UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. S. E. JOHNSON COMPANIES, Respondent,	DOCKET NO. 97-1087

Appearances : For Complainant: Anthony Stevenson, Esq. and Bruce Hezlett, Esq., Office of the Solicitor, U. S. Department of Labor, Cleveland, OH.; For Respondent: Patrick Lewis, Esq. and John T. Billick, Esq., Belkin, Billick, Harrold, & Wiencek Co., L.P.A., Cleveland, OH.
Before: Judge Covette Rooney

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission pursuant to Section 10(c) the Occupational Safety and Health Act of 1979 (29 U.S.C. §651, *et seq.*)("the Act"). Respondent, S. E. Johnson Companies, at all times relevant to this action maintained at a worksite at the Ohio Turnpike, Silica Road Bridge, Marker 218.4, Youngstown, OH., where it was engaged in the business of bridge demolition and related construction activities. Respondent admits that it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

On May 9, 1997, Industrial Hygienist Mark Snitzer conducted an inspection pursuant to a complaint received in his office[1]. The record reveals that Respondent had been engaged in a series of Ohio Turnpike bridge demolition projects. At the time of the inspection Respondent was engaged in cutting steel beams at the instant worksite at Silica Road As a result of this investigation, on June 17, 1997, Respondent was issued a citation alleging three serious violations with a proposed total penalty in the amount of $7,550.00. By timely Notice of Contest, Respondent brought this proceeding before the Review Commission. A hearing was held before the undersigned on March 18, 1998. Counsel for the parties have submitted Post-Hearing Briefs and Reply Briefs, and this matter is ready for disposition.

SECRETARY'S BURDEN OF PROOF

The Secretary has the burden of proving his case by a preponderance of the evidence. In order to establish a violation of an occupational safety or health standard, the Secretary has the burden of proving: (a) the applicability of the cited standard, (b) the

[1] The term "Tr" refers to the transcript of the hearing and "Exh" refers to Exhibits introduced into evidence at the hearing.

employer's noncompliance with the standard's terms, (c) employee access to the violative conditions, and (d) the employer's actual or constructive knowledge of the violation (the employer either knew or with the exercise of reasonable diligence could have known, of the violative conditions).

Atlantic Battery Co., 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

Citation 1, Item 1

§1926.95(c) "Design." All personal protective equipment shall be of safe design and construction for the work to be performed.

(a) Employees using disposal suits during the cutting of steel beams.

The suits were not of fire retardant design.

During IH Snitzer's inspection, he learned that two foremen had been involved in cutting steel beams with torches while two more employees were using gasoline powered leaf blower devices (Tr. 15). He testified that during his interviews of Respondent's safety coordinator, David Furiate, and employees, he learned that the employees had been wearing disposable suits made of "Tyvek". He testified that he determined that the suits were not fire retardant because he had observed employees at another jobsite scorch a similar suit while using a torch (Tr. 16, 18, 32). He also testified that he had also obtained information from Dupont which described the fabric as non-fire retardant and not recommended for use with heat (Tr. 17-18). He obtained information for Dupont's Website with regard to the properties of "Tyvek". (Exh. C-1). He also testified that he contacted Dupont and received information about "Tyvek". (Exh. C-2)[2] (Tr. 18-19). He utilized these two documents in recommending this citation.

The undersigned accords no probative weight to these documents - Exhs. C-1 and 2. They were admitted into evidence as documents which IH Snitzer testified that he utilized in recommending a citation, however, their contents are of no probative value. The Secretary presented no witness or evidence to authenticate these documents. *See* Fed. R. Evid. 901 and 902. The undersigned recognizes that the Secretary attempted to introduce these records for the truth of the matters asserted therein. These documents are hearsay. The Secretary failed to establish any foundation to support a finding that these documents fell within the ambit of any rule defining hearsay exceptions, such as, a business record [Fed. R. Evid. 803(6)]. Accordingly, these documents are of no value in proving that the suits were not fire retardant.

The Respondent presented testimony from Douglass McDowell, a laborer foreman at the subject worksite. He testified that he has cut steel for 20 years and had has experienced burns from sparks while performing burning operations. He testified that on those occasions he was not wearing a Tyvek suit. He further testified that while burning steel and wearing the Tyvek suit, it had never burned (Tr. 62-64).

The undersigned finds that the Secretary failed to prove by a preponderance of evidence that the Tyvek suit was not of a safe design and construction for the burning operations which Respondent's employees performed. The IH's testimony with regard to what he had previously observed with regard to this type of suit was speculative and failed to prove that the suits worn by the employees on the instant worksite were violative of the cited standard. The Secretary failed to

[2] This document was an incomplete document in that it consisted of a cover page and one other page.

produce any admissible evidence with regard to the properties of Tyvek. The violation is Vacated.

Citation 1, Item 2

§1926.62(d)(4)(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.

(a) Monitoring conducted by the employer revealed that two employees were exposed to lead above the permissible exposure limit (PEL). One employee was exposed to 15 times the PEL; another was exposed to lead above at 31.8 times the PEL. Other employees in the area were not monitored.

IH Snitzer testified that this violation was recommended because not every job classification on the jobsite had been sampled for lead exposure (Tr. 24). He concluded this as a result of his conversation with the safety coordinator, who had informed him that the two employees performing the cutting had been monitored for lead, but the other employees in the area had not been monitored for lead (Tr. 25). It was his concern that without the monitoring, they might not have had on the appropriate protective equipment. (Tr. 25). These employees, who handled the leaf blowers, wore half-mask respirators, which were acceptable up to 500 micrograms per cubic meter of air (hereinafter "$\mu g/m^3$ ")(Tr. 26, 39).

Respondent presented the testimony of Douglas H. McDowell, a laborer foreman, who worked on the instant worksite. He described the protective equipment worn while cutting steel as "pretty self contained". He testified that the cutters wore hooded Tyvek suits with respirators and full face masks. They wore burning gloves and put duct tape around the gloves (Tr. 55-56, 60). He testified that the helpers wore Tyvek suits and half masks with dual filters. He testified that the cutters and helpers had all had been fit tested for their masks (Tr. 57). In describing the method of work he testified that as the cutters cut the steel, the helpers would blow in the same direction that the wind was blowing to clear the air. He also testified that prior to the commencement of the project, he performed the lead and cadmium sampling by scrapping chips of paint from the bridge (Tr. 58, 62).

Robert DiNardo a certified industrial hygienist, certified professional engineer, and certified hazardous materials handler of Foley Occupational Health Consulting testified that he had been retained as a consultant for Respondent to advises them on their lead program on the Turnpike project. His qualifications included 20 years experience in the areas of lead and cadmium control (Tr. 69). He had personally performed services on at least seven bridge demolition projects of the Respondent. He described the standard protocol which similarly situated contractors involved in the same work used along the turnpike and which the Turnpike Commission had approved with regard to the removal of structural steel - torch cutter and helper with leaf blower to dissipate the fumes out of the cutter's breathing zone (Tr. 71). He testified that he had personally conducted air sampling, personal work zone and downwind air sampling for lead and testing for cadmium on the cutter and helper at Respondent's Ohio Turnpike Exit 8 worksite on April 4, 1997. He testified that based upon the testimony of the witnesses at trial, the work which was being done at Exit 8 was the same work being done at Silica Road. The work involved the standard protocol which he had become familiar and employees wore the same protective equipment. (Tr. 72-73,75, 82-83). The monitoring at Exit 8 took place a week to ten days within the time that work commenced at the instant worksite (Tr.

80, 98). He testified that the results were adjusted for an 8-hour average. He testified that his results at the Exit 8 location revealed that the exposure level for the leaf blower was five times the OSHA limit -240 Fg/m^3. The half-mask would allow for ten times the exposure -500 Fg/m^3. Accordingly, they wore the proper protection (Tr. 73-74). In light of the fact that the helper wore the same safety equipment on the instant worksite, it was his opinion that the helper was fully protected (Tr. 75, 79). He testified that based upon the testimony of Mr. McDowell, the protective equipment used at the Silica Road site was the same as that used at the Exit 8 site. He acknowledged that he had conveyed the results of the Exit 8 site to Respondent and that they were aware of those results (Tr. 97).

The cited standard requires that the employer conduct representative sampling for each employee on the worksite. This standard provides for an exception to this requirement at section 1926.62(d)(4)(ii) which sets forth that

> . . .Where the employer has previously monitored for lead exposure, and the data were obtained within the past 12 months during work operations conducted under workplace conditions closely resembling the processes, type of material, control methods, work practices, and environmental conditions used and prevailing in the employer's current operations, the employer may rely on such earlier monitoring results to satisfy the requirements of paragraph (d)(4)(I) of this section if the sampling and analytical methods meet the accuracy and confidence levels of paragraph (d)(10) of this section.

As a general rule, one who claims an exception was the burden of proving its application. *United States v. First City National Bank*, 386 U.S. 361, 366 (1967); McCormick, Law of Evidence 787 (2d ed. 1972). Review Commission precedent establishes that "the party claiming the benefit of an exception has the burden of proving that its claim comes within the exception." *StanBest Inc.*, 11 BNA OSHC 1222, 1226 (No. 76-4355, 1983). The undersigned finds that the Respondent had met its burden of proof. The record establishes that the helpers, air blower operators, had not been monitored for lead. However, the record establishes that that testing had been performed on these employees at the Exit 8 worksite which closely resembled processes, type of material, control methods, work practices and environmental conditions (same time of the year) of Silica Road worksite. The test had been performed within a two week period which meets the 12 month requirement. The helpers' wore the same protective equipment which protected them against lead exposure in accordance with the Exit 8 results. The Respondent presented this evidence in support of its claim that it had not violated the cited standard.

The Secretary does not claim that Respondent did not meet the terms of the exception but argues that Respondent should not be afforded this exception because the Respondent did not rely on the exception when it decided to forgo monitoring the Silica Road site. Furthermore, the Secretary argues that there was no evidence that Respondent knew of and relied upon its allegations that the processes and materials at Exit 8 closely resembled the processes and materials at Silica Road, or that the work practices and environmental conditions at Exit 8 closely resembled the practices at Silica Road.(Secretary's Post-Hearing Brief, p. 9). The record reveals that at the commencement of the hearing, the Secretary's counsel raised an issue of prejudice with regard to testimony concerning prior monitoring. Counsel for the Respondent represented at the hearing that he had become aware of documentation which supported a defense of testing at another site and its effect on the requirement to monitor at the instant site while preparing its expert witness for trial a

few days prior to hearing. Counsel represented that his expert raised this issue a few days prior to the hearing and the Secretary was immediately notified of this monitoring. The undersigned permitted Respondent to present this testimony and permitted the record to remain open for the Secretary to present rebuttal evidence (Tr. 5-9). The record reveals that the Secretary has presented no rebuttal evidence and did not request that the record remain open for additional evidence.

The undersigned has reviewed the record before her and makes her findings based upon the evidence presented at trial. The undersigned finds the Secretary's arguments do not negate the evidence which the Respondent presented at the hearing.(Tr. 73-74). Mr. DiNardo provided testimony which was based upon his review of his office files on the instant worksite and the testimony he heard at the hearing (Tr. 84-86). Upon having his memory refreshed during the course of cross examination, he admitted that he had reviewed the lead compliance program for the instant worksite prior to the commencement of work on the instant worksite (Tr. 87- 88). The undersigned having observed his demeanor and forthright responses to questions at the hearing, finds his testimony credible. The undersigned finds that his prior involvement with the Respondent on similar projects for several years and his review of the lead compliance plan for the instant worksite are sufficient to establish that the Respondent relied upon such earlier monitoring. The record contains no challenge to the accuracy or validity of said monitoring. The Secretary has not proved by preponderance of evidence that the Respondent violated the standard or that a hazard exited. In view of this finding the violation is Vacated.

Citation 1, Item 3

§1926.1127(d)(1)(I) Prior to the performance of any construction work where employees may be potentially exposed to cadmium, the employer shall establish the applicability of this standard by determining whether cadmium is present in the workplace and whether there is the possibility that employee exposures will be at or above the action level. The employer shall designate a competent person who shall make this determination. Investigation and material testing techniques shall be used, as appropriate, in the determination. Investigation shall include a review of relevant plans, past reports, material safety data sheets, and other available records, and consultations with the property owner and discussions with appropriate individuals and agencies.

(a) No determination was done.

CO Snitzer testified that prior to demolition at the subject worksite, the Respondent did not make a determination with regard to exposure to cadmium on the worksite (Tr. 28, 34). He testified that the action level for cadmium is 2.5 $\mu g/m^3$, and the permissible exposure level is 5 $\mu g/m^3$. He did not know what the exposure levels were at this worksite because the Respondent had not performed any air sampling (Tr. 28). He testified that in order to have complied with the standard the Respondent should have conducted air monitoring (Tr. 29). He acknowledged that Respondent could not have performed air sampling prior to demolition and that the Respondent had determined that cadmium was present, because "bulk testing" had been performed on a sample taken from the bridge .[3] The results of this testing revealed that there was less than a tenth of a percent (.1%) of cadmium in the sample of paint tested, which was below the detectable limits of the test - the test will not determine cadmium below a tenth of percent. He acknowledged that the testing Respondent did

[3] Bulk testing involves the collection of paint, via scraping it off the steel beams, and submitting it to a lab for testing (Tr. 36, 61-62).

perform, bulk testing, was the only test for cadmium which could be done prior to demolition. (Tr. 35- 37, 45).

Robert DiNardo testified that Respondent had performed monitoring - bulk sampling - for cadmium prior to demolition at the Silica Road site. He believed that these samples would have given a good cross section throughout the bridge (Tr. 76). He testified that the results showed that there was a trace of cadmium in the sample. He testified that based upon the results of the bulk sampling the detection limit was low enough to prevent overexposure and that there was no requirement for further monitoring of cadmium (Tr. 77). He testified that in his experience in other projects where they have tested and where cadmium results were this low, there has been no cadmium or very low levels of cadmium detected (Tr. 78). Mr. McDowell's testimony confirmed that the sampling had been performed.

The undersigned finds that the standard requires a determination be made as to whether cadmium is present and whether there is the possibility of exposure at or above the action level. The record establishes that Respondent made a determination via bulk testing that cadmium was present. The Respondent determined that based upon the results of this testing, there was no possibility at or above the action level. The undersigned also finds that the compliance officer's belief that .1% would cause an overexposure because .1% is much greater than 5 $\mu g/m^3$ is misleading testimony (Tr. 44). The standard's action and permissible exposure levels are airborne concentrations derived from an 8-hour time-weighted average. The .1% finding of cadmium was derived from a bulk sample scraped off of steel beams - it does not represent what a worker would breathe over 8 hours. The undersigned notes that he testified that he did not know what the levels were for cadmium at the worksite (Tr. 28). The Respondent's witness, who had over 20 years experience in the area of lead and cadmium control, testified that in his experience the cadmium results indicated a detection level so low that there would be no overexposure. The undersigned finds that Mr. DiNardo's testimony is more persuasive with respect to the meaning of the results of the bulk testing. IH Snitzer had only performed 20-30 inspections out of the 450 inspections he performed over his 13 year employment history with OSHA. The undersigned finds that the bulk sampling of the paint established the presence of cadmium which is what the standard requires. The Respondent determined that the results of the sampling indicated that there would be no overexposure. The undersigned finds that the Respondent complied with the standard. The cited standard does not require monitoring. *See* §1926.1127 (d)(2)(I). The violation is Vacated.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Federal Rule of Civil Procedure 52(a).

ORDER

Citation 1, Item 1 alleging a violation of 29 CFR §1926.95(c) is Vacated.
Citation 1, Item 2 alleging a violation of 29 CFR §1926.62(d)(4)(I) is Vacated.
Citation 1, Item 3 alleging a violation of 29 CFR §1926.1127(d)(1)(I) is Vacated.

Covette Rooney
Judge, OSHRC
Dated: Washington, D.C.