Secretary of Labor,	:	
Complainant,	:	
	:	
v.	:	OSHRC Docket No. 00-1791
	:	
SC Development Corporation,	:	
Respondent.	:	
	:	

APPEARANCES

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For Complainant

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For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

SC Development Corporation (SCD) was demolishing an abandoned railroad bridge over Nott Street in Schenectady, New York, in May – June, 2000. On June 8, 2000, Occupational Safety and Health Administration (OSHA) Compliance Officer (CO) Joseph Brown inspected the Nott Street Bridge job site. As a result of the inspection, SCD received serious and willful citations on August 16, 2000. SCD timely contested the citations.

Citation 1 alleges the following serious violations: Item 1a, 29 C.F.R. § 1926.62(d)(2)(v)(A) for failing to provide adequate respiratory protection to employees exposed to airborne lead; Item 1b, 29 C.F.R. § 1926.62(f)(2)(i) for failing to implement an adequate respiratory protection program for employees exposed to airborne lead; Item 1c, 29 C.F.R. § 1926.62(f)(3)(i) for failing to select appropriate respirator or combination of respirators for employees exposed to airbome lead; Item 2a, 29 C.F.R. § 1926.62(d)(2)(v)(B) for failing to provide appropriate personal protective clothing and equipment for employees exposed to lead; Item 2b, 29 C.F.R. § 1926.62(g)(1) for failing to provide, at no cost to the employees, protective work clothing and equipment for employees exposed to lead above the permissible exposure

limit (PEL); Item 3a, 29 C.F.R. § 1926.62(d)(2)(v)(D) for failing to provide hand washing facilities for employees exposed to lead; Item 3b, 29 C.F.R. § 1926.62(i)(5)(i) for failing to provide hand washing facilities for employees exposed to lead; Item 4a, 29 C.F.R. § 1926.62(d)(2)(v)(E) for failing to perform biological monitoring for employees exposed to lead; Item 4b, 29 C.F.R. § 1926.62(j)(1)(i) for failing to perform initial medical surveillance on employees exposed to lead at or above the action level; Item 5a, 29 C.F.R. § 1926.62(d)(2)(v)(F) for failing to provide training for employees exposed to lead; Item 5b, 29 C.F.R. § 1926.62(l)(1)(ii) for failing to provide a training program on elevated lead exposure to employees exposed to lead at or above the action level; and Item 6, 29 C.F.R. § 1926.62(e)(2)(i) for failing to establish and implement a written compliance program for lead prior to commencement of the job. The total penalty for the alleged serious violations is $7,500.00.

Citation 2 alleges the following willful violations: Item 1, 29 C.F.R. § 1910.134(f)(1) for failing to ensure that employees using a tight-fitting face-piece respirator pass an appropriate qualitative fit test (QLFT) or quantitative fit test (QNFT); Item 2a, 29 C.F.R. § 1926.62(d)(1)(i) for failing to initially determine if employees may be exposed to lead at or above the action level; and Item 2b, 29 C.F.R. § 1926.62(d)(1)(iii) for failing to perform personal exposure sampling for employees exposed to lead. The total penalty for the alleged willful violations is $77,000.00.

The hearing was held August 22-24, 2001, in Albany, New York. Jurisdiction and coverage were stipulated (Tr. 4). The parties filed post-hearing briefs.

SCD denies the alleged violations. SCD admits it was aware of lead on the job site but asserts the affirmative defense of unpreventable employee misconduct.

For the following reasons, SCD's employee misconduct defense is rejected. The Citation 1 serious violations of 29 C.F.R. §§ 1926.62(d)(2)(v)(A), 1926.62(f)(2)(i), 1926.62(f)(3)(i), 1926.62(d)(2)(v)(B), 1926.62(d)(2)(v)(D), 1926.62(d)(2)(v)(E), 1926.62(d)(2)(v)(F), and 1926.62(e)(2)(i) are affirmed and the remaining alleged violations are vacated. The Citation 2 willful classification is reclassified as serious, and the violations are affirmed. The total penalty assessed is $5,500.00.

Background

SCD is primarily engaged in the business of utility pipe and site development work for residential developments. It occasionally performs bridge construction and demolition. SCD's office is in Clifton Park, New York, and it employs approximately 25 employees. SCD was incorporated in 1998 and is the successor corporation to Schultz Construction Corporation that was founded in 1970 by William J. Schultz, the president and owner of both Schultz Construction and SCD (Tr. 446-447). Schultz Construction was involved primarily (60-70% of its work) in bridge construction and demolition (Tr. 448).

In April, 2000, SCD contracted to demolish an old abandoned railroad bridge over Nott Street in Schenectady (Tr. 453). The bridge was a steel girder bridge which was supported by upright steel columns. The job had to be completed as quickly as possible because Nott Street could only be closed to traffic for a limited amount of time (Tr. 75-76).

The chief estimator for SCD on the bridge project was Schultz's son, William M. Schultz. He noticed that the site plans and notes on the bridge stated that "the contractor should be aware of the potential existence of lead-based paint on the existing superstructure" and he asked Greg Turner, the safety officer and equipment coordinator for SCD, to look into it (Exh. R-1; Tr. 288). Turner went to the OSHA Internet website and downloaded the standards on lead (Tr. 290, 320). Turner took this information to Schultz, who told him to contact Joseph Boni, Jr., the former safety director for Schultz Construction (Tr. 292). Boni told Turner that in order to protect employees from lead exposure, the method used to remove lead from Schultz Construction projects in the past was to apply paint stripper to strip the lead-based paint 4 inches on either side of the locations where the torch would cut the steel (Tr. 292, 383, 396).

Before the job began, John Coons, project manager, and Robert DeGroot, foreman for the job, went to examine the bridge site. They saw that the channel girders (floor beams) were rusted but there was not a lot of rust on the inside of the upper surface of the bridge (Tr. 39). Coons performed swab/swipe tests for lead in 3 or 4 different areas on top of the bridge (Tr. 40, 71, 72). The test involves swabbing a sample of the paint. If the swab turns black, lead is not present; if it turns pink, lead is present (Tr. 43). DeGroot testified that two of the swabs were black and one was maroon, so none of the samples tested positive (*i.e.*, none were "bright pink") (Tr. 17, 43). According to Turner, Coons telephoned him from the site and told him that the test was positive for lead; and Turner informed president Schultz of the results (Tr. 296, 457).

The demolition of the bridge involved torch cutting the steel beams, girders, and rivets; taking them down; then removing the concrete abutments and sidewalks. The demolition crew consisted of foreman DeGroot, Mark Crannell, Clifford Murtlow and Neil Cullen (Tr. 19). Although DeGroot had worked for Schultz Construction for 9 years, this was his first time as a foreman on a demolition project and he stated that he was never briefed on the duties of a foreman (Tr. 52). The torch work was performed by DeGroot and Murtlow, who used oxy-acetylene torches, and Cullen, who used a magnesium torch (Tr. 82, 117, 128). Prior to torch cutting, no paint stripping was done (Tr. 49).

The employees wore blue jeans, T-shirts, work shoes, hard hats and gloves (Tr. 81, 101, 126). Two of the 3 employees who were torch cutting wore respirators. Murtlow testified that he started using a half-face cloth filter respirator off and on when he received one about half-way through the job (Tr. 100). Cullen stated that he requested a respirator because of the magnesium smoke and received one after he had been on the job about a week (Tr. 129). He wore a full-face air-purifying respirator. However, after 2 days the batteries died, but Cullen said he continued to use it without batteries (Tr. 133). DeGroot said he did not wear a respirator (Tr. 20).

The OSHA inspection by CO Brown was a referral inspection based on a photograph in a local newspaper of the Nott Street Bridge demolition (Tr.152). The age of the bridge (built in the 1930's) indicated the possibility of lead-based paint (Tr. 5, 245). One of the focuses of the Albany, New York, OSHA office was addressing the high hazard of lead in construction (Tr. 149).

CO Brown was at the job site approximately 2 hours, from 3:00 p.m. to 5:00 p.m., on June 8, 2000 (Tr. 248). At that time, the steel was all down and only some concrete and sidewalks needed to be removed (Tr. 307). CO Brown held an opening conference with foreman DeGroot who told him he was not aware of the presence of lead on the bridge (Tr. 157). Then CO Brown started to interview the other employees but DeGroot asked him to wait until he could get the safety manager on site (Tr. 153). CO Brown stopped his interviewing and waited for the safety manager. About 20-30 minutes later, Turner, the safety manager, arrived and CO Brown held an opening conference with him (Tr. 153). Turner told CO Brown that there was lead on the bridge based on the swipe samples (Tr. 154). CO Brown interviewed the rest of the employees on site. He stated that the employees told him they were not aware of lead on the job (Tr. 192).

CO Brown took 4 bulk samples of paint off pieces of the bridge in a junk pile (Tr. 157). The bulk samples were sent to a lab and the results were: sample one contained 0.08% lead, sample two and three were 0.8% lead, and sample four was 7% lead (Tr. 249).

DISCUSSION

The Secretary has the burden of proving, by a preponderance of the evidence, a violation of the standard.

> 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 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 (*i.e.,* 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).

The construction lead standards are applicable in this case because SCD's demolition work of the Nott Street bridge involved lead-based paint as evidenced by Coon's swipe test and CO Brown's bulk sampling. The lead-based paint was not removed prior to the demolition work. Employees were potentially exposed to airborne lead as a result of torch cutting the steel. The employees' access to the conditions is unrebutted. However, the level of employee exposure to airborne lead is unknown as air monitoring was not performed by the employer.

SCD knew of the existence of lead-based paint on the Nott Street Bridge. Even though foreman DeGroot stated he was not aware of lead on the job, safety officer Turner, project manager Coons, and president Schultz were aware of the presence of lead. "(W)hen a supervisory employee has actual or constructive knowledge of the violative conditions, that knowledge is imputed to the employer." *Dover Elevator Co.,* 16 BNA OSHC 1281, 1286 (No. 91-0862, 1993).

ALLEGED VIOLATIONS

Citation 1, Items 1a, 1b and 1c - Alleged Serious Violations of §§ 1926.62(d)(2)(v)(A), 1926.62(f)(2)(i) and 1926.62(f)(3)(i)

The citation alleges that SCD failed to implement an adequate respirator program and select and provide appropriate respirator protection to employees performing magnesium torch cutting and oxy-acetylene torch cutting. Section 1926.62(d)(2)(v)(A) provides:

> *Exposure assessment* - (2) *Protection of employees during assessment of exposure.* (v) Until the employer performs an employee exposure assessment as required under paragraph (d) of the section and determines actual employee exposure, the employer shall provide to employees performing the tasks described in paragraphs (d)(2)(i), (d)(2)(ii), (d)(2)(iii), and (d)(2)(iv) of this section with interim protection as follows: (A) Appropriate respiratory protection in accordance with paragraph (f) of this section.

Section 1926.62(f)(2)(i) provides:

> (f) *Respiratory protection.* (2) *Respirator Program.* (i) The employer must implement a respiratory protection program in accordance with 29 CFR 1910.134 (b) through (d) (except (d)(1)(iii)), and (f) through (m).

Section 1926.62(f)(3)(i) provides:

> (f) *Respiratory protection.* (3) *Respirator selection.* (i) The employer must select the appropriate respirator or combination of respirators from Table I of this section.

It is undisputed that the employees began torch cutting without respirators. DeGroot testified that Coons saw the employees torch cutting without respirators (Tr. 22-23). Murtlow said that Turner saw him torch cutting without a respirator (Tr. 103). Cullen stated that Turner, Coons and estimator Schultz saw the employees working without respirators (Tr. 130). The employees did not have respirators until they requested them because of the smoke generated by the magnesium torch (Tr. 129). Upon request, respirators were sent to the job site. Turner said that he did not make any selection for the respirators; he sent respirators which were in a box at the office and which were there when he took the job at SCD (in February, 1999) (Tr. 281, 338). Turner stated he did not inspect the respirators or know how old they were (Tr. 338-339). One respirator was a full-face powered air-purifying respirator (PAPR) operated with batteries that Cullen wore. The rest of the respirators were half-face negative pressure air purifying respirators that use cartridges (Tr. 165). Murtlow wore one of these off and on (Tr. 100). DeGroot did not wear a respirator.

Section 1910.134(c), which is incorporated by § 1926.62(f)(2)(i), requires employers "to develop and implement a written respiratory protection program with worksite-specific procedures and elements for required respirator use." Section 1920.134(e) requires employers to "provide a medical evaluation to determine the employee's ability to use a respirator, before the employee is fit tested or required to use the respirator in the workplace."

Section 1926.62(d)(2)(iv) provides in pertinent part that "until the employer performs an employee exposure assessment . . . the employer shall treat the employee as if the employee were exposed to lead in excess of 2,500 g/m^3 (50 x PEL) and shall implement employee protective measures" for employees performing torch cutting. Under Table I of § 1926.62(f)(3)(i), the respirator required is a ½ mask supplied air respirator operated in pressure demand mode for airborne concentrations of lead not in excess of 50,000 g/m^3 (employees are to be treated as if they were exposed to lead in excess of 2,500 g/m^3).

SCD did not perform any employee exposure assessments of the employees torch cutting on the Nott Street bridge. Turner told CO Brown on two different occasions that no exposure assessment had been performed (Tr. 155, 162, 174). Since the assessment was not performed, § 1926.62(f) requires SCD to provide air supplied respirators operated in pressure demand or other positive-pressure mode for employees who are torch cutting. Although SCD provided employees with half-face air purifying respirators and one full-face PAPR, it did not provide the required air supplied respirators (Tr. 165). Also, SCD failed to ensure that any respirators were actually worn by employees.

Further, CO Brown asked SCD for a copy of its respirator program. He was given a document that referenced § 1926.103, the old standard on respirator protection. Also, it was not site specific and did not address medical surveillance, medical evaluation, and fit testing of the respirators (Tr. 170-171). This document was not offered into evidence. It is undisputed that the employees were not given medical evaluations before wearing the respirators and were not fit tested for the respirators. One employee, Murtlow, who had open-heart surgery, was not medically evaluated for his ability to wear a respirator (Tr. 107).

Under § 17(k) of the Occupational Safety and Health Act (Act), a violation is serious if there is a substantial probability that death or serious physical harm could result from the violative condition. 29 U. S. C. § 666(k). SCD's violations of the respiratory requirements are serious

because it was aware of lead-based paint on the steel of the Nott Street Bridge. The exposure to lead can have serious health consequences, such as kidney and nervous system damage, which are irreversible (Tr. 167-168).

Accordingly, the violation of § 1926.62(d)(2)(v)(A), 1926.62(f)(2)(i), 1926.62(f)(3)(i) are affirmed as serious.

Citation 1, Items 2a and 2b – Alleged Serious Violations of §§ 1926.62(d)(2)(v)(B) and 1926.62(g)(1)

The citation alleges that SCD failed to provide appropriate personal protective clothing for employees performing torch cutting. Section 1926.62(d)(2)(v)(B) provides:

> (d) *Exposure assessment* – (2) *Protection of employees during assessment of exposure.* (v) Until the employer performs an employee exposure assessment as required under paragraph (d) of this section and determines actual employees exposure, the employer shall provide to employees performing the tasks described in paragraphs (d)(2)(i), (d)(2)(ii), (d)(2)(iii), and (d)(2)(iv) of this section with interim protection as follows: (B) Appropriate personal protective clothing and equipment in accordance with paragraph (g) of this section.

Section 1926.62(g)(1) provides:

> (g) *Protective work clothing and equipment* – (1) *Provision and use.* Where an employee is exposed to lead above the PEL without regard to the use of respirators, where employees are exposed to lead compounds which may cause skin or eye irritation (e.g. lead arsenate, lead azide), and as interim protection for employees performing tasks as specified in paragraph (d)(2) of this section, the employer shall provide at no cost to the employee and assure that the employee uses appropriate protective work clothing and equipment that prevents contamination of the employee and the employee's garments such as but not limited to: (i) coveralls or similar full-body work clothing; (ii) Gloves, hats, and shoes or disposable shoe coverlets; and (iii) Face shields, vented goggles, or other appropriate protective equipment which complies with § 1910.133 of this chapter.

It is undisputed that employees worked in their street clothes and that no protective clothing was provided by the employer except for torch cutting gloves (Tr. 81, 101, 126). The employees did not change clothes after work and wore the contaminated clothing in their vehicles and to their homes. CO Brown said that Turner told him that no head covers, no body covers and no shoe covers were provided (Tr. 176).

Section 1926.62(g)(1) is incorporated into § 1926.62(d)(2)(v)(B) by reference and citation of both sections is duplicative. Additionally, § 1926.62(g)(1) by itself is not applicable in this case because it is unknown whether employees were exposed to lead above the PEL.

The violation of § 1926.62(d)(2(v)(B) is serious because, without protective clothing, employees were exposed to lead which could result in serious health problems.

Therefore, the violation of § 1926.62(d)(2)(v)(B) is affirmed as serious and the violation of § 1926.62(g)(1) is vacated.

Citation 1, Items 3a and 3b – Alleged Serious Violations of §§ 1926.62(d)(2)(v)(D) and 1926.62(i)(5)(i)

The citation alleges that SCD did not provide hand washing facilities for employees exposed to lead. Section 1926.62(d)(2)(v)(D) provides in pertinent part:

> (d) *Exposure assessment* – (2) *Protection of employees during assessment of exposure.* (v) Until the employer performs an employee exposure assessment as required under paragraph (d) of this section and determines actual employee exposure, the employer shall provide to employees performing the tasks described in paragraphs (d)(2)(i), (d)(2)(ii), (d)(2)(iii), and (d)(2)(iv) of this section with interim protection as follows: (D) Hand washing facilities in accordance with paragraph (i)(5) of this section.

Section 1926.62(i)(5)(i) provides:

> (i) The employer shall provide adequate handwashing facilities for use by employees exposed to lead in accordance with 29 CFR 1926.51(f).

It is undisputed that hand washing facilities were not provided at the job site. Three employees and the safety officer stated that there were no hand washing facilities on site (Tr. 25, 103, 132, 291). CO Brown did not see any hand washing facilities on site (Tr. 181). Employees ate their lunch on site and were not able to wash their hands before they ate (Tr. 25, 103, 132).

Section 1926.62(d)(2)(v)(D) incorporates § 1926.62(i)(5)(i) by reference and citation of both sections is duplicative. Also, § 1926.62(i)(5)(i) on its own does not apply because it is unknown whether employees were exposed to lead above the PEL.

The violation of § 1926.62(d)(2)(v)(D) is serious because employees exposed to airborne lead, who are not able to wash their hands before they ate, would be ingesting lead.

Therefore, the violation of § 1926.62(d)(2)(v)(D) is affirmed and the violation of § 1926.62(i)(5)(i) is vacated.

Citation 1, Items 4a and 4b – Alleged Serious Violations of §§ 1926.62(d)(2)(v)(E) and 1926.62(j)(1)(i)

The citation alleges that SCD failed to provide employees with biological monitoring for lead (Item 4a) or initial medical surveillance to employees exposed to lead (Item 4b).

Section 1926.62(d)(2)(v)(E) provides that until the employer performs an employee exposure assessment to determine actual employee exposure, the employer shall provide to employees performing certain tasks with interim protection as follows:

> (E) Biological monitoring in accordance with paragraph (j)(1)(i) of this section, to consist of blood sampling and analysis for lead and zinc protoporphyrin levels. . .

Section 1926.62(j)(1)(i) provides:

> (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.

It is undisputed that SCD failed to perform an employee exposure assessment for lead before or during the demolition job. Turner admitted that SCD failed to perform biological monitoring of employees exposed to lead (Tr. 337). Exposure to lead can lead to serious physical harm.

The Secretary failed to establish a violation of § 1926.62(j)(1)(i). There is no evidence that employees were exposed in any day to lead levels at or above the action level for lead.

The violation of § 1926.62(d)(2)(v)(E) is affirmed as serious and the violation of § 1926.62(j)(1)(i) is vacated.

Citation 1, Items 5a and 5b – Alleged Serious Violations of §§ 1926.62(d)(2)(v)(F) and 1926.62(l)(1)(ii)

The citation alleges that SCD failed to provide training and a training program on elevated lead exposure and limitations on respirator use for employees exposed to lead.

Section 1926.62(d)(2)(v)(F) provides that until the employer performs an employee exposure assessment to determine actual employee exposure, the employer shall provide to employees performing certain tasks with interim protection as follows:

> (F) Training as required under paragraph (l)(1)(i) of this section regarding 29 CFR 1926.59, Hazard Communication; training as required under paragraph (l)(2)(ii)(C) of this section, regarding use of respirators; and training in accordance with 29 CFR 1926.21, Safety training and education.

Section 1926.62(l)(1)(ii) provides:

> (ii) for all employees who are subject to exposure to lead at or above the action level on any day or who are subject to exposure to lead compounds which may cause skin or eye irritation (e.g. lead arsenate, lead azide), the employer shall provide a training program in accordance with paragraph (l)(2) of this section and assure employee participation.

Since SCD failed to perform any lead exposure assessment of employees on the demolition job, SCD is required to provide training to employees on lead exposure and respirator use. Employees DeGroot, Murtlow, and Cullen testified that they received no training on lead exposure or respirator use (Tr. 15, 25, 98, 124). Safety officer Turner admitted that he had no training in lead and that he was not aware of any lead training for DeGroot (Tr. 313).

The Secretary failed to establish a violation of § 1926.62(l)(1)(ii). There is no evidence that employees were exposed in any day to lead levels at or above the action level.

Accordingly, the violation of § 1926.62(d)(2)(v)(F) is affirmed as serious and the violation of § 1926.62(l)(1)(ii) is vacated.

Citation 1, Item 6 – Alleged Serious Violation of § 1926.62(e)(2)(i)

The citation alleges that prior to commencement of the Nott Street Bridge job, SCD failed to establish and implement a written compliance program for employees exposed to lead. Section 1926.62(e)(2)(i) provides:

> (e) *Methods of compliance.* (2) *Compliance program.* (i) Prior to commencement of the job each employer shall establish and implement a written compliance program to achieve compliance with paragraph (c) of this section.

Section 1926.62(c) requires the employer to assure that no employee is exposed to lead at 50 g/m^3 averaged over 8 hours.

CO Brown said that Turner told him that there was no written compliance program for the Nott Street Bridge project (Tr. 200). SCD failed to establish a written compliance program. Because exposure to lead can have serious health consequences, the violation is classified as serious.

Therefore, the violation of § 1926.62(e)(2(i) is affirmed as serious.

Citation 2, Item 1 – Alleged Willful Violation of § 1910.134(f)(1)

The citation alleges that SCD failed to perform a fit test for employees who were exposed to lead using a tight-fitting face-piece respirators. Section 1910.134(f)(1) provides:

> (1) The employer shall ensure that employees using a tight-fitting face-piece respirator pass an appropriate qualitative fit test (QLFT) or quantitative fit test (QNFT) as stated in this paragraph.

The employees testified that the respirators they used, while torch cutting steel covered with lead-based paint, were not fit tested (Tr. 16, 102, 133). CO Brown stated that Turner told him that no fit testing of respirators was done for employees (Tr. 203, 208). One of the employees, Cullen, who used the full-face PAPR, had a beard and was wearing glasses while using the respirator (Tr. 133). Facial hair does not allow a tight fit for the respirator's facepiece seal. Cullen stated that the respirator was sometimes a tight fit, sometimes not (Tr. 133).

The violation of § 1910.134(f)(1) is affirmed.

Citation 2, Items 2a and 2b – Alleged Willful Violations of §§ 1926.62(d)(1)(i) and 1926.62(d)(1)(iii)

The citation alleges that SCD failed to perform an initial exposure determination of the amount of lead (item 2a) and failed to perform personal exposure sampling (item 2b) for employees exposed to lead-based paint when torch cutting. Section 1926.62(d)(1)(i) provides:

> (d) *Exposure assessment* – (1) *General.* (i) Each employer who has a workplace or operation covered by this standard shall initially determine if any employee may be exposed to lead at or above the action level.

Section 1926.62(d)(1)(iii) provides:

> (iii) With the exception of monitoring under paragraph (d)(3), 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.

Although SCD determined the presence of lead on the Nott Street Bridge site, it did not assess what the level of the lead was. Turner admitted that an initial exposure assessment to determine if employees were exposed to lead at or above the action level was not performed (Tr. 337). Also, Turner admitted that SCD did not perform any personal exposure air monitoring for employees exposed to lead (Tr. 350).

Accordingly, the violations of §§ 1926.62(d)(1)(i) and 1926.62(d)(1)(iii) are affirmed.

Willful Classification of Citation 2

The violations of §§ 1910.134(f)(1), 1926.62(d)(1)(i), and 1926.62(d)(1)(iii) are classified as willful. The Secretary contends they are willful because safety officer Turner intentionally disregarded the requirement to fit test respirators and was indifferent to the requirement to conduct an initial exposure assessment and personal exposure air monitoring.

"It is well settled that a willful violation is one committed with intentional, knowing or voluntary disregard for the requirements of the Act, or with plain indifference to employee safety." *Continental Roof Systems, Inc.,* 18 BNA OSHC 1070, 1071 (No. 95-1716, 1997). It is not enough for the Secretary to show that an employer was aware of conduct or conditions constituting the alleged violation. "A willful violation is differentiated by heightened awareness of the illegality of the conduct or conditions and by a state of conscious disregard or plain indifference when the employer committed the violation." *Hern Iron Works, Inc.,* 16 BNA OSHC 1206, 1214 (No. 89-433, 1993).

"A willful charge is not justified if an employer has made a good faith effort to comply with a standard or eliminate a hazard even though the employer's efforts are not entirely effective or complete." *Valdek Corp.,* 17 BNA OSHC 1135, 1136 (No. 93-0239, 1995, *aff'd*. 73 F.3d 1466 (8th

Cir. 1996). The test of good faith is an objective one, that is "whether the employer's belief concerning the factual matters in question was reasonable under all the circumstances." *Morrison-Knudson Co./Yonkers Contracting Co.,* 16 BNA OSHC 1105, 1124 (No. 88-572, 1993).

The Secretary failed to establish that SCD "consciously disregarded or was plainly indifferent" to the lead standards. The evidence shows that SCD did not disregard lead on the job because SCD attempted to eliminate the lead. Safety officer Turner had never worked with lead before and did not know much about the hazards of lead exposure (Tr. 291, 315). Although Turner downloaded a copy of the lead standards, he did not fully understand what the standards required. Boni, Schultz Construction's previous safety officer, testified that Turner was confused by the lead standards (Tr. 396, 401). An employer's "knowledge of a standard and a subsequent violation of that standard" do not automatically prove willfulness. *Wright and Lopez, Inc.,* 8 BNA OSHC 1261, 1265 (No. 76-3743, 1980).

After consultation with Boni, Turner believed that he could eliminate the lead through use of paint stripper to remove the lead-based paint. Turner ordered industrial strength paint stripper and provided it along with the other supplies for the job to DeGroot to use on the steel before beginning demolition (Tr. 297, 299). Turner stated that he told DeGroot to strip the paint 4 inches on each side of the cut (Tr. 299). He assumed that DeGroot used the paint stripper and thus eliminated the lead. However, unbeknownst to Turner, DeGroot never used the paint stripper. Consequently, when Turner sent respirators to the job site for the employees, he did not believe that the respirators were being used for lead protection (since he thought the lead had been removed), but were used only for smoke protection (Tr. 305).

Under these circumstances, Turner did not have a heightened awareness and did not make a deliberate decision to disregard the standards. "An employer's unsuccessful efforts to prevent a violation are sufficient to demonstrate that the employer's state of mind was not one of disregard or indifference so long as the employer acted in an objectively reasonable manner." *Beta Construction Co.,* 16 BNA OSHC 1435, 1445 (No. 91-102, 1993). The violations are not willful in light of Turner's good faith effort to comply with what he thought was required to remove the lead.

The Secretary has failed to establish that the violations of §§ 1910.134(f)(1), 1926.62(d)(1)(i), and 1926.62(d)(1)(iii) were willful. In view of the fact that exposure to lead can result in serious harm, the violations are reclassified as serious.

Unpreventable Employee Misconduct Defense as to Citations 1 and 2

SCD claims the affirmative defense of unpreventable employee misconduct based on foreman DeGroot's failure to use the paint stripper to remove the lead-based paint on the bridge before demolition.

In order to establish the unpreventable employee misconduct defense, an employer must show:

> (1) that it has established work rules designed to prevent the violation; (2) that it has adequately communicated these rules to its employees; (3) that it has taken steps to discover violations; and (4) that it has effectively enforced the rules when violations have been discovered.

Nooter Construction Co., 16 BNA OSHC 1572, 1578 (No. 91-0237, 1994).

In addition, when a supervisor is involved, such as in this case, "the proof of unpreventable employee misconduct is more rigorous and the defense is more difficult to establish since it is the supervisor's duty to protect the safety of employees under his supervision." *Archer-Western Contractors, Ltd.,* 15 BNA OSHC 1013, 1017 (No. 87-1067, 1991). "(A) supervisor's failure to follow the safety rules and involvement in the misconduct is strong evidence that the employer's safety program was lax." *Ceco Corp.,* 17 BNA OSHC 1173, 1176 (No. 91-3235, 1995).

The employer must first show that it has established work rules designed to implement the requirements of the standard. *Wheeling-Pittsburgh Steel Corp.,* 16 BNA OSHC 1780, 1784 (No. 91-2524, 1994). Turner stated that SCD did have a lead rule in the company's safety manual (Tr. 334). However, the company's safety manual was not offered into evidence. Although SCD had an employee "Safety Program"[1] (5 pages long and shorter than the company's safety manual) that was given to employees when they started employment with the company, it did not contain anything on lead (Exh. R-7, Tr. 330). Furthermore, there was no safety rule on use of paint stripper to remove lead-based paint. SCD failed to establish that it had work rules on lead safety.

The second requirement to prove the affirmative defense is that an employer must show that it has adequately communicated the rules to its employees. Employees had an individual safety

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[1] This exhibit was admitted only as to the type of document provided to SCD employees and not as a document provided to any specific employee.

orientation with Turner when they started work with the company. Turner stated that he did mention lead at the safety orientations (Tr. 333). Conversely, DeGroot, Murtlow and Cullen testified that they received no training on lead exposure standards (Tr. 15, 98, 124). They further stated that they did not know and had not been told that there was lead on the Nott Street Bridge job (Tr. 16, 120, 126). Safety officer Turner stated that he did not have any training on lead and was unfamiliar with the lead standards (Tr. 313, 315). He admitted that he never discussed the lead standards with foreman DeGroot (Tr. 324).

In addition, DeGroot stated that he was not instructed on the use of paint stripper for the Nott Street Bridge job and had never used paint stripper on a job before (Tr. 34, 61). Turner admitted that he did not tell DeGroot how to use the paint stripper (Tr. 358). Clearly, SCD failed to communicate anything on lead to its employees.

Third, an employer must show that it has taken steps to discover violations. "Establishing adequate procedures for monitoring employee conduct for compliance with applicable work rules is a critical part of any employer effort to eliminate hazards." *American Sterilizer Co.,* 18 BNA OSHC 1082, 1087 (No. 91-2494, 1997). Turner stated that he went to the job site a couple of times and saw employees cutting rusted steel; he did not believe the employees were using the paint stripper on that steel because it was rusted (*i.e.*, without paint) (Tr. 303). Turner admitted that he did not inspect what DeGroot was doing on the job, even though this was DeGroot's first time as a foreman (Tr. 315). Turner further acknowledged that he did not do anything to insure that the paint stripper was properly used or was used at all by DeGroot (Tr. 336). Hence, SCD made no efforts to discover the unsafe conditions.

Finally, the employer must show that it effectively enforced the rules when violations were discovered. "To prove adequate enforcement of its safety rule, an employer must present evidence of having a disciplinary program that was effectively administered when work rule violations occurred." *GEM Industrial, Inc.,* 17 BNA OSHC 1861, 1863 (No. 93-1122, 1996). "Where all the employees participating in a particular activity violate an employer's work rule, the unanimity of such noncomplying conduct suggests ineffective enforcement of the work rule." *Id.* at 1865. Before the OSHA inspection occurred, there was no enforcement of the lead standards at the Nott Street Bridge job. After the OSHA inspection, DeGroot stated that he received a written notice in his file

noting that Turner and president Schultz believed he was aware of lead-based paint on the job[2] (Tr. 91).

SCD failed to prove any of the 4 elements of its affirmative defense. SCD's employee misconduct defense is rejected.

PENALTY ASSESSMENT

Section 17(j) of the Act requires that when assessing penalties, the Commission must give "due consideration" to four criteria: (1) the size of the employer's business, (2) the gravity of the violation, (3) the good faith of the employer, and (4) the prior history of violations. 29 U.S.C. § 666(j). The Commission has wide discretion in penalty assessment. *Kohler Co.,* 16 BNA OSHC 1769, 1776 (No. 88-237, 1994).

SCD is a small employer with approximately 25 employees. Four employees were involved in the demolition work on the Nott Street Bridge. SCD is entitled to credit for size.

Generally, the gravity of the violation is the primary consideration in assessing penalties. *Trinity Industries, Inc.,* 15 BNA OSHC 1481, 1483 (No. 88-2691, 1992). The gravity of a particular violation "depends upon such matters as the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood that any injury would result." *J. A. Jones Construction Co.,* 15 BNA OSHC 2201, 2214 (No. 87-2059, 1993). In this case, the gravity is moderate. Only 3 employees were torch cutting steel with lead-based paint and thus were potentially exposed to airborne lead. It took 9 days to complete the torch cutting (Tr. 167). Two of the employees were using respirators most of the time, even though the respirators were not the appropriate type.

SCD exhibited good faith. It was cooperative throughout the inspection. Credit is given for good faith.

SCD has not received any prior citations. Although Schultz Construction received citations, they were before the previous three-year period and were not for lead violations. Therefore, credit is given for good history.

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[2] In this case, whether DeGroot was telling the truth or not about his awareness of lead-based paint on the job is irrelevant to the proof required to establish the employee misconduct defense.

Based on these factors, a total penalty of $4,100.00 is reasonable for the violations affirmed in Citation 1 and a total penalty of $1,400.00 is reasonable for the violations affirmed in Citation 2.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

ORDER

Based on the preceding decision, it is ORDERED that:

Citation 1, Serious

1. Items 1a, 1b and 1c, alleging serious violation of 29 C. F. R. §§ 1926.62(d)(2)(v)(A), 1926.62(f)(2)(i), and 1926.62(f)(3)(i) are affirmed and a grouped penalty of $700.00 is assessed.
2. Item 2a, alleging serious violation of 29 C. F. R. § 1926.62(d)(2)(v)(B), is affirmed and a penalty of $625.00 is assessed.
3. Item 2b, alleging serious violation of 29 C. F. R. § 1926.62(g)(1), is vacated.
4. Item 3a, alleging serious violation of 29 C. F. R. § 1926.62(d)(2)(v)(D), is affirmed and a penalty of $625.00 is assessed.
5. Item 3b, alleging serious violation of 29 C. F. R. § 1926.62(i)(5)(i), is vacated.
6. Item 4a, alleging serious violation of 29 C. F. R. § 1926.62(d)(2)(v)(E), is affirmed and a penalty of $625.00 is assessed.
7. Item 4b, alleging serious violation of 29 C. F. R. § 1926.62(j)(1)(i), is vacated.
8. Item 5a, alleging serious violation of 29 C. F. R. § 1926.62(d)(2)(v)(F), is affirmed and a penalty of $625.00 is assessed.
9. Item 5b, alleging serious violation of 29 C. F. R. § 1926.62(l)(1)(ii), is vacated.
10. Item 6, alleging serious violation of 29 C. F. R. § 1926.62(e)(2)(i), is affirmed and a penalty of $900.00 is assessed.

Citation 2, Willful

1. Item 1, alleging violation of 29 C. F. R. § 1910.134(f)(1), is affirmed as serious and a penalty of $700.00 is assessed.
2. Items 2a and 2b, alleging willful violations of 29 C. F. R. §§ 1926.62(d)(1)(i) and 1926.62(d)(1)(iii), are affirmed as serious and a grouped penalty of $700.00 is assessed.

KEN S. WELSCH
Judge

Date: February 26, 2002