

Brady's decision on remand on the consent issue as well as the issues on the merits originally directed for review that the Commission did not address in its first decision in this case.

II. BACKGROUND

In 1983, OSHA introduced the Cooperative Assessment Program ("CAP") to help employers achieve compliance with the lead standard. CAP was designed to be a cooperative effort among industry, labor and OSHA to develop feasible engineering controls to reduce levels of airborne lead as required by 29 C.F.R. § 1910.1025(e)(1)¹ of the standard. As we observed in *Sanders I*, at meetings early in the development of CAP, OSHA representatives had made comments that were understood by some employers and their representatives to mean that CAP inspections would not result in any citations. For example, Counsel for Appellate Litigation, Dennis Kade, stated at a September 1983 meeting, "We are not going to be citing you for a violation of the lead standard at the same time that we are working with you to try to figure out how to comply with it." *See Sanders I*, 15 BNA OSHC at 1642, 1991-93 CCH OSHD at p. 40,261-62. Sanders applied to participate in CAP in mid-1986. The citations for violations of the lead standard² in dispute here were issued to Sanders following an August 1986 CAP-eligibility inspection. Although Sanders had freely permitted inspections and follow-up inspections twice a year since 1983, it argued that its consent to OSHA's presence on its premises during the August 1986 inspection was only to have OSHA determine Sanders' eligibility for the CAP program, not to have OSHA issue citations. The company claimed that OSHA had engaged in an unreasonable search and seizure of evidence in violation of the Fourth Amendment. According to Sanders, had the company known that it was subject not only to disqualification from CAP but also to citations, it would not have allowed OSHA Compliance Officer Sallie Barber onto the premises without a warrant.

¹That standard requires employers to implement feasible engineering and work practice controls, including administrative controls, to reduce employee exposure to lead. These controls are to be supplemented by the use of respiratory protection where necessary.

²None of these citations was for a violation of the engineering controls provision, 29 C.F.R. § 1910.1025(e)(1).

III. FOURTH AMENDMENT CONSENT ISSUE

At the outset, we note that we will not attempt to characterize further OSHA's early statements on CAP or the parties' understanding of OSHA's position. Nevertheless, after considering the totality of the circumstances, *Schneckloth v. Bustamonte*, 412 U.S. 218, 224-27 (1973), particularly the events of the February 1986 meeting of OSHA representatives, industry representatives, and individual employers,³ we adopt the judge's findings that Sanders failed to carry its burden of showing any affirmative misrepresentation on the Secretary's part and that Sanders voluntarily consented to the inspection in August 1986. Regardless of any prior understanding on Sanders' part, by the time the February 1986 meeting had ended, the company was, as the judge found, "fully aware" of OSHA's policy to issue citations for non-engineering controls violations during CAP visits.

The judge based his decision on factors that we may readily evaluate, not just on his subjective observations of the witnesses. Joseph Hopkins, the OSHA official in charge of drafting the final CAP directive, testified that he stated at the February 1986 meeting that employers could be cited during CAP visits. The judge found that because Hopkins was charged with gathering comments and publishing the final directive, he had a precise reason for recalling the circumstances of the meeting. The judge found that Hopkins' recall of what transpired at the meeting was more complete and detailed than Sanders' witnesses in that he was able to remember exact times as well as specific people who raised questions and their responses. We concur with the judge that Hopkins' testimony is credible and deserving of weight in determining what was said at the meeting.

³Commissioner Montoya bases her finding of consent *solely* on the events of the February 1986 meeting and the fact that Sanders' witnesses did not deny or rebut the testimony by the Secretary's witnesses that the subject of citations during CAP visits was discussed and clarified at the February 1986 meeting. She does not rely on the balance of the evidence discussed in this section. Chairman Weisberg bases his finding of voluntary consent *not only* on the events of the February 1986 meeting and the balance of the evidence discussed in this section, but also on the fact that those management employees authorized to admit Compliance Officer Barber onto Sanders' premises did not object to her entry, nor did any representative of the company condition or limit consent in any way related to the CAP program or the issuance of citations. No Sanders representative demanded at any time during the inspection that she cease her inspection or produce a search warrant. This *prima facie* evidence of consent was un rebutted by Sanders, who failed to present clear and convincing proof of affirmative misrepresentation on OSHA's part.

Moreover, Hopkins' account was corroborated by Michael Wright, the labor representative. Wright confirmed that the subject of citations had arisen at the February 1986 meeting, and added that he remembered Hopkins' statement generating "lengthy and somewhat heated" discussions. He recalled being pleased that OSHA did not promise not to cite at all because then his union would have had to withdraw its support for CAP. The judge assigned significant weight to Wright's testimony because he characterized the witness as being in "a neutral non-adversarial" position. He did not represent Sanders' employees and his views diverged from OSHA's on a number of occasions during the CAP process. The Commission has stated that a judge may properly evaluate a witness' credibility in light of whether the witness "exhibited a biased, hostile, or inflexible bent of mind." *Hamilton Fixture*, 16 BNA OSHC 1073, 1080, 1993 CCH OSHD ¶ 30,034, p. 41,175 (No. 88-1720, 1993) (citation omitted), *aff'd without published opinion*, 28 F.3d 1213 (1994). Here, there is no evidence that Wright was hostile toward industry in general or Sanders in particular, nor does the record show that he was biased in OSHA's favor.

We find it particularly significant that the industry representatives who were at the meeting—the lead industry lobbyist⁴ Michael Sappington and the battery trade group representative Robert Wilbur—did not contradict Hopkins' and Wright's account. Sappington and Wilbur testified only that they did not recall the subject of citations resulting from CAP visits arising during the February 1986 meeting, not that OSHA promised at that meeting not to cite during CAP visits.

In sum, as noted above, we concur with the judge's determination of what transpired at the February 1986 meeting. As the judge observed, "full consideration of all the circumstances in this case discloses the inspection by OSHA was valid." Not only the testimony of an array of witnesses, but documentary evidence including a letter Sappington wrote after the February 1986 meeting,⁵ the model CAP agreement attached to the CAP application Sanders filed, and the final OSHA directive are all consistent with the judge's conclusion that Sanders was not free from all lead standard

⁴Sappington, who once held a high position at Sanders Lead, served as lead industry lobbyist and as a consultant to Sanders at all times material to this case.

⁵A letter Sappington wrote to Deputy Assistant Secretary Patrick Tyson shortly after the February 1986 meeting suggests that his understanding was that citations *could* issue during CAP inspections, and that he was prepared to advise his clients to withdraw from CAP if OSHA did not change its position.

citations during its participation in CAP, and that Sanders knew it. The testimony by Sanders' witnesses that they had never understood CAP to be an enforcement program and that they had received private verbal assurances that no citations would be issued does not outweigh the bulk of the evidence which supports the judge's decision.

We find that Sanders voluntarily consented to the August 1986 inspection and therefore proceed to evaluate the evidence on the merits of this case.

IV. MERITS

A. MRP Violations

1. Per-Instance Penalty Assessment

Judge Brady affirmed a citation alleging that Sanders willfully violated the medical removal protection ("MRP") standard, 29 C.F.R. § 1910.1025(k)(1)(i)(D),⁶ by failing to remove from their jobs fifteen employees whose work exposed them to lead above the action level. On review are whether instance-by-instance penalties may be assessed for these violations and what penalties are appropriate.

⁶That standard provides:

§ 1910.1025 Lead.

....

(k) *Medical Removal Protection—(1) Temporary medical removal and return of an employee—(i) Temporary removal due to elevated blood lead levels—(A) First year of the standard. . . .*

....

(D) *Fifth year of the standard, and thereafter.* Beginning with the fifth year following the effective date of the standard, the employer shall remove an employee from work having an exposure to lead at or above the action level on each occasion that the average of the last three blood sampling tests conducted pursuant to this section . . . indicates that the employee's blood lead level is at or above 50 $\mu\text{g}/100\text{ g}$ of whole blood; provided, however, that an employee need not be removed if the last blood sampling test indicates a blood lead level at or below 40 $\mu\text{g}/100\text{ g}$ of whole blood.

We find that in this case instance-by-instance penalties are appropriate. It is now settled⁷ that the Commission has the authority to assess separate penalties for separate violations of a single standard. *Caterpillar, Inc.*, 15 BNA OSHC 2155, 2172-73, 1991-93 CCH OSHD ¶ 29,962, p. 41,005 (No. 87-922, 1993). The standard cited in *Caterpillar*, 29 C.F.R. § 1904.2(a), required employers to "enter each recordable injury or illness on the log." The Commission held that this language permitted the Secretary to cite as many violations as there were failures to record. In this case, the MRP standard requires the employer to "remove an employee from work having an exposure to lead at or above the action level." Under *Caterpillar*, this language permits the Secretary to cite as many violations as there were failures to remove.

Sanders does not persuade us that individual violations may not be cited for its failure to remove each employee. It is not the single decision by an employer not to remove employees, but the language of the standard that is determinative. Sanders, relying on the belief that a variance would be extended, may have made a single managerial decision to apply certain criteria uniformly to all employees. Nevertheless, we find, as we did in *Caterpillar*, that a per-instance assessment is still appropriate.

2. Penalties

Under section 17(j) of the Act, 29 U.S.C. § 666(j), we consider the size of the employer's business, the gravity of the violation, the good faith of the employer, and the history of violations in determining an appropriate penalty. Sanders had approximately 237 employees in 1986, and would thus qualify as a moderate to large employer. It appears from the record that Sanders had no history of violations, presumably owing to the long-standing industry-wide variance from the requirements of the lead standard.

The gravity of the violations is relatively high, although there is no evidence that any employee suffered from lead-induced illness. Exposure to lead can have serious health

⁷On review, Sanders preserved the arguments challenging the use of instance-by-instance penalties that it had raised below, before the Commission issued such cases as *J.A.Jones Constr. Co.*, 15 BNA OSHC 2201, 2213, 1991-93 CCH OSHD ¶ 29,964, p. 41,032 (No. 87-2059, 1993) (citing *Caterpillar, Inc.*, 15 BNA OSHC 2155, 2172-73, 1991-93 CCH OSHD ¶ 29,962, p. 41,005 (No. 87-922, 1993)). Sanders' arguments on review do not persuade us to overrule Commission precedent in this regard.

consequences, as the judge mentioned. For instance, at blood-lead levels of 80 $\mu\text{g}/100\text{g}$, overt, clinically detectable signs of serious lead poisoning can occur. Very serious, significant subclinical effects, *i.e.*, pathological precursors of lead disease, occur at blood-lead levels of 40 $\mu\text{g}/100\text{g}$ and below. See *United Steelworkers of America v. Marshall*, 647 F.2d 1189 (D.C. Cir. 1980), *cert. denied*, 453 U.S. 913 (1981); *Johnson Controls*, 15 BNA OSHC 2132, 2142, 1991-93 CCH OSHD ¶ 29,953, p. 40,971 (No. 89-2614, 1993). Sanders' failure to remove employees from their posts when required by the standard subjected them to unwarranted levels of airborne lead, causing their blood-lead to reach levels exceeding 50 $\mu\text{g}/100\text{g}$.

In arriving at the penalty amount, we accord Sanders some credit for good faith. The evidence established that Sanders did not remove employees as required because it believed that a variance from the removal requirement was still in effect.⁸ In fact, the variance had expired in September 1985 and Sanders had received a number of letters in which OSHA informed the company that its request for an extension of the expired variance was denied. However, Sanders was acting in reliance on the advice of its consultant, Sappington, who had continually assured the company that the variance would be extended. Sappington testified that in advising Sanders, he in turn was relying on conversations with OSHA representatives in person and over the telephone indicating that Sanders' request for an extension would be granted.⁹ Based on these assurances, Sappington testified that he was "one hundred percent sure" that the variance would be extended,

⁸From 1981 through September 5, 1985, the Secretary had granted a number of companies, including Sanders, a temporary variance from the standard's requirement that employees be removed from their jobs if their exposure to lead raises their average blood-lead level above 50 $\mu\text{g}/100\text{g}$, allowing "skilled, maintenance, and supervisory" employees, whom Sanders characterized as "virtually irreplaceable," to continue in their positions even though their blood-lead levels exceeded the 50 $\mu\text{g}/100\text{g}$ mark. 49 Fed. Reg. 33757-62 (1984); 50 Fed. Reg. 10550-55 (1985).

⁹For instance, he testified that Patrick Tyson (Acting OSHA Administrator) had told him during a meeting in Washington early in 1985 that the variance had been extended from March 1985 to November 1985 to give inspectors time to determine whether companies had their programs "in order," at which time those that did would be granted additional relief. Sappington testified that Compliance Officer Barber (Mobile, Alabama Office) told him in August or September 1985 that she would recommend to headquarters that Sanders' variance be extended, and that around the same time, Alan McMillan (Region IV Administrator) told him at a meeting in Atlanta that the Regional Office had recommended to headquarters that Sanders receive extended variance relief.

and that when he learned that OSHA had denied the extension, he thought the variance office “just hadn’t gotten the message.”

We find that the company’s belief that the variance would be extended was reasonable enough to merit some slight penalty adjustment for good faith.¹⁰ Neither the company nor its consultant was entirely justified in ignoring OSHA’s letters, but their optimism was not altogether unfounded. For example, the Secretary presented no evidence to rebut Sappington’s testimony about verbal assurances from OSHA, and the fact that OSHA had earlier withdrawn¹¹ a citation issued to Sanders for MRP violations may have contributed to Sanders’ belief in an extension.¹²

Because the only information in the record indicates that the blood-lead levels of the fifteen employees are within the same range (just over 50 $\mu\text{g}/100\text{g}$), we assess a uniform penalty for each violation. *Cf. J.A.Jones Constr. Co.*, 15 BNA OSHC 2201, 2214, 1991-93 CCH OSHD ¶ 29,964, p. 41,033 (No. 87-2059, 1993). The Secretary proposed \$7,000 per instance penalty, for a total proposed penalty of \$105,000. The judge found the violation willful, but not so willful as to require

¹⁰In Chairman Weisberg’s view there is a fundamental inconsistency between finding this violation to be willful, *i.e.*, finding Sanders’ belief that it was covered by a variance was unreasonable enough to characterize the violation as willful, but yet finding that Sanders’ belief was reasonable enough to merit credit for good faith. This inconsistency exists irrespective of whether the finding of willfulness is based on the Commission adopting the judge’s finding on an issue not directed for review or results from a specific finding on review that the violation is willful. Accordingly, he would not afford any credit for good faith to Sanders here.

¹¹Following a September 1985 inspection, an “other-than-serious” citation for engineering controls violations and MRP violations, for which no penalties were proposed, was issued on December 20, 1985. Sanders contested the citation. The citation was amended on January 10, 1986 to delete the MRP violations, and in April 1986 a judge granted the Secretary’s motion to withdraw his complaint alleging the remaining engineering controls violations.

¹²The credit we give for good faith is minimal, however, not only because an employer may not reasonably rely on the Secretary’s failure to pursue a citation against it to defend against a later citation, *see e.g., Donovan v. Daniel Marr & Son*, 763 F.2d 477 (1st Cir. 1985), but, more importantly, because the record shows that Sanders received several letters denying the request for an extension of the variance *after* the January 1986 withdrawal of the earlier MRP violations.

instance-by-instance penalties. He imposed a single \$10,000 penalty. In light of all the statutory factors, we find that a penalty of \$1,000 per instance, for a total penalty of \$15,000, is appropriate.¹³

¹³Chairman Weisberg believes that a higher penalty is appropriate here for these willful violations involving medical removal under the lead standard. More importantly, he notes that while the Act expressly grants to the Commission the sole authority to determine the amount of the penalty to be assessed, *see Hern Iron Works, Inc.*, 16 BNA OSHC 1619, 1994 CCH OSHD ¶ 30,363 (No. 88-1962, 1994), it is improper for the majority to assess such a relatively low penalty without giving the Secretary the opportunity to introduce relevant evidence that the judge erroneously excluded. According to the Secretary, this evidence relating to Sanders' MRP variance history would support the considerable penalties he proposed. Offers of proof made by the Secretary suggest that the violations in this case were only the "tip of the iceberg," that for years Sanders had not even complied with the MRP trigger levels allowed under the variances, and that many of the employees cited in this case were not covered by those variances which only applied to irreplaceable skilled employees. The Secretary further contends that the excluded evidence would reveal that Sanders, who had stated in its variance extension request that it would cost \$450,000 per year to hire new employees and pay medical removal benefits in compliance with the MRP standard, stood to profit from violating the Act. Accordingly, Chairman Weisberg would remand the penalty issue to the judge with orders to admit the improperly excluded evidence and to determine the appropriate penalty amount based on all the evidence and application of the section 17(j) factors.

B. Respirator Fit-Test Violations

1. Characterization

The respirator fit-test standard¹⁴ requires employers to check each employee's respirator at least semiannually¹⁵ using one of three methods. The method involved in this case is the isoamyl acetate or banana oil test. Appendix D of the lead standard basically requires employers to construct a test chamber (large plastic bag hung upside down on a frame) in a separate room; to hang a paper towel wetted with banana oil inside the chamber; and to have the employee, wearing the respirator, move his or her head around in different positions and talk while in the chamber, as the employer continually checks whether the employee can smell the banana scent.

¹⁴Section 1926.1025(f)(3)(ii) provides:

§ 1910.1025 Lead

....
(f) *Respiratory protection*—(1) *General*. . . .

....
(3) *Respirator usage*. . . .

(ii) Employers shall perform either quantitative or qualitative face fit tests at the time of initial fitting and at least every six months thereafter for each employee wearing negative pressure respirators. The qualitative fit tests may be used only for testing the fit of half-mask respirators where they are permitted to be worn, and shall be conducted in accordance with Appendix D.

Appendix D by its terms “specifies the only allowable qualitative fit test protocols permissible for compliance with paragraph (f)(3)(ii).” Appendix D sets forth three different test protocols, the “isoamyl acetate protocol” (banana oil), the “saccharin solution aerosol protocol,” and the “irritant fume protocol.”

¹⁵The judge properly concluded that the Secretary did not establish by a *preponderance* of the evidence that Sanders violated the standard by not testing frequently enough. The compliance officer testified that the person in charge of administering the tests admitted to her that he had not kept up with the schedule because he “couldn’t get around to doing everything,” but at the hearing that person claimed that he was checking every employee every six months. Several employees told a compliance officer that it had been eight months or more since they had last been tested, but at the hearing, several employees, including one who had spoken to the compliance officer, testified that they were tested regularly every six months. Given such sharply conflicting testimony, the Secretary did not prove that Sanders violated the 6-month provision.

Sanders admitted that it did not follow the protocol exactly. Its safety and personnel director, James Coughlin, testified that the main difference was that he performed the tests in the employees' work areas and did not use a test chamber. Coughlin testified repeatedly that he believed his method to be approved by OSHA¹⁶ and designed to protect the health of employees, but he acknowledged that he was aware that his method did not include all the requirements for the fit test under the standard.

The judge found that Sanders willfully violated the standard by not following the protocol prescribed. He admonished that "employers are not exempt from compliance because they develop a 'better' method of ensuring safety. Sanders was not free to dismiss Appendix D in favor of its own version of a fit test." He found that no matter how well-intentioned, Sanders' persistence in conducting the fit tests in a manner which the company knew to be contrary to the law is evidence of intentional disregard and plain indifference.

We agree with the judge's finding that Sanders' violation of the respirator fit-test standard was willful.¹⁷ See *Reich v. Trinity Indus., Inc.*, 16 F.3d 1149 (11th Cir. 1994) ("*Trinity*"). In *Trinity*, a noise case involving the audiometric testing standard, the employer implemented an alternative

¹⁶The procedure Sanders followed was in accordance with an OSHA Industrial Hygiene Technical Manual (which allows employers *either* to pass the banana oil around the outside of the respirator *or* introduce the worker to a concentration of the chemical in a room, chamber, or hood), but the manual is meant to help OSHA gather evidence and is not a substitute for duly promulgated standards. There was evidence that Sanders' procedure followed the manufacturer's training film which compliance officer Barber had viewed without comment or objection, but reliance on her silence as approbation was unreasonable, especially in view of her testimony that Sanders assured her that it was following Appendix D protocols (reflected in Sanders' own manual).

¹⁷Commissioner Montoya would find that the violation is not willful, but serious. In her view, the Secretary did not establish that the violation was willful under *Reich v. Trinity Indus., Inc.*, 16 F.3d 1149 (11th Cir. 1994) ("*Trinity*"), because he failed to prove that Sanders voluntarily and intentionally disregarded the requirements of the standard. The Court in *Trinity* noted that its ruling applied to an employer whose program was touted as an alternative to the standard—not to an employer whose program was a good faith effort to comply with the standard. *Trinity*, 16 F.3d at 1154 n.3. In Commissioner Montoya's view, the employer's respirator fit-test program here *was* a good faith effort to comply with the OSH Act. As the majority notes, Sanders' program not only complied with an OSHA Industrial Hygiene Technical Manual but also with a training film made by the manufacturer and seemingly approved by the compliance officer.

program even though it knew that the standard required something else. *Trinity* is on all fours with this case because like Trinity Industries, Sanders knew of the standard's requirements and their applicability, yet the company intentionally disregarded them. It is of no moment that Sanders, like Trinity Industries, considered its alternative program wiser than or superior to that set forth in the standard. *Id.* at 1155. Sanders' belief that its respirator fit-test program "complied with OSHA" was objectively unreasonable. Coughlin knew what the standard required, and he knew that he was not following the standard. Such indifference makes the violation willful. *See also, e.g., Conie Constr., Inc.*, 16 BNA OSHC 1870, 1872, 1994 CCH OSHD ¶ 30,474, p. 42,089-90 (No. 92-0264, 1994) (willful violation where foreman knew what the standard required, yet purposefully relied on his own judgment instead); *Hern Iron Works, Inc.*, 16 BNA OSHC 1206, 1214, 1993 CCH OSHD ¶ 30,046, p. 41,256-57 (No. 89-433, 1993) (Secretary must show that employer knew of an applicable standard and consciously disregarded it). Here, as in *Morrison-Knudsen Co.*, 16 BNA OSHC 1105, 1123-1127, 1993 CCH OSHD ¶ 30,048, p. 41,284-85 (No. 88-572, 1993) *pet. for review filed*, June 15, 1993 (D.C. Cir., No. 93-1385), "the case may seem close" because it is not as if the employer sat idly by while employees continued to fall ill, but the evidence shows that the employer did not even follow its own safety program. *See id.* at 1127, 1993 CCH OSHD at p. 41,284. Sanders did not follow its own "Respiratory Protection Policy" which mirrored Appendix D (requiring semi-annual fit-tests in a separate chamber), and there was some evidence—although not a preponderance—that Sanders also did not conduct its fit-tests in an orderly enough fashion to ensure that each employee was checked at least twice a year.¹⁸

2. Penalty

The test under *Caterpillar* for the appropriateness of instance-by-instance penalties is whether the language of the standard prohibits individual acts or a single course of action. The respirator fit-test standard, Section 1926.1025(f)(3)(ii), requires employers to "perform either quantitative or qualitative face fit tests at the time of initial fitting and at least every six months thereafter for each employee wearing negative pressure respirators." Like the MRP standard, which required the removal of individual employees under certain unique circumstances peculiar to each

¹⁸At the hearing, Coughlin maintained that he went out among the employees every day and chose three to five employees to test, relying on his memory to make sure he did not miss anyone.

employee, the respirator fit-test standard requires the evaluation of individual employees' respirators under certain unique circumstances peculiar to each employee. We conclude that the language of the respirator fit-test standard permits a per-instance assessment.

As with the MRP violation, the evidence suggests that the employees' exposures to airborne lead were relatively uniform and that a uniform penalty for each affected employee is in order. In the absence of testimony on the degree to which Sanders' deviation from the standard protocol may have reduced the effectiveness of the fit-testing and thus may have reduced the effectiveness of respirators in preventing employee exposure to airborne lead, we find the link between Sanders' actions and employee health to be fairly attenuated.

The Secretary proposed a penalty of \$4000 per instance, for a total penalty of \$56,000. The judge found that the violation of the fit-test standard, while willful, was adequately met with the assessment of a single \$10,000 fine.

Again, Sanders was a moderate to large employer with no history of violations. Although the violation was willful, Sanders is not totally devoid of good faith in that it did perform regular respirator fit-testing. The gravity of this respirator fit-test violation is not as severe as the MRP violation discussed above. We conclude that a penalty of \$800 per instance, totalling \$11,200 for the fourteen instances cited, is appropriate for this violation.¹⁹

C. MRP Notification Violation

1. Characterization

We now consider whether the judge erred in reducing the characterization of a violation of the MRP notification standard, 29 C.F.R. § 1910.1025(j)(2)(iv),²⁰ from willful to other-than-

¹⁹Commissioner Montoya, who as noted above would find this violation to be not willful, but serious, would reduce the per-instance penalty accordingly.

²⁰That standard provides:

§ 1910.1025 Lead

. . . .

(j) *Medical surveillance*—(1) *General*. . . .

(2) *Biological monitoring*—(i) *Blood lead and ZPP level sampling and analysis*. . . .

(iv) *Employee notification*. Within five working days after the receipt of biological

(continued...)

serious. The judge found that the language in Sanders' notification²¹ was deficient because it did not tell employees that the *standard* requires temporary removal or that MRP benefits are to be paid during the removal time. In finding the violation to be not willful and other-than-serious, the judge mentioned only that "there is no question that notice was provided employees." He expressed the view that "the most significant part of the notification is informing the employee that his or her blood-lead level is above the permissible level and he or she is to be temporarily removed."

While Sanders' form conveyed some pertinent information, it did not convey *all* the required information and it erroneously stated that employees are to be removed if their blood-lead level

²⁰(...continued)

monitoring results, the employer shall notify in writing each employee whose blood lead level exceeds 40 $\mu\text{g}/100\text{ g}$: (A) of that employee's blood lead level and (B) that the standard requires temporary medical removal *with Medical Removal Protection benefits* when an employee's blood lead level exceeds the numerical criterion for medical removal under paragraph (k)(1)(i) of this section.

(Emphasis added). The numerical criterion for medical removal under the standard at the material time was 50 $\mu\text{g}/100\text{g}$.

²¹Sanders' notice informed the employee of his or her blood-lead level and the substantive language stated:

1. **MEDICAL REMOVAL:** An employee with a confirmed blood lead greater than 60 $\mu\text{g}/100\text{g}$ over a six (6) month average will be removed to an area of less exposure.
2. If you are placed on Medical Removal for having a confirmed blood level of over 60 $\mu\text{g}/100\text{g}$, **YOU WILL NOT BE ALLOWED TO RETURN TO YOUR JOB UNTIL YOUR BLOOD LEAD HAS DROPPED TO 40 $\mu\text{g}/100\text{g}$ OR BELOW.**

WARNING: Your blood lead level has increased by ___ point(s) from your previous blood lead test. Are you following all Safety and Health rules?

reaches $60 \mu\text{g}/100\text{g}$.²² We find that a willful violation has been established²³ because the record demonstrates that Sanders knew what the standard required and yet deliberately stated the wrong MRP trigger level and omitted any mention of MRP benefits. *See Trinity*. As in *Trinity*, the fact that the employer believes its method to be superior to that prescribed in the standard is of no moment. While Sanders was free to embellish the notice as it saw fit, the core of information required by the standard was missing. Sanders' heightened awareness of that deficiency, illustrated by the otherwise customized version of the notice it produced, compels us to find that the violation was willful.

2. Penalty

We find the gravity of this violation to be moderately severe. If employees had been properly notified that they were entitled to be removed, with pay, when their blood-lead level reached $50 \mu\text{g}/100\text{g}$ (not $60 \mu\text{g}/100\text{g}$), they would have had an opportunity to protect their health by seeking medical removal protection benefits when their blood-lead levels exceeded the trigger level. *See Phelps Dodge Corp.*, 11 BNA OSHC 1441, 1983-84 CCH OSHD ¶ 26,552 (No. 80-3203, 1983), *aff'd*, 725 F.2d 1237 (9th Cir. 1984) (violation found to be serious where employer's medical examination program incorporated financial disincentives to participate, thereby increasing the probability of undetected employee illness). The wrong blood-lead trigger alone, or the absence of any mention of benefits alone, might have resulted in our finding lower gravity and a lower penalty, but the combination here deprives employees of the very information the standard intended for them to have. In another case, where the evidence demonstrated that an employer was removing

²²Sanders' notice incorrectly stated that employees whose blood lead reached $60 \mu\text{g}/100\text{g}$ would be removed. This error is consistent with Sanders' belief that it was still covered under a variance which had relieved it from complying with the $50 \mu\text{g}/100\text{g}$ trigger that was in effect for the industry at large.

²³Commissioner Montoya would find that the violation is not willful, but other-than-serious. For the same reasons as noted above in connection with the respirator fit-test violation, she would find that the Secretary also failed here to establish a willful violation under *Trinity*. In her view, Sanders made a good faith effort to comply with the MRP notification standard, and did not intentionally disregard its requirements. As the judge in this case observed, Sanders' notice did convey the individual employee's blood-lead level and did explain the fundamentals of the medical removal provision. Such a good faith attempt to comply with a vaguely worded standard is incompatible with a finding of willfulness.

employees at the proper trigger level and paying them medical removal benefits, a deficient notice might make little difference. Here, however, the deficient notice contributed to the unwarranted exposure of employees to excessive levels of airborne lead.

The judge's decision assessed a \$5000 penalty, the result of either a typographical error or the judge's failure to align his penalty amount with his finding that the violation was other-than-serious.²⁴ Although Sanders willfully violated the standard in failing to conform the contents of its notice to the standard's requirements, the company deserves some credit for good faith for at least notifying its employees of their blood-lead level and telling them about some aspects of medical removal protection. In light of the moderate gravity of the violation, Sanders' moderate to large size, its lack of previous violations and its good faith, we find a single \$5000 penalty to be appropriate for this willful violation.²⁵

V. ORDER

Accordingly, we find that Sanders voluntarily consented to the inspection in this case, and based on the evidence derived therefrom, we affirm willful violations of 29 C.F.R. § 1910.1025(k)(i)(1)(D) and assess a penalty of \$15,000 based on fifteen instances at \$1,000 per instance, we affirm willful violations of 29 C.F.R. § 1910.1025(f)(3)(ii) and assess a penalty of \$11,200 based on fourteen instances at \$800 per instance, and we affirm a willful violation of 29

²⁴At the time the judge issued his decision, Section 17(c) of the Act, 29 U.S.C. § 666(c), permitted the assessment of a penalty of "up to \$1,000" for a violation "specifically determined not to be of a serious nature."

²⁵As noted above, Commissioner Montoya would characterize this violation as other-than-serious, not willful. She would find that the Secretary failed to prove that there is a "substantial probability that death or serious physical harm could result from" the deficient notice itself—as opposed to the actual failure to remove employees from high-exposure work. *See* 29 U.S.C. § 666(k). In the absence of such evidence and given the tenuous connection between the violation and employee safety and health, she would assess a single penalty of \$500.

C.F.R. § 1910.1025(j)(2)(iv) and assess a penalty of \$5000. The total penalty for these willful violations is \$31,200.²⁶

/s/ _____
Stuart E. Weisberg
Chairman

/s/ _____
Edwin G. Foulke, Jr.
Commissioner

/s/ _____
Velma Montoya
Commissioner

Dated: April 24, 1995 _____

²⁶As we noted in *Sanders I*, 15 BNA OSHC at 1652 n.21, 1991-93 CCH OSHD at p. 40,272 n.21, the parties are free to resubmit their partial settlement agreement for Commission approval. In light of our findings regarding the exclusion of evidence, there is no reason the agreement would not be approved upon resubmission.



United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
 1120 20th Street, N.W., Ninth Floor
 Washington, DC 20036-3419

Office of
 Executive Secretary

Phone: (202) 606-5100
 Fax: (202) 606-5050

SECRETARY OF LABOR,

Complainant,

v.

SANDERS LEAD COMPANY,

Respondent.

OSHR Docket No. 87-260

ORDER

On April 24, 1995, the Commission issued a decision in the above-referenced matter that invited the parties to resubmit their partial settlement agreement to the Commission. *Sanders Lead Co.*, 17 BNA 1197, 1205 n.26, 1993-95 CCH OSHD ¶ 30,740, p. 42,697 n.26. Both parties filed petitions for appellate review that were consolidated in the United States Court of Appeals for the Eleventh Circuit, and the Eleventh Circuit subsequently dismissed the case upon joint agreement of the parties. The parties have now resubmitted the partial settlement agreement to the Commission. The partial settlement agreement is approved.

So ordered.

BY DIRECTION OF THE COMMISSION

Ray H. Darling, Jr.

Ray H. Darling, Jr.
 Executive Secretary

Date: May 16, 1996

87-0260

NOTICE IS GIVEN TO THE FOLLOWING:

Daniel J. Mick
Office of the Solicitor, U.S. DOL
Room S4004
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Washington, D.C. 20210
Attn: Bruce Justh

Associate Regional Solicitor
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Paul L. Brady
Administrative Law Judge
Occupational Safety and Health
Review Commission
Room 240
1365 Peachtree Street, N.E.
Atlanta, GA 30309-3119

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

ROBERT B. REICH, SECRETARY OF LABOR

Complainant,

v.

SANDERS LEAD COMPANY,

Respondent.

OSHRC No. 87-260

PARTIAL SETTLEMENT AGREEMENT

The parties hereto, in order to resolve matters which are no longer controverted, hereby stipulate as set forth below:

I. The complainant, with the consent of the respondent, amends Citation Numbers 1 and 2, issued on February 4, 1987, and their respective Notifications of Penalty, as follows:

A. Citation No. 1

1. The proposed penalty for Item No. 1 is deleted, substituted in lieu thereof is a proposed penalty of \$200.00.
2. Item 3a is modified to an "Other" violation.
3. Item 3b is withdrawn.
4. Item 3c is withdrawn.
5. Paragraph (a) of Item 3(d) is withdrawn.
6. Item 3e is withdrawn.
7. The proposed penalty for Item 3, as above modified and amended, is deleted; substituted in lieu thereof is a proposed penalty of \$500.00.

B. Citation No. 2

1. Item 1b is withdrawn.

II. Respondent represents that the violations alleged in Citation No. 1, Items 1, 2, 3a, 3d(b), and 3g, and in Citation No. 4, Item 1, do not exist and that respondent is now, and will remain, in compliance with the regulations referred to in these items. Respondent hereby withdraws its notice of contest to Citation No. 1, Items 1, 2, 3a, 3d(b), and 3g and to Citation No. 4. Respondent states that this withdrawal was not induced by a promise of any other party hereto except as may appear herein.

III. Respondent agrees to pay, within thirty (30) days of the date this Agreement is approved by the Commission, the proposed penalty for the Items mentioned above.

IV. With respect to Citation No. 1, Item 3a, it is agreed that respondent's obligation in 29 C.F.R. 1910.1025(d)(8)(ii) to include in its "written notice" to employees "a description of the corrective action taken or to be taken to reduce exposure to or below the permissible exposure limit" may be fulfilled by posting in writing the corrective action information in the office of the affected employee's foreman, provided that the affected employee has access to, and is informed of, said information.

V. With respect to withdrawn Item 3c of Citation No. 1, respondent represents that it will insure that employees are trained in accordance with 29 C.F.R. 1910.1025(l)(1)(v)(C), that all employees are aware of their right under 29 C.F.R.

1910.1025(f)(2)(ii) to choose a powered, air-purifying respirator (PAPR) when it will provide adequate protection to the employee, and that it will keep two or more PAPRs available at the workplace for employees to use in making their choice.

VI. By entering into this Agreement, respondent does not admit the validity of the alleged violations or any of the underlying facts. By executing this Agreement, respondent does not waive any of the legal or factual defenses available to it with respect to the remaining items of Citations Nos. 1, 2 and 3. Specifically, the execution of this Agreement shall not be deemed as an admission by respondent that the inspection was legal.

VII. Affected employees herein are not represented by a certified bargaining representative.

VIII. With respect to Citation No. 1, Items 1, 2, 3a, 3d(b), and 3g, withdrawn items 3b, 3c, 3d(a), and 3e, Citation No. 2, Item 1b, and Citation 4, Item 1, and only those items, each party hereby agrees to bear its own fees (including attorney fees) and other expenses incurred by such party in connection with any stage of this proceeding.

IX. Respondent certifies that notice of the foregoing was given to employees by posting a true copy of this Stipulation, in accordance with Commission Rule 7(g) [29 C.F.R. 2200.7(g)].

ACCORDINGLY, the parties jointly move the Commission for an Order appropriate for final disposition of the matters addressed herein.

Executed, this 18th day of December, 1995.

SANDERS LEAD CO., INC.

ROBERT N. STEINWURTZEL

By: 
MICHAEL E. WARD

Swidler & Berlin, Chtd.
3000 K St., N.W., # 300
Washington, DC 20007

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By: 
BRUCE JUSTH
Assistant Counsel for
Appellate Litigation

Attorneys for the Secretary of
Labor, United States
Department of Labor

SOL CASE NO. 0401 8700148