OSHC 1954, 1994 CCH OSHD ¶30,558 (No. 91-2487, 1994). Accordingly, the Secretary's reliance upon the 1993 citations is disregarded for each item cited.

Based on the testimony and demeanor of the witnesses at hearing, it is clear that the penalty assessments were driven by personalities rather than by the statutory criteria. Manganas took a highly aggressive, sometimes questionable, approach to the 1994 inspection. OSHA responded with what appears to be vindictive assessments, assesing the maximum penalty without any real regard for the gravity of the underlying violations, or Manganas' history, size and good faith. Accordingly, all proposed penalties are set aside, and new penalties assessed according to the statutory criteria.

Gravity. Two employees were exposed to the cited hazard. [redacted] was responsible for supervising employees within the containment (Tr. 168, 580). CO Gilgrist stated that [redacted] was potentially exposed to airborne lead as he stood within 30 feet of the entrance to the containment area (Tr. 562). Manganas was aware that housekeepers or "yard people" cleaning the decontamination or changing trailers, and moving and cleaning drums of contaminated protective clothing might be exposed to lead in

excess of permissible levels (Tr. 179-82). [redacted], the housekeeper, was provided with a respirator (Tr. 699-700). The third instance cited, tarp handlers, was vacated.

[redacted], the foreman, had elevated blood levels throughout the 1994 job (Tr. 77, 80, 90-92, 95-99; Exh. C-16, C-18, C-19, C-20), making the failure to monitor his job classification grave. Since the purpose of air sampling is, in part, to determine if respirators should be worn, the fact that the housekeeper wore a respirator reduces the gravity of this violation.

Size. Manganas is a small employer, with approximately 40 employees (Tr. 617). Manganas would ordinarily be entitled to a reduction of the gravity based penalty for size alone. A reduction for size was improperly denied based on the 1993 citations.

History. Again, as noted above, the 1993 citations may not be considered for purposes of establishing a history of prior OSHA violations, and are disregarded. There is no evidence in the record of any final order against Manganas for prior violations of the lead standard.

Good Faith. Complainant ignores positive steps taken by Manganas prior to the inspection which show a significant level of acceptance of the Act's purposes. Manganas had provided employees with respirators, air supplied hoods, and air vacuums with filtration systems for the containment area (Tr. 929-31). It purchased a lead safety program (Tr. 174-76, C-13), and contracted for biological and air monitoring services to comply with the lead standard (Tr. 187, 385), and conducted the required monitoring for all but two of the job classifications cited here. While Manganas at times exhibited less than wholehearted good faith, its positive steps were significant and should be credited.

Penalty. A gravity based penalty is set at $3,500.00. Respondent is given credit for its size. lack of prior health violations and partial good faith. An adjusted penalty of $1,050.00 is appropriate.

Alleged Violations of §1926.62(d)(4)(i)

Willful citation 2, item 1 alleges:

29 CFR 1926.62(d)(4)(i): Where a determination conducted under paragraphs (d)(1), (2) and (3) of this section showed the possibility of any employee exposure at or above the action level the employer did not conduct monitoring which was representative of the exposure for each employee in the workplace who is exposed to lead:

a) Prior to June 9, 1994, initial monitoring performed for employees engaged in abrasive blasting after changes were made in ventilation within the containment area, was conducted with the sampling cassette placed under the abrasive blasting hood and therefore was not representative of employee exposure without regard to the use of respirators.

Willful citation 2, item 2 alleges:

29 CFR 1926.62(d)(4)(i): Where a determination conducted under paragraphs (d)(1), (2) and (3) of this section showed the possibility of any employee exposure at or above the action level the employer did not conduct monitoring which was representative of the exposure for each employee in the workplace who is exposed to lead:

a) Initial monitoring performed after changes in ventilation were made within the containment area, was conducted with the sampling cassette placed under the abrasive blasting hood and therefore was not representative of employee exposure without regard to the use of respirators when the employees performed grit vacuuming.

> Where exposure monitoring is required under this standard samples must be taken within the employee's breathing zone (i.e., personal samples) and must reflect the employee's exposure, without regard to the use of respirators, to airborne concentrations of lead over an eight-hour period. A full description of "Breathing zone" is provided in the OSHA Instruction CPL 2-2.20B, CH-1, Nov. 13, 1990, Directory of Technical Support. Basically, it encompasses a sampling area as close as practical to the nose and mouth of the employee.

Facts

James Joseph Sweeney, an industrial hygienist with OSHA, testified that he conducted lead sampling of Manganas employees working in containment in August and September of 1993 (Tr. 475). Sweeney testified that he took samples both inside and outside of the blaster's Ballard hoods at the request of Andrew Manganas, but explained to Manganas that sampling outside all protective clothing and equipment is mandatory under OSHA regulations; sampling inside the hood was optional (Tr. 476-77, 493).

In 1994 Manganas engaged Helix Environmental to conduct air monitoring at the Jeremiah Morrow site (Tr. 187, 385). Jeffrey Cooper conducted industrial hygiene monitoring during Manganas' abrasive blasting operations (Tr. 383-84). On April 11, 1994 Andrew Manganas asked Cooper to do personal exposure monitoring on two blasters and one vacuumer inside the containment area, as well as one individual at the recycling operation, and one individual outside the containment area on top of the bridge (Tr. 386-87; Exh. C-4). On April 12 Cooper returned to the Manganas site to perform additional testing. Cooper took an area sample in the containment, and personal samples from one vacuumer and two blasters in containment (Tr. 390-92). Cooper additionally sampled one employee in the recycling area outside the containment (Tr. 392). When sampling employees in containment, Cooper affixed the sampling pumps in the employee's breathing zones prior to their entry into containment, and prior to their donning their

Bullard hoods (Tr. 405, 418; Exh. C-5). Andrew Manganas would not allow Cooper to enter the containment area without prior medical monitoring for lead (Tr. 390).

Following receipt of its sampling results Helix notified Manganas of the results in an April 1994 letter (Exh. C-5). The letter informed Manganas that:

> "[personal sampling pumps and media were attached to workers performing abrasive-blasting and vacuuming activities prior to entering containment. Once inside containment, abrasive-blasting hood airline respirators were placed over the sampling media. This discrepancy with the Construction Industry Lead Standard (29 CFR 1926.62) was unavoidable since Helix Environmental, Inc. could not enter the containment area per instructions from Manganas Painting Company."

(Exh. C-5, p.2). Helix went on to state that the sampling protocol did allow the verification of adequacy of the combined use of respirators inside the containment (Exh. C-5).

On May 19, 1994, Helix returned to Manganas' work site to conduct additional monitoring. As he was placing the first sampling pump, Cooper told [redacted], the employee being sampled, that the sampling media needed to be placed on the outside of the blasting hood in order to conform with the OSHA construction standards (Tr. 405, 422; Exh. C-6). At the hearing, Cooper testified that Andrew Manganas informed his employee to disregard Cooper's instructions because he wanted the sampling media inside the blasting hood (Tr. 407-08).

Cooper returned to the Jeremiah Morrow Bridge project on June 9, 1994 with his supervisor, Ralph Froehlich (Tr. 410; Exh. C-12). At Mr. Froehlich's recommendation, samples were taken both inside and outside the blasting hood on that date (Tr. 411, 455; Exh. C-9). Only abrasive blasters were tested; no grit vacuumers were sampled on that date (Tr. 412).

Manganas does not dispute the material facts, admitting that it directed sampling cassettes be placed inside the Ballard blasting hood. Manganas defends against this item on the grounds that testing outside the hood did not provide it with the information it needed to ascertain the efficacy of its use of two respirators (Tr. 840-46, 862). Manganas argues that the cited standard does not contemplate circumstances where, as here, the employee must wear two respirators to reduce exposure levels to acceptable levels. CO Gilgrist admitted that there is no accepted method of ascertaining the protection factor provided by wearing both an air supplied hood over a respirator (Tr. 676). Daniel Adley testified that the only way to ensure that the worker is adequately protected is to test whether the sample inside the blast helmet is less than 500 ug/cm, the concentration limit for the half mask respirator worn inside the Bullard Hood (Tr. 844-45).

Discussion

The cited standard provides:

> (d)(4) *Positive initial determination and initial monitoring.* (i) Where a determination conducted under paragraphs (d)(1), (2) and (3) of this section shows the possibility of any employee exposure at or above the action level the employer shall conduct monitoring which is representative of the exposure for each employee in the workplace who is exposed to lead.
>
> Section 1926.62(d)(1)(ii) For the purposes of paragraph (d) of this section, employee exposure is that exposure which would occur if the employee were not using a respirator.

Manganas is cited here for failing to conduct proper initial monitoring for abrasive blasters prior to June 9 (item 1), or for grit vacuumers at any time (item 2). The Secretary maintains that Manganas failed to comply with the cited standard in that it failed, prior to June 9, to monitor any employees conducting abrasive blasting outside their blasting hoods. Complainant argues that at no time did Manganas conduct monitoring for grit vacuumers outside their Ballard hoods.

As noted above, Manganas maintains that its testing protocol is superior to that provided for in the cited standard.

The cited standard is clear in its requirement that sampling is to reflect the employee's exposure without regard to any respiratory protection. It requires that the employer to determine the composition of the atmosphere the employee would be exposed to prior to any filtering, *i.e.* as if the employee were not using respiratory protection. The record establishes that up until June 9, 1994, Manganas insisted that exposures for both abrasive blasters and for grit vacuumers be measured inside the Ballard hood. Both violations are established.

Willful

This is not a violation where the employer held a good faith belief that its testing techniques complied with those required by the cited standard; rather the employer in this case knew what was required, through its prior contact with OSHA and from conversations with Helix, its hygienist. Manganas deliberately chose to ignore the requirements of the standard, and to use its own monitoring methods. It has been established that an employer has no discretion to proceed with alternative program without OSHA approval. *Reich v. Trinity Industries, Inc.*, 16 F.3d 1149 (11th Cir., 1994). An employer's intentional disregard of OSHA requirements is "willful" *Id.* Manganas' knowing refusal to test in accordance with the standard, therefore, constitutes a willful violation.

Penalty

The Secretary proposes the maximum penalty of $70,000.00. In so doing, he failed to consider any of the statutory factors, as discussed in citation 1, item 1, above.

Accurate measurements of employee exposures are used to determine what, if any, protective measurements should be taken. At the time in question, Manganas had air purification units for its containment area, required its employees to wear respirators and Ballard hoods, had a written lead abatement program, and had retained the services of air and biological monitoring firms. When pressed by its testing firm, Manganas allowed sampling outside the Ballard hood. Since proper measurements were ultimately made, this violation had little effect on exposure measurements.

The minimum penalty for a single willful citation, $5,000.00 is assessed.

Alleged Violation of §1926.62(i)(3)(ii)

Willful citation 2, item 3 alleges:

29 CFR 1926.62(i)(3)(ii): Employee(s) exposed to lead in excess of the permissible exposure limit (PEL) were not required to shower at the end of the work shift:

a) The employer did not require and enforce employees who were exposed significantly above the permissible exposure limit to take showers at the end of the work shift:

Facts

While on site on June 9, 1994, Jeff Cooper noted and wrote in his log that only "half workers shower prior to exiting the site." Cooper stated at the hearing that approximately 10 workers still wore contaminated work clothing as they left the site (Tr. 414, 435). Cooper testified that he reported the failure of employees to shower to Andrew Manganas, and that when he was on the site later, at the end of June, he did observe employees showering (Tr. 438).

Mary Salisbury-Anderson, an industrial hygienist involved in the 1994 inspection (Tr. 233-35), testified that on June 17, 1994, she noted employees exiting the containment and leaving the site after changing their clothes, but without showering (Tr. 268-69, 317, 323). Salisbury-Anderson stated that only one employee was noticeably clean; about four others were still had dust from the grit on their hair and skin when they left, including DiPaolo (Tr. 269, 315). Salisbury-Anderson further stated that Andrew Manganas told her that [redacted], a blaster, was one of the only employees to shower at the end of the day, and that was the reason his blood leads were low (Tr. 270).

Gilgrist also testified that, based on the time employees spent in the decon trailer, and their appearance when they came out, he did not believe any of the employees he observed coming from the

containment area on June 17 had taken a shower (Tr. 541, 573). Andrew Manganas told him on the first day of the inspection that employees are required to wash up and change clothes before leaving the work site, and that they were encouraged to take showers (Tr. 534, 605). Gilgrist stated that Manganas said the workers were told to take showers, but that he couldn't bodily throw them in (Tr. 762).

[redacted], [redacted] testified that Manganas had a shower policy. Employees from the containment area were required to completely strip and shower before donning their street clothes (Tr. 784, 800, 818, 900). [redacted] stated that he had left without showering, and heard about it the next day (Tr. 818). [redacted] stated that he showered on a daily basis (Tr. 785). [redacted] further stated that they observed [redacted] and Andrew Manganas stand outside the showers at the end of the work day, where they would stop employees who had not showered and make them turn around and go back (Tr. 784). [redacted] recalled a couple of employees who did not shower at the end of their shift, [redacted] in particular (Tr. 790). [redacted] also were aware that some employees would sneak off without showering (Tr. 800, 818). [redacted] testified that he could tell when the men hadn't showered, because their hair wasn't wet (Tr. 901). When they were caught the men would return and shower (Tr. 901).

Discussion

The cited standard provides:

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

Manganas argues that the testimony of Gilgrist and Salsbury-Anderson is mere conjecture and cannot support a finding of a violation. This judge does not agree. That employees left the work site without showering is the only reasonable explanation for the observations of both CO's. In addition, their testimony is supported by that of employees who knew that others circumvented the showering requirement.

Manganas maintains that any violations were the result of unpreventable employee misconduct. In order to establish an unpreventable employee misconduct defense, the employer must establish that it had: established work rules designed to prevent the violation; adequately communicated those work rules to its employees (including supervisors); taken reasonable steps to discover violations of those work rules; and effectively enforced those work rules when they were violated. *New York State Electric & Gas Corporation*, 17 BNA OSHC 1129, 1993-95 CCH OSHD ¶30,745 (91-2897, 1995).

The evidence establishes that Manganas did have a policy requiring employees to shower after leaving the containment area, but that the policy was not followed or enforced. The record establishes that the work rule requiring showering was routinely ignored both during and prior to the OSHA inspection. Manganas and its supervisory personnel knew employees were not showering and at least on some occasions attempted to police the employees to ensure compliance. There is no evidence that any employee was ever disciplined for breaking the rule, however, and the infractions continued.

The violation is established.

Willful

Manganas had provided shower facilities, knew that showers were required, knew that employees were not taking showers, yet, inexplicably failed to require employees to take showers. The violation was willful.

Penalty

The gravity of the violation is high. Failure to shower allows employees to carry lead off site into their cars and homes and increases their long term exposure levels. Absorption of lead into the blood system interferes with the formation of hemoglobin, chronic exposure may result in anemia. High blood lead can interfere with and or damage or destroy kidney cells. Within the gastrointestinal system, lead can cause abdominal pains, cramping, and diarrhea or constipation. Acute lead levels affect the peripheral nervous system, interfering with motor nerves and causing muscle weakness or muscle loss. The central nervous system may also be affected, resulting in memory loss, or in acute levels, seizures or coma (Tr. 69-71). As discussed in items 10-18 below, 9 employees were shown to have elevated blood lead levels at or above 40 MG/dl, 4 had been removed from exposure to lead due to elevated blood lead levels. Failing to shower would have extended these employees' exposure to lead and increased the possibility of their developing lead associated cell damage.

The citation will be affirmed as a high gravity "willful" violation. Taking into account Manganas' size and history, discussed above, a penalty of $20,000.00 is deemed appropriate and will be assessed.

Alleged Violations of §1926.62(j)(2)(i)(A)

Willful citation 2, item 4 alleges:

29 CFR 1926.62(j)(2)(i)(A): The employer did not make available biological monitoring in the form of blood sampling and analysis for lead and zinc protoporphyrin levels to each employee covered under paragraphs (j)(1)(ii) of this section at least every 2 months for the first 6 months and every 6 months thereafter:

a) Employee A who worked as a blaster was due to be retested for blood lead and zinc protoporphyrin on 8/10/94 and the testing was not made available by the employer.

Willful citation 2, item 5 alleges:

29 CFR 1926.62(j)(2)(i)(A): The employer did not make available biological monitoring in the form of blood sampling and analysis for lead and zinc protoporphyrin levels to each employee covered under paragraphs (j)(1)(ii) of this section at least every 2 months for the first 6 months and every 6 months thereafter:

a) Employee B who worked as a blaster was due to be retested for blood lead and zinc protoporphyrin on 8/10/94 and the testing was not made available by the employer.

Willful citation 2, item 6 alleges:

29 CFR 1926.62(j)(2)(i)(A): The employer did not make available biological monitoring in the form of blood sampling and analysis for lead and zinc protoporphyrin levels to each employee covered under paragraphs (j)(1)(ii) of this section at least every 2 months for the first 6 months and every 6 months thereafter:

a) Employee C who worked as a laborer was due to be retested for blood lead and zinc protoporphyrin on 8/10/94 and the testing was not made available by the employer.

Willful citation 2, item 7 alleges:

29 CFR 1926.62(j)(2)(i)(A): The employer did not make available biological monitoring in the form of blood sampling and analysis for lead and zinc protoporphyrin levels to each employee covered under paragraphs (j)(1)(ii) of this section at least every 2 months for the first 6 months and every 6 months thereafter:

a) Employee D who worked as a blaster was due to be retested for blood lead and zinc protoporphyrin on 8/15/94 and the testing was not made available by the employer.

Willful citation 2, item 8 alleges:

29 CFR 1926.62(j)(2)(i)(A): The employer did not make available biological monitoring in the form of blood sampling and analysis for lead and zinc protoporphyrin levels to each employee covered under paragraphs (j)(1)(ii) of this section at least every 2 months for the first 6 months and every 6 months thereafter:

a) Employee E who worked as a blaster was due to be retested for blood lead and zinc protoporphyrin on 8/15/94 and the testing was not made available by the employer.

Willful citation 2, item 9 alleges:

29 CFR 1926.62(j)(2)(i)(A): The employer did not make available biological monitoring in the form of blood sampling and analysis for lead and zinc protoporphyrin levels to each employee covered under paragraphs (j)(1)(ii) of this section at least every 2 months for the first 6 months and every 6 months thereafter:

a) Employee F who worked as a blaster was due to be retested for blood lead and zinc protoporphyrin on 8/10/94 and the testing was not made available by the employer.

Facts

Manganas was aware that painters and laborers involved in abrasive blasting would be exposed to lead in excess of the action level either when in the containment area or in the open (Tr. 178). The employees in items 4 through 9 were identified as [redacted], respectively (Tr. 579).

Dr. Jeffrey Scott Davin, the facility medical director of Bethesda Care Blue Ash (Tr. 63), testified that Bethesda Care Blue Ash provided lead evaluation services to Manganas in 1994 (Tr. 74). Bethesda's services included lead surveillance, testing of ZPP levels (which ascertain the level of hemoglobin production in the blood [Tr. 70]), and physical examinations, including blood counts, urinalysis and evaluations of the kidney, and pulmonary function testing and history necessary for respirator medical approval (Tr. 74).

Linda F. Ford, director of the Bethesda SHARE occupational health program (Tr. 332-33), testified that pursuant to their contract with Manganas, Bethesda SHARE took blood lead samples at Manganas' work site on April 6, June 10, June 15, June 22, July 11 and July 19, 1994 (Tr. 338; Exh. C-15).

On June 10, 1994 blood lead tests were performed for employees [redacted] (Exh. C-17). Samples for [redacted] were drawn on June 15 (Exh. C-18). The results showed blood lead levels below 40 micrograms per deciliter (ug/dl).

The cited employees, with the exception of [redacted], underwent medical examinations required under §1926.62(j)(3) on July 19, 1994 (Exh. C-20, C-21).

In a July 22, 1994 letter Bethesda informed Manganas that repeat lead and ZPP levels would be drawn on August 12, 1994 for [redacted], among others who had been last tested between June 10 and June 15. Bethesda also informed Manganas that [redacted] needed to be scheduled for his lead exam as soon as possible (Exh. C-20, C-21).

On August 10, 1994, Andrew Manganas canceled the August 12 retests (Tr. 347; Exh. C-21). Linda Ford testified that she contacted Andrew Manganas, at which time he told her that the project was finishing up, that a number of employees had already left, and that Bethesda's services would no longer be required (Tr. 345-46; Exh. C-20). Ford stated that she encouraged Andrew Manganas to have exit leads drawn, but that he became angry and insisted that no more testing would be done (Tr. 348; Exh. C-20).

At the hearing Andrew Manganas testified that in the latter part of July, at his insistence, Ford contacted Dr. Davin regarding the necessity for repeat blood leads for employees who were leaving Manganas' employ. Manganas testified that Ford later called him, stating that Dr. Davin had told her that if blasting had been completed, no further evaluation was necessary (Tr. 199, 201, 208).

Ford stated that she never, either in person or on the telephone, told Andrew Manganas that no further blood lead levels were necessary for employees remaining on the site (Tr. 350).

Abrasive blasting on the Jeremiah Morrow Bridge continued until July 23, 1994 (Tr. 147-48). According to Ohio Department of Transportation (ODOT) personnel and as recorded in their payroll records, all the employees named in the OSHA citation were working on site on or after August 10, 1994 (Tr. 144, 584-88; Exh. C-1).

Discussion

The cited standard provides:

> *Biological monitoring"* - (i) *"Blood lead and ZPP level sampling and analysis.* The employer shall make available biological monitoring in the form of blood sampling and analysis for lead and zinc protoporphyrin levels to each employee covered under paragraphs (j)(1)(i)[2] and (ii) of this section on the following schedule:
>
> (A) For each employee covered under paragraph (j)(1)(ii) of this section, at least every 2 months for the first 6 months and every 6 months thereafter;

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

Manganas does not dispute Complainant's contention that the named employees were not retested during the periods provided for in the cited standard. Rather Manganas maintains that the standard becomes inapplicable once the employee's lead exposure ends. Because abrasive blasting ceased on the Jeremiah Morrow bridge project on July 23, 1994, argues Manganas, so did its requirement to provide blood lead monitoring.

The cited standard subsection (j)(2)(i)(A) states that it applies to each employee covered under paragraph (j)(1)(ii). Paragraph (j)(1)(ii) specifically provides:

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

Medical surveillance requirements, including blood sampling for lead and ZPP levels, is initially triggered for each employee who is or may be exposed by the employer at or above the action level for more than 30 days in any consecutive 12 months. CO Gilgrist testified that between April 9 and July 23, 1994, there were 66 days of abrasive blasting at the bridge site (Tr. 590). Andrew Manganas testified that any painter/blaster or apprentice/grit sucker could have been working inside the containment on any of those days (Tr. 164-65). The record clearly establishes that the surveillance requirements were triggered for each of the cited employees.

Complainant maintains that the surveillance requirements, once triggered, do not cease until the covered employee has completed a full monitoring cycle without a single full shift exposure above the action level or until the employee leaves that employer. It is well settled that the interpretation of a standard by the promulgating agency is controlling unless "clearly erroneous or inconsistent with the regulation itself." *Udall v. Tallman*, 380 U.S. 1, at 16, 87 S.Ct. 792, at 801 (1965). *See; Nooter Construction Co.*, 16 BNA OSHC 1572, 1994 CCH OSHD ¶29,729 (No. 91-237, 1994).

The medical surveillance provisions are part of this standard's comprehensive approach to prevention of lead-related disease. Its purpose is to supplement the standard's primary mechanisms of disease prevention, the elimination or reduction of airborne concentrations of lead and sources of ingestion, by facilitating the early detection of medical effects associated with exposure to lead.

Early detection is important because, as Davin testified, in the absence of tissue damage, most of the effects of blood lead are reversible (Tr. 71). Lead is normally eliminated from the body naturally over time (Tr. 72). In some cases, however, "chelation" therapy, introducing chemicals into the body which assists the kidney remove lead from the system, may be recommended (Tr. 72).

The undersigned finds that the Secretary's interpretation of §1926.62(j)'s reach is not unreasonable, His interpretation suits the purpose of the standard, in that it allows the employee to determine the effects of his most recent exposures, and whether his body is effectively eliminating accumulated blood lead, or if chelation or other treatment is desirable. Manganas' interpretation of the cited standard would relieve the employer of all obligation to provide blood monitoring for its employees so long as lead exposure ceased prior to the beginning of a new monitoring cycle, a result the drafters cannot have intended.[3]

The Secretary has proven the cited items.

Willful

The cited items were classified as "willful."

The cited standard is unclear as to the termination of its requirements. For example, Dr. Davin testified at the hearing that he believed the standard should, "from a medical standpoint," be applied to employees exposed to airborne lead at levels between 70 to 100 ug/m^3 for more than a week (Tr. 84-85, 134-35), a different interpretation from OSHA's, though also reasonable. This judge cannot find that Manganas' interpretation of the standard was unreasonable, or that it amounted to reckless indifference to employee safety. The violations are not willful.[4]

Penalty

The gravity of these violations is moderate. The number of days employees were exposed during the final testing cycle was low, and all lead exposure had ceased prior to the testing date. None of the employees named previously showed elevated blood lead levels. Taking into consideration the gravity of the violations, and giving credit based on the other statutory criteria, as discussed in item 1 above, an adjusted penalty of $1,200.00 for each violation of §1926.62(j)(2)(i)(A) cited in items 4 through 9 is deemed appropriate and will be assessed.

Alleged Violation of §1926.62(j)(2)(i)(B)

Willful citation 2, item 10 alleges:

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[3] Manganas' contention that the Secretary's interpretation would require it to hunt down ex-employees to conduct blood monitoring is unfounded. Manganas was not cited for failure to test any former employees, nor has Complainant at any time suggested that the requirements of §1926.62(j) apply to non-employees.

[4] Though Manganas did not raise the issue, I find that the parties have impliedly consented to try the issue of whether the violation was serious in the absence of a sufficient showing as to willfulness. *See, Atlas Industrial Painters*, 15 BNA OSHC 1215, 1991-93 CCH OSHD ¶29,439 (No. 87-619, 1991). In its brief, Respondent argues that the cited violations should be found to be serious, rather than willful. (Respondent's brief, p.70)

29 CFR 1926.62(j)(2)(i)(B): The employer did not make available biological monitoring in the form of blood sampling and analysis for lead and zinc protoporphyrin levels to each employee covered under paragraphs (j)(1)(i) or (ii) of this section whose last blood sampling and analysis indicated a blood lead level at or above 40 ug/dl, at least every 2 months until two consecutive blood samples and analysis indicated a blood lead level below 40 ug/dl:

a) Employee A who worked as a grit vacuumer was due to be retested for blood lead and zinc protoporphyrin on 8/10/94 and the testing was not made available by the employer. The employee's last blood lead was taken 6/10/94 and the level was 47.3 ug/dl.

Willful citation 2, item 11 alleges:

29 CFR 1926.62(j)(2)(i)(B): The employer did not make available biological monitoring in the form of blood sampling and analysis for lead and zinc protoporphyrin levels to each employee covered under paragraphs (j)(1)(i) or (ii) of this section whose last blood sampling and analysis indicated a blood lead level at or above 40 ug/dl, at least every 2 months until two consecutive blood samples and analysis indicated a blood lead level below 40 ug/dl:

a) Employee B who worked as a blaster was due to be retested for blood lead and zinc protoporphyrin on 8/15/94 and the testing was not made available by the employer. The employee's last blood lead was taken 6/15/94 and the level was 47.7 ug/dl.

Willful citation 2, item 12 alleges:

29 CFR 1926.62(j)(2)(i)(B): The employer did not make available biological monitoring in the form of blood sampling and analysis for lead and zinc protoporphyrin levels to each employee covered under paragraphs (j)(1)(i) or (ii) of this section whose last blood sampling and analysis indicated a blood lead level at or above 40 ug/dl, at least every 2 months until two consecutive blood samples and analysis indicated a blood lead level below 40 ug/dl:

a) Employee C who worked as a recycler operator was due to be retested for blood lead and zinc protoporphyrin on 8/10/94 and the testing was not made available by the employer. The employee's last blood lead was taken 6/10/94 and the level was 45.7 ug/dl.

Willful citation 2, item 13 alleges:

29 CFR 1926.62(j)(2)(i)(B): The employer did not make available biological monitoring in the form of blood sampling and analysis for lead and zinc protoporphyrin levels to each employee covered under paragraphs (j)(1)(i) or (ii) of this section whose last blood sampling and analysis indicated a blood lead level at or above 40 ug/dl, at least every 2 months until two consecutive blood samples and analysis indicated a blood lead level below 40 ug/dl:

a) Employee D who worked as a site superintendent was due to be retested for blood lead and zinc protoporphyrin on 8/10/94 and the testing was not made available by the employer. The employee's last blood lead was taken 6/10/94 and the level was 40.5 ug/dl.

Willful citation 2, item 14 alleges:

29 CFR 1926.62(j)(2)(i)(B): The employer did not make available biological monitoring in the form of blood sampling and analysis for lead and zinc protoporphyrin levels to each employee covered under paragraphs (j)(1)(i) or (ii) of this section whose last blood sampling and analysis indicated a blood lead level at or above 40 ug/dl, at least every 2 months until two consecutive blood samples and analysis indicated a blood lead level below 40 ug/dl:

a) Employee E who worked as a grit vacuumer was due to be retested for blood lead and zinc protoporphyrin on 8/10/94 and the testing was not made available by the employer. The employee's last blood lead was taken 6/10/94 and the level was 41.2 ug/dl.

Facts

The employees in items 10 through 14 were identified as [redacted], respectively (Tr. 580).

The June 10 and June 15, 1994, blood lead monitoring results showed employees with elevated blood lead including: [redacted], 45.7 MCG/DL; [redacted], 45.7 MCG/DL; [redacted], 40.5 MCG/DL; [redacted], 41.2 MCG/DL (Tr. 80-90; Exh. C-17); and [redacted], 47.7 MCG/DL (Tr. 90-92; Exh. C-18).

On July 12, medical examinations were performed for [redacted] (Exh. C-20, C-21).

In its July 22, 1994 letter Bethesda informed Manganas that repeat lead and ZPP levels would be drawn on August 12, 1994 for [redacted], along with others who had been last tested between June 10 and June 15 (Exh. C-20). On August 10, 1994 Andrew Manganas canceled the scheduled retests (Tr. 345-47).

Discussion

The cited standard provides:

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

The cited standard applies to the employees named in this item in that each employee showed blood lead levels above 40 ug/dl following monitoring conducted under (j)(1)(i) and/or (ii).

Manganas admits that follow up testing was not conducted after the June testing which first showed the named employees' elevated blood leads levels.[5] Manganas merely reiterates its argument above, *i.e.* that its obligation to conduct testing ends upon the cessation of blasting. Manganas' argument is without merit regarding this item. The cited standard clearly states that testing shall continue until two consecutive blood samples show blood lead levels below 40 ug/dl. Manganas' own safety program requires that:

> Employees with blood lead levels above 40 micrograms/100 grams, will continue to be provided blood lead tests every four weeks after lead exposure project ends until their blood lead levels are below 40 micrograms/100 grams.

(Tr. 191-92; Exh. C-13).

The cited violations have been established.

Willful

Here, unlike items 4 through 9, where the standard is unclear as to when the employer's obligation to conduct blood monitoring ends, the standard is clear and unambiguous. The employer's duty only ends once the employee's blood lead falls below 40 ug/dl.

Additionally, Manganas ignored the advice of its consultants at Bethesda Care[6], who had been retained for the purpose of ensuring Manganas' compliance with OSHA requirements, in favor of its own interpretation of the standard. In items 4 through 9, where the standard is unclear, failure to credit Bethesda's interpretation does not make the violation willful. Here, however, where the requirements of the standard are unambiguous, Manganas' failure to follow the advice of its testing firm to conduct exit tests is evidence the deliberate nature of Manganas' refusal to comply with the standard.

The violations were shown to be "willful."

Penalty

Secretary proposes penalties of $70,000.00 for each of the cited items. The violations are found to be of high gravity given the elevated blood lead levels of the employees subject to this section.

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[5] Manganas' contention that it mistook the July 19 medical exams for blood lead exams cannot be credited. Medical examinations for employees covered by the lead standard are required under a separate subsection (j)(3) of the standard; the exam results are easily distinguishable from those for blood monitoring, in that they contain no blood lead levels (Exh. C-20, C-21).

[6] I resolve the contradictory testimony in favor of Ms. Ford. Based on my observation of both Ms. Ford's and Andrew Manganas' demeanor and character during the hearing, I find her testimony more credible.

Manganas' failure to provide the required testing could have prevented the early detection of anemia, and damage to the kidney and/or peripheral and central nervous systems.

As above, Complainant improperly failed to adjust the proposed penalty given Manganas' size, and prior history. Manganas' size and the absence of any prior health citations are considered. Inasmuch as the violations are "willful," no credit for good faith is allowed. Based on the statutory criteria, a penalty of $15,000.00 each is deemed appropriate for items 10 through 14 and will be assessed.

Alleged Violation of §1926.62(j)(2)(i)(C)

Willful citation 2, item 15 alleges:

29 CFR 1926.62(j)(2)(i)(C): The employer did not make available biological monitoring in the form of blood sampling and analysis for lead and zinc protoporphyrin levels to each employee covered under paragraphs (j)(1)(i) or (ii) of this section who is removed from exposure to lead due to an elevated blood lead level at least monthly during the removal period:

a) Employee A who worked as a grit vacuumer was due to be retested for blood lead and zinc protoporphyrin on 8/19/94 and the testing was not made available by the employer. The employee was on medical removal protection, which required monthly monitoring. The employee's last blood lead was taken 7/19/94.

Willful citation 2, item 16 alleges:

29 CFR 1926.62(j)(2)(i)(C): The employer did not make available biological monitoring in the form of blood sampling and analysis for lead and zinc protoporphyrin levels to each employee covered under paragraphs (j)(1)(i) or (ii) of this section who is removed from exposure to lead due to an elevated blood lead level at least monthly during the removal period:

a) Employee B who worked as a blaster was due to be retested for blood lead and zinc protoporphyrin on 8/11/94 and the testing was not made available by the employer. The employee was on medical removal protection, which required monthly monitoring. The employee's last blood lead was taken 7/11/94.

Willful citation 2, item 17 alleges:

29 CFR 1926.62(j)(2)(i)(C): The employer did not make available biological monitoring in the form of blood sampling and analysis for lead and zinc protoporphyrin levels to each employee covered under paragraphs (j)(1)(i) or (ii) of this section who is removed from exposure to lead due to an elevated blood lead level at least monthly during the removal period:

a) Employee C who worked as a painter was due to be retested for blood lead and zinc protoporphyrin on 8/19/94 and the testing was not made available by the employer. The employee was on

medical removal protection, which required monthly monitoring. The employee's last blood lead was taken 7/19/94.

Willful citation 2, item 18 alleges:

29 CFR 1926.62(j)(2)(i)(C): The employer did not make available biological monitoring in the form of blood sampling and analysis for lead and zinc protoporphyrin levels to each employee covered under paragraphs (j)(1)(i) or (ii) of this section who is removed from exposure to lead due to an elevated blood lead level at least monthly during the removal period:

a) Employee D who worked as a foreman was due to be retested for blood lead and zinc protoporphyrin on 8/19/94 and the testing was not made available by the employer. The employee was on medical removal protection, which required monthly monitoring. The employee's last blood lead was taken 7/19/94.

Facts

Test results from the initial blood lead testing revealed employees with elevated lead levels including: [redacted], at 29.9 (ug/dl); [redacted], at 35.9 ug/dl (Tr. 77, 80; Exh. C-16). In June 1994, Davin received a second set of blood lead test results on 24 Manganas employees. Employees with elevated blood lead on that date included: [redacted], 49.2 ug/dl; [redacted], 82.4 ug/dl; [redacted], 51.7 ug/dl; and [redacted], 55.2 ug/dl (Tr. 90-92; Exh. C-18).

On June 16, 1994 Bethesda informed Manganas by letter that [redacted] and [redacted], among others, needed to be retested because their blood lead levels were above 50.0 Ug/dl Bethesda's letter stated that those employees needed to be re-tested for lead levels and ZPPs on June 22, 1994, when Bethesda would have an R.N. on the work site for that purpose (Exh. C-18). Upon re-testing [redacted] was found to have a blood lead level of 53.4 ug/dl (Tr. 95; Exh. C-19). [redacted] did not report for the June 22 retesting, but were retested at 71.9 and 58.6 ug/dl, respectively on June 25, 1994 (Tr. 95-99; Exh. C-19, C-20).

Bethesda recommended medical removal from lead exposure for [redacted] in a June 28, 1994 letter (Tr. 93-97; Exh. C-19). Those employees were subsequently prevented from entering Manganas' containment area (Tr. 185). An attachment to the June 28, 1994 letter also schedules a July 10, 1994 repeat blood lead level for [redacted], whose blood lead was 49.2 on June 10 (Tr. 99; Exh. C-19).

On July 11, 1994, [redacted] blood levels were tested at 40.6 ug/dl (Tr. 109; Exh. C-20).

On July 19, 1994 blood lead and ZPP levels were taken from [redacted], who was found to have a blood lead of 49.2 ug/dl, [redacted], who had blood leads at 47.9 and 64.9 ug/dl, respectively (Tr. 103-11; Exh. C-20).

In a July 22, 1994 letter Bethesda informed Manganas that [redacted] were due for lead and ZPP levels the week of August 19, 1994 (Tr. 103-11; Exh. C-20).

On August 10, 1994, Andrew Manganas canceled the August 12 retests (Tr. 347; Exh. C-21).

Manganas' lead program requires that employees removed from lead exposure due to elevated blood leads be provided with blood lead tests until two consecutive tests indicate that their blood lead levels are below 40 ug/dl, or until receiving a physicians recommendation that they be returned to their former job status (Tr. 192; Exh. C-13).

Discussion

The cited standard provides:

> The employer shall make available biological monitoring in the form of blood sampling and analysis for lead and zinc protoporphyrin levels to each employee covered. . .on the following schedule.
>
> * * *
>
> (C) For each employee who is removed from exposure to lead due to an elevated blood lead level at least monthly during the removal period.

The "removal period" is defined under §1926.62(k)(iii)(A) as:

> (1) For an employee removed due to a blood lead level at or above 50 ug/dl when two consecutive blood sampling tests indicate that the employee's blood lead level is at or below 40 ug/dl.
> (2) For an employee removed due to a final medical determination, when a subsequent final medical determination results in a medical finding, determination, or opinion that the employee no longer has a detected medical condition which places the employee at increased risk of material impairment to health from exposure to lead.

The employees for whom citations were issued were on medical removal pursuant to Bethesda's recommendation. Continuing biological monitoring was required for those employees until such time as they showed two blood lead levels under 40 ug/dl, or until a formal medical finding stated that those employees were no longer at risk. The evidence shows that neither criteria was satisfied prior to Andrew Manganas cancelling the required follow-up monitoring. The violations are established.

Willful

Despite the clear language of the standard, Manganas' own safety program, and the recommendation of its biological monitoring consultant, Manganas canceled follow up blood lead tests for the employees on medical removal. Complainant has shown a "willful" violation.

Penalty

Of the three groups Manganas failed to provide biological monitoring for, those without elevated blood lead, those with elevated blood lead, and those whose blood lead was so elevated that they were placed on medical removal, the last group was at greatest risk and so carries the highest gravity. Considering the high gravity, and adjusting for size and lack of prior violations, but not for good faith, a penalty of $20,000.00 is found appropriate for each of the cited violations.

DOCKET NO. 95-0103

Alleged Violation of §1926.500(d)(1)

Serious citation 1, item 1 alleges:

29 CFR 1926.500(d)(1): Open-sided floors or platforms, 6 feet or more above adjacent floor or ground level, were not guarded by a standard railing or the equivalent on all open sides:

(a) Employees were exposed to a fall of approximately 60' to the ground after descending a ladder to the east side of pier 6 and unhooking from a retractable lanyard. The employees were not protected while standing on and stepping from an open-sided 2' x 5' concrete pier structure.

Facts

CO John Collier testified that on June 24, 1994, while he was on the Jeremiah Morrow Bridge site, he observed three Manganas employees, including Ron Acie and an unidentified worker nicknamed by OSHA as "Mr. Congeniality," step off of a ladder onto the unguarded pier cap of pier 6, which was 60 feet above the ground. The employees, who had been wearing safety belts and lanyards hooked to a lifeline, unhooked, and stood briefly on the pier cap before stepping over onto the structural steel of the bridge (Tr. 1415-18; Exh. C-74, C-106A).

Discussion

The cited standard states:

> Every open-sided floor or platform 6 feet or more above adjacent floor or ground level shall be guarded by a standard railing, or the equivalent, as specified in paragraph (f)(1)(i) of this section, on all open sides, except where there is entrance to a ramp stairway or fixed ladder.. . .

Complainant maintains that pier cap 6 is a "platform" for purposes of the standard. A platform is defined at §1926.502(e) as:

> A working space for persons, elevated above the surrounding floor or ground such as a balcony or platform for the operation of machinery and equipment.

The record fails to establish that employees ever used the cited pier cap as a working space, *see Superior Electric Co.*, 16 BNA OSHC 1494, 1993 CCH OSHD ¶30,286 (No. 91-1597, 1993). The record establishes that the conduct for which Manganas was cited did not involve working from the pier cap. The Secretary failed to establish the cited violation. Citation 1, item 1 is vacated.

Alleged Violation of §1926.1053(b)(1)

Serious citation 1, item 2 alleges:

29 CFR 1926.1053(b)(1): Because of the portable ladder's length, the ladder side rails did not extend to at least 3 feet (.9 m) above the upper landing surface to which the ladder was used to gain access and the ladder was not secured at its top to a rigid support, and a grasping device, such as a grab rail, was not provided to assist the employees in mounting and dismounting the ladder:

(a) The ladder used by employees at approximate panel point 49 on the east side of the bridge extended only 22 ½" above the top of the concrete barrier from which it was suspended.

Facts

CO Collier testified that on June 17, 1994 he observed two Manganas employees, Acie and an unidentified Manganas employee climb down a ladder suspended from the concrete parapet by means of a sky hook at panel point 49 onto the catwalk beneath the bridge and then onto the structural steel of the bridge itself (Tr. 1419-21; Exh. C-75, C-76, C-77). The ladder was secured to the parapet with one line and a lifeline with rope grabs was hung beside the ladder (Tr. 1524, 1611; Exh. C-75). Andrew Manganas testified that the sky hook was equipped with a grab rail (Tr. 1609). Collier maintained that there was no grab rail (Tr. 1422). Manganas stated that the cited ladder extended 56 inches above the bridge deck, or "landing," and that employees climbed over, rather than onto the parapet or concrete barrier (Tr. 1722).

Exhibit C-77 shows a Manganas employee standing on the parapet either after or in preparation to climbing the ladder. On June 18 Collier measured the distance that the top of the ladder extended above the concrete parapet. From the top of the barrier to the top of the ladder measured 22-1/2 inches (1419-21; Exh. C-75).

Collier testified that the ladder presented a falling hazard to employees trying to access the ladder without adequate room to grab the side rails (Tr. 1422). The fall from the ladder to the ground was approximately 100 feet (Tr. 1422).

Discussion

The cited standard provides:

> When portable ladders are used for access to an upper landing surface, the ladder side rails shall extend at least 3 feet (.9m) above the upper landing surface to which the ladder is used to gain access; or, when such an extension is not possible because of the ladder's length, then the ladder shall be secured at its top to a rigid support that will not deflect, and a grasping device, such as a grab rail shall be provided to assist employees in mounting and dismounting the ladder. In no case shall the extension be such that ladder deflection under a load would, by itself, cause the ladder to slip off its support.

The evidence establishes that Manganas employees utilized the top of the concrete parapet as a landing, and that the ladder did not extend the required 36" above that landing. The ladder was secured at the top, but the grab rail on the sky hook, if any, did not comply with the standard because it was inadequate to assist employees mounting and dismounting the ladder, in that it was mounted at the level of the employees' feet while standing on the parapet.

The Secretary has proven the cited violation.

Penalty

A penalty of $7,000.00 was proposed for this violation. The violation was properly classified as "serious." A fall from 100 feet would likely result in death or serious bodily harm. The gravity of the violation is, nonetheless, low. The ladder extended 22 of the 36 inches required. Employees could access or dismount from the ladder without standing on the parapet; moreover, a lifeline and rope grabs were provided for use by employees, all of whom wore safety harnesses.[7] Taking the gravity and the other statutory factors, discussed above, into account, a penalty of $500.00 is deemed appropriate and will be assessed.

Alleged Violations of §1926.95(a)

Willful citation 2, item 1 alleges:

29 CFR 1926.95(a): Appropriate personal protective equipment was not used by employees in all operations where there was exposure to hazardous conditions.

[7] The record shows that not all employees used their safety belts while climbing the ladders. However, Manganas was also cited for the employees' failure to tie off, and that issue will be discussed separately.

(a) Employee #1 was exposed to a fall in excess of 140' while climbing a ladder suspended over the side of the bridge outside the containment area south of pier 4. The employee was exposed to falling while using the ladder in that a life line and lanyard provided at this location were not used.

Willful citation 2, item 2 alleges:

29 CFR 1926.95(a): Appropriate personal protective equipment was not used by employees in all operations where there was exposure to hazardous conditions.

(a) Employee #2 was exposed to a fall in excess of 140' while climbing a ladder suspended over the side of the bridge outside the containment area south of pier 4. The employee was exposed to falling while using the ladder in that a life line and lanyard provided at this location were not used.

Willful citation 2, item 3 alleges:

29 CFR 1926.95(a): Appropriate personal protective equipment was not used by employees in all operations where there was exposure to hazardous conditions.

(a) Employee #3 was exposed to a fall in excess of 140' while climbing a ladder suspended over the side of the bridge outside the containment area south of pier 4. The employee was exposed to falling while using the ladder in that a life line and lanyard provided at this location were not used.

Facts

OSHA inspectors left the Manganas site prior to the 4th of July holiday, but surreptitiously returned to an area below the bridge on July 7th through the 12th (Tr. 1413, 1467-69, 1642-44). Without informing Manganas, COs Medlock and Collier drove to a scenic overlook from a roadside rest area, and climbed approximately ½ mile along hiking trails (Tr.1216, 1403-04, 1525-26), to a hidden area approximately 100-300 yards from the bridge, where they observed and photographed the Manganas site through binoculars and telephoto lenses, while dressed in camouflage (Tr. 1290-92, 1330-31; Exh. R-121).

CO Collier testified that on July 11 and 12, 1994, from the woods adjacent to Manganas' work site, observed and photographed Manganas employees, including Tim McCully, Bill Miller and a thin black man, climbing a ladder suspended from the bridge 140 feet above the ground without the use of fall protection (Tr. 1422-28; 1527). A lifeline with a rope grab and lanyard hung down one side of the ladder; the ladder was secured to the parapet with a second line (Tr. 1524, 1611; Exh. C-75). Though the employees ascended or descended the ladder five or six times during those two days, Collier stated, only once did an employee, the thin black man, attach his safety belt to the lifeline (Tr. 1422-28; Exh. C-76, C-77, C-78).

Collier identified the employee in the baseball cap in Exh. C-76 and C-77 as Tim McCully (Tr. 1422-23). At the hearing McCully acknowledged that it was he in Complainant's Exh.C-76, but maintained that he was tied off at all times (Tr. 1881-82)[8]. Collier identified Bill Miller as the man standing on the bridge in Exh. C-76 (Tr. 1423). The thin black man in Exh. C-78 was not identified; Collier stated that he had seen the man on site, painting, throughout the inspection (Tr. 1423). Miller testified that the man in C-78 probably worked for Ahern (Tr. 1831). Andrew Manganas testified that Ahern and Associates, another contractor on the site, did some painting on the bridge piers (Tr. 1154-55). Collier stated that there was a safety net rigged in this area, but stated that it did not extend out to the end of the pic where the bottom of the ladder was located (Tr. 1426).

Discussion

The cited standard requires:

> *Protective equipment*, including personal protective equipment for eyes, face, head, and extremities, protective clothing, respiratory devices, and protective shields and barriers, *shall be* provided, *used*, and maintained in a sanitary and reliable condition *wherever it is necessary by reason of hazards of* processes or *environment,* chemical hazards, radiological hazards, or mechanical irritants *encountered in a manner capable of causing injury or impairment in the function of any part of the body through* absorption, inhalation or *physical contact*. (emphasis added).

Applicability. As a threshold matter, in the Order of October 31, 1995, this judge found that §1926.95 is not preempted by the ladder standard, and does require the use of personal fall protection devices where a reasonable person familiar with the circumstances would recognize a hazard warranting the use of such equipment.[9] The record establishes that Manganas itself recognized the existence of a fall hazard necessitating the use of safety belts and lanyards. Manganas issued belts and lanyards to its employees, and had a work rule requiring their use whenever working from heights in excess of six feet (Tr. 1157, 1163-64; Exh. C-68). Section 1926.95 is, therefore, applicable, mandating the use of personal fall protection in the cited circumstances.

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[8] Based on this judge's observations of Tim McCully's character and demeanor at the hearing, McCully was not deemed a credible witness, and his testimony is discounted.

[9] Subpart E, **Personal Protective and Life Saving Equipment**, is introduced by §1926.95, *Criteria for personal protective equipment.* Subpart E specifically contemplates the use of, and includes sections dealing with safety belts, lifelines, and lanyards in addition to head protection, hearing protection and, respiratory protection among others. *See*, Subpart E, §1926.104.

Exclusion. Manganas maintains that the Secretary's surreptitious continuation of its investigation off site violated the provisions of §8(a) of the Act, which required that inspections be conducted "at reasonable times, and within reasonable limits, and in a reasonable manner," and §8(e), which requires that an employer representative "be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any workplace. . .."

In addition, Manganas was clearly denied its right under §8(e) to be represented during that portion of the inspection. The record amply supports Manganas' contention that OSHA "behaved unreasonablyand inappropriately, its camouflaged COs concealing themselves in the woods conducting a clandestine survellence complete with paramilitary trappings to obtain evidence not otherwise available to them. Such activity is inconsistent with 8(a) requirements that inspections be "within reasonable limits, and in a reasonable manner." However, in *Gem Industrial, Inc.,* 17 BNA OSHC 1185, 1995 CCH OSHD ¶ (No. 93-1122, 1995), the Commission held that there is no remedy for the Secretary's failure to comply with the provisions of §8(a) or (e), unless the record reveals that such noncompliance substantially prejudiced the cited employer. *Id.* The Commission went on to hold that a general claim of prejudice is not enough, specific evidence of the loss of material or mitigating information is required. *Id.*

Manganas maintains that it was prejudiced, in that it was unable to investigate the videotaped violations or to present any mitigating facts or dispute any assumptions made by OSHA during its investigation. However, Manganas has had ample opportunity to examine Complainant's witnesses, as well as Complainants photographic evidence, and its argument is unsupported by specific instances of prejudice.

While Manganas' claim is too general to justify wholesale exclusion of the evidence obtained during the off-site inspection, any real questions of fact arising out of the evidence will be resolved in favor of Respondent to overcome any prejudice suffered by Manganas due to Complainant's unreasonable conduct.

Violation. Both the testimonial and photographic evidence clearly establish that the testifying CO had a clear view of Tim McCully climbing the ladder; and that McCully did not tie off. Manganas' contention that McCully was tied off to a second, invisible, lifeline is rejected. It is clear from the record that the only other rope attached to the cited ladder and/or sky hook was used to secure the ladder, not as a lifeline. It is undisputed that McCully was exposed to a 140 foot fall hazard. The violation cited in item 1 is proven.

The photographic evidence does not, however, show Bill Miller climbing the ladder. Normally, the unrefuted, though unsupported, testimony of the CO would be sufficient to establish the violation. Here, however, Manganas could never refute the CO's testimony because it was denied an opportunity to observe OSHA's investigation. The COs unsupported testimony is rejected; the violation is not proven.

Because he was never identified, and because the record contains no specific evidence of the tasks the thin black man was performing, there is insufficient evidence in the record from which to determine whether he was a Manganas employee.

Items 2 and 3 will be vacated.

Employee Misconduct

Manganas maintains that any violation was the result of employee misconduct. In order to establish an unpreventable employee misconduct defense, the employer must establish that it had: established work rules designed to prevent the violation; adequately communicated those work rules to its employees (including supervisors); taken reasonable steps to discover violations of those work rules; and effectively enforced those work rules when they were violated. *New York State Electric & Gas Corporation*, 17 BNA OSHC 1129, 1994 CCH OSHD ¶30,745 (91-2897, 1995).

As noted above, Manganas had a work rule requiring their use whenever working from heights in excess of six feet (Tr. 1157, 1163-64; Exh. C-68). Employees Finnefrock, Miller, DiPaolo, McCully and Lang all testified that they were trained in the proper use of rope grabs and lifelines, and told to tie off at all times (Tr. 1799, 1820, 1854, 1859, 1898, 1919-20). Those same employees understood that if they were discovered violating work rules, including the fall protection rules, they were subject to a progressive disciplinary procedure which included verbal and written reprimands followed by termination (Tr. 1800, 1821, 1849, 1920).

The disciplinary program communicated to the employees did not conform to Manganas' written disciplinary rules, which required a verbal reprimand for the first violation, a written reprimand with a one week suspension without pay for the second, and termination upon the third violation (Exh. C-68, p. 4). Andrew Manganas testified that they could not enforce the one week suspension rule because they "wouldn't have anybody to paint the bridge" (Tr. 1634). Manganas testified that he gave verbal reprimands to "just about everybody" at one time or another (Tr. 1633).

Finnefrock admitted that he had been caught twice not using fall protection, and was warned by Tim McCully and written up by Joe DiPaolo (Tr. 1800). Finnefrock's written warning was not documented. Miller also testified that he occasionally worked without tying off, and that he had been

caught at it more than once by Joe DiPaolo and Tim McCully (Tr. 1825-26). Miller stated that McCully "chewed me out twice, and the third time he put me up with Mario [the foreman who rant the top] for punishment for not listening (Tr. 1826).

Joe DiPaolo, who was charged with enforcing the fall protection policy (Tr. 1597-98, 1851), testified that many of the painters resisted tying off, and would "go on their own" when supervision wasn't around (Tr. 1848-49). DiPaolo testified that he had written only one reprimand, dated June 25, 1994, during the OSHA inspection. That reprimand was for Jim Peronis, who failed to use fall protection and attempting to excuse himself by telling DiPaolo, falsely, that the equipment was not working (Tr. 1852, 1862; Exh. R-64/R-126).

Foreman McCully testified that he asked for Bill Staud to be dismissed based on his refusal to wear fall protection (Tr. 1872-73). Staud's dismissal was not documented.

Superintendent Lang had primary responsibility for enforcing the work rules (Tr. 1631-32). Lang testified that he sent employees home for a day, without pay, for coming to work without a safety belt and for eating in the area of the recycling machine (Tr. 1921). These actions appear to have been taken after the OSHA inspection, however. Kevin Chenault was written up for eating in the recycling area on August 5, 1994 (Exh. R-64). Written warnings were issued to Ron Acie, Mike Rooker, Dan Carsner and Fatos Sheeno for failing to use fall protection, on June 26, July 17, July 20 and August 18, 1994, respectively (Exh. R-64/R-126). The only written warning issued before the June 17-29 OSHA inspection was a June 14 warning for Toby Griffis regarding his failure to wear coveralls while recycling abrasive materials (Tr. R-64/R-126).

Manganas failed to establish the affirmative defense of employee misconduct.

The evidence establishes widespread noncompliance with Manganas' fall protection rules, and strongly suggests Manganas was lax in correcting fall protection violations. *See, Prestressed Systems, Inc.*, 9 BNA OSHC 1864, 1981 CCH OSHD ¶25,358 (No. 16147, 1981) Manganas made little, if any effort to detect and deter misconduct. Manganas issued no written warnings prior to the OSHA inspection, and, in fact, refused to enforce its own suspension rules for fear of losing its entire work force. Finally, Tim McCully, a foreman, was observed violating the fall protection rules repeatedly. The Commission has held that misconduct by a supervisor constitutes strong evidence that safety program is lax. *Consolidated Freightways Corp.* 15 BNA OSHC 1317, 1991-93 CCH OSHD ¶29,500 (No. 86-351, 1991).

Willful

The infractions of Tim McCully and his failure to prevent at least one other Manganas employee from using the ladder without tying off is sufficient to establish these violations as "willful." The employer is responsible for the willful nature of its supervisors' actions to the same extent that the employer is responsible for their knowledge of violative conditions. *Tampa Shipyards, Inc.,*15 BNA OSHC 1533, 1991-93 CCH OSHD ¶29,617 (Nos. 86-360, 86-469, 1992). Here, foreman McCully's conduct displays reckless disregard for employee safety and for the requirements of the Act. *See, Williams Enterprises, Inc.*, 13 BNA OSHC 1249, 1986-87 CCH OSHD ¶27,893 (No. 85-355, 1987). In failing to use appropriate fall protection in the presence of employees, McCully not only allowed, but encouraged them to use the cited ladder without fall protection, though fall protection was readily available. McCully was charged with ensuring those employees' safety; his conduct can only be characterized as "willful."

Penalty

Penalties of $70,000.00 were proposed for each of these three items. Only one of the three items was proven. The proposed penalty is deemed excessive in that it does not take into account Manganas' small size. However, the fact that this violation involves a foreman and thereby sets a poor example make the gravity of this violation higher. A penalty of $28,000.00 is assessed.

Willful citation 2, items 4 and 5: Manganas raises identical defenses to items 4 and 5 and to items 7 through 12. Items 4 and 5, together with a recitation of the relevant facts, are set forth here, but will be grouped with items 7 through 12 for discussion. The discussion and penalty sections may be found following the recitation of item 12.

Willful citation 2, item 4 alleges:

29 CFR 1926.95(a): Appropriate personal protective equipment was not used by employees in all operations where there was exposure to hazardous conditions.

(a) Employee #1 was exposed to a fall in excess of 100' while climbing a ladder suspended over the side of the bridge at approximate panel point 49 in that a life line and lanyard were not used at this location.

Willful citation 2, item 5 alleges:

29 CFR 1926.95(a): Appropriate personal protective equipment was not used by employees in all operations where there was exposure to hazardous conditions.

(a) Employee #2 was exposed to a fall in excess of 100' while climbing a ladder suspended over the side of the bridge at approximate panel point 49 in that a life line and lanyard were not used at this location.

Facts

Collier testified that on June 17, 1994 he observed and videotaped Ron Acie and the Manganas employee nicknamed Mr. Congeniality, identified in the citation as employees #1 and #2, climbing the ladder at panel point 49 without using the available lifeline (Tr. 1434-36; Exh. C-79, C-106A, 21:42:00 - 22:53:00). The ladder was approximately 100 feet off the ground (Tr. 1436).

Willful citation 2, item 6 alleges:

29 CFR 1926.95(a): Appropriate personal equipment was not used by employees in all operations where there was exposure to hazardous conditions.

(a) Located under the south bound bridge deck at approximate panel point U35, there was an employee observed hand painting the bridge structure while standing on the top rail of the runway/catwalk's guard railing without the adequate use of personal protective equipment in that, the lanyard snap hook was clipped to the port hole flange, exposing the employee to a fall potential in excess of 30'.

Facts

CO Medlock testified that on June 24, 1994 he observed and videotaped a Manganas employee, identified to him as Nick Kalafatis, standing on top of the catwalk guardrails painting with a right to left motion (Tr. 1185-87; Exh. C-106A, at 03:53:9, C-80). At the hearing, Andrew Manganas identified the employee depicted as John Kantaras, another Manganas employee, and was performing work only Manganas employees would normally perform (Tr. 1601-02, 1689-90. 1706-07). Medlock stated that as he painted, the employee wore a safety belt which was clipped to the porthole or flange of the structural steel (Tr. 1187). The keeper on the clip is intended to close around a safety line or beam strap of limited diameter. The keep cannot close completely around the flat steel flange and may become disengaged from its anchorage point (Tr. 1189-90). Medlock testified that, during an earlier inspection, he had specifically warned Andrew Manganas of the hazards associated with incompletely snapping the clip (Tr. 1191-92). In addition, the literature from the manufacturer, Miller Equipment, in its Instruction and Warning Information, requires that "each snap hook freely engage dee ring or anchor point and that its keeper is completely closed. . . Never use an anchor point which will not allow snap hook keeper to close" (Exh.C-110, p. 6, p. 8).

Medlock testified that the fall was 30 feet to the structural steel below. A safety net was in place, but below the structural steel in this location (Tr. 1192).

Discussion

As discussed above, the cited standard requires that:

> Protective equipment, including personal protective equipment for eyes, face, head, and extremities, protective clothing, respiratory devices, and protective shields and barriers, shall be provided, used, and maintained in a sanitary and reliable condition wherever it is necessary by reason of hazards. . . encountered in a manner capable of causing injury or impairment in the function of any part of the body through absorption, inhalation or physical contact..

Manganas maintains that the cited section does not address, and cannot be construed to require the "proper" use of required equipment. In the 1994 OSHA regulations, a separate section addresses the selection and use of safety belts, lifelines, and lanyards is found at §1926.104.[10] That section, however, is silent on the proper use of snap hooks. In the 1995 OSHA regulations, a new standard addressing the requirements for selecting and using snap hooks in a personal fall arrest systems is found at 29 CFR §1926.502(d)(5), and (6)[11]. The new §1926.502 specifically requires that snaphooks be attached only to compatibly sized anchor points. The new personal fall arrest standards became effective February 6, 1995, well after the citation was issued in this case.

The evidence establishes that the practice of hooking onto the porthole, or flange, is recognized in the industry as unsafe, and posed a hazard to Manganas' employees. Despite the existence of a hazard, I agree with Respondent that the evidence will not support a citation of the cited standard.

At the time of the inspection, the specific, and exclusive, guidelines for the *use* of personal fall protection equipment were contained in §1926.104. Complainant recognized that nothing in that section prohibits the cited practice, and cited Manganas under the general standard at §1926.95. The plain language of §1926.95, however, requires only that protective equipment be used when necessary, and cannot reasonably be construed as addressing particular practices or methods of use. It is well settled that the Secretary may not extend the reach of a standard beyond the plain meaning of a regulation's language,

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[10] The preamble to the revised fall protection standard states:
OSHA has made subpart M the comprehensive reference for construction fall protection standards by revising and relocating the general requirements in existing Sec. 1926.104 -- Safety belts, lifelines, and lanyards; existing Sec. 1926.105 -- Safety nets; and the pertinent definitions in existing Sec. 1926.107 to subpart M. 59 Fed.Reg. 40672 (1994).

[11] §1926.502(d) states *inter alia*:
(5) Snaphooks shall be sized to be compatible with the member to which they are connected to prevent unintentional disengagement of the snaphook by depression of the snaphook keeper by the connected member, or shall be a locking type snaphook designed and used to prevent disengagement of the snaphook by the contact of the snaphook keeper by the connected member. . .(6) Unless the snaphook is a locking type and designed for the following connections, snaphooks shall not be engaged:. . . (v) to any object which is incompatibly shaped or dimensioned in relation to the snaphook such that unintentional disengagement could occur by the connected object being able to depress the snaphook keeper and release itself.

thus depriving the employer of fair warning of proscribed conduct. *See e.g., Bethlehem Steel v. OSHRC*, 573 F.2d 157 (3rd Cir. 1978); *Dravo Corporation v. OSHRC,* 613 F.2d 1227, (3rd Cir. 1980).

Though this judge is reluctant to resolve this matter in a way which would leave workers unprotected from a recognized hazard in the future, in this case the fall protection standards have been revised to eliminate the gap in coverage illustrated by this item. Item 6 will, therefore, be vacated.

Willful citation 2, items 7 through 12: With the exception of its objection to the applicability of the cited standard at §1926.95(a) to the violation cited at item 7, Manganas has raised the same defenses to items 4 and 5, and to items 7 through 12. With the exception of §1926.95(a)'s applicability, the listed items will be discussed together following the recitation of the citations and the relevant facts.

Willful citation 2, item 7 alleges:

29 CFR 1926.95(a): Appropriate personal equipment was not used by employees in all operations where there was exposure to hazardous conditions.

(a) Located under and along the east side of the south bound bridge deck approximate panel point U/L 39 there were two employees observed working from a single-point adjustable suspension scaffold in which one employee was working within the scaffold without personal protective fall protection equipment, exposing the employee to a fall potential in excess of 50'.

Facts

Medlock testified that on June 25, 1994 he observed and videotaped a Manganas employee, Jim Peronis, riding in a single-point adjustable scaffold, also referred to as a spider scaffold, without using fall protection (Tr. 1194; Exh. C-106A). Medlock stated that the fall to the structural steel below was approximately 50 feet (Tr. 1196).

Applicability. Manganas argues that fall protection for a single point suspension scaffold is exclusively governed by 29 CFR 1926.451(k), which requires such scaffolds be equipped with guardrails. It has been OSHA's policy; one which has been affirmed by the Commission, that where a specific standard does not eliminate a hazard addressed by a citation, and where meaningful abatement beyond that required by specific standards are proposed by the Secretary, the Secretary may require the employer to provide the additional abatement under a general standard. The specific standard will not pre-empt the general standard under these circumstances. *Coleco Industries, Inc.*, 14 BNA OSHC 1961, 1991 CCH OSHD ¶29,200 (No. 84-546, 1991). An employer may be cited under §1926.95 for failing to enforce the use of personal fall safety equipment if a reasonable person familiar with the circumstances would

recognize a hazard warranting the use of such equipment. *Cleveland Electric Illuminating Co.*, 16 BNA OSHC 2091, 1994 CCH OSHD ¶30,590 (No. 91-2198).

The record establishes that Manganas recognized the need for personal fall safety protection on the spider scaffold. Manganas received a copy of the Spider Staging Manual from the scaffold manufacturer (Tr. 1702-04). The manufacturer requires that safety lines and harnesses be used when using the spider; "[e]ach person riding the scaffold should have on a safety harness and be connected to the safety line grab device with a lanyard (Exh. C-111, p. 000347). Andrew Manganas admitted he was aware of the need to have independent lifelines for passengers on the spider scaffold, and stated that lifelines were installed for Manganas employees' use (Tr. 1652).

Willful citation 2, item 8 alleges:

29 CFR 1926.95(a): Appropriate personal equipment was not used by employees in all operations where there was exposure to hazardous conditions.

(a) Located under and along the east side of the south bound bridge deck between approximately L32-L34 panel points, there was an employee observed hand scraping the lower box beam cord without personal protective fall protection equipment being utilized, exposing the employee to a perimeter exterior fall potential in excess of 100'.

Facts

Medlock testified that late in June of 1994 he observed and videotaped Manganas employee Bill Miller hand scraping the perimeter exterior cord 100 feet above the ground without benefit of fall protection (Tr. 1200-01; Exh. C-106A at 06:00:0 to 06:17:9, C-82). Medlock stated that a safety net was in place 21 to 24 inches to Miller's right protecting Miller from injury in the event of an interior fall (Tr. 1202); there was no protection for falls to the exterior of the bridge (Tr. 1203). Medlock testified that during the 1993 inspection he discussed the need for lifelines and safety belts on the bridge perimeter with A. Manganas (Tr. 1202-03). Manganas admitted that the nets were not intended to protect against exterior falls (Tr. 1708).

Willful citation 2, item 9 alleges:

29 CFR 1926.95(a): Appropriate personal equipment was not used by employees in all operations where there was exposure to hazardous conditions.

(a) Located under and along the east side of the south bound bridge deck between approximately L30-L34 panel points, there was an employee observed spray painting the lower cord without personal protective fall protection equipment being utilized, exposing the employee to a perimeter exterior fall potential in excess of 120'.

Facts

On June 19, 1994, CO Salisbury-Anderson observed and videotaped Bill Miller walking along the lower cord, 120 feet above the ground, spray painting, without the use of fall protection (Tr. 515-17, 1204-07; Exh. C-106A at 06:21:0 to 10:48:0, C-83). CO Medlock testified that in the course of OSHA's 1993 inspection he had told Andy Manganas that people working on the perimeter cord needed lifelines and safety belts, and that Manganas told him they would be used (Tr. 1209).

Willful citation 2, item 10 alleges:

29 CFR 1926.95(a): Appropriate personal equipment was not used by employees in all operations where there was exposure to hazardous conditions.

(a) Located under and along the east side of the south bound bridge deck at approximately panel point L39, there was an employee observed using an air hose to blow down deposits from the bridge steel while working from the lower cord without personal protective fall protection equipment being utilized, exposing the employee to a perimeter exterior fall potential of approximately 80'

Facts

Medlock observed Bruce Finnefrock using an air hose to blow down deposits from the structural steel (Tr. 1210). Finnefrock was working adjacent to a hole approximately 6 feet wide in a tarpaulin below him (Tr. 1211-13; Exh. C-106 at 0:10:49 to 12:12:5, C-85, C-86). A safety net extended out to approximately 21 to 25 inches to Finnefrock's right (Tr. 1212). Medlock testified that the fall through the opening in the tarp to the ground is approximately 80 feet (Tr. 1211). Before June 27, 1994 Medlock told Andrew Manganas that employees working near tarp holes would need to use personal fall protection, and Manganas stated that fall protection would be used (Tr. 1214-15).

Willful citation 2, item 11 alleges:

29 CFR 1926.95(a): Appropriate personal equipment was not used by employees in all operations where there was exposure to hazardous conditions.

(a) Located under and along the east side of the south bound bridge deck between approximately U38-L38 panel point, there was an employee observed spray painting the column, lower box beam cord and 45 degree column without personal protective fall protection equipment being utilized, exposing the employee to a perimeter exterior fall potential in excess of 100' or an interior fall in excess of 30'.

Facts

Medlock testified that on July 12, 1994, from the wooded area below the bridge site, he observed Tim McCully on the catwalk below the bridge deck (Tr. 1215-17; Exh. C-106A at 0:12:27 to 0:12:38, C-91). The testimonial and photographic evidence establish that, two to three panel points away, Miller spray

painted a column by climbing over and onto cables and structural steel 100 feet above the ground without using fall protection (Tr. 1218-22; Exh. C-87, C-88, C-89, C-90). It was a 30 foot fall to the interior of the bridge (Tr. 1221).

Willful citation 2, item 12 alleges:

29 CFR 1926.95(a): Appropriate personal equipment was not used by employees in all operations where there was exposure to hazardous conditions.

(a) Located under and along the west side of the south bound bridge deck at approximately panel point U42, there was an employee observed using an air hose to blow down deposits from the bridge steel while walking on a wire rope cable without personal protective fall protection equipment being utilized, exposing the employee to fall potentials in excess of 30'.

Facts

On June 28, 1994 Medlock observed and videotaped the Manganas employee known as Mr. Congeniality walking on the cable while blowing down deposits from the structural steel in the area of panel point U-42 without using his safety belt and lanyard, which he wore wrapped around his neck, and/or hanging down at his side (Tr. 1224-29; Exh. C-106A at 0:14:27 to 0:16:47, C-92, C-93). The cable was 30 feet above the structural steel below, and a hole in the tarp. If the employee had fallen through the tarp hole, he would have fallen 100 feet to the ground (Tr. 1226-27, 1231).

Discussion

In order to prove a violation of section 5(a)(2) of the Act, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies, (2) there was a failure to comply with the cited standard, (3) employees had access to the violative condition and (4) the cited employer either knew or could have known of the condition with the exercise of reasonable diligence. *See, e.g., Walker Towing Corp.*, 14 BNA OSHC 2072, 2074, 1991-93 CCH OSHD ¶29239, p. 39,157 (No. 87-1359, 1991) The evidence establishes the existence of the cited violations, with the exception of Manganas' knowledge as to the individual instances where employees did not use their fall protection equipment.

The only evidence presented by Complainant that suggests Manganas' supervisory personnel was actually aware of any of the cited violations is the presence of Tim McCully on the cat walk two or three panel bays from painters cited in item 11. Because OSHA's observation of McCully in that instance was from their position in the woods, 100 to 300 yards from the bridge, they cannot credibly evaluate what McCully could or could not see from his position, and that evidence is discounted.

The Commission has found that an employer knew or reasonably could have known of its employees failure to consistently wear fall safety equipment over a long period of time where the employer had reprimanded each employee for noncompliance with the employer's safety belt rule. *Pace Construction Corp.,* 14 BNA OSHC 2216, 1991-93 CCH OSHD ¶29,333 (No. 86-759, 1991). The number of violations observed by OSHA, coupled with Manganas' knowledge that a problem existed in this area (discussed in the *employee misconduct* section of items 1 through 3 above), mandate a finding that with diligent supervision Manganas could have know of its employees' failure to utilize fall protection in the above cited circumstances. *See, Precast Services, Inc.*, 17 BNA OSHC 1454, 1995 CCH OSHD ¶30,910 (No. 93-2971, 1995)[evidence establishing failure to effectively enforce work rule also demonstrates constructive knowledge].

Complainant has shown the cited violations.

Willful

The Secretary characterizes the violations as "willful." Complainant argues that Manganas had previously received citations for violations of various fall protection standards (Tr. 1552-53; Exh. C-69, C-70, C-71). In many instances, OSHA specifically told Manganas that employees were required to utilize personal fall protection in circumstances similar to those cited. The Commission has held, however, that an employer's mere familiarity with the requirements of an applicable standard does not, in itself, establish willfulness. *See Wright and Lopez, Inc.*, 8 BNA OSHC 1261, 1980 CCH OSHD ¶24,419 (No. 76-3743, 1980).

Complainant also maintains that the number of violations cited shows that Manganas not only failed to enforce its fall protection program, but condoned its employees' infractions of the rules. Normally, where the Secretary elects to cite individual instances as separate willful violations, that decision carries with it the burden of proving that each instance was willful. Here, the Secretary attempts to avoid the burden of showing willfulness in each instance cited, by arguing that the number of violations cited in itself shows plain indifference to employee safety. Even if this was a proper means for the Secretary to meet his burden, as a factual matter his argument fails in this case.

As a threshhold matter, many of the alleged violations Complainant relies on have been vacated. More importantly, the remaining violations do not establish Manganas' indifference to the use of fall protection when balanced against the protective measures Manganas did take. Employees were provided with safety belts and lifelines. Tie off lines were provided for employees climbing from one level to another. Tie off lines were provided the length of the working area approximately every 5 to 6 feet for

lateral movement (Tr. 1582-86). Walkways were provided with guardrails. During the inspection employees were observed tied off more often than not. Given the protective measures taken, I cannot find that Manganas was indifferent to its employees' use of fall protection. Thus, while Manganas' enforcement of fall protection requirements was so lax as to preclude its reliance on the affirmative defense of employee misconduct, it did not amount to a "heightened awareness" of the illegality of its conduct or the conditions. I find that the Secretary has failed to establish that the violations were not willful. There can be no doubt that a fall from any of the heights at which these employees were working would likely result in serious bodily harm. All items are affirmed as serious violations.

Penalty

Taking into account the statutory criteria discussed at length above, a penalty of $2,800.00 will be assessed for each violation.

Alleged Violations of §1926.451(a)(4)

Willful citation 2, item 13 alleges:

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

(a) Located under and along the east side of the south bound bridge deck, approximate panel point between U38-L38, an employee was observed working from a pic scaffold spray painting a column and the upper cord or steel area without standard guardrails or equivalent, exposing the employee to perimeter exterior falls in excess of 100' and interior falls of approximately 30'.

(b) Employees were exposed to a fall in excess of 140' while using the scaffold pic adjacent to the ladder suspended over the side of the bridge outside the containment area south of pier 4 in that there were no guardrails on the pic.

(c) Located under and along the east side of the south bound bridge deck approximate panel point U34, employees were working from a pic scaffold without standard guardrails or equivalent exposing employees to perimeter exterior falls in excess of 100' and interior falls in excess of 30'.

Facts

Medlock testified that on July 12, 1994, he observed Bill Miller in two separate locations, painting from unprotected pic scaffolds without using other fall protection (Tr. 1231-33; Exh. C-94, C-95). Medlock testified that Miller was exposed to an interior fall of 30 feet to the structural steel, or an exterior fall in excess of 100 feet to the ground (Tr. 1232). Medlock stated that Tim McCully was standing on the catwalk in the area when the alleged violations occurred (Tr. 1234; Exh. C-91).

Collier testified that between July 8th and 12th he observed Manganas employees, including Tim McCully and Bill Miller, on an unguarded scaffold pic south of the containment area (Tr. 1437-40). Collier stated that the pic was 140 feet above the ground, and that the employees used no fall protection (Tr. 1438; Exh. C-77, C-96, C-97, C-98).

Medlock further stated that on June 20, 1994 he observed Nick Kalafatis and one other Manganas employee walking across a scaffold pic without using fall protection (Tr. 1238-41; Exh. C-99, C-100). Medlock testified that the employees were exposed to perimeter falls in excess of 100 feet and/or an interior fall over 30 feet to the structural steel (Tr. 1239).

Discussion

The cited standard provides:

> Guardrails and toeboards shall be installed on all open sides and ends of platforms more than 10 feet above the ground or floor . . ..

The facts in instances (a) and (b) of this item are essentially duplicative of the infractions cited in items 1 through 5, where employees including Tim McCully failed to attach their safety belts when climbing down and stepping from a ladder to a pic; and item 11, where Bill Miller was observed painting from the structural steel of the bridge without attaching his safety belt. Moreover, the identical conduct required by the standards cited in those items, *i.e.* requiring the employees to use their safety belts, would have been abated both violations[12] (Tr. 1272-73). The citations attempt to penalize Manganas twice for the identical conduct, both instances are vacated as duplicative. *See, J.A.Jones Construction Co.*, 16 BNA OSHC 1497, 1991-93 CCH OSHD ¶29,964 (No. 87-2059, 1993).

In addition, Complainant made no showing in either instance (b) and (c) that the pics were intended or used for any purpose other than access. Complainant failed to show that the cited pics were "platforms" within the statutory definition of that term, as discussed in serious citation, item above. Instance (c) is also vacated.

Alleged Violations of §1926.500(d)(2)

[12] Manganas points out, reasonably, that putting guardrails on the narrow pics would have made it difficult to move the portable pics, could have unbalanced the pics, and would have made it difficult for employees to get to their work (Tr. 1588-94, 1809-12, 1821-24, 1854-56, 1872-76, 1935-37, 1967-71).

Willful citation 2, item 14 alleges:

29 CFR 1926.500(d)(2): Open side(s) of runways, 4 feet or more above floor or ground level, were not guarded by a standard railing, or the equivalent:

(a) Located under the south bound bridge deck at approximately panel point U30, employees were not protected by standard guardrails when accessing over pics located in the runway/catwalk, in that there was only an approximate 22" high rail protection exposing employees to a fall potential in excess of 30'.

Facts

Medlock testified that on June 25, 1994 scaffold pics were stacked on the catwalk directly below the bridge deck, which was used for accessing the containment area (Tr. 1244-47, 1250). Employees, including Bruce Finnefrock and James Peronis, used the catwalk by walking on top of the pics. The catwalk guardrails were approximately 22 inches higher than the stacked pics, coming to the employees knees; the employees used no alternative fall protection (Tr. 1245-49; Exh. C-101). Employees using the catwalk were exposed to a 30 foot fall to the structural steel below (Tr. 1247-48).

Medlock testified that earlier in the 1994 inspection he had spoken to both Andy and Nick Manganas, asking them to remove pics from another portion of the catwalk (Tr. 1251-52). CO Gilgrist testified that he asked A. Manganas to remove pics stacked three deep on the catwalk near the containment area on June 17th, 19th and 20th without result (Tr. 1544-48). Gilgrist stated that the pics were not removed until June 27, after he called Nick Manganas (Tr. 1549).

Willful citation 2, item 16 alleges:

29 CFR 1926.500(d)(2): Open side(s) of runways, 4 feet or more above floor or ground level, were not guarded by a standard railing, or the equivalent:

(a) Employees were exposed to falling over the catwalk railing at the area where scaffold pics were stacked on the catwalk deck in that the rail height was only 18" to 20" above the top pic on which the employees walked while crossing the stacked pics.

Facts

Collier testified that between June 18 and June 21, 1994, three, and later four pics were stacked at a 7° angle in the catwalk obstructing the passageway (Tr. 1450-51; Exh. C-104). Manganas employee's used the catwalk by walking on top of the pics without alternative fall protection (Tr. 1452; Exh. C-105). The guardrail in that area was 18 and 20 inches above the pics on the respective sides (Tr. 1452). The catwalk was 28 feet 9 inches above the structural steel; the pic stack 35 feet 6 inches above the net (Tr.

1456-57). Collier testified that he requested the three pics be removed on June 18th; on June 20 the stack had not been moved, rather a fourth pic had been added (Tr. 1454).

Discussion

The cited standard provides:

> Runways shall be guarded by a standard railing, or the equivalent, as specified in paragraph (f) of this section, on all open sides, 4 feet or more above floor or ground level. . ..

Manganas maintains that the cited standard is inapplicable to the cited conditions. This judge agrees. It is undisputed that the catwalks had guardrails which comported to the standard. Manganas was cited not for a violation of the guardrail requirements, but for storing material on the catwalk which made the guardrails ineffective. The construction standards contain requirements regarding the storage of materials in passageways and on runways. *See generally,* §1926.250 *General requirements for storage.* As discussed in item 6 above, the Secretary may not extend the reach of a standard beyond the plain meaning of a regulation's language, *See e.g., Bethlehem Steel v. OSHRC*, *supra.*

Items 14 and 16 are vacated.

Willful citation 2, item 15 alleges:

29 CFR 1926.500(d)(2): Open side(s) of runways, 4 feet or more above floor or ground level, were not guarded by a standard railing, or the equivalent:

(a) The scaffold pic used by employees as a ramp to reach the fixed catwalk at the south end of the bridge had a railing on one side only, and the railing was omitted from both sides of the ramp at a point 41" short of reaching the fixed catwalk railing.

Facts

Collier testified that between June 18 and June 20 a portion of the guardrail was removed from one side of the pic that was used as a ramp to access the catwalk. In addition, there was, in the same area, a 41 inch gap between the permanent and temporary guardrails on both sides of the ramp (Tr. 1445-48; Exh. C-102, C-103). Collier observed a number of Manganas employees accessing the catwalk and the containment area by this ramp (Tr. 1448). The unguarded portions of the ramp were from 4 feet to 10 feet 8 inches above the ground (Tr. 1448). Collier informed A. Manganas of this apparent hazard on June 18; the guardrail was replaced on June 20 (Tr. 1449). To Collier's knowledge, the 41 inch gap between the permanent and temporary railings was never corrected (Tr. 1450).

Discussion

Manganas does not dispute the existence of the cited condition, but maintains that the cited standard provides an exception at §1926.500(d)(3) for "[r]unways used exclusively for special purposes." When a standard contains an exception to its general requirement, the burden of proving that the exception applies lies with the party claiming the benefit of the exception. *Falcon Steel Co.*, 16 BNA OSHC 1179, 1991-93 CCH OSHD ¶30,059 (No. 89-2883, 89-3444, 1993). Manganas failed to make any showing that the cited runway was used exclusively for special purposes. The evidence establishes, rather, that the runway was routinely used for employee access. The violation has been established.

Willful

As discussed in items 4 and 5 and 7 through 12 above, the fact that a number of citations were issued as a result of this inspection is insufficient to show willfulness. Additionally, Manganas cannot be characterized as indifferent to its employees safety, where guardrails were originally provided and then removed for a specific purpose. The citation was not shown to be "willful."

Penalty

The violation is affirmed as "serious" as a 10 foot fall is capable of causing severe bodily injury. The probability of such serious injury occurring, however, is not great; the gravity of the violation is low. A penalty of $500.00 is appropriate and will be assessed.

Press Releases

Remaining for consideration is Manganas' contention that press releases issued by OSHA officials constituted a "public campaign persecuting Respondent." (Manganas' post-hearing brief, p. 95). Manganas maintains that the press releases amounted to a sanction or penalty issued under the Administrative Procedure Act without the benefit of due process.

On February 1, 1994 OSHA issued a one page press release which stated that Manganas had been cited under the new interim final rule governing lead exposure in construction. The release stated that Manganas was alleged to have subjected some of its employees to lead exposures "many times the level permitted by federal regulations." The release contained a quote from the Secretary of Labor, Robert B. Reich, stating that "[b]ased on our investigation, we believe the employer in this case failed to provide even the most basic and important protections for its workers. Such callousness cannot and will not be tolerated. Employers need to know that the Department of Labor will go after bad actors who blatantly jeopardize the safety and health of workers."

On December 14, 1994 OSHA issued a press release announcing the issuance of the citations decided above. That release contains a synopsis of the citations issued and contains a statement made by OSHA Assistant Secretary of Labor Joseph A. Dear, stating that "Manganas Painting Company failed to take seriously its responsibility to ensure a safe and healthful workplace."

Manganas cites *Industrial Safety Equipment Ass'n, Inc. v. E.P.A.*, 837 F.2d 1115 (D.C. Cir. 1988), in which the Court stated that, in some cases, adverse publicity, especially false or unauthorized publicity, might merit review as an agency sanction, where it was issued with intent to penalize an employer.

Initially, this judge notes that the February 1, 1994 press release refers not to the citations before this judge, but announces the issuance of an earlier set of citations, currently pending before ALJ Michael Schoenfeld. Consideration of this press release is inappropriate in this case.

The remaining press release contains no statements so potentially damaging as to constitute an agency sanction[13]. No relief, therefore, is available on the basis of OSHA's February 6 press release.

ORDER

Docket No. 95-0104

1. Serious Citation 1, item 1, alleging violation of §1926.62(d)(1)(iii) is AFFIRMED, and a penalty of $1,050.00 is ASSESSED.

2. Willful Citation 2, items 1 and 2, alleging violations of §1926.62(d)(4)(i) are AFFIRMED, and a single penalty of $5,000.00 is ASSESSED.

3. Willful Citation 2, item 3, alleging violation of §1926.62(i)(3)(ii) is AFFIRMED, and a penalty of $20,000.00 is ASSESSED.

4. Willful Citation 2, items 4, 5, 6, 7, 8 and 9, alleging violations of §1926.62(j)(2)(i)(A) are AFFIRMED as "serious" violations, and penalties of $1,200.00 for each violation, or $7,200.00, are ASSESSED.

5. Willful Citation 2, items 10, 11, 12, 13 and 14, alleging violations of §1926.62(j)(2)(i)(B) are AFFIRMED, and penalties of $15,000.00 for each violation, or $75,000.00, are ASSESSED.

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[13] Once OSHA has issued its citations, the allegations contained therein are a matter of public record and are properly the subject of press releases. However, in this case, the press releases appear to be a departure from the Labor Departments's prior practice of fulfilling the public right to know by paraphrasing the allegations of the citations without characterization or comment. Where a press release distributed prior to adjudication contains potentially inflammatory or damaging statements that may operate to deprive the respondent of business, the effect may well be to sanction the employer.

6. Willful Citation 1, items 15, 16, 17, and 18, alleging violations of §1926.62(j)(2)(i)(C) are AFFIRMED, and penalties of $20,000.00 for each violation, or $80,000.00, are ASSESSED.

Docket No. 95-0103

7. Serious Citation 1, item 1, alleging violation of §1926.500(d)(1) is VACATED.

8. Serious Citation 1, item 2, alleging violation of §1926.1053(b)(1) is AFFIRMED, and a penalty of $500.00 is ASSESSED.

9. Willful Citation 2, item 1, alleging violation of §1926.95(a) is AFFIRMED, and penalties of $28,000.00 is ASSESSED.

10. Willful Citation 2, items 2 and 3, alleging violation of §1926.95(a) are VACATED.

11. Willful Citation 2, item 6, alleging violation of §1926.95(a) is VACATED.

12. Willful Citation 2, items 4, 5, 7, 8, 9, 10, 11, and 12 alleging violations of §1926.95(a) are AFFIRMED as "serious" violations and penalties of $2,800.00 for each violation, or $22,400.00 are ASSESSED.

13. Willful Citation 2, item 13, alleging violation of §1926.451(a)(4) is VACATED.

14. Willful Citation 2, items 14 and 16, alleging violations of §1926.500(d)(2) are VACATED.

15. Willful Citation 2, item 15, alleging violation of §1926.500(d)(2) is AFFIRMED as a "serious" violation, and a penalty of $500.00 is ASSESSED.

/s/
James H. Barkley
Judge, OSHRC

Dated: June 14, 1996