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SECRETARY OF LABOR,	:	
Complainant,	:	
v.	:	OSHRC Docket No. 92-0959
AMERICAN BRIDGE COMPANY,	:	
Respondent.	:	

DECISION

BEFORE: WEISBERG, Chairman; FOULKE and MONTOYA, Commissioners.

BY THE COMMISSION:

This case arises out of an OSHA inspection of a bridge rehabilitation project that involved torch cutting and burning on steel coated with lead-based paint. At issue on review is a citation item (citation no. 1, item 3) alleging a serious violation of 29 C.F.R. § 1926.51(f)[1] in that American Bridge Company ("American") failed to provide "adequate

[1] At the time of the alleged violation, the cited standard provided, as follows:

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

The standard has since been recodified at 29 C.F.R. § 1926.51(f)(1).

washing facilities" at the worksite for the removal of "harmful [contaminants]." We conclude that Administrative Law Judge Paul L. Brady erred in vacating this item on the ground that American lacked fair notice of the standard's applicability to the cited conditions. We further conclude that the Secretary met his burden of proving the alleged violation.

BACKGROUND

American, which was described by its safety administrator as "one of the largest steel erection companies in the . . . world," was aware that employees engaged in rehabilitating bridges covered with lead-based paint were potentially exposed to accumulations of surface lead dust and high levels of airborne lead. American had therefore, according to its posthearing brief, "voluntarily developed guidelines and procedures to control lead exposure."[2] These were embodied in work rules incorporated into the company safety manual and also in a 5-page attachment to American's hazard communication program (hereafter "American's lead policy"). These documents reveal that, at the time of the alleged violation, American was knowledgeable about the harmful effects of overexposure to lead, the routes of entry into the body (inhalation and ingestion), the types of overexposure (acute and chronic), and the importance of good personal hygiene practices as a means of preventing overexposure through ingestion.[3]

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[2] At the time of the alleged violation, the permissible exposure limit ("PEL") for employees exposed to airborne lead during construction operations was an 8-hour time weighted average ("TWA") exposure to 200 $\mu g/m^3$. 29 C.F.R. § 1926.55(a). American assertedly believed that its only legal obligation at the time, with respect to employees exposed to lead, was to comply with section 1926.55(a) and that any other action it may have taken to protect these employees was done "voluntarily."

[3] For example, the foreward to section 17 ("Painting") of American's safety manual stated:

> You should realize that lead and other toxic contents of paint may enter your system through the skin, the mouth, and by inhaling into the lungs. These harmful substances are taken into the system most commonly by inhaling the fumes or dust, but just as readily, in eating or putting the hands to the mouth.

(continued...)

The construction project at issue involved rehabilitation work on two bridges (the Eagle Avenue and Carter Road bridges) crossing the Cuyahoga River in Cleveland, Ohio. American had approximately 27 employees performing work on this project over a period of several months. Compliance officer and industrial hygienist Fioritto ("the CO") testified, without contradiction, that American could have provided the washing facilities needed at this worksite by maintaining an on-site mobile trailer equipped with wash basins and a shower.[4]

American's failure to provide the type of washing facilities sought by the Secretary was a *decision* made by construction manager Krizner, safety administrator Mykich, and construction superintendent DelCostello at a February 1991 pre-job meeting. According to Mykich, the planning group anticipated that the exposures of employees engaged in burning on the Eagle Avenue Bridge would exceed 200 $\mu g/m^3$. American therefore adopted a policy

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[3](...continued)
This discussion was immediately followed by safety rule 17.1, which emphasized the "importan[ce]" of "personal cleanliness" and instructed employees to "[w]ash carefully before you eat" and "[b]athe each evening."

Similarly, American's lead policy included the following provisions on "hygiene facilities and practices":

> Wash-up facilities and clean change rooms are desirable for all employees exposed to lead dust or lead fume. Where practical, a facility to wash the hands and face, shall be provided and all employees encouraged to wash their face and hands before eating and at the end of the workday or before going home. Showering before going home is recommended where facilities are available.

[4] The Secretary's expert witness, OSHA compliance program manager Newman, testified that "adequate washing facilities" at the worksite in question would have been a "shower . . . on the work site . . . and some sort of sink . . . with running water" so that employees could have washed their hands and faces before eating and smoking and showered at the end of the day before going home. Similarly, the CO testified that the employees should have been provided with "water, soap and some type of towels" for use at lunch time and a shower for use at the end of the day. This testimony was corroborated by the Secretary's documentary evidence, *e.g.*, an April 1991 OSHA pamphlet captioned "Working with Lead in the Construction Industry" and an August 1991 NIOSH Alert dealing with this same subject.

of requiring these employees to wear respirators whenever they performed burning on surfaces covered with lead-based paint, based on their belief that the respirators would be needed "to maintain exposures below the permissible exposure level."

On the other hand, construction manager Krizner informed his colleagues that "very little" burning would be required on this project in comparison to other bridge rehabilitation projects. Accordingly, the planning group concluded that, by eliminating all unnecessary burning on the Eagle Avenue Bridge and requiring use of respirators whenever burning took place, American could meet its obligations under OSHA's standards. *See supra* note 2. They specifically decided *not* to implement the other protective measures in American's lead policy, including the hygiene practices described *supra* note 3.

A few months later, OSHA issued its pamphlet on lead in the construction industry, *see supra* note 4, which highlighted the "[s]ignificant lead exposures" that can occur during bridge rehabilitation work. Prominently displayed in this pamphlet was a list of safe work practices that included the personal hygiene practices described *supra* notes 3 & 4. The pamphlet also included a list of Part 1926 standards containing "related requirements," which was headed by "**1926.51 Sanitation,**" and it expressly warned construction contractors that these "[listed] OSHA standards may apply to lead work in construction." At the hearing, safety administrator Mykich acknowledged that he had received a copy of this pamphlet sometime around the time it was issued (in April 1991). Nevertheless, American did not alter its earlier decision not to provide washing facilities at the worksite in question.

THE ALLEGED VIOLATION

On the record before us, the Secretary has established the alleged violation of 29 C.F.R. § 1926.51(f) by sustaining his burden of proving that employees at the inspected workplace were "engaged in . . . operations where contaminants . . . [might have] be[en] harmful" to them within the meaning of the cited standard. Air contaminant monitoring conducted by the CO on December 10, 1991, while burning operations were in progress near the top of the Eagle Avenue Bridge, revealed that one of the employees engaged in that burning, Thomas McTaggart, had been exposed as a result to an 8-hour TWA concentration of airborne lead of 760 $\mu g/m^3$, which was approximately 3.8 times the 200 $\mu g/m^3$ PEL then

applicable.[5] Wipe sampling demonstrated that McTaggart had additionally been exposed on that same day to surface lead dust, under circumstances where lead ingestion was certainly possible, if not likely.[6] The CO also observed employees during the burning operations, surrounded by a "fairly thick cloud" of "fairly thick heavy smoke" in the vicinity of the face and hair.

American was therefore required under the terms of the cited standard to "provide adequate washing facilities" for employees exposed to lead that were "so equipped as to enable [them] to remove such substances." *See McGraw Constr. Co.*, 15 BNA OSHC 2144, 2148, 1991-93 CCH OSHD ¶ 29,947, p. 40,948 (No. 89-2220, 1993). On this record, it is beyond dispute that American failed to provide the required facilities at the workplace in question.[7] The CO testified that there were *no* washing facilities of any kind at the inspected site, and employee McTaggart confirmed this by testifying that there had been no place at the worksite where he could wash his hands.

We are not persuaded by American's argument that "the objective evidence from lead testing at the worksite confirms . . . that any requirement for showers and other washing

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[5] Although American questions the reliability of OSHA's determination, we agree with the judge that, in view of the reported result of *760* $\mu g/m^3$, "there is no question that McTaggart's exposure exceeded the TLV."

[6] The CO conducted his wipe sampling in two areas where employees customarily ate. Four samples were taken in the operator's room on the bridge *while* McTaggart was eating his lunch. They established the presence of lead dust on McTaggart's left hand, the outside of his lunch box, the top of his right shoe, and the outer surface of his hard hat, which was sitting on the table where McTaggart was eating. The other two samples were taken later in the day in a shanty where employees sometimes ate breakfast and changed their clothes. Five of the six samples detected amounts of surface lead in the range of 17 to 71 μg. The sixth (taken from the surface of McTaggart's hard hat) picked up 165 μg of lead.

[7] American argues that Judge Brady found that American complied with the cited standard by providing "employees with a waterless type of hand cleaner which could be deemed 'adequate.' " We doubt that the judge intended to enter such a finding, particularly after *American*, in its post hearing submissions, proposed a finding that "Respondent did *not* provide washing or shower facilities for employees who worked on the Eagle Avenue and Carter Road bridge rehabilitation projects" (emphasis added). If there were such a finding, we would have little difficulty in setting it aside on the ground that it was not supported by the evidence.

facilities was inapplicable due to the limited nature of the burning of lead-based paint." Neither OSHA's wipe sampling as described *supra* note 6 nor the blood lead level tests administered by American over the course of several months establish that the levels of lead at the project in question were not potentially "harmful" within the meaning of the cited standard.

American urges us to compare the Secretary's wipe sample results with "clearance criteria" adopted by the U.S. Department of Housing and Urban Development (HUD) for lead abatement projects in public and Indian housing. However, the purpose of the CO's wipe sampling was merely to establish whether lead was present on the surfaces tested, not to provide any qualitative information. Accordingly, the wipe sample results are stated only in terms of micrograms and are not directly comparable to the limits American relies on, which are stated in terms of "weight of lead present per relevant surface area." In any event, it would not be appropriate to apply the HUD guidelines in the context of a long-term bridge rehabilitation project. The HUD guidelines were developed for application to a situation where the source of any further lead contamination has been removed. Here, in contrast, the likelihood was that the lead contamination levels would either sporadically increase or fluctuate due to ongoing burning and cutting operations.

We acknowledge that the results of American's biological monitoring consistently showed employee blood lead levels below 40 μg/100 g, *i.e.*, the level at which an employee may be safely returned to ordinary work duties following medical removal. *See* 29 C.F.R § 1910.1025(k)(1)(iii)(A)(*3*). However, we agree with OSHA compliance program manager Newman that these test results did not establish that American's employees were "in no danger." As noted in American's lead policy, lead poisoning is usually the result of "[c]hronic overexposure," which "occurs with the slow, continual overabsorption of lead over a long period of time." The test results therefore did not negate the possibility that employees at this site could have been harmed by continuing exposure to lead over the course of the lengthy bridge rehabilitation project.

Here, as in *McGraw*, we need not resolve the parties' dispute over whether the Secretary can require an employer to provide showers under 29 C.F.R. § 1926.51(f).[8] We decide only that American failed to provide "adequate washing facilities" at the worksite in question and that "one way [American] could have complied with the standard was by providing its employees [with the facilities advocated by the Secretary]." *McGraw*, 15 BNA OSHC at 2148, 1991-93 CCH OSHD at p. 40,948.

FAIR NOTICE

We reverse the judge's holding that American lacked fair notice of the applicability of the cited standard to the cited conditions and the actions that were required of it under the terms of that standard. Constitutional due process requires only that the cited employer be given "a fair and reasonable warning"; it "does not demand that the employer be *actually aware* that the regulation is applicable to his conduct or that a hazardous condition exists." *Faultless Div., Bliss & Laughlin Indus., Inc. v. Secretary of Labor*, 674 F.2d 1177, 1185 (7th Cir. 1982). Moreover, "a standard is not impermissibly vague simply because it is broad in nature." *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2205, 1991-93 CCH OSHD ¶ 29,964, p. 41,024 (No. 87-2059, 1993). Instead, "a broad regulation must be interpreted in the light of the conduct to which it is being applied, and external objective criteria, including the knowledge and perceptions of a reasonable person, may be used to give meaning to such a regulation in a particular situation." *Id.* at 2205-06, 1991-93 CCH OSHD at p. 41,025.

Applying these principles to the case before us, we conclude that the notice provided American by the cited standard's terms was clearly adequate in view of this employer's extensive experience in bridge rehabilitation work, its acute awareness of the hazards presented by employee exposure to lead, and its familiarity with such related guidelines as the April 1991 OSHA pamphlet on lead exposure during construction work and the hygiene provisions of the general industry lead standard. Indeed, American's own

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[8] We also need not address American's claim that the Secretary is improperly attempting to enforce the general industry lead standard against it. We have not relied on the provisions of 29 C.F.R. § 1910.1025 in determining that American failed to comply with the requirements of 29 C.F.R. § 1926.51(f). *Cf. McGraw*, 15 BNA OSHC at 2149 n.8, 1991-93 CCH OSHD at p. 40,944 n.8 (similar disclaimer relating to the coke oven standard).

internally-developed lead policy negates its claim that it could not determine from the broad language of the cited standard what actions were required on its part.

The factors cited by Judge Brady and/or American in support of their opposite conclusion do not in fact establish that American was deprived of fair notice.

The exemption at § 1910.1025(a)(2)

The Secretary's adoption in 1978 of the general industry lead standard, 29 C.F.R. § 1910.1025, with its construction industry exemption (subsection (a)(2)), did not create any "ambiguity" over the steel erection industry's continuing obligation to comply with its pre-existing duty under section 1926.51(f). As the Secretary correctly points out, there is nothing in either the language of 1910.1025(a)(2) or its legislative history to even suggest "any intention by the Secretary to revoke or preempt other construction standards that would otherwise be applicable." Even if there was any uncertainty on this matter initially, it was soon dispelled by the appellate court decision in *United Steelworkers of America v. Marshall*, which expressly construed the provision in question as a decision "only to exempt the construction industry from this *particular* standard, not from OSHA jurisdiction generally," adding that, until OSHA adopted a new construction industry lead standard, "other OSHA regulations now in effect will protect construction workers against general air contamination through engineering, work practice, and respirator controls." 647 F.2d 1189, 1310 (D.C. Cir. 1980) (emphasis supplied by the court). Here, of course, American had more than the *constructive* notice provided by this court decision that Part 1926 standards such as section 1926.51(f) could still be applied to its operations to protect employees exposed to lead. The April 1991 OSHA pamphlet that American's safety administrator received shortly after its publication gave American *actual* notice of the potential application of section 1926.51(f).

The lack of specificity in § 1926.51(f)

Given American's background and experience, we fully agree with the Secretary that "a reasonable reading of the [cited] standard as a whole should have put [American] on notice of the standard's applicability" to its bridge rehabilitation work. The standard by its terms, *see supra* note 1, clearly requires "adequate washing facilities" for employees engaged

in *applying* lead-based paints and coatings, since lead is universally recognized as a "harmful [contaminant]" contained in paints and coatings. A reasonable employer in the steel erection industry should therefore draw the logical inference that the standard also requires "adequate washing facilities" for employees performing cutting and burning on these same lead-based paints and coatings.

"Limited" nature of the burning operations

We do not agree with American that it "reasonably exercised its judgment" in determining that the washing facilities at issue here were not needed at the inspected worksite "because any exposure of its employees to particulate lead would be very limited, and therefore, could not be 'harmful' [within the meaning of the cited standard]." Safety administrator Mykich essentially conceded on cross-examination that the planning group's decision finds no support in American's written lead policy, which amply demonstrates that American knew or should have known that respirator usage alone would not protect employees from the hazard of lead *ingestion*. We also question the characterization of the exposure at this workplace as "limited." OSHA's monitoring results confirmed American's prediction that, on those occasions when burning would be performed, employees would be exposed to air contaminant levels in excess of 200 $\mu g/m^3$. Moreover, construction superintendent DelCostello estimated that approximately 5 percent of the total work hours expended on this project were devoted to burning operations. As the Secretary correctly points out, this constitutes an admission that as many as 18 work days on this project involved potential exposures to airborne lead levels in excess of the PEL.

Industry custom and practice

The only evidence American cites in support of its industry custom and practice claim is the opinion testimony of safety administrator Mykich. Aside from the fact that Mykich provided no foundation for the opinions he expressed, the testimony on its face is inadequate to establish that there was *any* common understanding or practice within the steel erection industry concerning the providing of washing facilities, let alone an industry custom and practice that conflicted with the Secretary's enforcement action in this case.

ORDER

The evidence fully supports the Secretary's characterization of the instant violation as serious. As for the Secretary's proposed penalty of $3750, American has presented no challenge to it, and the record evidence relating to the four statutory penalty criteria (gravity, size, good faith and past history) establishes that it is "appropriate[]." *See* section 17(j) of the Act, 29 U.S.C. § 666(j). We therefore reverse the judge, affirm item 3 of citation 1, and assess the proposed penalty of $3750.

Stuart E. Weisberg
Stuart E. Weisberg
Chairman

Edwin G. Foulke, Jr.
Edwin G. Foulke, Jr.
Commissioner

Velma Montoya
Velma Montoya
Commissioner

Dated: April 7, 1995

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Complainant,	:	
v.	:	Docket No. 92-0959
AMERICAN BRIDGE COMPANY,	:	
Respondent.	:	

NOTICE OF COMMISSION DECISION

The attached decision by the Occupational Safety and Health Review Commission was issued on April 7, 1995. **ANY PERSON ADVERSELY AFFECTED OR AGGRIEVED WHO WISHES TO OBTAIN REVIEW OF THIS DECISION MUST FILE A NOTICE OF APPEAL WITH THE APPROPRIATE FEDERAL COURT OF APPEALS WITHIN 60 DAYS OF THE DATE OF THIS DECISION.** See Section 11 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 660.

FOR THE COMMISSION

Ray H. Darling, Jr.

April 7, 1995
Date

Ray H. Darling, Jr.
Executive Secretary

Docket No. 92-0959

NOTICE IS GIVEN TO THE FOLLOWING:

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SECRETARY OF LABOR
Complainant,
v.
AMERICAN BRIDGE CO.
Respondent.

OSHRC DOCKET
NO. 92-0959

NOTICE OF DOCKETING OF ADMINISTRATIVE LAW JUDGE'S DECISION

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on August 12, 1993. The decision of the Judge will become a final order of the Commission on September 10, 1993 unless a Commission member directs review of the decision on or before that date. ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW. Any such petition should be received by the Executive Secretary on or before September 1, 1993 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

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Petitioning parties shall also mail a copy to:

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If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 606-5400.

FOR THE COMMISSION

Ray H. Darling, Jr. /BKW

Date: August 12, 1993

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 92-0959

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SECRETARY OF LABOR,
Complainant,

v.

AMERICAN BRIDGE COMPANY,
Respondent.

OSHRC Docket No.: 92-959

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Office of the Solicitor
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For Complainant

Richard R. Nelson, Esquire
Cohen and Grisby
Pittsburgh, Pennsylvania
For Respondent

Before: Administrative Law Judge Paul L. Brady

DECISION AND ORDER

This proceeding is brought pursuant to Section 10 of the Occupational Safety and Health Act of 1970 (Act) to contest two citations and proposed penalties issued by the Secretary of Labor (Secretary) pursuant to Section 9(a) of the Act.

The basic facts surrounding inspection of respondent's worksite are not in dispute. Respondent, American Bridge Company (American Bridge), was engaged in the steel erection business. At the time of the inspection, it was performing rehabilitation work on the Carter Road, and Eagle Avenue bridges, over the Cuyahoga River in Cleveland, Ohio. American Bridge was engaged in a business affecting interstate commerce and employed approximately 27 employees at these worksites.

The following items remain in issue after various amendments of the citations. Items 1a, 1b, 2 (as amended), 3, 4a, 4b, 5c, 5e, 5h, 6a, and 6b of Citation No. 1, and Item 1 of Citation No. 2.

American Bridge raises the question of jurisdiction regarding several of the alleged violations. It is argues that the construction industry is specifically exempted from the lead standard and the Secretary's attempt to impose these requirements must be rejected.

It is true that 29 C.F.R. § 1910.1025, which pertains to lead, states "this section applies to all occupational exposure to lead, except as provided in paragraph (a)(2)." Paragraph (a)(2) states in pertinent part that "this section does not apply to the construction industry . . .." When the lead standard was promulgated, it is noted the Occupational Safety and Health Administration (OSHA) contemplated a lead standard for the construction industry. OSHA explained at that time the exemption was made because of insufficient information about applicability of the standard to conditions in the construction industry (43 Federal Register 52986, Nov. 14, 1978). The exemption was challenged in court and in upholding OSHA's decision to exempt the industry, the Court of Appeals stated:

> Of course, OSHA would be shirking its statutory responsibilities if it made no effort to protect workers in the construction industry from lead exposure. But we construe OSHA's decision here as only to exempt the construction industry from this *particular* standard, not from OSHA jurisdiction generally . . . . [O]ther OSHA regulations now in effect will protect construction workers against general air contamination through engineering, work practice, and respirator controls. *United Steelworkers of America v. Marshal,* 647 F.2d 1189 (D. C. Circuit, 1980).

The court made it clear that any other decision would be contrary to OSHA's responsibility and the purpose of the Act to "assure safe and healthful working conditions." While the construction industry is exempt from the lead standard, OSHA is not, otherwise, without jurisdiction.

Alleged Violation of 29 C.F.R. § 1926.21(b)(2)

The standard provides as follows:

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

The citation alleges that employees were not instructed in the recognition and avoidance of lead exposure while cutting and buring on the Eagle Avenue bridge which involved lead-based paint.

Ms. Nancy Newman, industrial hygienist, testified that she believed necessary instruction should include: (1) health effects and signs and symptoms of lead exposure; (2) proper use of respiratory protection; (3) proper use of engineering controls; (4) proper use of other personal protective equipment; (5) good hygiene practices such as washing the hands before eating or smoking and showering at the end of the workshift (Tr. 77-78).

In addition, "an effective and adequate lead training program" is contained in an OSHA/NIOSH pamphlet entitled *Working with Lead in the Construction Industry* published in April, 1991, which includes the following:

> Construction standard, such as 29 C.F.R. § 1926.21 require that a potentially exposed employee be informed of the hazards of lead and be trained in the precautions to take when working around it. The employee shall also be trained in the proper work practices, personal hygiene procedures, and the use and limitations of protective equipment, such as eye and face protection, head protection, hand protection, coveralls and respirators (Exh. C-2, p. 9).

Mr. Robert Fioritto, an industrial hygienist/compliance officer, conducted the inspection. He stated the training document provided him at the opening conference (Exh. C-1) and the company safety manual (Exh. R-1) did not provide adequate instruction. He believed employees should have been instructed on how to protect themselves in the use of protective equipment and hygiene practices (Tr. 190-192). In this regard, the Secretary refers to the testimony of Thomas McTaggart, an iron worker who engaged in torch cutting. McTaggart testified that although he was told to wear a respirator when burning, he was not shown how to check it's fit (Tr. 19-20). Also, there was no discussion about eating or drinking in areas where he was working with lead and there was no place at the Eagle Avenue bridge to wash his hands (Tr. 21-22).

In response to the allegations, respondent asserts that through its safety program employees were properly instructed in accordance with the standard. It is shown that Mr.

McTaggart received a copy of the company safety manual when he first became employed. The manual at section 16.19 states:

> "use a respirator when burning material that has been painted or material that gives off fumes and smoke" (Exh. R-1).

In addition, McTaggart testified that weekly safety meetings were held and employees were required to attend. He stated the purpose is "to make everyone aware of what hazardous conditions might be going on at the time . . .." This included discussion of avoiding exposure to lead. On July 15, 1991, he attended a meeting where one of the topics discussed was "use a respirator when burning material that has been painted or material that gives off fumes and smoke" (Tr. 34-38, 40; Exhs. R-1, R-3).

Respondent argues that the safety manual also specifically concerns the recognition and avoidance of hazards resulting from lead exposure. Section 17 states:

> You should realize that lead and other toxic contents of paint may enter your system through the skin, the mouth, and by inhaling into the lungs. These harmful substances are taken into the system most commonly by inhaling the fumes or dust, but just as readily, in eating or putting the hands to the mouth.

In regard to hygiene, section 17.1 provides:

> Obviously, personal cleanliness is most important. Wash carefully before you eat. Bathe each evening. Change work clothes as often as possible, but at least once each week.

Mr. McTaggart stated that he used waterless hand cleaner at the work site (Tr. 40).

A statement of McTaggart indicated his use of a respirator at the time of the inspection. He stated:

> "On the day of December 10, 1991, I, Pat McTaggart, state that I was wearing my respirator while burning with a torch on Eagle Avenue bridge taking it off only when I was not burning or in the area of any burning."
>
> "I was notified prior to the commencement of work on this job that respirators were available and that their use was mandatory."

He indicated that he was able to make the respirator fit tightly, even over his beard (Tr. 19, 50; Exh. R-4).

The gist of the standard is to require an employer to "instruct" his employees. While the Secretary has the burden to show respondent failed to instruct its employees as required, the nature and extent of such instructions are not specified. A plain reading of the cited

standard makes clear there are no special instructions required for employees exposed to certain materials including lead.

The Secretary maintains that respondent should be held to a higher level of responsibility than set forth in the standard. The standard, however, does not require that an employee "shall also be trained in proper work practices" or "proper use" of certain controls or equipment.

There is no question that the presence of lead in the work place constitutes a hazard. The Commission has held an adequate safety program including appropriate instructions about such hazards, will satisfy the standard. *Archer-Western*, 15 BNA OSHC at 1020, 1991 CCH OSHD at p. 39,381; *Dravo Engrs. & Constructors*, 11 BNA OSHC 2010, 1984-85 CCH OSHD ¶ 26,930 (No. 81-748, 1984). In this case, the Secretary has failed to carry his burden to show respondent's safety program and instructions do not satisfy the terms of the standard.

Alleged Violation of Section 4.3, ANSI Z 35.1 - 1968, as Adopted by 29 C.F.R. § 1926.200(i)

The standard requires compliance with the American National Standards Institute (ANSI). Specifications for accident prevention signs which provides:

> Safety instruction signs shall be used where there is a need for general instructions and suggestions relative to safety measures.

There is no dispute that respondent did not use a safety instruction sign regarding lead exposure at the worksite. The question is whether the Secretary has proven the necessary elements to establish the violation. The Commission has held that in order to establish a violation of the standard, the Secretary must show by a preponderance of the evidence that (1) the cited standard applied, (2) its terms were not met, (3) employees had access to the violative condition, and (4) the employer knew or could have known of the violation with the exercise of reasonable diligence. *Seibel Modern Mfg. & Welding Corp.*, 15 BNA OSHC 1218, 1991 CCH OSHD ¶ 29,442, p. 39,678 (No. 88-821, 1991). The issues relate to whether the standard applies and whether the respondent had knowledge of the violations.

The Secretary contends there was a need for instruction regarding measures to avoid hazardous lead exposure. Mr. Fioritto explained that a sign would serve as a warning and to alert employees of the lead hazard (Tr. 196-197). He acknowledged, however, that Section 4.3 does not specify under what working conditions safety instruction signs are warranted. This includes the need for a safety sign regarding lead exposure (Tr. 302).

Mr. Henry Mykich, respondent's safety administrator and member of the National Erector's Association's task force on lead, testified he has no knowledge of an employer engaged in bridge rehabilitation work using safety instruction signs to warn against the hazards of lead exposure (Tr. 392).

It is also noted that ANSI Z 35.1-1968 relates to "Specifications for Accident Prevention Signs." Under Section 1.1 it is indicated that the signs are intended to apply to the "design, application, and use of signs . . . to define specific hazards of a nature such that failure to designate them may lead to *accidental injury* to workers . . . ." (Exh. C-20, emphasis added).

Although the Secretary exempted the construction industry from the lead standard, it is indicated in this case that special consideration is sought under the construction standards to cover lead. The evidence is convincing that employee knowledge of the presence of lead at the site coupled with the employer's safety program and instruction, renders unnecessary any special safety instruction signs for lead.

Alleged Violation of Section 5(a)(1) of the Act

Section 5(a)(1) requires each employer to furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees. The Secretary alleges that respondent failed to provide employees exposed to airborne and surface lead contamination with appropriate protective clothing or change areas.

In order to prove a violation of § 5(a)(1) of the Act the Secretary must establish that: (1) there was an activity or condition in the employer's work place that constituted a hazard to employees; (2) either the cited employer or the employer's industry recognized that the activity or condition was hazardous; (3) the hazard was causing, or was likely to cause, death or serious physical harm; and (4) there was a feasible means to eliminate the hazard or

materially reduce it. *Industrial Glass*, 15 BNA OSHC 1594, 1992 CCH OSHD ¶ 29,655, p. 40,170 (No. 88-348, 1992).

To meet the required burden, the Secretary asserts that on December 10, 1991, air monitoring revealed Pat McTaggart's full-shift exposure to airborne lead was 760 Vg/M3 (Tr. 168-171; Exhs. C-17, C-18). Wipe samples revealed the presence of lead on McTaggart's hand, shoe, hard hat, and lunch box (Tr. 160-162; Exh. C-16, C-17, C-18). While working, he wore his own clothing, which included coveralls, jacket, hand gloves, and work shoes (Tr. 25-26; Exh. C-5). He left his work clothes in the ground level shanty, but wore his contaminated work shoes home. He took his work clothes home "when they got too dirty," sometimes once a week (Tr. 26-27; 160-162; 187-188; Exh. C-18).

Ms. Newman testified that the period of Mr. McTaggart's exposure was extended by taking the contaminated clothing home. Also, the protective clothing should be cleaned often to prevent accumulation of the dust which adds to the overall exposure (Tr. 79-80, 92).

The Secretary points out that respondent recognized that lead dust presented a hazard in the workplace that could build up on clothing. This is indicated by documents sent to the worksite (Tr. 377-379, 450-451; Resp. Exhs. R-13, R-14). In addition, it is shown that the safety administrator had an OSHA/NIOSH pamphlet, (Tr. 394; Exh. C-2). The pamphlet noted at page 7:

> At no time should workers be allowed to leave the worksite wearing lead contaminated clothing and equipment. All contaminated clothing and equipment should be prevented from reaching the worker's home or vehicle. This is a significant step in reducing the movement of lead contamination from the workplace into a worker's home and provides added protection to employees and their families.

Ms. Newman testified to the harmful effects of lead exposure. She stated that lead can be absorbed into the body by either inhalation or ingestion. Such exposure could result in damage to the blood forming system, renal system, central nervous system, and reproductive system (Tr. 68-72; Exhs. C-2, C-7, C-8).

It is asserted that respondent knew of the means to abate the hazard as evidenced by Exhibit R-14, its hazard communication program. Appendix E, page 3, provides as follows:

> Protective Work Clothing and Equipment: Employees exposed to lead dust or lead fume should be provided with coveralls or similar full body work clothing, gloves and *disposable shoe coverlets. (Emphasis supplied).*
>
> Hygiene Facilities and Practices: Employees exposed to lead dust or lead fume should be encouraged to refrain from carrying home work clothing contaminated with lead dust.

Respondent admits that employees were not provided with cleaning, laundering, or disposal of personal protective equipment. It is argued that such action was not necessary since the limited burning of lead-based paint was not recognized as hazardous. Mr. Mykich also testified that he was not aware of any steel erection company in the country that provides for cleaning or disposal of personal protective equipment for employees engaged in limited burning as in this case (Tr. 381, 393).

Respondent contends that the OSHA/NIOSH pamphlet *Working With Lead in the Construction Industry* (Exh. C-2) does not establish that respondent or the industry recognized the alleged hazard. It is also argued that the Secretary failed to prove employees were exposed to a hazardous condition. The wipe samples were not shown to have levels of lead high enough to result in a recognized hazard. In support of this contention, respondent asserts there is no federal standard which requires that specific action be taken by an employer when certain levels of lead dust are detected (Tr. 273-274).

The elements necessary to establish a § 5(a)(1) violation have been proven. The evidence clearly demonstrates that lead burning at the worksite constituted a hazard to employees and that respondent recognized it was hazardous. The evidence also shows that the hazard of lead absorption into the body by inhalation or ingestion is likely to cause death or serious physical harm. A feasible means to eliminate the hazard or materially reduce it was proven.

Respondent strenuously argues that no prudent employer engaged in limited burning projects as in this case would undertake the proposed abatement steps. Also, that the levels of lead on the clothing were not established as high enough to expose employees to a recognized hazard.

There is no question that respondent engaged in bridge rehabilitation work would look to the broad construction standards as a source of its duties and responsibilities. It is

also true that there is no construction standard requiring the use and manner of use of protective clothing for employees exposed to airborne lead resulting from lead burning. There is no question, however, that exposure to lead in the workplace constituted a hazard, and that American Bridge recognized such hazard. Therefore, Section 5(a)(1) does apply and the Secretary has adequately established the violation in showing that respondent:

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

Section 5(a)(1) was violated as alleged.

Alleged Violation of 29 C.F.R. § 1926.51(f)

The standard provides in pertinent part as follows:

> The employer shall provide adequate washing facilities for employees engaged in . . . operations where contaminants may be harmful to the employees.

The Standard further provides:

> "Such facilities shall . . . be so equipped as to enable employees to remove such substances."

The Secretary refers to levels of airborne lead employee McTaggart was exposed to during his workshift. In addition, reference is made to the wipe sample taken while the employee was eating lunch. It is, therefore, argued that respondent's employees were exposed to a contaminant which "may be harmful" within the meaning of the standard. Both Ms. Newman and Mr. Fioritto testified that soap and water should be available to employees for washing before eating. In addition, shower facilities were needed to enable employees to shower and change clothes before going home (Tr. 70, 80, 204-206). Mr. Fioritto noted that mobile trailers with showers and change rooms are available which could be used at the site (Tr. 206).

Respondent admits that no washing or shower facilities were provided at the worksite (Tr. 22, 26, 204-205). Mr. Myrick testified that it is not a recognized industry hazard for employers engaged in bridge rehabilitation work to provide washing or shower facilities (Tr. 381). It is, therefore, argued that no prudent employer in the construction industry and under the circumstances of this case, would require washing or shower facilities, citing *Cape*

& Vineyard Div. of New Bedford Gas & Edison Light Co. v. OSHRC, 512 F.2d 1148, 2 BNA OSHC 1628 (1st Cir. 1975).

In considering the elements necessary to establish a violation under *Seibel Supra,* questions arise regarding applicability of the standard and knowledge of a violative condition.

Clearly, the construction industry is exempt from the general industry lead standard which includes provisions for showers. 29 C.F.R. § 1910.1025(i)(3) requires employers to assure that employees shower at the end of the workshift when they are exposed to levels of lead above the PEL (permissible exposure limits).

The cited standard, however, does not specify the type of contamination or level of exposure considered to be harmful. Also, the standard does not indicate what facilities should consist of or would be adequate under the circumstances. In this regard, it is noted that respondent provided employees with a waterless type of hand cleaner which could be deemed "adequate" (Tr. 40).

Based upon the facts in this case, respondent can hardly be held to know of the violative conditions. In view of the exemption, a reasonably prudent employer, under the facts presented, is not on notice to provide washing and showering facilities because lead is involved on a limited basis, on the job to be performed.

The standard was not violated as alleged.

Alleged Violation of 29 C.F.R. § 1926.55(a) and § 1926.55(b)

The standards state in pertinent part as follows:

.55(a): Exposure of employees to inhalation, ingestion, skin absorption, or contact with any material or substance at a concentration above those specified in the *Threshold Limit Values of Airborne Contaminants for 1970* . . . shall be avoided.

.55(b): To achieve compliance with paragraph (a) of this section, administrative or engineering controls must first be implemented whenever feasible. When such controls are not feasible to achieve full compliance, protective equipment or other measures shall be used to keep the exposure of employees to air contaminants within the limits prescribed in this section. . . . Whenever respirators are used, their use shall comply with § 1926.103.

The citation allege the violations as follows:

.55(a): Employee(s) were exposed to material(s) at concentrations above those specified in the *Threshold Limit Values of Airborne Contaminants for 1970* of the American Conference of Governmental Industrial Hygienists:

On December 10, 1991, an ironworker who was cutting/burning on the Eagle Avenue Bridge, was exposed to lead at an 8-hour time-weighted average of 760 micrograms per cubic meter of air, approximately 3.8 times the TLV of 200 micrograms per cubic meter of air.

.55(b): Feasible administrative or engineering controls were not implemented to reduce employee exposure(s):

For the employees as described in Citation No. 1, Item No. 4a. General methods of control applicable in these circumstances include, but are not limited to, the following:

(1) Increase the length of the cutting torch, thereby increasing the distance from the source of contamination.

(2) Strip the paint away from areas to be cut with a torch.

(3) Work upwind of the cutting torch when possible.

(4) Use (Hepa) high efficiency particulate air filter vacuuming equipment to vacuum off clothing of employees.

(5) Use air movers (air horns) to remove airborne lead away from the employees.

The Secretary presented evidence that employee McTaggart's full-shift exposure was 760 Vg/M3 or 3.8 times the limit of 200 Vg/M3 specified by the standard (Tr. 168-171; Exh. C-18).

Mr. Fioritto determined that air movers as used on the Carter Road bridge worksite by respondent would be an effective engineering control (Tr. 209-210). He also believed that an effective administrative control would be for employees to work upwind of the cutting torches (Tr. 212-213).

Mr. Krizner, construction manager, testified that he determined from the plans and drawings that work on the project would involve very little cutting. Removal of most of the steel was performed by knocking out rivets. He stated that burning was kept to a minimum,

and when performed, was in the open air at the top of the structure (Tr. 333-334). Mr. DeCostello, construction superintendent, believed about 5% of the total man hours spend on the job were devoted to burning at the two locations. In order to reduce employee exposure, sandblasting and air movers were considered besides respirators. He stated sandblasting was prohibited by the contract and air movers were not deemed feasible because their positioning would result in the employee being showered with sparks. It was, therefore, determined respirators would provide adequate protection (Tr. 435-438).

Mr. Krizner explained that air movers were used on respondent's Carter Road project because of the "exceptional amount of welding" and that it was performed on the roadway level which was very accessible (Tr. 348). He also indicated that on this job working upwind was feasible at times depending on which way the wind was blowing (Tr. 347).

Mr. Fioritto stated that the basis for charging the 55(a) violation was that employees did not use respirators (Tr. 214). He stated Mr. McTaggart was not using a respirator although at times McTaggart was cutting about 100 feet up from where he was located. He did not observe McTaggart wearing a respirator when he entered the lunch room and when he returned to work after lunch. Fioritto said he did observe McTaggart using a welding hood while cutting (Tr. 182-186).

Mr. Fioritto's testimony is contradicted by Mr. McTaggart who, in his statement of February 12, 1992, Exhibit R-4, declared he used a respirator on December 10, 1991, while torch burning on the project. Mr. McTaggart also indicated that use of respirators while burning was "mandatory."

Both McTaggart and Fioritto testified the closest Fioritto was to the actual burning site was the bridge deck some distance below. McTaggart explained that that the respirator was stored in the "gang box" on top of the bridge span (Tr. 18, 28, 29). This explaination is consistant with the inspector's testimony that he did not see McTaggart take a respirator with him up to the work location, or have one when he came down for lunch (Tr. 181-184). The evidence of record, including the distance between the compliance officer and the work location, supports respondent's contention McTaggart wore a respirator while performing the burning.

Respondent's shows that controls such as having employees work upwind or using air movers were considered. Mr. Krizner testified the practice was not feasible because of the location of the work, the amount of work, and consistency in the direction the wind was blowing (Tr. 346-348). Air movers were not deemed feasible because of the limited space and the cumbersome hoses (Tr. 349, 355). Mr. Del Costello, superintendent, testified that the only feasible location would be over the employees' head. In thisposition, however, the air mover would not only draw smoke and fumes but also sparks which would shower back on the employee (Tr. 457).

Testimony on behalf of respondent showed that use of a longer cutting torch was not feasible because of the detailed nature of the work (Tr. 345, 456). It was also not feasible to strip away the paint because of the cost involved for the amount of work to be performed (Tr. 346).

The evidence shows that the work area was approximately 5 by 8 at the very top of the structure with the bridge in the up portion. The space contained the up-haul/down-haul sheaves (Tr. 346, 456-457). The evidence also shows that respondent's employees who planned the job had considerable experience in implementing adminitrative or engineering controls to reduce lead exposure (Tr. 327-331, 360-370). In this regard, respondent points out that the inspecting officer is not an engineer and has no experience in consideration of implementing administrative or engineering controls to reduce lead exposure (Tr. 263-264). It is, therefore, argued that the opinions of witnesses, including Mr. Krizner, a registered professional engineer, are entitled to more weight than the compliance officer.

The standard at 29 C.F.R. § 1926.55(a) must be read in conjunction with § 1926.55(b). If an employees' level of exposure exceeds the TLV set forth in § 1926.55(a), the employer is in violation only if it fails to follow the procedures for compliance provided in § 1926.55(b). In this case there is no question McTaggart's exposure exceeded the TLV. However, the evidence convincingly shows that respondent achieved compliance by implementing feasible controls. The standard was not violated as alleged.

Alleged Violation of 29 C.F.R. § 1910.134(b)(1)

The standard pertains to requirements for a minimal acceptable respiratory protective program and states:

> Written standard operating procedures governing the selection and use of respirators shall be established.

The citation alleges that such operating procedures were not established for iron workers exposed to lead while working on the Eagle Avenue Bridge.

There is no dispute that respondent's safety bulletin entitled *Procedure for Selection, Use and Maintenance of Respirators* (Exh. R-12) was present at the worksite. Testimony showed that the safety bulletin was part of respondent's written safety program (Tr. 365, 366). In addition, the safety bulletin contained standard operating procedures governing the selection and use of respirators (Tr. 373-374).

The Secretary's basic contention is that the contents of the program were not communicated to employees, therefore, it is argued that the written program was not "established" as required by the standard. The express language of the standard requires that: "written standard operating procedures . . . shall be established." The evidence proves that such written procedures have been established.

Alleged Violation of 29 C.F.R. § 1910.134(b)(8)

The standard provides in pertinent part as follows:

> Appropriate surveillance of work area conditions and degree of employee exposure . . . shall be maintained.

The citation alleges that personal air monitoring was not performed to determine actual employee exposure to lead during the cutting and burning at the Eagle Avenue bridge worksite.

Mr. Fioritto testified that the basis for the alleged violation was the failure to monitor employees to determine exposure after lead contamination was known to be on the site. Results of the monitoring could be used to reduce levels of exposure and determine adequate protection (Tr. 222-224). Respondent does not deny that personal air monitoring was not performed on the worksite. Mr. Mykich explained that this was not done because of respondent's knowledge and experience by previous monitoring at other sites (Tr. 390, 441). He stated that the prior experience led to the planning for lead exposure on this job (Tr. 369-371).

The standard does not set forth the type of surveillance that may be required. Therefore, "appropriate surveillance" is open to varying interpretations. Under the circumstances presented, personal monitoring is not shown as being required to met the terms of the standard.

The Secretary has failed to establish that respondent's conduct did not meet the terms of the standard.

Alleged Violation of 29 C.F.R. § 1910.134(e)(5)(i)

The standard states in pertinent part as follows:

> Respirators shall not be worn when conditions prevent a good face seal. Such conditions may be a growth of beard.

The citation alleged that employees with full beards were issued respirators while cutting and burning. The record reflects that Mr. McTaggart wore a respirator while performing torch cutting and burning on December 10, 1991. On that date, he also wore a beard (Tr. 24; Exh. C-5).

Mr. Fioritto who, in addition to his other responsibilities, is the regional respirator fit-testing coordinator for the Cleveland OSHA office (Tr. 113-114). He is also familiar with fit testing and the sealing capabilities of the type respirator worn by McTaggart. Fioritto did not believe a good face seal could be attained with a respirator while wearing a full beard. Since he did not observe the employee wearing the respirator he was unable to check the seal (Tr. 218-220).

The standard states that conditions may prevent a good face seal. In this case, the evidence does not establish Mr. McTaggart's beard did actually prevent such good face seal in violation of the standard.

The standard was, therefore, not violated.

Alleged Violation of 29 C.F.R. § 1926.106(c)

The standard which pertains to working over or near water requires:

> Ring buoys with at least 90 feet of line shall be provided and readily available for emergency rescue operations. Distance between ring buoys shall not exceed 200 feet.

Mr. Fioritto testified that he observed employees working at both ends of the bridge and walking back and forth. He did not observe any ring buoys and was told by

respondent's assistant superintendent, Ben McClain, there were none on the bridge (Tr. 226-229).

Mr. McTaggart did not know what a ring buoy was, but testified there was at least one life preserver on the worksite. He also indicated that safety nets and other means of fall protection were provided (Tr. 47-48, 54).

The testimony of the inspecting officer, which was not refuted, sufficiently establishes the violation as alleged.

Alleged Violation of 29 C.F.R. § 1926.106(d)

The standard provides as follows:

> At least one lifesaving skiff shall be immediately available at locations where employees are working over or adjacent to water.

The citation alleges that a lifesaving skiff was not immediately available for employees working on the Eagle Avenue bridge.

Mr. Fioritto testified that he did not observe a lifesaving skiff at the Eagle Avenue bridge site. He noted that there was one in an overturned position on a barge at the Carter Road worksite. In his opinion, the skiff was too far away to be considered "immediately available" (Tr. 229-231).

Mr. Del Costello estimated the distance of the skiff to be approximately 900 feet, and he did not know how long it would take to row the skiff to the site. Del Costello explained that the skiff was removed from the water because it had been swamped by the backwash of passing ships. Also, in the event of an emergency, respondent's foreman could, through radio contact, call for the skiff (Tr. 458-460, 464-466).

The evidence clearly establishes that a skiff was not "immediately available" at the location where the employees were working.

The standard was violated as alleged.

Alleged Violation of 29 C.F.R. § 1910.20(g)(2)

The standard which pertains to employee exposure and medical records states in pertinent part that:

> Each employer shall keep a copy of this section and its appendices, and make copies readily available, upon request, to employees . . ..

Mr. Fioritto testified that when he asked Mr. Del Costello if he had a copy of the exposure and medical records, he was told he did not have a copy and he was not familiar with them (Tr. 232-233).

Mr. Del Costello admitted that he was not familiar with the requirements of the standard (Tr. 455). When respondent's safety administrator, Mr. Mykich, was informed of the request, he faxed a copy to the jobsite (Tr. 384).

The standard requires that the employer to "keep a copy" of the records, but does not specify where such records are to be kept. The evidence shows the records were provided on the day requested (Tr. 384).

Although the Secretary argues, Mr. Del Costello's lack of familiarity with the standard establishes the records were not available, the terms of the standard have been met.

The standard was not violated as alleged.

The violations of Section 5(a)(1) and 29 C.F.R. § 1926.106(c) and (d), under Citation No. 1 were alleged to be of a serious nature. For a violation to be determined serious under § 17(k) of the Act, there must be a substantial probability that death or serious physical harm could result therefrom. The evidence in this case adequately establishes the serious nature of the violations.

The Commission, in all contested cases, has the authority to assess civil penalties for violations of the Act. Section 17(j) of the Act provides:

> The Commission shall have authority to assess all civil penalties provided in this section, giving due consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations.

The determination of what constitutes an appropriate penalty is within the discretion of the Commission and the foregoing factors do not necessarily accord equal weight. Generally speaking, the gravity of a violation is the primary element in the penalty assessment. *Trinity Industry, Inc.,* 15 BNA OSHC 1481, 1483, 1992 CCH OSHD ¶ 29,582, p. 40,033 (No. 88-2691, 1992); *Astra Pharmaceutical Prods., Inc.,* 10 BNA OSHC 2070 (No. 78-6247, 1982). The gravity of a particular violation, moreover, 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.

Having considered the foregoing factors, it is determined an appropriate penalty for violation of Section 5(a)(1) is $2,500.00. An appropriate penalty for violation of 29 C.F.R. § 1926.106(c) and (d) is $1,000.00.

Subsequent to the hearing, the Secretary filed a motion to vacate Citation No. 1, Item 5a (alleging a violation of 29 C.F.R. § 1926.103(a)(1)) and Item 5i (alleging a violation of 29 C.F.R. § 1926.354(c)(2)), and American Bridge moved to withdraw its notice of contest (as to a violation only) to Citation No. 1, Item 5d (alleging, as amended, a violation of 29 C.F.R. § 1926.103(c)) and Item 5g (alleging a violation of 29 C.F.R. § 1910.134(e)(5)). The parties stipulate that Items 5a and 5i should be vacated; and Items 5d and 5g should be affirmed and a penalty in the amount of $2,500.00 should be assessed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

ORDER

1. Citation No. 1, alleging a violation of Section 5(a)(1) of the Act, is affirmed and a penalty in the amount of $2,500.00 is hereby assessed;

2. Citation No. 1, alleging violations of 29 C.F.R. § 1926.106(c) and (d), is affirmed and a penalty in the amount of $1,000.00 is hereby assessed;

3. Citation No. 1, alleging violations of 29 C.F.R. § 1926.103(c) and 29 C.F.R. § 1926.354(c)(2), is affirmed and a penalty in the sum of $2,500.00 is hereby assessed;

4. Citation No. 1, alleging the following violations, are hereby vacated: 29 C.F.R. § 1926.21(b)(2); 29 C.F.R. § 1926.200(i); 29 C.F.R. § 1926.51(f); 29 C.F.R. § 1926.55(a) and (b); 29 C.F.R. § 1926.103(a)(1); 29 C.F.R. § 1910.134(b)(1); 29 C.F.R. § 1910.134(b)(8); 29 C.F.R. § 1910.134(e)(5)(1); and 29 C.F.R. § 1926.354(c)(2); and

5. Citation No. 2 alleging violation of 29 C.F.R. § 1910.20(g)(2) is hereby vacated.

Paul L. Brady

PAUL L. BRADY
Judge

Date: August 5, 1993