

**THIS CASE IS NOT A FINAL ORDER OF THE REVIEW COMMISSION AS IT IS
PENDING COMMISSION REVIEW**

Some personal identifiers have been redacted for privacy purposes

SECRETARY OF LABOR, Complainant,	:	
	:	
v.	:	OSHRC Docket No. 94-3393
	:	
SOUTHERN SCRAP MATERIALS CO., INC., Respondent,	:	
	:	
and	:	
	:	
<i>{redacted}</i> , :	:	
Affected Employee.	:	

Appearances:

Margaret Cranford, Esquire
Robin Horning, Esquire
U. S. Department of Labor
Office of the Solicitor
Dallas, Texas
For Complainant

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For Respondent

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Baton Rouge, Louisiana
For Affected Employee

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For Respondent

Edward S. Rapier, Esquire
Southern Holdings, Inc.
New Orleans, Louisiana
For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

Southern Scrap Materials Co., Inc. (SSM), owns and operates three scrap metal processing yards in Baton Rouge, Louisiana. After an inspection by the Occupational Safety and Health Administration (OSHA), SSM received four citations on September 30, 1994. Citation No. 1, consisting of twenty-one items, alleges serious safety and health violations including workers' exposure to cadmium and proposes penalties totaling \$58,500. Citation No. 2, consisting of forty items, alleges willful and egregious violations for workers' exposure to lead and proposes penalties totaling \$1,935,000. Citation No. 3, consisting of four items, alleges repeat safety violations and proposes penalties totaling \$30,200. Citation No. 4, consisting of three items, alleges "other" than serious safety violations and proposes penalties totaling \$3,000.

SSM timely contested the citations. The hearing held in New Orleans, Louisiana, took twenty-two days. Over SSM's objection, *{redacted}* participated as an "affected employee" pursuant to Commission Rule 20.

SSM acknowledges that it is an employer engaged in a business affecting commerce within the meaning of § 3(5) of the Occupational Safety and Health Act (Act) (Tr. 6). The Secretary withdraws Citation No. 1, items 1a, 1b, 6, 7, 8 and 10; Citation No. 2, items 8b, 10a, and 10b; and Citation No. 3, items 2 and 4 (Secretary's Brief, p. 2; Tr. 25).

The principal issues in dispute involve the alleged workers' exposure to airborne concentrations of cadmium and lead during SSM's torch cutting operations. In monitoring for cadmium and lead exposures, OSHA placed the filter cassette outside the worker's face shield instead of inside the shield. The monitoring establishes the presence of cadmium and lead at SSM. However, this method of monitoring during torch cutting fails to accurately establish the worker's level of exposure. Therefore, the alleged violations which require showing that the worker's exposure exceeded the permissible exposure limit (PEL) are vacated.

Background

SSM,¹ a wholly-owned subsidiary of Southern Holdings, Inc., procures and processes scrap metal at three different yards in Baton Rouge, Louisiana, for sale to steel mills, foundries, and smelters. SSM's main yard is the Thomas yard; the yard to the north is called the Stainless yard; and the yard across the river is referred to as the Shredder yard. The three yards comprise 24 acres and employ 130 employees (Tr. 2150).

The Thomas yard is twelve and a half acres where, in addition to processing scrap metal, SSM maintains administrative offices and a maintenance facility. A large portion of the Thomas yard, referred to as the ferrous department, is used to process iron-based scrap metal, *e.g.*, steel plates, railroad tracks, and axles. A smaller portion of the Thomas yard is used to process miscellaneous nonferrous scrap, *e.g.*, copper, aluminum, and other noniron-based metals derived from radiators, heat exchangers, and tube bundles (Tr. 43, 1236-1238). The Stainless yard, which is smaller and a couple blocks north of the Thomas yard, processes stainless steel alloys (Tr. 44, 3061). At the Shredder yard, a large shredder machine is used to render large metal objects such as automobiles, refrigerators, and appliances into smaller pieces which are separated into ferrous, nonferrous, and nonmetal pieces (Tr. 1461).

The scrap metal processed by the three yards is purchased from three basic sources. There are approximately 30,000 tons of scrap purchased each month (Tr. 1558). Generally, the scrap metal is purchased from petrochemical businesses (Tr. 2070). SSM maintains long-term scrap metal procurement contracts with large chemical companies including Exxon, Dow, and BASF. These large corporate customers regularly sell scrap to SSM which locates collection bins at their plants (Tr. 1474-1475). SSM also purchases scrap from brokers and approximately 20,000 "peddlers" who bring the scrap metal to SSM's yards (Tr. 1472-1473, 1525). Additionally, SSM obtains scrap metal from bidding on large demolition projects such as bridges (Tr. 1866, 3174).

Processing the scrap metal at the Thomas and Stainless yards is generally done by large hydraulic shears which cut the scrap metal into the specified sizes for sale (Tr. 1461). The scrap

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Since April 1995, SSM is incorporated as SSXLC (Tr. 1437).

metal, which cannot be processed by shears, is cut to size by workers using oxygen-propane cutting torches (Tr. 298, 694).² Generally, the scrap metal is torch cut into 4-foot pieces to fit into the shears. The Thomas yard processes approximately 15,000 to 20,000 tons of ferrous scrap metal each month (Tr. 1889). During the period of OSHA's inspection, SSM estimated that approximately 98 percent of the scrap metal purchased was either sold to SSM without further processing after sorting or processed by the shears. The remaining 2 percent was processed by cutting torches (Tr. 3215). In 1994, to cut the iron scrap by torch in the ferrous department, SSM contracted with Barfield Enterprises, a Texas corporation, to supply the workers (Tr. 513). There was also some scrap metal such as radiators with iron attachments (clips or brackets) which was removed by torch cutting (Tr. 1115, 3226-3227). The radiators were cleaned in the nonferrous department by SSM workers or workers provided by temporary employment agencies (Tr. 3226).

SSM sells the processed scrap metal to steel mills and foundries throughout the United States and overseas. The mills and foundries set specifications as to the type and size of scrap metal accepted (Tr. 1476, 3168). The amount, if any, of nonferrous or other contaminants contained in the scrap are limited by the mills (Tr. 3188-3189). They reject shipments containing contaminants exceeding their specifications (Tr. 1814-1815, 3191-3192).

OSHA's inspection of SSM was performed by Industrial Hygienist Brad Baptiste with some assistance in air monitoring at the Stainless yard by Industrial Hygienist Dorinda Folse (Tr. 1149). Baptiste was on-site twenty-five days extending over a five-month period during April through September 1994. Baptiste observed SSM's processes, conducted noise and air monitoring surveys at the various torch cutting locations, and interviewed workers and SSM's management. Based on the inspection, OSHA cited SSM for numerous safety and health violations principally involving the workers' torch cutting the scrap metal and their exposure to excessive concentrations of airborne cadmium and lead.

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Other equipment at the yards used in processing include crushers to reduce aluminum cans in size and balers to bale the cans (Tr. 1461).

Discussion

Preliminary Matters

SSM's Motion to Dismiss

SSM renews its motion to dismiss the citations because of OSHA's failure to timely file SSM's notice of contest with the Review Commission (Respondent's Brief, p. 9). Rule 33 of the Commission's Rules of Procedure requires OSHA, within fifteen working days after receipt of an employer's notice of contest, to notify the Review Commission of the receipt in writing and promptly furnish any documents filed by the contesting party.

SSM's notice of contest was received by OSHA on October 21, 1994, and filed with the Review Commission on December 2, 1994. The Secretary does not dispute that she failed to file SSM's notice of contest within fifteen working days. She states the oversight was due to a shortage of office personnel in OSHA's area office which was involved in explosion investigations at several refineries. During the hearing, SSM did not examine OSHA about the delay.

SSM's motion to dismiss was originally denied by order dated January 11, 1995. The record still does not show that OSHA's conduct was contumacious. Its delay in filing the notice of contest was uncontroverted and excusable. There is no showing that SSM was prejudiced in proceeding in this case due to OSHA's delay. *See Ford Development Corp.*, 15 BNA OSHC 2003, 1991-93 CCH OSHD ¶ 29,900, pp. 40,796-97 (No. 90-1505, 1992).

SSM's motion to dismiss is denied.

SSM's Motion for Sanctions

SSM moves for sanctions against the Secretary for failing to timely produce documents requested during discovery (Respondent's Brief, p. 10). SSM states that documents from OSHA's inspection files, files from the Salt Lake City laboratory, and Baptiste's journal were not furnished until the hearing or was destroyed, as in the case of the journal. Because of the Secretary's failure to timely produce documents, SSM asserts it was prejudiced in preparing for hearing.

SSM's motion was previously denied by order dated August 29, 1995, and also on the first day of the hearing (Tr. 7-32). Other than the journal, all known documents were furnished to SSM prior to the hearing or at the hearing, with SSM given sufficient time to prepare its defense. There

is no evidence that any documents not already provided to SSM exist. SSM is unable to identify any remaining documents.

The Secretary represents, and the record reflects, that there were thousands of pages of documents located in OSHA's area, regional, and national offices, and also at the Salt Lake City laboratory. Many of the documents were duplicates, and copies were already available to SSM from the area office files. The Secretary does not dispute that some documents were not timely provided during discovery. Some documents from Salt Lake City were not given to SSM until the hearing. However, the hearing lasted twenty-two days covering a five-month period. SSM was allowed sufficient time to review the Salt Lake City documents. The witnesses from Salt Lake City did not testify until the ninth day of the hearing. SSM was not prejudiced by the delay.

With regard to the journal destroyed by Baptiste, the record reflects that he used it to make notes on-site during his inspection. He states that it was destroyed after the information was transcribed into the inspection files. Although the journal should not have been destroyed, the court concludes Baptiste was new to legal proceedings. His inspection files were provided to SSM. There is no showing of contumacious conduct, or that the journal contained information which benefited SSM. Both parties were denied the benefit of any entries in the journal.

SSM's motion for sanctions is denied.

Reasonableness of the Inspection

SSM moves to dismiss the citations pursuant to section 8(a) of the Act, 29 U.S.C. 657(a), because of the alleged unreasonableness of the inspection. SSM's inspection was described by OSHA as a general scheduled programmed health inspection (Tr. 2394). SSM alleges the inspection was unreasonable and for the purpose of harassment. SSM claims it was selected for the inspection because OSHA withdrew an alleged lead citation in 1989 as part of a settlement (Exh. R-13). As evidence of harassment, SSM points to the length of OSHA's on-site inspection, the number of citations issued, and a statement made by Baptiste during the inspection referring to SSM's attorney as a "slick lawyer" in settling the 1989 citations (Tr. 2143-2144, 2150).

SSM was selected for inspection from an inspection list of employers furnished to the area office from OSHA's national office. SSM's request for the inspection list was denied at the hearing (Tr. 473-497, 2395, 2400). By consenting to the inspection and not requiring an inspection warrant,

SSM waived its Fourth Amendment right to require a warrant based on probable cause. Therefore, SSM was not entitled to OSHA's inspection list. Section 8(a) also does not apply to an employer's selection for inspection. There was no showing of preselection.

Section 8(a) requires that OSHA's inspection be conducted in a reasonable manner, at reasonable times, and within reasonable limits. *See Adams Steel Erection, Inc.*, 13 BNA OSHC 1073, 1079, 1986-87 CCH OSHD ¶ 27,815, p. 36,403 (No. 77-3804, 1987). SSM asserts the inspection was unreasonable. It is an affirmative defense, and the burden is on SSM to show unreasonable conduct by OSHA during the inspection. *Hamilton Fixture*, 16 BNA OSHC 1073, 1077, 1993 CCH OSHD ¶ 30,034, p. 41,173 (No. 88-1720, 1993). The evidence must show that OSHA substantially failed to comply with the provisions of § 8(a), and such noncompliance substantially prejudiced SSM. *Gem Industrial, Inc.*, 17 BNA OSHC 1185, 1995 CCH OSHD ¶ 30,762 (No. 93-1122, 1995).

The record does not show the inspection was unreasonable. There is no dispute the inspection was conducted during normal working hours and at times to accommodate SSM's safety director from New Orleans. There is also no evidence the inspection was disruptive of SSM's business operations or production. OSHA's inspection was a general health inspection, taking part of twenty-five on-site days, and conducted over a five-month period. For the most part, there was one industrial hygienist involved in the inspection. His inspection involved 3 separate yards, 25 acres of scrap metal processing, and covered approximately 130 employees.

Although twenty-five days is a long inspection, it was not shown to be unreasonable considering the nature and extent of the alleged violations. There were sixty-eight separate safety and health standards cited. The health monitoring found evidence of worker exposure to noise and airborne concentrations of cadmium and lead. Delays during the inspection were caused by monitoring problems, scheduling conflicts, and weather (Tr. 236, 561, 1149). Thus, the inspection was conducted in a reasonable manner, and there was no showing the inspection substantially prejudiced SSM.

Further, OSHA's settlement of the 1989 lead citation was not shown as a basis for harassment. The Secretary agreed to the settlement and voluntarily withdrew the lead citation (Exh. R-13). Although Baptiste testified he was aware of the settlement agreement, he was hired after the 1989 inspection and did not participate in the decision to withdraw the lead citation.

Baptiste exhibited no vendetta against SSM (Tr. 463, 465, 972). Also, there is no evidence that Baptiste's supervisors were hostile to SSM (Tr. 1215, 2429, 3533).

Baptiste's comment referring to SSM's attorney as a "slick lawyer" was admittedly inappropriate. The court accepts Baptiste's explanation that it was intended to be a joke and not intended to intimidate or harass (Tr. 511, 940). Baptiste's conduct and testimony at the hearing did not bear a trace of bias, prejudice, or animosity toward SSM.

SSM's motion to dismiss the citations under § 8(a) is denied.

{redacted}'s Status As an Affected Employee

SSM renews its objection to *{redacted}*'s status as an affected employee and moves to strike all evidence obtained by *{redacted}*'s counsel during the hearing (Respondent's Brief, p. 13). SSM argues that *{redacted}* is not an affected employee because he was not an employee of SSM and was no longer working on SSM property when the citations were issued. *{redacted}* was employed by TempStaffers, a temporary employment agency providing workers to SSM. SSM asserts that *{redacted}* requested party status to obtain information for a private lawsuit.

{redacted} was granted party status as an affected employee under Commission Rule 20. The rule provides that affected employees "may elect party status concerning any matter in which the Act confers a right to participate." "Affected employee" is defined at Commission Rule 1(e) as "an employee of a cited employer who is exposed to or has access to the hazard arising out of the alleged violative circumstances, conditions, practices or operations."

In determining whether *{redacted}* was an employee of SSM, the Commission applies an economic realities test. As described in *Loomis Cabinet Co.*, 15 BNA OSHC 1635, 1637, 1992 CCH OSHD ¶ 29,775 (No. 88-2012, 1992), the economic realities test employs the following factors: (1) who does the worker considers his employer; (2) does the alleged employer have the power or responsibility to control the worker; (3) does the alleged employer have the power to fire, hire, or modify the employment conditions of the worker; (4) does the worker's ability to increase his wages depend on efficiency rather than initiative, judgment, and foresight; and (5) how are the worker's wages established? The key factor in addressing an employment issue is the right to

control the work. See *Abbonizio Contractors, Inc.*, 16 BNA OSHC 2125, 1994 CCH OSHD ¶ 30,109 (No. 91-2929, 1994).

It is undisputed that at the request of SSM, TempStaffers, a temporary employment agency, provided {redacted} to SSM to work as a laborer. TempStaffers functioned as a personnel department for SSM. SSM did not hire any workers as full-time employees unless they first came through TempStaffers. SSM identified its job needs to TempStaffers. TempStaffers performed background checks on prospective workers, interviewed the workers, and made the selection.

While working on its property, SSM assigned the worker to a job, provided him with any training, set the worker's hours, and provided the worker with any tools or equipment. SSM gave the worker a safety belt. Workers had to buy hardhats and goggles from SSM (Tr. 4070-4072, 4075). SSM supervised the work and controlled the working conditions. SSM paid TempStaffers for the service, and TempStaffers paid the worker an hourly wage.

During OSHA's inspection, {redacted} was torch cutting radiators, heat exchangers, and tube bundles in the nonferrous department at SSM's Thomas yard. {redacted} worked at SSM from May 25 to June 24, 1994. He was hired as a laborer. He worked eight hours per day. He was trained to do his job by SSM. SSM also provided {redacted} with hazard communication and lockout/tagout training (Tr. 1584, 2796). {redacted} was supervised by SSM's nonferrous supervisor (Exhs. C-34, R-3; Tr. 242, 311, 976, 3355). There were no TempStaffer supervisors at SSM (Tr. 976). {redacted} was required to work the schedule set by SSM, and he exercised no independent judgment. His hourly wage was not dependent on how many radiators were cut. SSM had the power to modify {redacted}'s working conditions. His work was controlled by SSM.

Thus, under the economic realities test, {redacted} meets the requirement of an "employee of a cited employer" under Commission Rule 1(e). SSM controlled his job and working conditions. The fact that he is no longer employed on SSM property does not change his employment status at the time of his alleged exposure to unsafe conditions. The Commission rule does not limit participation in OSHA proceedings to employees currently employed at the time of the hearing.

OSHA alleges {redacted} was exposed to hazardous conditions while working at SSM. He was monitored for airborne concentrations of lead on June 15, 1994. Willful Citation No. 2 identifies {redacted} as an exposed employee to excessive airborne concentrations of lead. See

items 7, 11(h), 18, 20(h), 21(h), 22a(h), 22b(h), and 31. Thus, the Secretary identifies *{redacted}* as exposed or having access to a hazard arising out of the alleged violative conditions.

Therefore, *{redacted}* met the definition of “affected employee.” As an “affected employee,” *{redacted}* was given party status and entitled to participate in the hearing. His participation included the right to present witnesses, cross-examine witnesses, and offer documentary evidence on the issues in dispute. See *Donovan v. Oil, Chemical, and Atomic Workers International Union*, 718 F.2d 1341, 1349 (5th Cir. 1983). Although the Secretary has the burden of proof to establish the alleged violations, an affected employee is entitled to fully participate at the hearing as any other party. SSM was not prejudiced by *{redacted}*’s participation. Any information obtained by *{redacted}* was available to him under the Freedom of Information Act or by attending the public hearing.

SSM’s motion to strike *{redacted}*’s party status or evidence is denied.

Validity of the Lead and Cadmium Standards to the Scrap Metal Industry

SSM seeks to dismiss the alleged violations of the lead and cadmium standards on the basis that the standards are invalid to the scrap metal industry as identified under SIC Code 5093³ (Respondent’s Brief, p. 34). SSM asserts that during rulemaking proceedings, OSHA failed to demonstrate that the lead and cadmium standards produce a significant health risk and are feasible of attainment in the scrap metal industry.

The Review Commission does consider challenges to the validity of standards in enforcement proceedings. See *Holly Springs Brick & Tile Co.*, 16 BNA OSHC 1856, 1858 (No. 90-3312, 1994); *Deering Milliken, Inc. v. OSHRC*, 630 F.2d 1094 (5th Cir. 1980). This includes standards promulgated under the elaborate rulemaking procedures at section 6(b) of the Act. *RSR Corp. v. Donovan*, 747 F.2d 294, 302 (5th Cir. 1984). The burden of proving a standard invalid in

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Standard Industrial Classification is from a manual of the Office of Management and Budget which classifies businesses. SIC Code 5093 includes businesses engaged in assembling, breaking up, and sorting wholesale distribution of scrap and waste materials. Also, it includes those engaged in wrecking automobiles, iron steel, and nonferrous metals.

an enforcement proceeding lies with the party challenging the validity. It is a heavy burden. See *Atlantic & Gulf Stevedores v. OSHRC*, 534 F.2d 541, n. 13 (3d Cir. 1976).

1. Lead Standard

The lead standard was promulgated under § 6(b) of the Act. After promulgation in 1978, there was extensive litigation involving the lead standard, including its findings of technological and economic feasibility. In 1980 the D. C. Circuit Court substantially upheld the validity of the lead standard as to most industries. The court, however, remanded the lead standard to OSHA for additional feasibility findings in a number of miscellaneous industries, including industries involved in collecting and processing scrap lead. *United Steelworkers of America v. Marshall*, 647 F.2d 1189 (D.C. Cir. 1980), *cert. denied*, 453 U.S. 913, 101 S. Ct. 3148 (1981). Also see *American Iron & Steel Institute v. OSHA*, 939 F.2d 975 (D.C. Cir. 1991). In December 1981, OSHA made additional feasibility determinations for the miscellaneous industries. See 46 F.R. 60,758 (December 11, 1981). The court accepted OSHA's determinations.

OSHA's deputy director for health standards identified three documents used by OSHA during its rulemaking proceedings which involved the scrap metal industry under SIC Code 5093 (Exhs. R-35, R-36, R-37; Tr. 3400). The documents refer to three companies in Utah which accept ferrous scrap material. It was not shown how these documents were used in the rulemaking process. The deputy director, however, testified that OSHA did make specific feasibility findings for scrap metal processors under SIC Code 5093 (Tr. 3401). He also stated that OSHA's feasibility findings related to any industry where a torch was used to cut or burn metal (Tr. 3405-3406).

A review of the Federal Register shows OSHA made risk and feasibility findings for all employers engaged in the "collection and processing of lead scrap" under SIC Code 5093. See 46 F.R. 60,758, 60,764-60,765 (December 11, 1981). OSHA described the industry as establishments engaged in collecting, cleaning, breaking, sorting, chopping, cutting, baling, and distributing all types of scrap metal for delivery to remelters and secondary smelters. In making its risk and feasibility analysis, OSHA recognized the number of employees exposed above the permissible exposure limit (PEL) may be small, and that the amount of lead content may be irregular and sporadic depending on the type of scrap metal processed and the nature of processing. Therefore, OSHA exempted scrap metal processors from the requirements of implementing engineering

controls whose employees were exposed above the PEL for less than thirty days. The other requirements of the lead standard, however, were made applicable to the scrap metal industry.

OSHA's risk and feasibility findings for the scrap metal industry are sufficient and satisfy the requirements of § 6(b) of the Act. Further, the record shows the National Association of Recycling Industries (NARI) actively participated in OSHA's rulemaking process. NARI is a predecessor association to the Institute of Scrap Recycling Institute, Inc (Tr. 1788, 1795). SSM is an active member (Tr. 1250, 1252-1253). The Institute of Scrap Recycling Industries, Inc., also intervened in a challenge to the feasibility of the lead standard. *American Iron and Steel Institute v. OSHA*, 939 F.2d 975 (D. C. Cir. 1991). Based on a need for an agency's standards to reach finality, courts refuse to entertain challenges to the validity of a standard during enforcement proceedings where an employer previously participated in OSHA's rulemaking process and did not raise a challenge. *RSR Corp. v. Donovan*, 747 F.2d 294, 302 (5th Cir. 1984). Similarly, SSM through its association participated in previous challenges to the lead standard.

Also, SSM was aware of the presence of lead at its facility since it was shown by its air monitoring in 1989 and 1992 (Exh. C-42; Tr. 1330, 1332, 2098). One worker's lead exposure was above the PEL, and another worker's level exceeded the action level for lead (Tr. 2254). Although the 1989 lead citation was withdrawn, SSM was on notice that OSHA considered the lead standard applicable to its facility (Exhs. C-41, R-13). Southern Holdings, SSM's parent company, implemented a full lead program at its scrap facility in New Orleans (Exh. C-47; Tr. 1343-1344).

SSM's challenge to the validity of the lead standard is denied.

II. Cadmium Standard

Unlike the lead standard, there is no evidence that OSHA made specific feasibility findings for the scrap metal industry under SIC Code 5039 in promulgating the cadmium standard. OSHA's deputy director for health standards testified that, based on his review of OSHA's rulemaking docket for cadmium, he was unable to locate any documents involving SIC Code 5093 which led to the adoption of the cadmium standard in 1992. He further could not recall receiving any information with respect to cadmium in the scrap metal industry (Tr. 3417). He testified that OSHA did not identify SIC Code 5093 as an impacted or potentially impacted industry for cadmium exposure (Tr. 3421).

However, the cadmium standard specifically describes at § 1910.1027(a) its scope to include “all occupational exposures to cadmium and cadmium compounds, in all forms, and in all industries covered by the Occupational Safety and Health Act except the construction-related industries, which are covered under 29 C.F.R. 1926.63.” A review of the Federal Register reveals that in addition to making health risk assessments and feasibility findings for specific industries, OSHA included a general industry analysis which addressed potential cadmium exposure in occupations that are not directly associated with cadmium but may involve incidental exposure in the use of products containing cadmium. 57 F.R. 42,102, 42,310-42,333 (September 14, 1992). Among the occupations considered, OSHA identified “welders, brazers, and solderers” as possibly exposed to cadmium fumes released from cadmium-bearing base metals, brazing rods, or solders. Within the welder category, OSHA included “employees who use welding and flame cutting equipment such as arc welders, gas welders, and gas torches to join, cut, trim, and scarf metal components.” 57 F.R. at 42,312. OSHA made health risk assessments and feasibility analyses for the welder category.

SSM’s use of torch cutting to process the scrap metal is within the welder category. An industry-by-industry risk-finding is not required: *U.A.W. v. OSHA*, 37 F.3d 665, 670 (D.C. Cir. 1994); *American Dental Assn. v. Martin*, 984 F.2d 823, 827 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 172 (1993). The Review Commission has also concluded that OSHA is not required to assess the significant health risk for each affected industry. *Holly Springs Brick & Tile Co.*, 16 BNA OSHC 1856 (No. 90-3312, 1994). As with lead, SSM was aware of the potential applicability of the cadmium standard to its scrap metal yards. Prior to the OSHA citations, SSM’s holding company found the presence of cadmium at its scrap metal facility in New Orleans, and the corporate safety director was familiar with the cadmium standards (Tr. 1384-1385, 1408).

SSM’s challenge to the validity of the cadmium standard is denied.

The Validity of OSHA Air Monitoring Results

SSM challenges OSHA’s air monitoring results for lead and cadmium during the torch cutting operations in the ferrous and nonferrous departments because of the placement of the filter cassettes on the worker’s collar and not inside his face shield. SSM asserts the monitoring results do not accurately reflect the worker’s exposure level to airborne lead and cadmium.

There is no dispute that OSHA clipped the filter cassettes to the worker's collar within 9 inches of his breathing zone, but outside of the worker's face shield. While torch cutting the scrap metal, workers wore face shields which, when in the down position, covered their faces (Tr. 585, 587). The face shield, made of clear or tinted curved plastic, was hinged to the hardhat allowing the shield to be raised above the head or lowered in front of the face. When lowered, the shield covered the face to the chin or throat and curved behind the worker's temple. The primary purpose of the face shield was to protect the worker's eyes and face (Exhs. C-25 thru C-32; Tr. 233, 238, 1152-1153).

In *Equitable Shipyards*, 13 BNA OSHC 1177 (Nos. 81-1685, 81-1762 & 81-2089, 1987), the Review Commission invalidated samples of airborne contaminants taken outside of helmets worn by welders. The Commission reasoned that a filter cassette attached to the welder's collar, outside of the welding helmet, was unreliable and failed to provide an accurate indication of the worker's exposure. The Commission noted that OSHA's technical manual directed industrial hygienists when sampling for welding fumes to place the filter cassette inside the welding helmet to achieve an accurate characterization of the employee's exposure. 13 BNA OSHC at 1181. See also OSHA technical manual (Exh. R-48⁴, p. 6, D.2 and Exh. R-47).

The Secretary argues the technical manual relating to welding fumes is not applicable in this case. SSM's workers were not welding and were wearing face shields, not welding helmets. OSHA's technical manual states that, when generally sampling for air contaminants, "attach the collection device to the shirt collar or as close as practical to the nose and mouth of the employee, *i.e.*, in a hemisphere forward of the shoulders with a radius of approximately 6 to 9 inches" (Exh. C-48, p. 1, B.5). Monitoring of welding fumes is under special sampling procedures and is considered an exception to OSHA's general sampling method.

In another case involving monitoring for lead exposure during torch cutting operations by workers wearing face shields, a judge concluded OSHA improperly sampled a worker's exposure by not placing the filter cassette inside the worker's face shield. The judge found that welding and torch cutting were closely allied processes and "to require different sampling techniques dependent

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Exhibit C-24 is the same document except minus page 2.

upon whether the welder/cutter's facial barrier is classified as a 'face shield' rather than a welding helmet creates a distinction without a relevant difference." *Louisville Scrap Material Co., Inc.*, 17 BNA OSHC 1620 (No. 94-2293, 1995). The court agrees.

Welding and torch cutting generate the same type of fume when the operation is performed on the same type of base metal with the same type of surface coating. Welding and torch cutting are allied processes that OSHA has classified them as such. See § 1910.251, *et seq.* A welder is defined as any operator using electric or gas welding and cutting equipment. Although OSHA is not required to absolutely follow the procedures outlined in its technical manual, the Review Commission accords the guidelines significance and are probative evidence of the proper sampling technique. *FMC Corp.*, 5 BNA OSHC 1707, 1710, 1977-78 CCH OSHD ¶ 22,060, p. 26,573 (No. 13155, 1977).

There is no support in the record for the deputy director's opinion that the face shield provided no respirator protection (Tr. 1109). To the contrary, literature offered by SSM supports a finding that the level of exposure is different inside versus outside the shield. Studies found that welders using welding helmets were exposed to the airborne concentrations inside the helmet which varied from 36 percent to 71 percent less than the concentrations outside the helmet (Exhs. R-42, R-44). This significant difference in the worker's exposure level depended on the placement of the sampling cassette. Although one would reasonably expect the welding helmet to provide more protection from air containments than the face shield used at SSM, it is also reasonable to assume there is still a difference in the exposure levels inside the face shield as opposed to outside the shield. The facial barrier created when the face shield is down during torch cutting work limits to an extent the worker's exposure to air containments. No studies were offered involving face shields and torch cutting operations. There is also no shown statistical correlation to compare the exposure levels outside versus inside the welder's helmet or face shield.

Therefore, OSHA's air monitoring results for lead and cadmium exposure of the workers engaged in torch cutting were not shown to accurately measure the workers' exposure levels. However, despite SSM's arguments to the contrary, the record establishes the presence of airborne concentrations of lead and cadmium at SSM. To what extent OSHA's incorrect sampling procedure affected the alleged violations is discussed separately as to each alleged violation.

SSM's Responsibility for Barfield's Workers

SSM asserts the workers monitored by OSHA for exposure to airborne lead in the ferrous department were not employees of SSM. The workers' torch cutting scrap metals in the ferrous department were employed by Barfield Enterprises, an independent contractor. SSM argues that any violations of the lead standards were the responsibility of Barfield (Respondent's Brief, p. 58). However, OSHA opened no inspection files and no citations were issued to Barfield Enterprises.

There is no dispute that SSM verbally contracted⁵ with Barfield Enterprises, Inc., a corporation from Texas, to torch cut scrap metal in SSM's Thomas yard (Tr. 3455). Barfield was in business to provide torch cutting services to steel mills, scrap yards, and other companies in a number of southern states (Tr. 2534-2538). Barfield furnished approximately ten workers to SSM to torch cut scrap metal from February to October 1994⁶ (Tr. 2629). The workers were supervised by Barfield's on-site foreman, *{redacted}*. Another Barfield supervisor visited the Thomas yard several days each week (Tr. 515, 2646-2648, 2565). The workers were Mexican nationals who spoke little English. There is no dispute that *{redacted}*, and *{redacted}* were the workers furnished by Barfield Enterprises. Barfield paid the workers an hourly rate and furnished them with rented housing in the Baton Rouge area (Tr. 2566). All equipment such as torches, hoses, and face shields were provided by Barfield.

Barfield was paid by the ton of scrap metal processed by its workers based on the type of metal processed (Tr. 2570-2572). SSM provided an area in the Thomas yard for the workers to torch cut the scrap metal. SSM selected the scrap metal for cutting, moved the scrap metal to and from the area, and furnished propane gas for the workers' cutting torches. SSM also furnished the workers with respirators, if requested, and some safety-related training (Tr. 1295-1296, 2138, 2624, 2776, 2991-2993). SSM retained the authority to stop the workers' torch cutting if their work was unsatisfactory or unsafe (Tr. 2141, 2675).

⁵The parties did sign a hold harmless agreement (Exh. R-28).

⁶Barfield anticipated working longer than October 1994 (Tr. 2720).

Barfield, a separate and independent corporation, was hired by SSM to torch cut scrap metal which could not be cut by SSM's large shears. Barfield's business is to provide this service and does so for other scrap yards. Barfield hires, fires, pays the wages, and sets the working conditions for the workers. The workers are paid an hourly wage by Barfield. Barfield's compensation is based on the tonnage processed. Although SSM furnished the workers a place on-site to work and identified scrap metal to cut, it is not shown that SSM controlled or had the authority to control the workers. The workers did not consider SSM their employer. Thus, in applying the "economic realities" test, the workers were not employees of SSM.

Having concluded that Barfield was an independent contractor, SSM nevertheless is not relieved of its responsibility to provide the workers a safe workplace. An employer at a multi-employer worksite is responsible for abating hazardous conditions which expose workers of other employers where the employer could be reasonably expected to prevent or detect and abate the violations because of its control over the worksite and its supervisory authority. *IBP, Inc.* 17 BNA OSHC 2073, 2074-76 (No. 93-3059, 1997). The multi-employer worksite analysis applies to an employer at a nonconstruction worksite such as SSM.

Applying this analysis, SSM was responsible for the health and safety of Barfield's workers for conditions it created and controlled. The alleged violations involve the workers' exposure to air concentrations of lead. If exposure existed to lead, it was the result of scrap metal which SSM contracted Barfield to process. SSM owned the workplace. SSM selected the scrap metal to cut. SSM's responsibility was to ensure that workers on its property were not exposed to airborne contaminants or hazardous metals it contracted to process. Any unsafe conditions, if existed, were under the control of SSM. SSM was under a duty to inform Barfield or prevent the processing of hazardous materials without implementing appropriate protective measures. Barfield relied on SSM to identify any hazards. SSM failed to inform Barfield of the possible lead exposure (Tr. 2629). Therefore, if violations of the lead standard are found, SSM is a responsible employer because of its control over the work environment.

This does not imply that Barfield has no responsibility for the safety of its workers and may have been subject to an OSHA citation. By not citing Barfield, SSM argues OSHA engaged in

selective prosecution. However, the Secretary is empowered with the “broad prosecutorial discretion” in deciding whom to prosecute for violations of the Act. *DeKalb Forge Co.*, 13 BNA OSHC 1146, 1153, 1986-87 CCH OSHD ¶ 27,842, p. 36,451 (No. 83-299, 1987). Based on this broad discretion, there is no showing that the selection of SSM for the issuance of a citation was motivated by discriminatory purposes or had a discriminatory effect. As explained by OSHA, SSM did not identify Barfield as an independent contractor when asked at the beginning of the inspection (Tr. 512). SSM’s claim of “selective prosecution” is denied. *See Vergona Crane Co.*, 15 BNA OSHC 1782, 1787-88 (No. 88-1745, 1992).

The Citations

Having made preliminary findings, attention is directed to the various citation items remaining in contest.

SERIOUS CITATION NO. 1

Item 2 - Alleged Violation of § 1910.27(d)(1)(iv)

In the Shredder yard, OSHA alleges the safety cage on the fixed ladder used to access a pedestal crane was 15 feet above ground level in violation of § 1910.27(d)(1)(iv). The standard requires the cage on a fixed ladder to extend to a point not less than 7 feet nor more than 8 feet above the base of the ladder.

SSM’s pedestal crane is stationary and moves scrap metal to the shredder (Tr. 2174). To access the crane, the operator climbs a fixed vertical ladder to a platform. The fixed ladder is protected, for the most part, by a cage. Based on his observations, however, Industrial Hygienist Baptiste determined the cage ended 15 feet above the base of the ladder (Exh. C-7; Tr. 98-99). SSM immediately extended the cage (Tr. 100, 878).

SSM argues that the Secretary failed to establish the application of the standard, employees’ exposure, and the height of the cage (Respondent’s Brief, p. 119). SSM asserts that the pedestal crane is covered by the overhead and gantry crane standards at § 1910.179(c)(2), which incorporates the ANSI standards for access to the crane.

SSM's arguments are rejected. Although the § 1910.179 standards apply to cranes such as the pedestal crane, § 1910.179(d)(4)(iii) specifically requires that ladders be "permanently and securely fastened in place and shall be constructed in compliance with § 1910.27." Therefore, § 1910.27(d)(1)(iv) is the appropriate standard, and the evidence supports a violation.

Industrial Hygienist Baptiste determined the height of the cage by counting the rungs on the ladder which were 1 foot apart (Tr. 99, 877). Despite James Arledge's⁷ denial, Baptiste's testimony is more credible (Tr. 2175). Arledge offered no other measurements, and a photograph of the pedestal crane show a height greater than 8 feet (Exh. C-7). Although no employee was seen using the ladder, the record established exposure based on access. The ladder was the only means identified to access the crane by the operator. The crane was used daily (Tr. 99, 1355).

The violation of § 1910.27(d)(1)(iv) is considered "serious" within the meaning of § 17(k) of the Act. The unguarded portion of the ladder was in plain view. SSM conducted daily safety audits, and it should have been aware of the inadequate cage and possible fall hazard (Tr. 96, 1569-1570). The operator was exposed to a fall hazard in excess of 10 feet. Such a fall hazard could cause serious injury or possible death.

A serious violation of § 1910.27(d)(1)(iv) is affirmed.

Item 3 - Alleged Violation of § 1910.95(i)(2)(i)

OSHA alleges the Barko⁸ operator and a torch cutter were exposed to noise levels above 90 dBA for an eight hour time-weighted average without the use of hearing protection. Section 1910.95(i)(2)(i) requires that, if employees are exposed to noise levels above 90 dBA for eight hours, the employer must ensure that hearing protectors are worn.

Industrial Hygienists Baptiste and Folsie monitored workers' exposure to noise in the Thomas and Stainless yards. They monitored the noise exposure of ten workers, including torch cutters and equipment operators. OSHA's noise monitoring found the noise exposure level for the Barko operator to be 94.7 dBA; for a worker torch cutting, 95.1 dBA for an eight hour time-

⁷

The corporate safety director who accompanied Baptiste for most of his inspection.

⁸

The Barko is a hydraulic crane.

weighted average (Exhs. C-8, C-9; Tr. 103). Neither the operator nor the worker was wearing hearing protection. The worker torch cutting had ear plugs around his neck but was not using them (Tr. 103, 118). Based on these findings which are not disputed by SSM, a violation of §1910.95(i)(2)(i) is established.

SSM asserts an employee's misconduct defense (Respondent's Brief, p. 109). SSM claims it has a comprehensive hearing protection program (Exh. C-10). Baptiste rated SSM's program as better than other employers (Tr. 887). Hearing protection was provided at no cost (Exhs. R-33, R-34). SSM provided an annual audiogram to workers. SSM also designated certain areas in the Thomas and Stainless yards as high noise areas. The areas were posted with warning signs which stated hearing protection was required in the area (Exhs. R-19, R-26; Tr. 2178, 2180, 2308). SSM notes that only two workers were identified not wearing hearing protection.

In order to establish an employee misconduct defense, SSM must show that the action of its employees represented a departure from a work rule that was effectively communicated and enforced. *Mosser Construction Co.*, 15 BNA OSHC 1408, 1414, 1991 CCH OSHD ¶ 29,540, p. 39,905 (No. 89-1027, 1991). SSM has the burden of proof.

The record establishes that SSM implemented a good hearing conservation program and developed rules for wearing hearing protection. Based on its written program, training, and posted warning signs, SSM's hearing protection rule was communicated to employees. SSM, however, failed to show effective enforcement. There is no showing that the rule was enforced or that any worker was reprimanded for not wearing hearing protection. Although OSHA was present on-site for twenty-five days, noise monitoring was performed on only ten workers during three days. Although not monitored, Baptiste testified that most of the workers torch cutting were not wearing hearing protection (Tr. 879). Noncompliance by the two workers indicates ineffective enforcement. SSM's daily safety audits in the yards were not shown to adequately detect unsafe conditions. The lack of hearing protection was in plain view. An employee's misconduct defense is rejected.

Under § 17(k), the violation is considered serious in that SSM should have known of the lack of hearing protection with the exercise of reasonable diligence. It allegedly conducted daily safety audits of the yard. The exposure to excessive noise subjected workers to possible hearing loss.

A serious violation of § 1910.95(i)(2)(i) is affirmed.

Item 4 - Alleged Violation of § 1910.151(b)

The citation alleges SSM failed to provide employees with immediate first aid or transportation to an infirmary or hospital. Section 1910.151(b) provides:

In the absence of an infirmary, clinic, or hospital in near proximity to the workplace which is used for the treatment of all injured employees, a person or persons shall be adequately trained to render first aid.

The essential facts are not in dispute. For workers furnished by temporary employment agencies such as TempStaffers, SSM's policy is not to render first aid on-site (Tr. 123-125). SSM also does not transport an injured worker to a hospital for treatment. The record shows that several temporary workers were injured while at SSM (Exh. C-55). Two such workers, *{redacted}* and *{redacted}*, did not receive first aid from SSM after receiving injuries. *{redacted}* was not treated for an injury to his foot (Tr. 4054-4056). *{redacted}* waited twenty minutes for transportation to a clinic after receiving burn injuries (Tr. 125, 997-998).

SSM argues the standard does not require an employer to transport nor to render first aid on-site to an injured worker if a suitable hospital or clinic is nearby its facility. It is uncontroverted that a hospital with emergency room service is within 2.7 miles of SSM (Tr. 2859). There is no evidence that injured workers are excluded from treatment by the hospital (Tr. 124). SSM asserts that in the event of an emergency, SSM decides whether to send the worker to the hospital or call "911." If a temporary worker, SSM's policy is to contact the temporary agency and call "911" if it is a serious injury. SSM does not transport an injured temporary worker to the hospital because of insurance and liability reasons (Tr. 2187, 2860-2861, 3063-3064). Baptiste was aware that SSM called "911" (Tr. 126).

The record shows SSM does not have an employee on-site who is adequately trained in first aid. *{redacted}* renders only minor first aid for cuts and scratches. He is not specifically trained in first aid. However, § 1910.151(b) requires an employer to assure that it has employees adequately trained to render first aid *only if* there is no infirmary, clinic, or hospital in near proximity available to render treatment.

A hospital with an emergency room is within 2.7 miles of SSM. The court finds that 2.7 miles is in "close proximity" of SSM. Also, there is no showing that the hospital's emergency service does not transport injured workers from SSM or provide them first aid treatment. The fact

that SSM may provide first aid to some workers, and not to workers provided by temporary employment agencies, does not violate §1910.151(b) as long as such workers are provided medical treatment at a hospital in close proximity. The standard is silent as to an employer's responsibility to transport injured workers to the clinic or hospital. However, it contemplates that such treatment is rendered at a hospital, clinic, or infirmary. The twenty-minute wait for transportation by the hospital was not shown to be caused by SSM's refusal to contact the hospital. Similarly, the failure of a worker to receive treatment for a foot injury was also not shown to be due to SSM's refusal to contact the hospital or the hospital's refusal to render treatment. The Secretary's burden to establish the violation was not met.

An alleged violation of § 1910.151(b) is vacated.

Item 5 - Alleged Violation of § 1910.151(c)

The citation alleges SSM failed to provide eye flushing facilities. Section 1910.151(c) provides:

Where the eyes or body of any person may be exposed to injurious corrosive materials, suitable facilities for quick drenching or flushing of the eyes and body shall be provided within the work for immediate emergency use.

Workers used a degreaser known as Big Red Cleaning System Degreaser to clean parts and equipment in the maintenance department. According to OSHA, the material safety data sheet (MSDS) identified the degreaser as a corrosive. Industrial Hygienist Baptiste described the eye wash facility in disrepair and not accessible because of the scrap metal (Tr. 127-128, 898-899). SSM's first aid log showed several eye injuries to workers. However, there was no record of an eye injury caused by a corrosive or the use of the Big Red Degreaser (Tr. 128).

SSM argues the Secretary failed to show that any person was "exposed to injurious corrosive materials" as required by the standard (Respondent's Brief, p. 122). SSM's maintenance supervisor testified the degreaser was not caustic or corrosive. He described the effect in the eye as similar to soap (Tr. 3098-3099).

The MSDS for the degreaser was not made part of the record. Baptiste's testimony regarding the character of the degreaser is not supported by the record. Baptiste's notes from the inspection refer to the degreaser as an "eye irritant," not as a corrosive (Exh. R-9). An eye irritant would affect the eye in the manner described by the maintenance supervisor. Therefore, the record is not sufficient to show that an "eye irritant" exposed workers to an "injurious corrosive material."

Also, notes from the inspection file identified sink and water hoses around the maintenance building which provided water for flushing eyes (Tr. 900). Also, a water bottle was available in the guard office for eye flushing (Tr. 898).

An alleged violation of § 1910.151(c) is vacated.

Item 9 - Alleged Violation of § 1910.305(g)(2)(ii)

In the maintenance building, OSHA alleges that spliced flexible cords were used to supply 110-volt electric power to hand tools and fans. Section 1910.305(g)(2)(ii) requires:

Flexible cords shall be used in continuous lengths without splice or tape. Hard service flexible cords No. 12 or larger may be repaired if spliced so that the splice retains the insulation, outer sheath properties, and usage characteristics of the cord being spliced.

Industrial Hygienist Baptiste observed two or three extension cords in the maintenance building which were used to supply 110-volt electric power to a grinder and ventilation fans. The extension cords were taped as if spliced (Exh. C-15; Tr. 155, 922). SSM's maintenance supervisor immediately removed the cords from service (Tr. 158). The supervisor acknowledged that despite his attempts to police the cords, occasionally employees used damaged cords (Tr. 155).

SSM argues that because the tape was not removed from the cords, there is no evidence the cords were damaged and spliced (Respondent's Brief, p. 129; Tr. 923). SSM cites *Metal Recycling Co.*, 16 BNA OSHC 1324 (No. 92-533, 1993) (violation affirmed based on a close examination of the cord). SSM also asserts that there is no evidence as to the size of the cord.

Although the tape was not removed, the weight of the evidence shows the cords were damaged. The maintenance supervisor and corporate safety director who were present during the inspection immediately removed the cords from service and destroyed them (Tr. 158, 2209). They did not protest Baptiste's findings. The statement of the supervisor indicates that he also considered

the cords damaged. Further, the corporate safety director was unable to offer any other reason for taping the cords. He conceded that the use of tape generally indicated a spliced cord (Tr. 2210). *{redacted}*, chief of security and safety director, who inspected the yard daily testified that if he saw tape on an electrical cord, he considered it a safety violation and destroyed the cord (Tr. 2939).

The record, however, fails to show that the extension cords were not “hard service flexible cord No. 12 and larger” which permit splicing. OSHA was unable to identify the type or size of the extension cords observed during the inspection. Also, a photograph of one cord does not assist in identification (Exh. C-15). The Secretary failed to meet her burden of proof.

An alleged violation of § 1910.305(g)(2)(ii) is vacated.

Item 11 - Alleged Violation of § 1910.1027(c)

The citation alleges that on April 13, 1994, workers torch cutting in the Stainless yard were exposed to airborne concentrations of cadmium in excess of the permissible exposure limit (PEL) for eight hours time-weighted average (TWA). Section 1910.1027(c) limits the exposure of cadmium to five micrograms per cubic meter of air (5 ug/m³), calculated as eight hour time-weighted average.

OSHA’s air monitorind found two workers *{redacted}* in the Stainless yard exposee to cadmium. The two workers were torch cutting large pieces of steel into 4-foot pieces, removing any attached iron or copper (Tr. 1155). The workers wore long sleeved shirts, gloves, safety glasses, and face shields which attached to their hardhats (Tr. 1152-1153). *{redacted}* exposure level to cadmium was recorded at 10.2 micrograms per cubic meter for an eight-hour time-weighted average, twice the PEL of 5 micrograms. In addition to torch cutting, *{redacted}* also operated the Barko hydraulic crane used to move the scrap metal around the yard (Tr. 1166-1167). After OSHA’s inspection, *{redacted}* was removed from torch cutting work because his blood test showed “high blood.” He was not told if it was a high level of cadmium or lead (Tr. 2049-2050). The corporate safety director testified that *{redacted}* was removed from torch-cutting because there was blood in his urine (Tr. 2340). However, the manager of the Stainless yard testified that the test did find a “minute” amount of cadmium in his blood and the doctor instructed *{redacted}* not to torch cut (Tr. 3080-3081).

The other torch cutter monitored, *{redacted}*, showed exposure to air concentrations of cadmium of 3.9 micrograms per cubic meter for an eight-hour time-weighted average (Exhs. C-19, C-20; Tr. 169, 173-174, 1150). Although not above the PEL, *{redacted}*'s cadmium level was above the action level.⁹

To perform the air monitoring, OSHA placed the filter cassette on the torch cutter's collar within 9 inches of his breathing zone. The cassette was not inside the face shield when the shield was down during torch cutting. The flow rate for the pumps was set at 2.0 liters as if monitoring for "welding fumes" (Tr.1151, 1160).

There is no dispute that the requirements of the cadmium standards were not implemented by SSM (Tr. 182, 191-192). SSM was aware of the cadmium standard and did not monitor for cadmium in the Stainless yard (Tr. 177-178, 1301, 2338).

As discussed under preliminary matters, OSHA's method of air monitoring fumes from torch cutting fumes failed to accurately establish the worker's level of exposure to airborne concentrations of cadmium. Although the court is convinced that workers were exposed to cadmium, placing the filter cassettes outside the worker's face shield failed to show the worker's level of exposure exceeded the PEL. The workers kept their face shields down in front of their faces while torch cutting the scrap metal. By placing the filter cassette on the worker's collar, OSHA's air monitoring failed to take into account the facial barrier created by the face shield. There is no known correlation between the exposure level inside the face shield as opposed to outside the shield, which could be used with reasonable certainty to establish the level of exposure.

An alleged violation of § 1910.1027(c) is vacated.

Item 12 - Alleged Violation of § 1910.1027(d)(1)(i)

The citation alleges SSM failed to conduct initial personnel air monitoring to determine if workers were exposed to airborne concentrations of cadmium above the action level. OSHA identified workers torch cutting, truck drivers, forklift operators, the Barko operator, maintenance employees, and laborers as workers potentially exposed to airborne concentrations of cadmium.

⁹

The action level is 2.5 micrograms per cubic meter of air calculated as an eight-hour time-weighted average. § 1910.1027(b).

Section 1910.1027(d)(1)(i) requires an employer to determine if any worker “may be exposed to cadmium at or above the action level.”

SSM admits that it did not perform initial air monitoring at its facilities (Tr. 178, 180). The corporate safety director told OSHA that “he had not gotten around to it” (Tr. 182). Instead, SSM refers to monitoring done at a New Orleans facility which found cadmium below a quantifiable level as representative (Tr. 2133-2135).

The presence of airborne concentrations of cadmium in the Stainless yard is established by OSHA’s air monitoring results from the two workers torch cutting. OSHA recorded levels of 10.2 and 3.9 micrograms per cubic meter for an eight-hour time-weighted average (Exhs. C-19, C-20). One worker (*{redacted}*), who showed the highest level of cadmium exposure, also worked as the Barko operator. He torch cut scrap metal for part of the day and also operated the Barko crane to move the scrap in the yard (Exh. C-19; Tr. 1167). Other workers in the Stainless Yard, such as equipment operators, truck drivers, and forklift operators, worked in and around the torch cutting area (Tr. 184).

The requirement to determine if employee exposure to cadmium exists in the workplace under § 1027(d)(1)(i) is triggered if a potential for exposure is shown. Initial monitoring allows an employer to identify which workers may be exposed above the action level of 2.5 micrograms. If such levels of exposure are found, the employer is expected to initiate protective measures and, if practical, abate the condition causing the exposure.

For the purpose of showing the potential for exposure to cadmium, OSHA’s monitoring results on April 13, 1994, are accepted. The presence of airborne concentrations of cadmium in the Stainless yard and SSM’s need to conduct initial monitoring is established. SSM argues, however, that because of the nature of stainless steel and the monitoring results from a New Orleans facility also owned by Southern Holdings, there was no reason to expect cadmium in the Stainless yard (Tr. 1302, 1384).

In order to establish a violation of a standard, the Secretary must show that the employer knew or should have known with the exercise of reasonable diligence of the violative condition. An employer who lacks actual knowledge is nevertheless charged with constructive knowledge of conditions that could be reasonably detected. An employer is expected to make a reasonable effort,

including inspecting the workplace, to anticipate hazards which expose employees. *Pace Constr. Corp.*, 14 BNA OSHC 2216, 2221, 1991-93 CCH OSHD ¶ 29,333, p. 39,431 (No. 86-758, 1991).

SSM processes a variety of scrap metals by torch cutting. It torch cuts any metal that cannot be processed by the shears, including radiators and heat exchangers. Although SSM notified its sellers of scrap that it would not accept any hazardous materials, cadmium was not specifically identified as hazardous. Further, there is no showing that all sellers of scrap were notified of SSM prohibition, particularly SSM's 20,000 peddlers. SSM failed to take reasonable precautions to keep hazardous or contaminated metals from entering its property. There was no inspection or testing of the metals (Tr. 1596-1597, 1600).

The monitoring at the New Orleans facility was not shown as representative of the exposure in the Stainless yard. The New Orleans yard processes metal from naval ships. SSM processes principally scrap metals from large chemical companies (Tr. 2070, 2107, 2150). Also, the monitoring in New Orleans detected the presence of cadmium, indicating the potential for exposure to cadmium (Tr. 1408, 2135). The corporate safety director did not know the actual amounts of cadmium detected and the relationship, if any, to OSHA's exposure levels. Further, the monitoring conducted in New Orleans was by area sample and not by personal samples (Tr. 1408, 2258, 2265-2267).

Section 1910.1027(d)(1)(iii) permits an employer to rely on representative sampling if "employees perform the same job tasks, in the same job classification, on the same shift, in the same work area, and the length, duration, and level of cadmium exposures are similar." This was not shown. SSM failed to show the level of exposure in New Orleans was representative of the Stainless yard.

SSM also lacked a reasonable basis for failing to perform initial monitoring. To avoid initial monitoring, an employer may show by objective data that employees' exposure to cadmium will not exceed the action level under the expected conditions of processing, use, or handling. See § 1910.1027(d)(2)(iii). Objective data requires showing an industry-wide study or laboratory test results from manufacturers of cadmium-containing products or materials. See § 1910.1027(n)(2). Such objective data was not shown.

By failing to perform initial monitoring, workers were exposed to airborne concentrations of cadmium at levels which could expose the workers to potential serious illness. SSM should have known of the potential exposure of cadmium.

A serious violation of § 1910.1027(d)(1)(i) is affirmed.

Item 13 - Alleged Violation of § 1910.1027(e)(1)

The citation alleges SSM did not establish a regulated area in the Stainless yard where workers' exposure to airborne cadmium exceeded the PEL of five micrograms. SSM does not dispute that no regulated area was designated. Section 1910.1027(e)(1) requires:

The employer shall establish a regulated area wherever an employee's exposure to airborne concentrations of cadmium is, or can be reasonably be expected to be in excess of the permissible exposure limit (PEL).

SSM's argument regarding the validity of OSHA's method of monitoring is rejected as applicable to §1910.1027(e)(1). The standard requires showing that the exposure to cadmium "can reasonably be expected to be in excess of the permissible exposure limit (PEL)." OSHA's air monitoring establishes the presence of cadmium in the area where workers were torch cutting in the Stainless yard. The two air samples taken on April 13, 1994, included *{redacted}{redacted}*'s sample which was twice the PEL (Exhs. C-19, C-20). Although the samples may not reflect the exact level of exposure, the results do establish the presence of cadmium. If OSHA's monitoring had been conducted with a filter cassette placed inside the face shield, there still is a reasonable expectation the results would exceed the PEL. According to the manager of the Stainless yard, *{redacted}*'s blood did detect the presence of cadmium (Tr. 3080-3081).

SSM failed to exercise reasonable diligence in determining whether workers were exposed to cadmium. A worker's exposure to cadmium subjects the worker to possible serious illness.

A serious violation of § 1910.1027(e)(1) is affirmed.

Item 14 - Alleged Violation of § 1910.1027(g)(1)

The citation alleges SSM failed to provide respirators and ensure their use to workers torch cutting in the Stainless yard on April 13, 1994, in violation of § 1910.1027(g)(1). The standard requires workers to wear respirators at no cost under certain circumstances including in regulated areas. §1910.1027(g)(1)(i)-(viii).

There is no dispute that *{redacted}* was not wearing a respirator while torch cutting scrap metal in the Stainless yard on April 13, 1994 (Exh. C-19). Respirators were available, but SSM did not require their use in the torch cutting area. Respirators were not mandatory (Tr. 195). Although SSM has a written respirator program, it was not in effect in the torch cutting area during the inspection (Exh. C-35; Tr. 1366, 1369).

As discussed above, the torch cutting area should have been designated as a regulated area under § 1910.1027(e). OSHA's air monitoring of *{redacted}* shows that his exposure to cadmium may reasonably be expected to exceed the PEL if monitored properly.

A serious violation of § 1910.1027(g)(1) is affirmed.

Item 15 - Alleged Violation of § 1910.1027(i)(1)

The citation alleges SSM failed to provide and ensure the use of appropriate protective work clothing and equipment that prevent cadmium contamination to workers torch cutting in the Stainless yard. Section 1910.1027(i)(1) requires:

If an employee is exposed to airborne cadmium above the PEL or where skin or eye irritation is associated with cadmium exposure at any level, the employer shall provide at no cost to the employee, and assure that the employee uses, appropriate protective work clothing and equipment that prevent contamination of the employee and the employee's garments.

It is undisputed that the protective work clothing and equipment were not required or provided by SSM. The workers torch cutting in the Stainless yard wore long sleeve shirts, jeans, and hardhats (Exh. C-19; Tr. 1152, 2025). SSM admits the requirements of the cadmium standards were not implemented (Tr. 199-200).

The standard requires protective work clothing if workers are exposed to cadmium above the PEL, or where it is shown that skin and eye irritation is associated with exposure to cadmium

at any level. *{redacted}*, a 36-year-old from Laos, testified he was no longer able to work as a torch cutter because a blood test found “high blood levels” (Tr. 2049-2050). SSM claims *{redacted}* was removed from torch cutting because there was blood in his urine with a “minute” amount of cadmium (Tr. 2340, 3080-3081).

As discussed, OSHA’s method of air monitoring outside the face shield failed to establish that workers were exposed to levels of cadmium at or above the PEL. Also, there is no evidence of “eye or skin irritation” associated with exposure to cadmium. Although there was cadmium detected in his blood, *{redacted}* did not complain of eye or skin irritation. Other workers failed to make such complaints. The record fails to establish a requirement for protective work clothing.

An alleged violation of § 1910.1027(i)(1) is vacated.

Item 16 - Alleged Violation of § 1910.1027(j)(1)

OSHA alleges that SSM failed to provide change rooms, hand washing facilities, showers, and lunchrooms to a worker torch cutting in the Stainless yard. Section 1910.1027(j)(1) requires that:

For employees whose airborne exposure to cadmium is above the PEL, the employer shall provide clean change rooms, hand washing facilities, showers, and lunchroom facilities that comply with 29 CFR §1910.141.

There is no dispute that change rooms were not provided (Tr. 169, 173-174, 201). Although cadmium was shown to be present in the Stainless yard, the record fails to establish that the workers’ exposure exceeded the PEL. OSHA’s monitoring outside the face shield failed to accurately record the worker’s level of exposure to airborne cadmium.

An alleged violation of § 1910.1027(j)(1) is vacated.

Item 17 - Alleged Violation of § 1910.1027(l)(1)(i)(a)

The citation alleges SSM failed to institute a medical surveillance program for two workers torch cutting (*{redacted}* and *{redacted}*) in the Stainless yard. Section 1910.1027(l)(1)(i)(a) provides:

The employer shall institute a medical surveillance program for all employees who are or may be exposed to cadmium at or above the action level unless the employer demonstrates that the employee is not, and will not be, exposed at or above the action level on 30 or more days per year (twelve consecutive months);

SSM does not dispute that it did not initiate a medical surveillance program for cadmium. Also, OSHA's monitoring results for cadmium establishes that workers "may" be exposed to cadmium at or above the action level. The standard is couched in terms of possibilities. The level of exposure may be as much as 10 micrograms, or twice the PEL. Without a medical surveillance program, workers were exposed to airborne concentrations of cadmium which could cause serious illness. SSM was aware of the cadmium requirements.

Therefore, a serious violation is established unless SSM demonstrates that workers will not be exposed at or above the action level for thirty days or more per year. This is an exception to the requirement for medical surveillance. SSM did not show that the possible exposure was less than thirty days. One worker testified he did some torch cutting every week (Tr. 2048). Another worker torch cutting in the Stainless yard testified he cut the entire day (Tr. 4082, 4086).

A serious violation of § 1910.1027(l)(1)(i)(a) is affirmed.

Item 18 - Alleged Violation of § 1910.1027(m)(1)

SSM was also cited for failing to comply with the hazard communication program for the cadmium hazards in the Stainless yard. Section 1910.1027(m)(1)¹⁰ requires:

In communications concerning cadmium hazards, employers shall comply with the requirements of OSHA's Hazard Communication Standard, 29 CFR 1910.1200,

¹⁰

The citation issued on September 30, 1994, was amended to correct the designation of the standard allegedly violated. It was originally cited as §1910.1027(g)(1).

including but not limited to the requirements concerning warning signs and labels, material safety data sheets (MSDS), and employee information and training.

SSM does not dispute that the requirements under the cadmium standards were not implemented in the Stainless yard. SSM's corporate safety director told OSHA that hazardous communication training for cadmium was not provided to workers (Tr. 169, 173-174). This was confirmed by a worker in the Stainless yard who was unfamiliar with material safety data sheets. He was not trained in the hazards associated with torch cutting (Tr. 2045, 4062, 4068, 4080-4081).

The hazard communication requirements regarding employee training and information is triggered if there is potential worker exposure to airborne cadmium. See § 1910.1027(m)(4). OSHA's air monitoring establishes the presence of airborne cadmium in the Stainless yard. The monitoring shows the potential for exposure to cadmium. SSM failed to take reasonable precautions such as training to insure that workers were aware of the potential exposure and adequately protected. Workers were exposed to possible serious illness from cadmium.

A serious violation of § 1910.1027(m)(1) is affirmed.

Item 19 - Alleged Violation of § 1910.1030(c)(1)(i)

The citation alleges SSM failed to establish a written exposure control plan for security supervisors who regularly provided emergency first-aid to injured workers. Section 1910.1030(c)(1)(i) requires an employer to establish a written exposure control plan designed to eliminate or minimize the potential exposure to blood borne pathogens¹¹ for employees with occupational exposure¹² to blood or other infectious materials. The standard requires an employer to determine which workers are potentially exposed to bloodborne pathogens. The exposure must be reasonably anticipated.

¹¹

“Blood borne pathogens” mean “pathogenic microorganisms that are present in human blood and can cause disease in humans . . . including, but not limited to hepatitis B virus” § 1910.1030(b).

¹²

Occupational exposure means reasonably anticipated skin, eye, mucous membrane, or parenteral contact with blood or other potentially infectious materials that may result from the performance of an employee's duties. § 1910.1030(b).

SSM designated *{redacted}*, chief of security and safety director, and *{redacted}*, his assistant, to provide first aid treatment to workers (Tr. 206-207). *{redacted}* testified that he administered first-aid as often as two to three times a week (Tr. 1567-1568). The first aid included washing out workers' eyes, applying hydrogen peroxide, and patching scrapes and cuts (Tr. 205-206). Industrial Hygienist Baptiste observed them administering first-aid without gloves (Tr. 209). Also, neither *{redacted}* nor *{redacted}* was given first aid training or Hepatitis B shots (Tr. 206-207). OSHA concedes that *{redacted}* and *{redacted}* were not likely to be exposed to "sharps," the most common form of transmittal of bloodborne diseases. 56 F.R. 64,010, 64,142.

SSM does not dispute that it did not have a written exposure control plan. SSM argues that the standard applies primarily to health care providers and other occupations where employees are exposed to blood and body fluids as part of their regular duties (Respondent's Brief, p. 151). The first-aid *{redacted}* rendered was for relatively minor cuts and scrapes. More serious injuries were referred to a doctor (Tr. 2859). SSM argues that providing first-aid for minor cuts and scrapes did not expose *{redacted}* to blood or other infectious materials.

The preamble to the bloodborne pathogen standard indicates that it primarily targets the health care industry. The only reference to first-aid providers is in the section discussing the "Good Samaritan." For the "good Samaritan" to be covered by the standard, the exposure to blood or infectious materials must be reasonably anticipated, and the contact must result from the performance of an employee's assigned duties as a member of a first-aid team. See 56 F.R. 64,101-64,102 (1991); see also *Patterson Drilling Co.*, 16 BNA OSHC 1990 (No. 93-1371, 1994) (ALJ).

{redacted} were regularly exposed to blood from injured workers. *{redacted}* and *{redacted}* told OSHA that providing first-aid was part of their assigned duties and, if not provided, their jobs were jeopardized (Tr. 206). They were observed treating bleeding cuts and scrapes. Also, they were seen removing an object from a worker's eye. They utilized a first-aid kit. SSM failed to implement an exposure control plan.

A serious violation of § 1910.1030(c)(1)(i) is affirmed.

Item 20 - Alleged Violation of § 1910.1200(e)(1)

The citation alleges SSM failed to develop and implement a written site-specific hazard communication program as required by § 1910.1200(e)(1). OSHA alleges that workers were exposed to compressed oxygen, propane, acetylene, degreasers, diesel fuel, gasoline, motor oils, lead, and cadmium. The standard requires an employer to develop, implement, and maintain at each workplace a written hazard communication program.

The parties agree SSM maintained a written hazard communication program. OSHA described the program as adequate (Exh. C-21; Tr. 218). SSM also maintained an extensive collection of MSDSs (Tr. 213).

The Secretary, although acknowledging the existence of the program, argues that it was not implemented (Tr. 214-216; 218). To show the lack of implementation, Industrial Hygienist Baptiste described a fire in a vessel being torch cut and no one knew the type of material in the vessel (Tr. 215). Also, there were pipes and 55-gallon drums which Baptiste testified were not analyzed (Tr. 215-216).

Baptiste's testimony does not establish a violation. His testimony that a worker did not know what an "MSDS" was or the content of a vessel on fire fails to show the lack of program implementation. There could be a number of reasons other than lack of implementation as to why a worker responded negatively to OSHA's questions. The worker may not have understood the question or did not want to be involved in an OSHA inspection against his employer. SSM did have a written hazardous communication program which Baptiste conceded was adequate. The standard requires an employer to implement a hazardous communication program. It does not require a worker to be able to answer OSHA's questions.

An alleged violation of § 1910.1200(e)(1) is vacated.

Item 21 - Alleged Violation of § 1910.1200(h)

The citation alleges SSM failed to develop and implement an employee information and training program for employees exposed to materials covered by a hazard communication program in violation of § 1910.1200(h). The standard requires an employer to provide information and

training on hazardous chemicals in the work area at the time of the worker's initial assignment and whenever a new worker is introduced into the work area.

OSHA alleges workers used compressed oxygen, propane, acetylene, degreasers, diesel fuel, gasoline, motor oils, lead, and cadmium. Other than lead and cadmium, there is no dispute that workers were exposed to the remaining chemicals and such chemicals were hazardous. Hazardous chemical includes "any chemical which is a physical hazard or a health hazard." § 1910.1200(c).

Industrial Hygienist Baptiste testified he was given conflicting information about who provided the training. *{redacted}* told him that department supervisors trained employees; yet, the department supervisors stated *{redacted}* provided the training (Tr. 214-215, 223-224). Workers (*{redacted}*, *{redacted}*, *{redacted}*, *{redacted}*, and *{redacted}*) testified they were not trained or provided information on chemicals used in their work areas (Tr. 2045, 4047, 4054, 4062, 4081).

However, the workers' testimony is refuted by records from their personnel files. The records show they were trained in safety, lockout/tagout, and hazardous communication. Although *{redacted}* denied receiving any training, their personnel files showed they received the training. Signed acknowledgments in their file reflect that training was given (Exhs. R-55 through R-59; Tr. 4118, 4129-4132). The personnel records are given more weight than the workers' testimony because of the general nature of the questions asked during the hearing and the workers' possible bias toward SSM due to their private lawsuits.

Also, the record fails to show that some workers were exposed to the hazardous chemicals identified by OSHA. For example, *{redacted}*, the "cleaning lady," cleaned the offices and was not exposed to propane, compressed oxygen, acetylene, gasoline, diesel fuel, and motor oils (Tr. 4042). It is also unlikely that she was exposed to lead or cadmium from the torch cutting operation. Further, the maintenance supervisor testified he trained the workers in his department. Maintenance workers were the most likely to be exposed to hazardous chemicals (Tr. 3098-3099).

An alleged violation of § 1910.1200(h) is vacated.

Penalty Considerations for Citation No. 1

The Commission is the final arbiter of penalties in all contested cases. Section 17(j) of the Act, requires consideration of the size of the employer's business, history of previous violations, the employer's good faith, and the gravity of the violation in determining an appropriate penalty. Gravity is the principal factor.

SSM is not given credit for size, history, and good faith. SSM employed 130 employees (Tr. 2150). It received a serious citation in the past three years. Also, the nature and number of the violations found does not entitle SSM to credit for good faith.

A penalty of \$2,500 is reasonable for the violation of § 1910.27(d)(1)(iv) (item 2) in that the ladder to the pedestal crane was climbed daily. The lack of a proper cage was in plain view. SSM allegedly inspected the yard daily for safety violations, and it should have been aware of the condition. The crane operator was exposed to a fall hazard in excess of 10 feet.

With regard to the lack of hearing protection required by §1910.95(i)(2)(i) (item 3), a penalty of \$1,000 is reasonable. Two workers were not wearing hearing protection. The workers were exposed to noise levels in excess of 90 dBA. Their failure to wear hearing protection was in plain view. However, it is noted SSM maintained a hearing conservation program, provided hearing protection at no cost, and designated high noise areas in the yard.

A penalty of \$2,500 is reasonable for violation of § 1910.1027(d)(1)(i) (item 12). The record establishes exposure to cadmium in the Stainless yard. Two employees were shown to potentially be exposed above the action level for cadmium. One employee exposure level was twice the PEL. SSM was aware of the monitoring requirements. It failed to take reasonable precautions. It performed no initial air monitoring.

SSM maintained no regulated areas. Workers working in the area of the torch cutting in the Stainless yard were potentially exposed to cadmium. A penalty of \$2,500 is reasonable for violation of § 1910.1027(e)(1) (item 13).

A penalty of \$2,500 is reasonable for violation of § 1910.1027(g)(1) (item 14). At least one worker who was not wearing a respirator, was potentially exposed to a cadmium level exceeding the PEL.

A penalty of \$2,500 is reasonable for violation of § 1910.1027(l)(1)(i)(a) (item 17). SSM failed to institute a medical surveillance program for two workers torch cutting in the Stainless yard who showed exposure to airborne cadmium.

As a result of failing to recognize the possible cadmium hazard in the Stainless Yard in its hazard communication program, a penalty of \$2,500 is reasonable for violation of § 1910.1027(m)(1) (item 18).

A penalty of \$2,500 is also reasonable for violation of § 1910.1030(c)(1)(i) (item 19). Two workers were exposed to possible bloodborne pathogens. As part of their assigned duties, the employees regularly administered first aid for cuts and scratches. SSM failed to implement an exposure control plan.

WILLFUL CITATION NO. 2

Citation No. 2 alleges violations of the lead standards. Also, OSHA applies its egregious policy to several of the alleged violations.

Items 1, 2, 3, 4, 5 and 6 - Alleged Violations of § 1910.1025(c)(1)

Each item alleges that a different worker provided by Barfield Enterprises torch cutting scrap metal in the ferrous department of the Thomas yard was exposed to lead concentrations in excess of the permissible exposure limit (PEL). Section 1910.1025(c)(2) requires:

The employer shall assure that no employee is exposed to lead at concentrations greater than fifty micrograms per cubic meter of air (50 ug/m³) averaged over an 8-hour period.

Industrial Hygienist Baptiste monitored the workers for exposure to airborne concentrations of lead on April 13 and May 26, 1994 (Exhs. C-22, C-23). His air monitoring results for an eight hour time-weighted average (TWA) found lead exposure levels for *{redacted}* (item 1) of 205 and 99 micrograms, *{redacted}* (item 2) of 62 micrograms, *{redacted}* (item 3) of 105 micrograms, *{redacted}* (item 4) of 140 micrograms, *{redacted}*'s (item 5) of 74 micrograms, and for *{redacted}* (item 6) of 170 micrograms.

On April 13, 1994, the monitoring involved five workers from a crew of eight to ten workers. The workers were in two locations in the ferrous department (Tr. 231). The air monitoring was conducted for six hours when the workers abruptly stopped torch cutting and left the yard. It was a Friday, the end of the week. On May 26, the monitoring was for a full eight hour shift and again involved five workers (Tr. 240). On both occasions, the workers were torch cutting similar types of scrap metal (Tr. 234-237).

The PEL for lead is 50 micrograms per cubic meter of air for an eight-hour TWA. Based on OSHA's monitoring, the record establishes that workers were exposed to airborne concentrations of lead which could be significant. However, OSHA's method of monitoring outside of the worker's face shield failed to accurately measure the worker's level of exposure to lead. OSHA's monitoring results did not establish that the workers' exposure level exceeded the PEL of 50 micrograms. The facial barrier created by the face shield in front of the worker's face during torch cutting prevented an accurate recording of the worker's level of exposure. Such facial barriers affected the worker's exposure to airborne concentrations of lead from the fumes caused by the torch cutting.

The standard of 50 micrograms is based on a worker's personal level of exposure to lead. It is not based on environmental exposure. By conducting its monitoring outside the shield, the Secretary failed to establish the workers' level of personal exposure. There is also no correlation shown between the level of exposure inside the face shield versus outside the shield which could be used to adjust OSHA's findings.

The alleged violations of § 1910.1025(c)(1) (items 1 through 6) are vacated.

Item 7 - Alleged Violation of § 1910.1025(c)(2)

SSM was cited for exposing a cutter/burner (*{redacted}*) in the nonferrous department of the Thomas Yard to a lead level in excess of a reduced PEL. Section 1910.1025(c)(2) provides that:

If an employee is exposed to lead for more than 8 hours in any work day, the permissible exposure limit, as a time weighted average (TWA) for that day, shall be reduced according to the following formula: Maximum permissible limit (in ug/m(3)) = 400 divided by hours worked in the day.

{redacted} was monitored for airborne concentrations of lead in the nonferrous department on June 15, 1994. *{redacted}* was removing steel clips or supports from radiators with a propane

torch. He was cleaning “dirty radiators” (Tr. 3227). *{redacted}* was also torch cutting heat exchangers to remove plates or bands from the tube bundles (Tr. 309, 312). *{redacted}* was monitored for nine hours. The monitoring found a nine-hour TWA exposure level of 467 micrograms of lead per cubic meter of air (Exh. C-22, p. 924, C-23, p. 886; Tr. 242). Based §1910.1025(c)(2), the reduced PEL for *{redacted}*’s lead exposure was 44 micrograms instead of 50 micrograms (Tr. 307). Therefore, *{redacted}*’s level of exposure was recorded at ten times the PEL.

As discussed, however, OSHA’s method of air monitoring during the torch cutting process failed to accurately establish that *{redacted}*’s level of exposure to lead was in excess of the reduced PEL of 44 micrograms. Although *{redacted}*’s exposure appears significant, the Secretary offered no adjustment factor. The literature offered by SSM showed the lead levels varied from 31 to 70 percent based on the placement of the cassette on welders wearing welding helmets.

An alleged violation of § 1910.1025(c)(2) is vacated.

Item 8a - Alleged Violation of § 1910.1025(d)(2)

The citation alleges SSM failed to conduct initial personal air monitoring in the Thomas yard on workers who were potentially exposed to lead. OSHA identified the jobs of torch-cutters, crane operators, truck drivers, HRB bailer press operators, forklift and Barko operators, maintenance employees, and laborers as having a potential exposure to lead. Section 1910.1025(d)(2) requires an employer to make an initial determination if any worker may be exposed to lead levels at or above the action level of 30 micrograms per cubic meter of air averaged over an eight hour period. The purpose for initial air monitoring is to establish or evaluate the workers’ potential exposure to lead during the course of their job duties.

OSHA’s air monitoring does establish the presence of airborne concentrations of lead in the ferrous and nonferrous departments in the Thomas Yard. Although OSHA’s monitoring failed to accurately measure the worker’s level of exposure to lead, the monitoring does show that workers were potentially exposed to lead. The level of airborne lead detected by OSHA indicates that SSM has a lead exposure problem. *Louisville Scrap Metal Co.*, 1995 OSHRC 138 (No. 94-2293, 1995); *TTX Co., Acorn Div.*, 16 BNA OSHC 163, 1994 CCH OSHD ¶30,302 (No. 93-0033, 1993); *Cleveland Aluminum Casting Co.*, 12 BNA OSHC 1349, 1985 CCH OSHD ¶27,268 (No. 84-198,

1985); *aff'd w/o published opinion*, 788 F.2d 38 (D.C. Cir. 1986). Leslie Ungers, SSM's expert, recognized the potential lead exposure from the dust fumes emitted during torch cutting of scrap metals (Tr. 3981-3983). The level of lead exposure could be more than four times the PEL according to OSHA's results. OSHA found *{redacted}* at 205 micrograms and *{redacted}* at 467 micrograms (Exhs. C-22, C-23).

SSM argues that it performed initial monitoring in 1989 and 1992 when it monitored workers in response to OSHA's 1989 citation for lead and while torch cutting railcars from Ethyl (Exh. C-41). SSM's reliance upon its monitoring is misplaced. First, its monitoring found two workers (*{redacted}*) were exposed lead levels above the action level. One worker's exposure was above the PEL. Further, SSM characterizes that its purpose for monitoring in 1989 was to challenge the OSHA citation and not to make an initial determination as required by the standard. Also, the standard requires personal air monitoring. SSM's monitoring in 1989 was by area sampling and no initial monitoring was conducted in the nonferrous department (Tr. 314, 1346). With regard to the jobs identified by OSHA, the record shows that such jobs required the workers to be in and around the torch-cutting operation and thus potentially exposed to airborne concentrations of lead.

A violation of § 1910.1025(d)(2) is affirmed.

Item 9 - Alleged Violation of § 1910.1025(d)(8)(i)

The citation alleges SSM failed to notify workers of the results of their lead exposure monitoring. Section 1910.1025(d)(8)(i) requires that within five working days after the receipt of monitoring results showing lead exposure, an employer must notify each worker in writing of the results which represent that worker's exposure.

SSM acknowledges that five workers monitored by SSM in 1989 and 1992 were not notified in writing of their air monitoring results (Tr. 318-319). SSM's lead monitoring results found that on December 12, 1989 (*{redacted}* - 5.0 µg/m³, *{redacted}* - 5.7 µg/m³ and *{redacted}* - 10.0 µg/m³); on December 20, 1989 (*{redacted}* - 12.7 µg/m³, *{redacted}* - 31.2 µg/m³); and, on September 30, 1992 (*{redacted}* - 23.4 µg/m³, and *{redacted}* - 41.6 µg/m³) (Exh. C-41).

SSM argues that the violation is time barred because the monitoring was performed more than six months prior to the citation. Also, SSM asserts that it has no duty to inform workers of an independent contractor (Respondent's Brief, p. 67).

Section 9(c) of the Act provides that “no citation may be issued under this section after the expiration of six months following the occurrence of any violation.” A violation for failing to provide monitoring results to workers is not time barred; it is a continuing violation until the worker is informed of his lead exposure level. *See Johnson Controls, Inc.*, 15 BNA OSHC 2132, 2136 (No. 89-2614, 1993) (inaccurate entry on OSHA Form 200 violates Act until it is corrected); *Sun Ship, Inc.*, 12 BNA OSHC 1185 (No. 80-3192, 1985). Although the exposure levels to lead were below the PEL, the standard requires notification to workers of results showing lead exposure regardless of the level detected. SSM’s monitoring found levels above the action level for *{redacted}* and *{redacted}*.

SSM performed the monitoring for lead exposure at its facility. SSM has a duty to inform workers their lead exposure including workers of an independent contractor. SSM monitored the lead levels on the workers and the monitoring was done at its facility while the workers were processing SSM’s scrap metal. The requirements of the standard are not limited to employees. The standard uses the broader classification of “worker.” Although OSHA may have known the results, the standard places the responsibility for notifying workers on the employer.

A violation of § 1910.1025(d)(8)(i) is affirmed.

Item 11 - Alleged Violation of § 1910.1025(f)(1)

The citation alleges SSM failed to require the use of respirators for workers exposed to airborne concentrations of lead while torch cutting scrap metal in the Thomas yard. Section 1910.1025(f)(1) requires respirators when a worker’s exposure to airborne concentrations of lead is above the PEL or whenever requested.

Industrial Hygienist Baptiste observed workers torch cutting scrap metal. The workers were not wearing respirators (Tr. 321). The workers were *{redacted}* on April 13, 1994; *{redacted}* on May 26, 1994; and *{redacted}* on June 15, 1994. The nonferrous supervisor acknowledged that workers were not wearing respirators while burning “dirty radiators” (Tr. 3020). SSM’s corporate safety director also testified that respirators were required only during the torch cutting of the Ethyl railcars prior to OSHA’s inspection (Exhs. C-35, C-36, C-37; Tr. 328, 726, 1366). Respirators were available for any worker who wanted to wear a respirator. Respirators were not required by SSM.

The Secretary has not met her burden of proof. OSHA's air monitoring found that workers were exposed to airborne concentrations of lead. However, the accuracy of the air monitoring was flawed by the placement of the filter cassette outside the worker's face shield. The air monitoring failed to establish that the level of exposure exceeded the PEL. There is also no evidence that any worker who wanted a respirator was prohibited by SSM from using one. Respirators were available and Baptist observed *{redacted}* sometimes wearing a respirator (Exh. R-4, R-5; Tr. 256, 321).

An alleged violation of § 1910.1025(f)(1) is vacated.

Items 12, 13, 14, 15, 16, 17 and 18 - Alleged Violations of § 1910.1025(g)(1)

Each item alleges SSM failed to ensure the use of appropriate protective work clothing and equipment for a each worker torch cutting in the Thomas yard. Section 1910.1025(g)(1) requires:

If an employee is exposed to lead above the PEL, without regard to the use of respirators or where the possibility of skin or eye irritation exists, the employer shall provide at no cost to the employee and assure that the employee uses appropriate protective work clothing and equipment.

SSM does not dispute that protective work clothing, gloves, and equipment were not provided to workers torch cutting scrap metal in the Thomas yard. The workers wore street clothing of jeans and shirts (Tr. 324). SSM acknowledges the clothing was not appropriate protective clothing for lead exposure (Tr. 1347).

The standard requires a showing that workers are exposed above the PEL, or there exists the possibility of skin or eye irritation. Neither requirement triggering the standard was shown. As discussed, OSHA's air monitoring method precludes a finding that workers were exposed to lead at or above the PEL. Although the air monitoring results show the potential presence of significant quantities of lead, there is also no showing the lead exposure caused eye or skin irritations. *{redacted}* complained of stomach and chest pains (Exh. C-22). Other workers suffered from nausea, metal taste in the mouth, and stomach queasiness (Tr. 786). Two torch-cutters showed blood lead levels of 21 and 40 (Tr. 787). However, such complaints are not evidence of possible eye or skin irritation.

An alleged violation of § 1910.1025(g)(1) is vacated.

Item 19 - Alleged Violation of § 1910.1025(h)(1)

The citation alleges SSM failed to maintain surfaces in the Thomas yard free of lead accumulations. Section 1910.1025(h)(1) requires all surfaces maintained “as free as practicable” of accumulations of lead.

Industrial Hygienist Baptiste took one bulk and five wipe samples from various surfaces including a permanent bench, filing cabinet, picnic/dining table, and another table (Tr. 752). The surfaces were in areas where workers took breaks and ate lunch (Tr. 342-343). The level of lead accumulation on the bench in the drivers’ waiting area was 96.9 micrograms; on the filing cabinet, 122.5 micrograms; on the picnic/dining table, 34.8 micrograms; on the table in the locker trailer, 23.8 micrograms; and on the picnic/dining table in the maintenance shop, 37 micrograms (Exhs. C-22, C-23, C-38; Tr. 335).

Baptiste described his method of taking the wipe samples as visualizing an area 10 inches square with the assistance of a ruler held above the surface. The dust in the area was then scraped into a glass collection vial. Once collected, the vial was sealed (Tr. 753, 762). The wipe samples were packed into the same box with the bulk sample and sent for analysis to OSHA’s laboratory in Salt Lake City. No blank cassettes were sent with the samples.

SSM argues the wipe samples were not valid due to sampling and handling errors (Respondent’s Brief, p. 74). SSM maintains that Baptiste failed to use a template as required in OSHA’s technical manual and failed to send a blank with the samples for analysis (Exh. C-24, p. 23; Tr. 763-764, 3942-3944). SSM also argues the wipe and bulk samples should not have been sent in the same package.

OSHA’s technical manual instructs industrial hygienists to use a template in order that a precise area of 100-square centimeters is sampled. The manual also directs hygienists to send bulk and wipe samples separately to avoid cross-contamination and a blank cassette for comparison purposes (Exh. C-24, pp. 1.7, 2.3; Tr. 3943). A blank cassette reflects any contamination from the manufacturer or that may be in the reagents used to prepare the sample at the laboratory (Tr. 1635). The amount of contamination found in the blank cassette is subtracted from the cassette used in the air monitoring.

OSHA’s technical manual is accepted as a guide which OSHA is expected to follow. However, failure to follow the technical manual does not automatically invalidate a citation. *Equitable Shipyards, Inc.*, 13 BNA OSHC 1177, 1179 (Nos. 81-1685, 81-1762, 81-2089, 1987).

Although the ruler method used by the industrial hygienist may not provide an exact 100-square centimeter of surface area, any discrepancy was not shown as significant in affecting the sample results. The hygienist explained his method would “typically” result in less accumulation (Tr. 762). Also, the shipping error and failure to send a blank were not shown to affect the results obtained from the samples (Tr. 1634-1635, 1649, 1682, 1691). The supervisory chemist from the Salt Lake City laboratory testified that there was no evidence of any cross-contamination. The seals on the bulk and wipe samples were intact. SSM’s expert also acknowledged that there was no indication any seals were broken (Tr. 3938). The chemist also testified the use of a laboratory blank cassette would not significantly change the analytical results. Therefore, for the purposes of §1910.1025(h)(1), the wipe and bulk samples establish the presence of lead accumulation.

However, the record fails to establish that the amount of accumulation found was not “free as practicable.” The standard cited is not triggered by a certain amount of accumulation. Instead, the standard requires that the surfaces be maintained as “free as practicable of accumulations of lead.” There is no showing SSM’s cleaning of the areas was deficient or that the accumulations represented other than the lowest practical accumulations of lead under the circumstances. The Secretary failed to show that lower levels could be obtained. The standard does not prohibit all accumulations. The purpose of the standard is to ensure that surfaces are regularly cleaned. The frequency of cleaning depends on the circumstances of each situation. The Secretary failed to show what it expected of SSM or that SSM’s cleaning was deficient. Merely establishing the amount of accumulation does not meet the Secretary’s burden of establishing a violation. As noted by OSHA’s deputy director for compliance programs, CPL 2-2.58 which applies to an identical lead standard for construction at §1926.62(h)(1) provides that OSHA does not expect that surfaces should be cleaner than “HUD’s recommended level for acceptable decontamination of 200 u/ft² for floors in evaluating cleanliness of change areas, storage facilities, and lunch rooms/eating areas” (Exh. R-15; Tr. 1116). In this case, the levels of accumulations were below 200 micrograms.

An alleged violation of § 1910.1025(h)(1) is vacated.

Items 20, 21, 22a, 22b and 23 - Alleged Violations of §§ 1910.1025(i)(1), 1910.1025(i)(2)(i) 1910.1025(i)(3)(i), 1910.1025(i)(3)(ii), and 1910.1025(i)(4)(i)

SSM was cited for failing to assure that food, beverage, and tobacco products were not present or consumed in the ferrous and nonferrous departments in violation of § 1910.1025(i)(1) (item 20); for failing to provide clean changing rooms in violation of § 1910.1025(i)(2)(i) (item 21); for failing to require showers at the end of the work shift in violation of § 1910.1025(i)(3)(i) (item 22a); for failing to provide shower facilities in violation of § 1910.1025(i)(3)(ii) (item 22b); and for failing to provide lunchroom facilities in violation of § 1910.1025(i)(4)(i) (item 23). OSHA identified eight workers monitored for airborne lead as exposed while torch cutting scrap metal. To trigger these hygiene requirements, each standard requires a showing that workers are exposed to airborne concentrations of lead in excess of the PEL of 50 micrograms without regard to the use of respirators.

It is undisputed that a lead program was not implemented in the Thomas yard and that the hygiene provisions of §1910.1025(i) were not provided workers torch cutting scrap metal. The workers were not prohibited from smoking or eating in the work area. There were no change rooms, lunchroom facilities, or shower facilities (Respondent's Brief, pp. 72-73; Tr. 1348-1349).

As discussed, OSHA's method of monitoring fails to establish that the worker's level of exposure to lead exceeded the PEL. The Secretary cites *Cleveland Aluminum Casting Co.*, 12 BNA OSHC 1349, 1352-1353 (1985), *aff'd w/o published opinion*, 788 F.2d 38 (D.C. Cir. 1986), in which the judge sustained a violation of the change room standard even though the monitoring could not support a violation of § 1910.1025(c)(1). However, the *Cleveland* case is not applicable. The judge did not find a violation of § 1910.1025(c)(1) because of OSHA's failure to consider the use of respirators by employees in its sampling which was not required for finding a violation of the change room standard. Unlike the *Cleveland* case, OSHA's air monitoring at SSM failed to accurately establish the worker's level of exposure by placing the cassette outside the worker's face shield.

The Secretary also cites *Louisville Scrap Material Co., Inc.*, 17 BNA OSHC 1620 (No. 94-2293, 1995). The judge, in a similar case as here, accepted OSHA's monitoring results to establish a violation of § 1910.1025(i)(2)(i) even though OSHA's sampling method was rejected because the filter cassette was placed outside the worker's face shield. The judge reasoned that the use of the face shield was not a factor in measuring the amount of lead which could be inhaled or ingested from accumulated lead on the workers' clothing and skin. Unlike the standards dealing with individual exposure which address the hazard of respirable lead primarily from the immediate

source, such as the fumes and dust generated by workers directly engaged in the torch cutting process, the hygiene standards at § 1910.1025(i) address the hazards of exposure from additional sources, such as lead-contaminated clothing and skin. Therefore, for the purposes of such standards, as requiring change rooms, the judge found the monitoring results obtained by OSHA were sufficient to establish that lead levels exceeded the PEL even though the sampling cassette was placed outside the worker's face shield.

This court does not accept the analysis in the *Louisville Scrap Material Co., Inc.*, case as appropriate to establish the PEL for compliance with §1910.1025(i). The lead standard does not provide for separate PEL's depending on the nature of exposure. There is only one source of exposure in this case, and that involves torch cutting scrap metal. Standards including the hygiene facilities under §1910.1025(i) are triggered by the level of worker's exposure, which in the case of torch cutting, must be measured from inside the face shield. The record in this case fails to show that the worker's level of exposure to lead exceeded the PEL.

Accordingly, alleged violations of §§ 1910.1025(i)(1), 1910.1025(i)(2)(i), 1910.1025(i)(3)(i), 1910.1025(i)(3)(ii), and 1910.1025(i)(4)(i) are vacated.

Item 24 - Alleged Violation of § 1910.1025(j)(1)(i)

SSM was cited for failing to institute a medical surveillance program for workers torch cutting scrap metal in the Thomas yard. Section 1910.1025(j)(1)(i) requires an employer to "institute a medical surveillance program for all employees who are or may be exposed above the action level for more than 30 days per year."

SSM argues the Secretary failed to show that the torch cutters were exposed to airborne lead above the action level for more than thirty days per year. Based on compilations by SSM showing the number of "dirty radiators" purchased and the average time taken to clean the radiators in the nonferrous department, SSM claims it spent less than thirty days per year cleaning radiators (Exh. R-32). SSM also asserts the medical evidence shows workers were not exposed on a daily basis to lead levels in excess of the PEL (Exhs. R-30, R-31).

The standard requires a medical surveillance program for workers who *may be exposed* above the action level. The record establishes that workers' level of exposure to lead may exceed the action level for more than thirty days a year (Exhs. C-22, C-23). The torch cutting process

occurred daily (Tr. 1352). Cleaning dirty radiators was not the only torch cutting operation which involved the release of airborne concentrations of lead. Workers were torch cutting other scrap metals. The Barfield workers were torch cutting at SSM from February to October, 1994 (Tr. 2629).

A violation of § 1910.1025(j)(1)(i) is affirmed.

Item 25 - Alleged Violation of § 1910.1025(l)(1)(i)

The citation alleges SSM failed to inform workers including pickers, laborers, crane operators, equipment operators, forklift drivers, mechanics, welders, and workers torch-cutting in the Thomas yard of the contents of Appendices A and B of the lead standard. Section 1910.1025(l)(1)(i) requires workers to be informed of the appendices where there is potential exposure to airborne lead at any level. The contents of Appendix A include substance identification, health hazard data, and PEL information. Appendix B includes information about exposure monitoring, methods of compliance, respiratory protection, protective work clothing, housekeeping, hygiene facilities, medical surveillance and removal, employee information, and training.

One worker testified he was not informed by SSM of the hazards associated with torch cutting scrap metal (Tr. 2045). Two other workers testified they had received no safety information or training (Tr. 4062, 4081). The lead training provided to the workers demolishing the Ethyl rail cars in early 1994 was not given to all workers torch cutting metals in the ferrous department (Exh. C-37).

SSM does not dispute that the appendices were not provided to the workers in the Thomas yard (Respondent's Brief, p. 79). SSM, however, argues that it was Barfield Enterprises's duty to provide the appendices to its workers. Also, SSM argues that other employees identified by OSHA such as the drivers, mechanics, and welders were not shown to be exposed to lead. No monitoring was performed on these workers.

OSHA's monitoring results establish the workers' potential exposure to lead. SSM has the responsibility to provide a safe workplace to workers of other employers. It is SSM's duty to assure that workers of Barfield were provided with the appendices. SSM had supervisory authority and control over the worksite. SSM purchased the scrap metal for processing. SSM directed the workers and selected the scrap metal to torch cut. SSM exercised control over the Thomas yard. SSM was in the best position to know the contents of the scrap metal, including the potential for lead

exposure. See *IBP, Inc.* 17 BNA OSHC 2073 (No. 93-3059, 1997) (owner of meat processing plant responsible for lockout/tagout violations of an independent contractor). Also, there was nothing preventing other workers of SSM from coming into the torch-cutting area. The torch cutting area was not regulated. Therefore, other workers in the Thomas yard should also be informed of Appendices A and B.

A violation of § 1910.1025(l)(1)(i) is affirmed.

Items 26 through 39 - Alleged Violations of § 1910.1025(l)(1)(ii)

SSM was cited for failing to institute and require a training program for workers engaged in torch cutting scrap metal. Under OSHA's egregious policy, the standard was cited separately for each worker (*{redacted}*, *{redacted}*, and *{redacted}*). The workers' exposure to airborne lead concentrations were shown by OSHA's monitoring (Exhs. C-22, C-23). Section 1910.1025(l)(1)(ii) provides:

The employer shall institute a training program for and assure the participation of all employees who are subject to exposure to lead at or above the action level or for whom the possibility of skin or eye irritation exists.

SSM argues that some workers (*{redacted}*, and *{redacted}*) were trained in lead exposure when SSM contracted to torch cut Ethyl railcars prior to OSHA's inspection (Tr. 725). Also, SSM argues that many of the workers were not shown to be exposed to lead. There was no lead monitoring performed on *{redacted}* (item 32), *{redacted}* (item 33), *{redacted}* (item 34), *{redacted}* (item 35), *{redacted}* (item 36), and *{redacted}* (item 39). Other workers, such as *{redacted}*, showed levels of exposure below the action level (Tr. 368) (Respondent's Brief, p. 79).

The standard requires the training of workers "subject to" exposure to airborne lead at or above the action level of 30 micrograms. OSHA's monitoring establishes the potential for exposure in excess of the action level regardless of the placement of the filter cassette outside the face shield. The workers not monitored were nevertheless shown doing the same job, in the same manner, and at the same time as the workers monitored. Therefore, there is reasonable expectation that the workers were subject to lead exposure at or above the action level.

SSM's corporate safety director acknowledges that no lead training was provided any workers except for a few workers engaged in torch cutting the Ethyl railcars (Tr. 353, 2271). However, even this training did not satisfy all training requirements. It was not a full lead program (Tr. 1375, 2123). Also, the training was not shown to comply with the standard (Exhs. C-36, C-37; Tr. 353, 356, 986). *{redacted}*, SSM's safety director, did not know how to fit test respirators (Tr. 1589).

The violations of § 1910.1025(l)(1)(ii) (items 26 through 39) are affirmed. OSHA's willful classification and egregious policy are separately discussed.

Item 40 - Alleged Violation of § 1910.1025(m)(2)(i)

The citation alleges SSM failed to post warning signs in the ferrous and nonferrous departments of the Thomas yard where workers were torch cutting scrap metals. Section 1910.1025(m)(2)(i) requires an employer to post warning signs in each work area where the PEL is exceeded. The sign is to state: "Warning - Lead Work Area - Poison - No Smoking or Eating."

In addition to inadequate monitoring procedures. SSM argues that Baptiste's conduct at its workplace showed he did not believe the lead exposure level presented a hazard (Tr. 2474-2475). SSM notes the hygienist took none of the precautions required by the *Field Operations Manual*. He did not wear a respirator; he drank from the workers' water container in the ferrous department; and he failed to warn workers of his monitoring results. Also, SSM argues that it made a good faith effort to protect workers and was not aware of the possible lead exposure (Respondent's Brief, p. 52).

Warning signs are meant to alert workers to the danger of eating and smoking in work areas exposed to excessive concentrations of lead. SSM does not dispute there was no lead warning sign in the Thomas yard. Workers were observed eating and smoking in the area where they were torch cutting the scrap metals. There was also a water container in the area (Exh. C-39; Tr. 343-344).

SSM's arguments regarding the field operation manual and lack of knowledge are rejected. Although the Baptiste should have followed the manual in order to protect himself, SSM is not relieved of its responsibility to protect the safety of workers at its facility. Steps taken to detect lead were not shown sufficient to allege a lack of knowledge. SSM is in the scrap metal business obtaining scrap from variety sources including "peddlers." There were no internal checks made to

ensure that lead was not being received by the facility. Its letters to customers did not specifically prohibit lead from entering its property. There was no inspection or testing for lead. Photographs taken from the yard showed painted scrap metal which, unless tested, may have contained lead. SSM did not prohibit painted scrap metal. SSM was aware that radiators contained lead in the solder holding the pieces together. Therefore, SSM, with reasonable diligence, should have known of the workers' exposure to lead. Its expert acknowledged the potential for lead exposure from torch cutting scrap metal (Tr. 3983).

OSHA's method of monitoring, however, failed to establish an overexposure to airborne lead. Its method was not sufficient to show worker's level of exposure exceeded the PEL for lead.

An alleged violation of § 1910.1025(m)(2)(i) is vacated.

Willful Classification for Citation No. 2

OSHA alleges SSM's violations of the lead standard, §§ 1910.1025(d)(2) (item 8a), 1910.1025(d)(8)(i) (item 9), 1910.1025(j)(1)(i) (item 24), 1910.1025(l)(1)(i) (item 25), and 1910.1025(l)(1)(ii) (items 26 through 39), were willful.

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." *Conie Construction, Inc.*, 16 BNA OSHC 1870, 1872, 1994 CCH OSHD ¶ 30,474, p. 42,089 (No. 92-264, 1994). A willful violation is differentiated from other classifications of violations by a heightened awareness of the illegality of the conduct or conditions and by a state of mind showing conscious disregard or plain indifference. A violation is not willful if the employer has a good faith belief that it was in compliance with the cited condition. The test of good faith is an objective one--whether the employer's belief concerning a factual matter, or the interpretation of a rule, was reasonable under the circumstances. *General Motors Corp., Electro-Motive Div.*, 14 BNA OSHC 1064, 2068, 1991 CCH OSHD 1991 CCH OSHD ¶ 29,240 (No. 82-630, 1991); *Tampa Shipyards Inc.*, 15 BNA OSHC 1533, 1541, 1991-93 CCH OSHD 29,617, p. 40,104 (No. 86-360, 1992).

SSM should have known of the workers' exposure to lead during torch cutting. Although it knew of the requirements of the lead standard, SSM did no general air monitoring at its facility for lead exposure. Its air monitoring in 1989 and 1992 was for the limited purpose of refuting OSHA 1989 citation and complying with Ethlyly's requirements while torch cutting its railcars. This

monitoring, however, even showed two workers overexposed to airborne lead. The monitoring of routine scrap in 1989 found a worker exposed above the action level for lead (Exh. C-42; Tr. 1398, 2098, 2103). The 1992 monitoring found a lead level for one worker of 785 micrograms which is fifteen times the PEL (Exh. C-43; Tr. 1333). In response to its limited monitoring, SSM maintains that it attempted to prevent lead from entering its yard. SSM sent letters to customers and posted signs warning against accepting “dangerous materials.” SSM asserts its conduct showed a good faith effort to comply.

On the contrary, SSM’s efforts were inadequate and not reasonable under the circumstances. SSM showed plain indifference. There was no effort to verify that lead was not present in the yard. Its letters to customers did not include the more than 20,000 peddlers who brought scrap metal to SSM. These letters also did not specifically identify lead-containing metals as a prohibited metal.

SSM did not ensure that the scrap metal entering its property contained no lead. It visually inspected a small percentage of scrape metal entering the yard. It inspected the scrape for radiation, rubber, batteries and asbestos. There was no inspection for lead contaminated materials (Tr. 1597, 1600). The corporate safety director testified that there was no policy prohibiting lead painted metal from entering the yard (Tr. 2982). There was also no policy of testing the metals (Tr. 1396, 2247-2248). Instead, SSM relied on its customers for compliance (Tr. 1890, 1902).

Although aware of the dangerous of lead, SSM made no effort by further monitoring to ensure that it complied with the lead standard (Tr. 1596). SSM was aware that sources of lead included lead paint, marine cable with sheathing, wheel weights, grating that seals soil pipe joints, solder, most copper and brass (Tr. 1788, 3322-3323). These items were processed by SSM, including torch cutting. SSM regularly cleaned radiators to remove the iron attachments (clips and brackets) (Tr. 3226-3227, 3229). Despite recognizing that lead exposure could occur when torch cutting the attachments secured by solder or on metals with lead, SSM failed to monitor the torch cutting process to assess the workers’ level of exposure (Tr. 1349-1350, 1355).

Also, SSM made exceptions to its own policy against lead when it contracted to torch cut the Ethyl railcars in 1992 and early 1994 and when it torch cut the solder on radiators to remove the brackets and clips. SSM did not take bulk samples of painted metal or the solder to determine if it contained lead (Tr. 1503-1504). SSM was told that there was a possibility of lead penetration in the Ethyl railcars that lead fumes could be released by the heat of a torch (Exh. C-45, p. 02062;

Tr. 3442). In fact, if the railcars were torch cut on Ethyl's property, Ethyl required implementation of a full lead program (Tr. 1375, 2123). Instead, SSM opted to torch cut the railcars on its property with some lead training and a respirator program provided to the Barfield workers (Exh. C-35; Tr. 1366, 1369, 2137-2138, 2271). Also, SSM conceded that it receives lead sheeting and lead weights (Tr. 3201).

SSM receives 30,000 tons of scrap per month which SSM claims make it impossible to test (Tr. 1556). However, SSM only torch cuts approximately two percent of the scrap metal (Tr. 3215). SSM also refuses to accept radioactive materials. To prevent their entry, SSM uses detection equipment and hand held detectors (Tr. 1275, 1277). However, by continuing to torch cut scrap metal without inspecting, testing, or monitoring for lead exposure, SSM exhibited a plain indifference to the requirements of the lead standard and the health of its workers.

The violations of §§ 1910.1025(d)(2) (item 8a), 1910.1025(d)(8)(i) (item 9), 1910.1025(j)(1)(i) (item 24), 1910.1025(l)(1)(i) (item 25), and 1910.1025(l)(1)(ii) (items 26 through 39) are willful.

Application of the Egregious Policy

The Secretary applied her egregious policy to the violation of § 1910.1025(l)(1)(ii) (items 26 through 39). The Secretary, in appropriate circumstances, may cite and penalize separately for each instance of noncompliance with a single standard. The egregious penalty procedure is applicable only to willful violations that are considered particularly flagrant. See OSHA Instruction CPL 2.80 (Exh. C-57).

An egregious penalty in certain cases is acceptable to the Review Commission. The test whether the standard cited permits multiple or single violation depends on whether the cited standard can "reasonably be read to involve as many violations as there were failures to [comply]." *Caterpillar, Inc.*, 15 BNA OSHC 2153, 2172-2173 (No. 87-922, 1993). It is irrelevant if the multiple violations of a standard result from a "single management decision" or if they potentially

could be abated by a “single action.” See *Hartford Roofing Co.*, 17 BNA OSHC 1361, 1366-1367 (No. 92-3855, 1995). Rather, the correct inquiry focuses on the language of the standard. The language of the cited standard determines appropriateness of instance-by-instance citation, not whether the employer made a single decision. *Sanders Lead Company*, 17 BNA OSHC 1197 (No. 87-260, 1995); *J. A. Jones Constr. Co.*, 15 BNA OSHC 2201, 1991-93 CCH OSHD ¶ 29,964 (No. 87-2059, 1993).

In assessing the appropriateness of the egregious policy under § 1910.1025(l)(1)(ii), the Secretary argues that the standard places an obligation on the employer which is applicable to each exposed employee (Tr. 1012, 1016). Berrien Zettler, Deputy Director of Compliance Programs, stated that the routine manner of assessing penalties would not be enough to make a point to SSM (Tr. 1010.1012).

SSM argues that application of the egregious policy is not appropriate. There is no evidence that SSM was a “bad actor.” *S. A. Healy Co.*, 17 BNA OSHC 1150 (No. 89-1508, 1995). Also, the language of the standard does not permit the egregious policy (Respondent’s Brief, p. 100).

The court agrees. The standard requires an employer to “institute a training program for and insure the participation of all employees who are subject to exposure to lead at or above the action level.” § 1910.1025(l)(1)(ii). The plain reading of the standard reveals that its focus is on an employer’s duty to train employees. The language of the standard prohibits a single course of action, not individual acts. Abatement may be achieved by a single training program. The wording of the standard addresses employees in the aggregate, not individually. To prove a violation of the training standard, it makes no difference whether one or ten employees were not trained.

Accordingly, § 1910.1025(l)(1)(ii) (items 26 through 39) does not permit a per-instance assessment. A grouped penalty will be considered for violation of § 1910.1025(l)(1)(ii).

Penalty Consideration for Citation No. 2

As discussed, no reduction is given to SSM for size, history, and good faith.

A penalty of \$20,000 is reasonable for willful violation of § 1910.1025(d)(2) (item 8a). SSM failed to conduct the initial monitoring required by the standard. More than ten workers were potentially exposed to airborne lead concentrations.

A penalty of \$40,000 is reasonable for willful violation of § 1910.1025(d)(8)(i) (item 9). SSM acknowledges it failed to notify workers of the lead exposures. There were seven workers who were not notified.

A penalty of \$70,000 is reasonable for willful violation of § 1910.1025(j)(1)(i) (item 24). There was no medical surveillance program for workers potentially exposed to lead.

A penalty of \$55,000 is reasonable for willful violation of § 1910.1025(l)(1)(i) (item 25). Workers were not informed of the contents of the lead requirements.

A grouped penalty of \$50,000 is reasonable for a grouped willful violation of §1910.1025(l)(1)(ii) (items 26 through 39). There was no training program given to workers exposed to lead.

REPEAT CITATION NO. 3

Item 1 - Alleged Violation of § 1910.147(c)(4)(i)

The citation alleges SSM failed to develop specific written lockout/tagout procedures for equipment such as the scrap shears, HRB bailer presses, cranes, a car shredder, can crusher, and other equipment. Section 1910.147(c)(4)(i) requires an employer to develop energy control procedures for the “control of potentially hazardous energy” when employees are engaged in maintenance or service work on equipment.¹³

Industrial Hygienist Baptiste observed a worker clearing a jam on the 880 shear machine. The shear was not locked or tagged out (Exh. C-50; Tr. 396). He understood that workers cleared jams on the shear every couple of hours (Tr. 396). Clearing a jam is defined as service and maintenance. See § 1910.1047(b) (definition of “servicing and/or maintenance”). Two former employees testified they were not familiar with lockout/tagout procedures (Tr. 4062, 4069, 4082).

¹³

The standard provides an exception to documenting the lockout procedure for a particular machine. SSM does not claim the exception.

SSM maintained a written lockout on-site program (Exh. R-19). A former OSHA compliance officer testified that the written lockout program was comprehensive and beyond the requirements of the standard (Tr. 3766-3767). The written program included specific lockout procedures for each machine or a piece of equipment listed with the exception of the can crusher (Tr. 2077, 2228-2234). The record is undisputed that the can crusher did not require a lockout procedure. It was a cord and plug-operated machine (Tr. 2350-2351). See § 1910.147(a)(2)(iii)(A). Also, it is uncontroverted that workers were provided the information and trained in the written lockout program (Tr. 2793-2794, 3089, 3092-3094). The citation alleges no written program. SSM had a written lockout program. Also, the record is not sufficient to show that the equipment or machinery identified presented a hazard of unexpected energization. *General Motors Corp.*, 17 BNA OSHC 1217 (Nos. 91-2973, 91-3116, 91-3117, 1995), *aff'd*, 89 F.3d 313 (6th Cir. 1996).

An alleged violation of § 1910.147(c)(4)(i) is vacated.

Item 3 - Alleged Violation of § 1910.215(b)(9)

The citation alleges that two grinders in Shredder and Thomas yards were not properly protected by tongue guards. Section 1910.215(b)(9) requires the use of safety guards on grinders which can be adjusted to the constantly decreasing diameter of the abrasive wheel and maintain a distance not to exceed 1/4 inch between the wheel periphery and the adjustable guard.

Industrial Hygienist Baptiste observed the two grinders in the maintenance areas. There was no tongue guard on the dual wheel bench grinder at the Shredder yard (Exhs. C-51, C-53; Tr. 404). The pedestal grinder in the Thomas yard did have a tongue guard, but it was not adjusted to within 1/4 inch of the wheel. The tongue guard was observed not properly adjusted on three occasions (Exh. C-52; Tr. 403-404). The grinders were regularly used to sharpen tools or perform other work in the maintenance areas. The grinder without a tongue guard was purchased new within the year and was used daily (Tr. 3125).

SSM does not dispute the lack of a guard on the bench grinder or the improper adjustment of the guard on the pedestal grinder. Instead, SSM asserts it is a continuing problem to maintain guards on grinders (Respondent's Brief, p. 130). It claims that it conducts ongoing daily reviews

of its grinders. Guarding and proper adjustment of guards is among the items that are checked each day (Tr. 2792-2793, 3108). SSM asserts that the record supports nothing more than a technical violation.

The record establishes a violation of § 1910.215(b)(9). SSM does not dispute the violation. There is no evidence that employees were properly trained and instructed to replace or readjust the tongue guards. The lack of a guard on one grinder is more than a matter of maintaining proper adjustment. SSM's alleged daily inspection of the workplace were not shown to be adequate and were performed by employees who exhibited a lack of safety training and understanding.

A violation of § 1910.215(b)(9) is affirmed. The violation is classified as a repeat under § 17 of the Act. The Secretary alleges a repeat classification based on prior citations issued on January 8, 1993, to the Houma facility involving the same standard (Exh. C-49; Tr. 398-399).

A violation is considered a repeat under § 17(a) if, at the time of the alleged repeat violation, there is a Commission final order against the employer for a substantially similar violation. *Potlatch Corporation*, 7 BNA OSHC 1061, 1063, 1979 CCH OSHD ¶ 23,294, p. 28, 171 (No. 16183, 1979). The Secretary establishes a prima facie similarity if both violations are of the same standard. *Monitor Constr. Co.*, 16 BNA OSHC 1589, 1594, 1993-95 CCH OSHD ¶ 30,338, p. 41,825 (No. 91-1807, 1994). A review of the prior citation issued to the Houma facility establishes that the same standard under similar conditions was previously cited by OSHA (Exh. C-49).

SSM argues, however, that the Houma facility is not part of SSM. It is operated by Southern Scrap Materials Co., Ltd., a separate corporation which is headquartered in New Orleans. SSM asserts there is no evidence showing it as a single entity (Respondent's Brief, p. 132).

The Commission ordinarily does not pierce the corporate veil for the purpose of determining whether a company committed a repeat violation. In *Hills Department Stores, Inc.*, 14 BNA OSHC 1798 (No. 89-1807, 1980) (ALJ), the judge held that because the Secretary failed to provide evidence showing that the parent and subsidiary should be treated as a single entity, the parent company could not be held liable for the acts of the subsidiary. The burden of proof is on the Secretary. "The fact that two corporations have common management personnel is insufficient in and of itself to justify ignoring the separate corporate entities." *Id.* at 1799.

In this case, the record shows a commonality between SSM and Houma. SSM is wholly owned by Southern Holdings which also owns Southern Scrap in Houma (Tr. 1227-1229). Southern

Holdings' corporate safety director regularly provided safety advice and training to SSM. He regularly visited and inspected SSM. He developed the written safety programs for SSM. He participated in the OSHA inspection as the employer's representative of SSM. He was also contacted during OSHA's inspection at Houma. The corporate safety director permitted the inspection of Houma to proceed (Tr. 1181). Also, SSM throughout this proceeding attempted to rely on monitoring done at other facilities such as the New Orleans facility as representative of conditions at SSM. Thus, for the purposes of a repeat classification, the two corporations were operated as a single entity.

Accordingly, a violation of § 1910.215(b)(9) is affirmed as a repeat violation. A penalty of \$10,000 is reasonable. There were two grinders found not in compliance. One grinder did not have a guard exposing the operator to a greater possible hazard.

“OTHER” THAN SERIOUS CITATION NO. 4

Item 1 - Alleged Violation of § 1904.2(a)

The citation alleges SSM failed to record all recordable injuries and illnesses of workers furnished by a temporary labor pool on the OSHA 200 logs. Section 1904.2(a) provides:

Each employer shall, (1) maintain in each establishment a log and summary of all recordable occupational injuries and illnesses for that establishment; and (2) enter each recordable injury and illness on the log and summary as early as practicable but no later than 6 working days after receiving information that a recordable injury or illness has occurred.

SSM does not dispute that occupational injuries and illness of workers provided by temporary employment agencies are not reflected on its 200 logs. SSM’s corporate safety director acknowledges that it was SSM’s policy not to record the injuries or illnesses of workers from temporary agencies (Exhs. C-54, C-55; Tr. 409-410). SSM maintains OSHA 200 logs on its own regular employees (Tr. 409-410).

SSM argues that it is not the employer of the temporary workers. The standard, however, requires a log and summary of all recordable occupational injuries and illnesses “for that establishment.” The language of the standard includes temporary workers working at SSM’s establishment. The plain wording of the standard focuses on the injuries and illnesses at the establishment and not the employment relationship with the workers. The purpose of the OSHA 200 log is to identify the types of injuries and the particular equipment used at the time the injuries occur. SSM is responsible for recording any illnesses or injuries to workers working at SSM while performing SSM’s work. Also, as discussed, the workers from temporary agencies may also be considered employees of SSM under the economic realities test. SSM controlled and supervised their work. Further, it is noted that SSM maintained some injury record for the temporary employees. This record was incomplete and not equivalent to the OSHA 200 logs because lost workdays were not shown (Exh. C-55; Tr. 410-411).

A violation of § 1904.2(a) is affirmed. Although “other” than serious, a penalty of \$3,000 is assessed. It is a recordkeeping violation which allows a penalty to be assessed.

Item 2 - Alleged Violation of § 1910.95(c)(1)

The citation alleges that SSM failed to maintain an effective hearing conservation program.

Section 1910.95(c)(1) requires, in part:

The employer shall administer a continuing, effective hearing conservation program whenever employee noise exposures equal or exceed an 8-hour time-weighted average sound level (TWA) of 85 decibels measured on the A scale (slow response) or, equivalently, a dose of fifty percent.

The Industrial Hygienists monitored the noise levels for five workers including workers torch cutting scrap metals, a shear operator, sorter, express operator, baler operator, and equipment operator. OSHA found the noise levels based on an eight hour time-weighted average to range from 87.1 to 95.1 dBA (Exhs. C-8, C-9). Although hearing protectors were available, the industrial hygienist considered them dirty and not properly worn (Tr. 414-415).

It is uncontroverted that SSM maintained a written hearing conservation program (Exh. C-10; Tr. 3761-3762). The industrial hygienist considered the written program to be better than at many other workplaces (Tr. 887). SSM gave workers annual audiograms and informed them of the results (Tr. 3763). High noise areas in the yard were established by SSM's noise surveys and based on experience with similar equipment at other facilities (Tr. 2311). SSM maintained a map that identified areas in the yard as high noise areas (Exh. R-19; Tr. 2178). Signs were also posted designating the high noise areas and requiring hearing protection (Exh. R-26; Tr. 2180, 2182, 2308). Hearing protection was provided to employees (Exhs. R-33, R-34; Tr. 3307).

OSHA identified two workers not wearing hearing protection: *{redacted}* and *{redacted}* (Exhs. C-8, C-9). The monitoring records indicate that Ramirez had "foam ear plugs around neck - (dirty)" (Exh. C-8). Industrial Hygienist Baptiste testified that at times during the day *{redacted}* ear plugs were not worn (Tr. 886-887). Also, the monitoring record for *{redacted}* indicates that he was wearing hearing protection while operating the Barko crane (Exh. C-9; Tr. 1195, 1200). Except for these two workers, the record indicates other workers monitored wore hearing protection.

The industrial hygienist was at SSM twenty-five days over a six-month period, and the record identifies only two workers for part of one day not wearing hearing protection (Tr. 561, 881, 3818). The failure of the two workers to wear hearing protection on one day based on the number of days OSHA was on-site and the number of workers affected does not establish a failure to maintain an effective hearing conservation program. Also, the number of alleged "dirty" hearing

protectors and deficiencies in the written program were not identified and detailed. The Secretary failed to meet her burden of proof.

An alleged violation of § 1910.95(c)(1) is vacated.

Item 3 - Alleged Violation of § 1910.106(f)(6)

SSM was cited for failing to post “No Smoking” signs at the refueling tank in the Thomas yard. The standard provides:

Class I liquids shall not be handled, drawn, or dispensed where flammable vapors may reach a source of ignition. Smoking shall be prohibited except in designated localities. “No Smoking” signs shall be conspicuously posted where a hazard from flammable liquid vapors is normally present.

It is undisputed that there were no “No Smoking” signs at the refueling tank south of the maintenance building (Exh. C-56; Tr. 415). SSM acknowledges that it maintained the fuel tank for the purpose of refueling equipment used in its daily operations (Tr. 2238-2239). SSM argues that the standard does not apply because its refueling tank is not a “bulk plant” (Respondent’s Brief, p. 132).

Section 1910.106(f) applies to bulk plants. A “bulk plant” is defined as “that portion of a property where flammable or combustible liquids are received by tank vessel, pipelines, tank car, or tank vehicle, and are stored or blended in bulk for the purpose of distributing such liquids by tank vessel, pipeline, tank car, tank vehicle or container.” § 1910.106(a)(7). The refueling tank used by SSM was part of an activity incidental to the primary business of SSM. The Secretary failed to show that the refueling tank was a bulk plant. The liquids were not retained for the purpose of redistribution in bulk.

An alleged violation of § 1910.106(f)(6) is vacated.

FINDINGS OF FACT
AND CONCLUSIONS OF LAW

The foregoing 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 upon the foregoing decision, it is ORDERED that the citations be disposed of as follows:

CITATION NO. 1

1. Item 1a, in violation of § 1910.23(c)(1), and item 1b, in violation of §1910.23(d)(1)(iii), are withdrawn by the Secretary.
2. Item 2, in violation of § 1910.27(d)(1)(iv), is affirmed and a penalty of \$2,500 is assessed.
3. Item 3, in violation of § 1910.95(I)(2)(i), is affirmed and a penalty of \$1,000 is assessed.
4. Item 4, in violation of § 1910.151(b), is vacated.
5. Item 5, in violation of § 1910.151(c), is vacated.
6. Item 6, in violation of § 1910.157(g)(4), is withdrawn by the Secretary.
7. Item 7, in violation of § 1910.212(a)(3)(ii), is withdrawn by the Secretary.
8. Item 8, in violation of § 1910.303(g)(2)(i), is withdrawn by the Secretary.
9. Item 9, in violation of § 1910.305(g)(2)(ii), is vacated.
10. Item 10, in violation of § 1910.305(g)(2)(iii), is withdrawn by the Secretary.
11. Item 11, in violation of § 1910.1027(c), is vacated.
12. Item 12, in violation of § 1910.1027(d)(1)(i), is affirmed and a penalty of \$2,500 is assessed.
13. Item 13, in violation of § 1910.1027(e)(1), is affirmed and a penalty of \$2,500 is assessed.
14. Item 14, in violation of § 1910.1027(g)(1), is affirmed and a penalty of \$2,500 is assessed.
15. Item 15, in violation of § 1910.1027(I)(1), is vacated.

16. Item 16, in violation of § 1910.1027(j)(1), is vacated.
17. Item 17, in violation of § 1910.1027(l)(1)(i)(a), is affirmed and a penalty of \$2,500 is assessed.
18. Item 18, in violation of § 1910.1027(m)(1), is affirmed and a penalty of \$2,500 is assessed.
19. Item 19, in violation of § 1910.1030(c)(1)(i), is affirmed and a penalty of \$2,500 is assessed.
20. Item 20, in violation of § 1910.1200(e)(1), is vacated.
21. Item 21, in violation of § 1910.1200(h), is vacated.

CITATION NO. 2

1. Items 1, 2, 3, 4, 5 and 6, in violation of § 1910.1025(c)(1), are vacated.
2. Item 7, in violation of § 1910.1025(c)(2), is vacated.
3. Item 8a, in violation of § 1910.1025(d)(2), is affirmed and a penalty of \$20,000 is assessed.
4. Item 8b, in violation of § 1910.1025(d)(6)(iii), is withdrawn by the Secretary.
5. Item 9, in violation of § 1910.1025(d)(8)(i), is affirmed and a penalty of \$40,000 is assessed.
6. Item 10a, in violation of § 1910.1025(e)(1), and item 10b, in violation of §1910.1025(e)(3)(i), are withdrawn by the Secretary.
7. Item 11, in violation of § 1910.1025(f)(1), is vacated.
8. Items 12, 13, 14, 15, 16, 17 and 18, in violation of § 1910.1025(g)(1), are vacated.
9. Item 19, in violation of § 1910.1025(h)(1), is vacated.
10. Item 20, in violation of § 1910.1025(i)(1), is vacated.
11. Item 21, in violation of § 1910.1025(i)(2)(i), is vacated.
12. Item 22a, in violation of § 1910.1025(i)(3)(i), and item 22b, in violation of §1910.1025(i)(3)(ii), are vacated.

13. Item 23, in violation of § 1910.1025(i)(4)(i), is vacated.
14. Item 24, in violation of § 1910.1025(j)(1)(i), is affirmed and a penalty of \$70,000 is assessed.
15. Item 25, in violation of § 1910.1025(l)(1)(i), is affirmed and a penalty of \$55,000 is assessed.
16. Items 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38 and 39, in violation of § 1910.1025(1)(l)(ii), are affirmed and a grouped penalty of \$50,000 is assessed.
17. Item 40, in violation of § 1910.1025(m)(2)(i), is vacated.

CITATION NO. 3

1. Item 1, in violation of § 1910.147(c)(4)(i), is vacated.
2. Item 2, in violation of § 1910.157(e)(3), is withdrawn by the Secretary.
3. Item 3, in violation of § 1910.215(b)(9), is affirmed and a penalty of \$10,000 is assessed.
4. Item 4, in violation of § 1910.1200(e)(1)(i), is withdrawn by the Secretary.

CITATION NO. 4

1. Item 1, in violation of § 1904.2(a), is affirmed and a penalty of \$3,000 is assessed.
2. Item 2, in violation of § 1910.95(c)(1), is vacated.
3. Item 3, in violation of § 1910.106(f)(6), is vacated.

/s/ _____
KEN S. WELSCH
Judge

Date: October 13, 1997

