United States of America

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR, Complainant, v. MANGANAS PAINTING CO., INC., Respondent.	:	OSHRC Docket No. 94-0588

APPEARANCES:

Jordana W. Wilson, Attorney; Nicholas J. Levintow, Senior Trial Attorney; Kenneth A. Hellman, Senior Trial Attorney; Joseph M. Woodward, Associate Solicitor for Occupational Safety and Health; J. Davitt McAteer, Acting Solicitor of Labor, U.S. Department of Labor, Washington, D.C.
For the Complainant

Roger L. Sabo, Esq. and Denise L. Hanson, Esq., Schottenstein, Zox & Dunn, Columbus, OH
For the Respondent

DECISION

Before: RAILTON, Chairman; ROGERS and THOMPSON, Commissioners.

BY THE COMMISSION:

In March 1993, Manganas Painting Co., Inc. ("Manganas"), a thirty-five employee family-owned industrial and commercial painting contractor, began a nineteen-month project under contract with the Ohio Department of Transportation ("ODOT") to repaint the Jeremiah Morrow Bridge in Lebanon, Ohio. The project required abrasive blasting paint removal from two parallel bridges, followed by repainting.

The Occupational Safety and Health Administration ("OSHA") inspected the worksite on four occasions throughout the project, issuing numerous citations for alleged violations of the Occupational Safety and Health Act of 1970 ("OSH Act" or "Act"), 29 U.S.C. §§ 651-678.

Manganas contested all of the citations, which were the subject of five docketed cases before the Review Commission. The Commission previously issued a consolidated decision resolving the first two docketed cases that involved only fall protection and personal protective equipment violations for conditions pre-dating any paint removal work.[1] The instant case principally involves alleged willful and serious violations of the lead in construction standard, 29 C.F.R. § 1926.62, that occurred immediately after the standard went into effect, for which the Secretary proposed a total penalty of $1,319,850.[2]

The late Administrative Law Judge Michael H. Schoenfeld affirmed most of the alleged violations, and assessed a total penalty of $799,090. On review are numerous challenges, including those related to the validity of the standard and its applicability, feasibility of compliance, and OSHA's lead sampling results. For the following reasons, we uphold the validity of the standard and its applicability to most of the cited conditions; find that OSHA's sampling results, in this case, are sufficiently reliable to establish employee overexposure to lead; vacate cited overexposures where respiratory protection now deemed sufficiently protective was used; and resolve specific items based on the evidentiary and legal bases discussed below.[3]

BACKGROUND

Beginning April 10, 1993, Manganas began removing lead-based paint from one of the bridges in preparation for re-painting. It encapsulated sections of the bridge in large canvas containments inside which its employees blasted steel grit against the bridge surface to remove the paint. Another group of employees then vacuumed up the grit for re-use as the work progressed. It is undisputed that this process released lead dust and particles into the atmosphere inside the containment, and Manganas admitted "that the amount of airborne lead within the

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[1] *Manganas Painting Co.*, 19 BNA OSHC 1102, 2000 CCH OSHD ¶ 32,202 (No. 93-1612, 2000) (consolidated), *aff'd per curiam*, 273 F.3d 1131 (D.C.Cir. 2001).

[2] Still pending before the Commission are the remaining consolidated citations (Nos. 95-0103 & 95-0104), alleging fall protection violations and violations of various provisions of the lead standard that occurred at a later date.

[3] We deny Manganas' October 15, 1997 motion for consolidated oral argument, as we find that the record and briefs provide a sufficient basis upon which to decide these cases. *See AAA Delivery Servs., Inc*., 21 BNA OSHC 1219, 1221, n.4, 2005 CCH OSHD ¶ 32,796, p. 52,449, n.4 (No. 02-0923, 2005).

containment while blasting operations were in progress during the month of August 1993 exceeded 50 µg/m³."

On May 4, 1993, OSHA promulgated a new lead in construction standard, denoted an "Interim Final Standard," that had an effective date of June 3, 1993. 29 C.F.R. § 1926.62(p). By its terms, the standard applied "to all construction work where an employee may be occupationally exposed to lead." 29 C.F.R. § 1926.62(a). In general, the new standard reduced permissible exposure from a threshold limit value of 200µg/m³ (29 C.F.R. § 1926.55) to a permissible exposure limit (PEL) of 50µg/m³ averaged over an eight-hour period (time weighted average (TWA)). 29 C.F.R. § 1926.62(c)(1). Although effective on June 3, with compliance required "as soon as possible," the standard permitted delayed compliance, as follows:

> *Startup dates*. (1) The requirements of paragraphs (c) through (o) of this section, including administrative controls and feasible work practice controls, but not including engineering controls specified in paragraph (e)(1) of this section, shall be complied with as soon as possible, *but no later than 60 days from the effective date of this section.*
>
> (2) Feasible engineering controls specified in paragraph (e)(1) of this section shall be implemented as soon as possible, but no later than 120 days from the effective date of this section.

29 C.F.R. § 1926.62(r) (emphasis added).

Prompted by a July 28, 1993 inquiry from Dr. Thomas Martin, who treated a Manganas employee for lead poisoning, and consistent with the OSHA Area Office's special emphasis program on lead in construction, OSHA industrial hygienist (IH) James J. Sweeney commenced an inspection of the Manganas bridge-painting worksite on August 2, 1993, precisely sixty days from the standard's effective date. Based on the results of that inspection, which continued until September 24, 1993, OSHA issued one serious and one willful citation to Manganas on February 1, 1994. The citations included allegations of lead overexposure, lack of a compliance program, and failures to provide adequate respiratory protection, protective work clothing, housekeeping, hygiene facilities/practices, and medical removal protection and surveillance.

DISCUSSION

I. Threshold Issues

A. Standard Validity Challenge

Manganas contests all of the lead citation items on the same threshold basis – that the "interim final regulation" under which OSHA issued the citations is invalid. Manganas argues

that the promulgation process was procedurally deficient and that the substance of the regulation does not conform with requirements set forth in the statutory mandate authorizing its enactment. In addition to her arguments opposing the merits of Manganas' standard validity challenge, the Secretary argues that Manganas is precluded by the pre-enforcement challenge provision of section 6(f) of the Act, 29 U.S.C. § 655(f), from raising the validity challenge in this enforcement proceeding. The judge denied Manganas' pre-hearing motion for partial summary judgment to declare the lead in construction standard invalid. He found that section 6(f) does not preclude review of the standard's validity, and concluded that the standard was validly promulgated. For the following reasons, we affirm the judge.

1. Statutory Preclusion

The OSH Act authorizes the Secretary to promulgate "Occupational Safety and Health Standards" pursuant to the procedures set forth in section 6 of the Act, 29 U.S.C. § 655. Enforcement of those standards is addressed in section 10 of the Act, 29 U.S.C. § 659, which authorizes inspections, issuance of citations, and contest thereof in administrative proceedings. Section 6, however, contains a provision authorizing *pre-enforcement* challenges to standards "issued under this section," providing, in relevant part, that:

> Any person who may be adversely affected by a standard issued under this section may at any time prior to the sixtieth day after such standard is promulgated file a petition challenging the validity of such standard with the United States court of appeals . . . for a judicial review of such standard.

Section 6(f), 29 U.S.C. § 655(f).

With respect to standards promulgated pursuant to section 6, the Commission has already considered and rejected the contention that section 6(f) provides the exclusive vehicle by which an employer can raise, and the Commission can consider, a challenge to the validity of a standard. *CBI Services, Inc.*, 19 BNA OSHC 1591, 1594, 2001 CCH OSHD ¶ 32,473, p. 50,226 (No. 95-0489, 2001) (re-affirming that section 6(f) pre-enforcement challenge mechanism does not preclude substantive or procedural challenges in enforcement proceedings), *aff'd*, 53 F. App'x 122 (D.C. Cir. 2002) (unpublished), and cases there cited. *Accord Simplex Time Recorder Co. v. Secretary*, 766 F.2d 575, 582-83 & n.2. (D.C. Cir. 1985). Moreover, we find that because the challenged "interim final regulation" was not promulgated pursuant to section 6 of the Act, it is not subject to any limitations that might be inherent in section 6(f). Accordingly, we reject the

Secretary's preclusion argument and address the merits of Manganas' standard validity challenge.

2. Notice-and-Comment Rulemaking

It is undisputed that the Secretary did not utilize notice-and-comment rulemaking procedures in promulgating the lead in construction standard. As stated in the preamble, the Secretary promulgated the standard pursuant to the "exclusive authority" of the Congressional mandate contained in Title X of the Housing and Community Development Act of 1992 ("Title X"). 58 Fed. Reg. 26,590 (May 4, 1993). Under that provision, Congress directed the Secretary to enact the standard, as follows.

> Not later than 180 days after the enactment of this Act, the Secretary of Labor shall issue an interim final regulation regulating occupational exposure to lead in the construction industry. Such interim final regulation shall provide employment and places of employment to employees which are as safe and healthful as those which would prevail under the Department of Housing and Urban Development guidelines published at Federal Register 55, page 38973 (September 28, 1990) (Revised Chapter 8). Such interim final regulations shall take effect upon issuance (except that such regulations may include a reasonable delay in the effective date), shall have the legal effect of an Occupational Safety and Health Standard, and shall apply until a final standard becomes effective under section 6 of the Occupational Safety and Health Act of 1970.

42 U.S.C. § 4853. Citing to the legislative history of Title X, the Secretary stated in the preamble to the lead in construction standard that "Congress . . . did not impose any procedural requirements that must be followed" and that Congress intended that "the Secretary need not follow the procedural requirements of the OSH Act or the APA [Administrative Procedure Act, 5 U.S.C. § 553]." 58 Fed. Reg. at 26,591. We agree with the Secretary's assessment of Congressional intent.

We also note that "interim final regulation" is not defined in Title X. Nor does the phrase, by its terms, implicate a particular process by which such a rule is to be adopted. *See, e.g. Analysas Corp. v. Bowles*, 827 F.Supp. 20, 21 n.3 (D.D.C. 1993) (referring to phrase interim-final as "oxymoronic"); *Career College Ass'n v. Riley,* 74 F.3d 1265, 1268 (D.C. Cir. 1996) (referring to interim-final as "maladroit"). The phrase, however, seems to have become a term of "general currency," referring to "rules adopted by federal agencies *that become effective without prior notice and public comment and that invite post-effective public comment*." Michael Asimow, *Interim-Final Rules: Making Haste Slowly*, 51 Admin. L. Rev. 703, 705 n.7 (1999) (emphasis in original). This meaning, applied to the circumstances here, is consistent

with the historical underpinnings of Title X and with its explicit terms, and is compelled by its legislative history.

Congress took the unusual step of forcing the Secretary's hand in revising the lead in construction standard out of frustration at the Secretary's fourteen-year delay in addressing the undisputed "fact that exposure to lead at exposures of 200 mg/m^3 can cause irreversible health impairment among construction workers[,]" and in light of reports that "lead poisoning among construction workers [has] risen at alarming rates." H.R.REP. No. 102-852, pt. 2, at 16 (1992). In so doing, Congress set a short, 180-day, time limit for promulgation of the standard, denoting it an "interim final regulation," endowing it with the "legal effect of an Occupational Safety and Health Standard," and ensuring its applicability "until a final standard becomes effective under section 655 of Title 29 [section 6 of the Act]." There would have been no need for Congress to specify that the interim regulation would have the legal effect of an OSH Act standard if it were to have been promulgated pursuant to the requirements of section 6. Any doubt, however, about Congressional intent to exempt the enactment of the lead standard from notice-and-comment rulemaking procedures, is erased by the following statement in the Committee Report.

> The Committee amendment creates a new provision, not a part of either the OSH Act or the Toxic Substances Control Act, which directs the Secretary of Labor to issue an interim final regulation governing lead. The interim regulation is not an occupational safety and health standard as that term is defined in section 3(8) of the Occupational Safety and Health Act of 1970. As the Secretary has previously recognized, *the distinction between an interim regulation and an occupational safety and health standard is legally significant because it means that the procedural requirements of section 6 of the OSH Act do not apply to the promulgation of the interim final regulation. Nor, as the Secretary has previously recognized in publishing an interim final regulation governing hazardous waste operations, do the notice and comment provisions of the Administrative Procedures Act apply.*

Id. (citation omitted) (emphasis added). *See Garcia v. United States*, 469 U.S.70, 76 (1984) ("In surveying legislative history we have repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which 'represen[t] the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation.'" (citation omitted)).

Moreover, with respect to APA rulemaking procedures, the APA itself "recognizes that Congress may modify these requirements" as long as "'it does so expressly.' 5 U.S.C.§ 559." *Asiana Airlines v. FAA*, 134 F.3d 393, 396 (D.C. Cir. 1998). Although in "[a]pplying § 559, the

Supreme Court has held that 'exemptions from the terms of the Administrative Procedure Act are not lightly to be presumed [as they] must be express,'" we find that the terms of Title X combined with its legislative history make clear that in this case, Congress "purposely and expressly created an exception to the otherwise-applicable APA notice and comment procedures." *Id*. at 397-98. In these circumstances, we conclude that the Secretary was not required to follow the procedural requirements of either section 6 of the OSH Act or section 553 of the APA when she promulgated the lead in construction standard.[4] Accordingly, we reject Manganas' claim that the promulgation process was procedurally deficient.

3. Substantive Compliance With Statutory Mandate

In enacting Title X, Congress mandated that the interim lead in construction standard "shall provide employment and places of employment to employees which are as safe and healthful as those which would prevail under the Department of Housing and Urban Development [HUD] guidelines published at Federal Register 55, page 38[,]973 (September 28, 1990) (Revised Chapter 8)." 42 U.S.C. § 4853. Manganas contends that the Secretary exceeded her authority because she did not base the new standard on the HUD guidelines but, rather, on the general industry lead standard, 29. C.F.R. § 1910.1025. We reject Manganas' contention.

The Secretary does not dispute that many of the provisions in the new standard were derived primarily from the general industry lead standard. 58 Fed. Reg. at 26,592-597. As she explained in the preamble to the lead in construction standard, "the HUD Guidelines expressly incorporate many provisions of the OSHA [general industry] lead standard . . . ." 58 Fed. Reg. at 26,592. Congress also acknowledged that "[t]he HUD guidelines are based on, and in most respects mirror, OSHA's general industry lead standard." H.R.REP. No. 102-852, pt. 2, at 15-16. Moreover, the Committee Report states that while Title X requires that the HUD guidelines "serve as the basis for OSHA's interim final regulation[,]" "the Secretary may alter the provisions of the HUD guidelines, so long as the interim regulation provides workers with health and safety protections which are equally as effective." *Id.* at 15.

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[4] Consistent with our conclusion that the Lead in Construction standard is not subject to any of the procedural requirements prescribed by section 6 of the OSH Act, we reject Manganas' validity challenges based on the absence of "significant risk" and "feasibility" findings inherent in those requirements.

Based on the plain wording of Title X, as supported by its legislative history, we find that Congress established a minimum threshold of worker protection for the interim lead in construction standard based on the HUD guidelines, from which the Secretary could not depart. However, based on the Committee Report, we also conclude that Congress intended the Secretary to have the discretion to depart from the HUD guidelines in the interim standard as long as she maintained that minimum level of protection. Here, Manganas does not contend that the cited standard fails to provide "places of employment to employees which are as safe and healthful as those which would prevail under the [HUD] guidelines." Accordingly, we reject Manganas' allegation that the interim final standard does not conform with requirements set forth in Title X, and we uphold its validity as to all of the challenges addressed herein.

B. Feasibility

Manganas argues that compliance was infeasible with each provision of the lead standard for which it was cited, which it contends OSHA recognized when it exempted the construction industry from compliance with the general industry lead standard. As the previous discussion makes clear, however, the standard's adoption was mandated by Congress, and the Commission may not entertain any challenge to the wisdom of the standard. *E.g., Loomis Cabinet Co.*, 15 BNA OSHC 1635, 1640, 1991-93 CCH OSHD ¶ 29,689, p. 40,258 (No. 88-2012, 1992) (holding that Commission "lacks the power" to question the wisdom of an OSHA standard). Moreover, for the reasons discussed below, we find that Manganas has otherwise failed to substantiate any of its infeasibility claims.

Manganas contends that the general industry lead standard's longer phase-in periods show that the construction standard's phase in periods were too strict. It cites no evidence, however, showing that it was unable to timely achieve compliance with any particular provision, and elsewhere emphasizes that it was just unaware of the standard's immediate applicability to this project. As to its claimed economic burden, Manganas cites the standard's failure to address the costs that must be borne by an employer who might be required to medically remove an employee due to blood lead levels that were permissibly incurred under the previous standard. However, it has provided no specific evidence that it would have sustained an economic burden from medically removing the seven of its thirty-five employees who the Secretary alleges should have been removed to positions where they would not have been exposed to lead above the standard's action level. *See El Paso Crane & Rigging Co.*, 16 BNA OSHC 1419, 1421, 1993-95

CCH OSHD ¶ 30,231, p. 41,616 (No. 90-1106, 1993) (noting that success of infeasibility affirmative defense is dependent on employer's "show[ing] that the particular fact situation to which the citation refers was . . . infeasible"). In fact, Manganas acknowledges that it would have been entitled to a change order covering any additional costs that resulted from compliance with the new standard.

Finally, Manganas contends that compliance with the PEL was infeasible because available respirators were inadequate to handle the measured ambient lead exposure. We find that this issue is resolved by subsequent developments. At the time the citation issued, OSHA rated the abrasive blasting helmet with integrated respirator that Manganas provided to its employees as protective only up to 25xPEL (1,250 μg/m³), which would have been insufficient for some of the measured exposure levels. OSHA later reevaluated the effectiveness of the integrated abrasive blasting helmet that Manganas provided to its employees and, on August 30, 1995, increased its rated protection factor to 1000xPEL (50,000 μg/m³), a level that exceeded all of the exposures measured at the Manganas worksite. *See* Memorandum to OSHA Regional Administrators from John B. Miles, Jr., Director of OSHA Compliance Programs (August 30, 1995). As a factual matter, therefore, it can now be determined that the integrated respiratory protection that Manganas provided to its employees engaged in abrasive blasting was in fact adequate for the lead levels to which they were exposed.[5] We address the effect of these circumstances in our discussion below of the relevant citation items.

C. OSHA's lead sampling

On August 6, 1993, IH Sweeney conducted area sampling inside a containment where Manganas employees were vacuuming grit and, on September 21, 22, and 24, 1993, he conducted personal air sampling of numerous employees. As previously noted, Manganas concedes exposure exceeding the 50 μg/m³ PEL during blasting operations in August, and

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[5] Manganas' infeasibility claim would fail even had the respirator rating not changed. The standard's preamble states that until an adequate integrated abrasive blasting helmet is developed, "workers may have to wear a respirator type that provides an acceptable protection factor but lacks integral head protection." 58 Fed. Reg. at 26,614. As the judge found, Manganas made no showing that it could not have used an adequate respirator *in conjunction* with *separate* head protection. *See SSPC's Lead Paint Bulletin*, June 1993 (describing available positive pressure respiratory protection for exposures greater than 1,250 μg/m³).

Sweeney's August 6 area sample showed an 8-hour TWA of 110 μg/m³, more than twice the PEL. The personal sampling that Sweeney conducted outside employees' blasting hoods in September yielded results showing extremely high levels of lead overexposure, with some reaching nearly 100 times the PEL. Six of Sweeney's fifteen samples showed exposure levels exceeding 4,000 μg/m³ (eighty times the PEL), one sample showed exposure at 3,700 μg/m³ (over seventy times the PEL), two samples showed exposure levels exceeding 1,600 μg/m³ (over thirty times the PEL), two samples showed exposure levels exceeding 400 μg/m³ (eight times the PEL), and three of the samples showed exposure levels ranging from 82 μg/m³ to 182 μg/m³ (between one and one-half and nearly four times the PEL). Only one of the fifteen samples showed no overexposure.

Like the judge, we reject Manganas' contention that the shortcomings in Sweeney's sampling methods completely invalidated his results. Sweeney conceded that he did not fully comply with all elements of the OSHA Technical Manual,[6] and we do not condone his departure from best-practice sampling methods. In the circumstances of this case, however, where overexposure is admitted for August during which similar work was performed under similar conditions, and where the degree of measured overexposure was exceedingly high, we find that the evidence shows that Sweeney's methodology and results were sufficiently reliable to determine whether employees were overexposed to lead.

With regard to sampling procedures, we find that Sweeney's methods conformed in many respects with accepted guidelines. For instance, Sweeney calibrated the air flow rate of each pump before and after taking samples and determined that all of the flow rates were within the acceptable range prescribed by the Technical Manual. Sweeney also personally attached "all or nearly all" of the air sampling devices, positioning the filters on the shirt collar area pointing forward and "slightly downward." This placement is consistent with that recommended by Manganas expert Robert Leighton, who testified that the filter cassettes should be located "within . . . the workers' breathing zone" and positioned to prevent contaminants from falling into the cassette. In addition, Sweeney explained the monitoring procedure to the employees,

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[6] OSHA Instruction CPL 2-2.20B CH-1, (Nov. 13, 1990). Manganas acknowledges that the Technical Manual does not contain requirements to which the Secretary must adhere, but notes that any departure from its procedures is relevant to the reliability of the sampling results.

instructing them to try to do their work in a normal manner and keep the filter where he had attached it.

On the first day he conducted personal sampling, Sweeney checked some of the equipment periodically, but not always as frequently as indicated in the Technical Manual. However, he checked on the grit recyclers and forklift operators approximately every two hours, and followed the same procedures for the blasters sampled on September 22. On September 24, Sweeney checked the equipment worn by four employees vacuuming grit when they came out for breaks, and again at the end of the day, but he never entered the containment to check the equipment so as to avoid personal exposure to the hazards of airborne lead and the high-velocity steel used during blasting operations, a concern that Leighton also acknowledged. The location of Sweeney's monitoring and status checks from his position outside the containment were consistent with the "alternative procedures" that Leighton identified. Finally, at the end of sampling each day, Sweeney turned off the pumps, and capped and taped the filter cassettes, which he then stored in the trunk of his car. The samples remained there until he returned to his office, where he carefully prepared the filters for analysis and sent them to OSHA's Salt Lake City laboratory by certified mail.[7]

We also reject Manganas' contention that the sampling results were so variable as to undermine their validity. Sweeney's testing showed lead exposure for abrasive blasters sampled on September 21 and 22, ranging from 430 to 4,960 $\mu g/m^3$ measured outside the hood, and from 0 to 587 $\mu g/m^3$ measured inside the hood. Nonetheless, the majority of abrasive blasting samples taken outside the hood on September 21 and 22, showed lead exposures in the narrower range of 3,700 to 4,960 $\mu g/m^3$. Moreover, all but one of the ambient air sample results substantially exceeded the PEL, including the August 6 area sample taken from inside the containment that showed an 8-hour TWA of 110 $\mu g/m^3$. For the four employees recycling grit sampled on September 21, none of whom wore respirators, the lead exposure varied from 16.1 to

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[7] Manganas argues that Sweeney's sampling results are unreliable, in part, because he left the filter cassettes "unsealed" in his car trunk for a number of days. The evidence shows, however, that Sweeney protected the contents of the cassettes with a cap and tape until he had an opportunity to weigh and "seal" the cassettes in preparation for mailing. Manganas provides no scientific reason to show why Sweeney's handling of the filter cassettes in this manner would have undermined their integrity.

647 μg/m^3, with three of the four levels substantially exceeding the PEL. For the four employees who vacuumed grit and were sampled on September 24, the exposure range was the narrowest – 4,100 to 4,620 µg/m^3. Thus, despite some variability, we find that the sampling results are largely consistent in showing exposure to lead at levels substantially exceeding the PEL.[8]

In these circumstances, we conclude that the record evidence supports the judge's finding that "[t]he overall consistency of [Sweeney's] sampling as well as the lack of any significantly different test results leads to the finding that Compliance Officer Sweeney's sampling data is reasonably reliable." As noted, this finding is also supported by the fact that Sweeney's testing showed a large number of extremely high readings, and Manganas' admission that abrasive blasting in August, under similar conditions, created airborne lead levels exceeding the PEL. Accordingly, we find that the Secretary has established the requisite overexposures in support of the cited violations, as further addressed below.[9]

II. Serious Citation 1

A. Item 5: 29 C.F.R. § 1926.59(h)(1) (hazard communication)

Under this citation item, the Secretary alleged that Manganas failed to provide information to numerous employees about the hazards associated with a number of chemicals used at the worksite, as well the contents of the hazard communication (HazCom) standard and the employer's HazCom program.[10] The judge affirmed an other-than-serious violation based on evidence unrelated to any lead hazards.[11]

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[8] We note that Manganas' outside consultant, Rust Environment & Infrastructure (Rust) (then known as SEC Donohue Environment & Infrastructure), performed ambient lead exposure testing in August and September 1993. As with Sweeney's sampling, Rust's tests also showed some variability in exposures above and below the PEL.

[9] We do not address whether the Secretary's computer model evidence contributes to the exposure assessments here as we find that the sampling evidence is sufficient, and vacate on other grounds the particular items for which the Secretary relied on the model.

[10] At the time of the alleged violation, the cited standard provided:

> (h) *Employee information and training.* Employers shall provide employees with information and training on hazardous chemicals in their work area at the time of their initial assignment, and whenever a new hazard is introduced into their work area.

(continued)

We find that the record supports affirming a violation. IH Sweeney testified, and Manganas does not deny, that the citation's enumerated chemicals were hazardous and were used at this worksite. According to Sweeney, numerous employees indicated to him that they had not been trained in some or all of the chemical hazards.[12] One employee received no information regarding the hazards of any chemical other than lead. This evidence is unrebutted and consistent with testimony provided by Manganas painter/blaster Lloyd May, who stated that he never received training about the paints and chemicals at the work site, and did not know the

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(1) *Information.* Employees shall be informed of:

(i) The requirements of this section;

(ii) Any operations in their work area where hazardous chemicals are present; and,

(iii) The location and availability of the written hazard communication program, including the required list(s) of hazardous chemicals, and material safety data sheets required by this section.

[11] Manganas claims that this item should have been grouped with two alleged lead training violations – Citation 1, Items 23 and 24 – which the Secretary cited under the lead standard rather than the HazCom standard. As discussed below, the lead standard is unique to lead training and predicated on exposure to lead at or above the action level for specified time periods. Accordingly, the lead standard's applicability is predicated on different criteria than that of the HazCom standard, and abatement of the HazCom and lead training items would not be duplicative. In these circumstances, we find that the judge properly assessed separate penalties for the separately cited training items.

[12] We reject Manganas' contention that the judge erroneously admitted Sweeney's testimony concerning written employee statements made during the investigation. The Commission has held that employee statements to compliance officers concerning work activities are admissible. *E.g., Regina Constr. Co.*, 15 BNA OSHC 1044, 1047, 1991 CCH OSHD ¶ 29,354, p. 39,466 (No. 87-1309, 1991) (admitting compliance officer's testimony detailing employees' statements about their work activities under "plain language" of Federal Rules of Evidence, Rule 801(d)(2)(D)). Although the statements were not provided to Manganas prior to the hearing and the declarants were not called to testify, Manganas does not contend that it made or was denied a request for a continuance, nor did it seek to call these individuals to testify once their identity was revealed. *See Lanzo Construction Co.*, 20 BNA OSHC 1641, 1652 n.19, 2002-04 CCH OSHD ¶ 32,732, p. 51,928 n.19 (No. 97-1821, 2004) (Chairman Railton, concurring) (indicating that prejudice from failure to reveal privileged information prior to trial can be cured by continuance) (citation omitted).

meaning of hazard communication. Accordingly, we affirm this violation as other-than-serious.[13]

B. Item 6(a-e): 29 C.F.R. § 1926.62(c)(1) (abrasive blaster lead overexposure)

Under these items, the Secretary alleged that Manganas exposed five abrasive blasters to lead levels that exceeded the PEL. The judge affirmed all of the cited instances under this standard, which provides as follows:

> (c) *Permissible exposure limit.* (1) The employer shall assure that no employee is exposed to lead at concentrations greater than fifty micrograms per cubic meter of air (50 μg/m^3) averaged over an 8-hour period.

The standard also prescribes that any exposure assessment should take into account the effect of an employee's use of respiratory protection, as follows.

> When respirators are used to limit employee exposure as required under paragraph (c) of this section and all the requirements of paragraphs (e)(1) and (f) of this section have been met, employee exposure may be considered to be at the level provided by the protection factor of the respirator for those periods the respirator is worn.

29 C.F.R. § 1926.62(c)(3).[14] For the following reasons, we reverse the judge and vacate these citation items.

IH Sweeney conducted personal sampling of five abrasive blasters on September 21 and 22, for whom Manganas provided abrasive blasting helmets with integrated respiratory protection that, at the time, was rated up to 25xPEL (1,250 μg/m^3). Sweeney's measurements showed outside-the-hood exposures to airborne lead in excess of the 50 μg/m^3 PEL for each blaster, as follows: (a) 4,960 μg/m³; (b) 4,070 μg/m³; (c) 3,700 μg/m³; (d) 1,620 μg/m³; and (e)

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[13] The judge found the violation non-serious because the Secretary did not show that Manganas' failure to provide the required information relating to chemicals other than lead "gave rise to a particular hazard." The Secretary contends that the judge erred, but delineated only the health effects of lead, and did not respond to the evidentiary deficiencies the judge noted. In these circumstances, we find no basis on which to disturb the judge's characterization.

[14] The reference to sections 1926.62(e)(1) and (f), pertain to engineering control requirements that were not yet in effect at the time OSHA sampled these employees, § 1926.62(r)(1), as well as work practice controls and respiratory protection requirements. The Secretary does not allege that any failures to timely implement administrative and/or work practice controls would have obviated Manganas' ability to establish compliance through the use of appropriate respiratory protection. Accordingly, we do not address any effect such failures might have on our assessment of whether Manganas violated the cited standard.

430 μg/m³. As discussed above, however, the Secretary later reassessed the protective value of the integrated respiratory protection that Manganas provided, and determined that it was protective up to 1,000xPEL (50,000 μg/m³). Although we normally evaluate the facts and law as of the time the alleged violations occurred, the respirator protective value change was not due to a subsequent change in the equipment but, rather, a reassessment in light of emerging scientific knowledge that the equipment Manganas used was, in fact, always protective at the higher level. *See Joel Yandell d/b/a Triple L. Tower*, 19 BNA OSHC 1623, 1628, 1999 CCH OSHD ¶ 31,782, p. 46,538 (No. 94-3080, 1999) (noting that material time to examine most issues in Commission proceedings is "the time of the alleged violation(s)"). On this basis, we find that there was no overexposure for those employees who used the provided respiratory protection, as the exposure levels were all well within the protective rating of their respirators. Accordingly, we vacate Items 6(a), 6(c), 6(d), and 6(e).[15]

With respect to the employee whose measured "outside the hood" exposure is the subject of Item 6(b), the Secretary also issued a separate citation, Item 30, alleging a violation for respirator non-use. Indeed, the evidence shows that the employee did not wear a respirator at the time he was sampled, and that his "inside" measurement exceeded the PEL. Thus, abatement of any violation under Item 6(b) would be the same as that for Item 30 (use of proper respiratory protection). Accordingly, we vacate Item 6(b), and address the evidence pertaining to the employee's respirator usage in Item 30. *See United States Steel Corp.*, 10 BNA OSHC 2123, 2133-34, 1982 CCH OSHD ¶ 26,297, p. 33,235-236 (No. 77-3378, 1982) (vacating alleged overexposure violation as duplicative of specific engineering control and respirator violations); *Trinity Indus.* 20 BNA OSHC 1051, 1064, 2002-04 CCH OSHD ¶ 32,666, p. 51,410 (No. 95-1597, 2003) (vacating duplicative citation involving "substantially the same violative conduct

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[15] With respect to Item 6(e), we note that the measured "outside the hood" exposure was the lowest of the four sampled employees (430 μg/m³), and was within the 25xPEL protective factor in effect at the time the citation issued, which would support vacating this item regardless of the respirator's changed rating. However, the "inside the hood" lead exposure for that employee measured at 52.9 μg/m³, which exceeded the PEL. The Secretary did not rely on the "inside" measurement, however, and it is so anomalous that it appears unreliable. In these circumstances, we find that the Secretary's silence on this matter, in conjunction with sufficiently inconsistent data to substantially question the reliability of this particular measurement, supports vacating Item 6(e).

[that requires] the same means of abatement") (citations omitted), *aff'd without published opinion*, 107 F. App'x 387 (5th Cir. 2004).

C. Item 7: 29 C.F.R. § 1926.62(d)(8)(i) (written notice to employees of air sampling results)

Under this item, the Secretary alleged that Manganas failed to timely report to employees the air sampling results that Manganas obtained from Rust. The cited standard provides:

> (d) *Exposure assessment*—(1) *General.* (i) Each employer who has a workplace or operation covered by this standard shall initially determine if any employee may be exposed to lead at or above the action level [30 μg/m^3].
>
> . . . .
>
> (8) *Employee notification.* (i) Within 5 working days after completion of the exposure assessment the employer shall notify each employee in writing of the results which represent that employee's exposure.

Manganas hired Rust to conduct personal sampling of numerous employees shortly after OSHA commenced its inspection, which Rust performed in August and September 1993. The evidence shows that two employees did not receive the required written notice of their exposure results. Abrasive blaster [redacted], sampled by Rust on August 5, testified that he never received written notice of the sampling results, which indicated exposure to 208.3μg/m^3 of lead. IH Sweeney testified that abrasive blaster [redacted], sampled by Rust on August 8, told him on September 23 that he had not received written notice of his sampling results, which showed exposure to 124 μg/m^3 of lead.[16]

The judge affirmed a serious violation, and found that "posting the results in the company trailer is not sufficient notification in writing to the employees." We note, however, that regardless of whether posting the results in the jobsite trailer would constitute sufficient written notice, Manganas does not contend that it timely did so. According to the record, Rust verbally informed Manganas of the August test results by the end of August, and we read the standard as requiring Manganas to at least notify [redacted] and [redacted] of their test results within five working

[16] We reject Manganas' challenge to the reliability of this particular testimony. Based on its specificity and consistency, we find no basis to overrule the judge's conclusion that this testimony is sufficiently reliable to make out a *prima facie* case that Manganas may then rebut.

days of that date.[17] Because neither employee was timely notified, we find that the Secretary established a *prima facie* case of noncompliance with the cited standard that Manganas did not rebut. Based on this evidence, we affirm this citation item.[18]

D. Item 8: 29 C.F.R. § 1926.62(e)(2)(i) (written compliance program)

Under this item, the Secretary alleged that Manganas violated the cited provision because it did not have a written compliance plan based on the requirements of the lead in construction standard. The provision states that "[p]*rior to the commencement of the job* each employer shall establish and implement a written compliance program to achieve compliance with paragraph (c) [specifying permissible exposure limit] of this section." (Emphasis added.) A different subsection of the standard, not cited here, also prescribes that "[w]ritten programs shall be revised and updated at least every 6 months to reflect the current status of the program." § 1926.62(e)(2)(v). It is undisputed that Manganas commenced its paint removal operations at the worksite prior to the effective date of the standard, and that it did not have a written compliance plan either by the standard's June 3, 1993 effective date, or by the end of the applicable startup period on August 2, 1993.

The judge vacated this item based on his finding that:

> because the Lead in Construction Standard became effective after the commencement of the job, the cited standard, which requires that certain actions be taken "before the onset of work," could not possibly apply to the work Respondent was performing at the Jeremiah Morrow Bridge.

The Secretary contends that the judge erred in vacating this item, noting that she interprets the cited provision to require a written compliance plan "upon the standard's effective date" even if work commenced prior to that date. She argues that:

> This interpretation is supported by Section 1926.62(r)(1) which requires compliance with paragraph (e)(2)(i) "as soon as possible" following the effective date of the standard. Respondent's employees were therefore entitled to the

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[17] Regardless of whether the standard requires employee notification of the sampling results within five working days of the sampling, or within five days of the employer's *receipt* of the sampling results, we note that the outcome here would be the same.

[18] We address the characterization of citation items only where raised on review. *See Commission Rules of Procedure,* § 2200.92(a) (issues on review "ordinarily" those stated in direction for review, raised in petitions for discretionary review, or stated in any later order).

protection of a plan to control their exposure to airborne lead as soon as possible after June 3, 1993.

For the following reasons, we find the cited standard applicable, but affirm the vacatur based on lack of notice. The judge's interpretation is consistent with the well-settled principle that statutory language is to be construed according to its plain meaning. *E.g., Caminetti v. United States,* 242 U.S. 470, 485 (1917); *Reich v. Gen. Motors Corp.*, 89 F.3d 313 (6th Cir. 1996) ("we need not defer to the Secretary's interpretation where an 'alternative reading is compelled by the regulation's plain language or by other indications of the Secretary's intent at the time of the regulation's promulgation'") (citation omitted). The phrase "prior to the commencement of the job" presents no apparent ambiguity. Moreover, the Secretary used different language in another part of the lead standard that also implicated operations commenced prior to the start-up period, specifying that prescribed initial training is required "prior to the time of job assignment or prior to the startup date for this requirement, whichever comes last." 29 C.F.R. § 1926.62*(l)*(1)(iii) (Citation 1, Item 24). The compliance program provision cited here contains no such alternatives.

It is also well-established, however, that even "plain meaning" may have to yield where its result would be absurd. *See, e.g., Unarco*, 16 BNA OSHC 1499, 1502, 1993-95 CCH OSHD ¶ 30,294, p. 41,731 (No. 89-1555, 1993) ("[i]t is well established that a statute or, in this case, a standard must be construed so as to avoid an absurd result") (citing *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564 (1982)). *Accord Hartford Underwriters v. Union Planters*, 530 U.S. 1, 6 (2000). We find that principle applicable here. The preamble to the lead in construction standard terms the written compliance plan "essential," which supports the Secretary's contention that she intended the plan to be required upon the standard's effective date, even for ongoing work projects. 58 Fed. Reg. at 26,601. The requirement under § 1926.62(e)(2)(v), that compliance plans "be revised and updated at least every 6 months to reflect the current status of the program," also supports her claim that the provision's applicability is an essential component of the lead in construction standard. Yet, if the initial program provision were interpreted as inapplicable to work commenced prior to the standard's effectuation, the bi-annual update provision would also be inapplicable regardless of how long the work continued after the standard's effective date, as it would be anomalous to require updating a program that had never been required in the first place. In these circumstances, the facts of this case present the unusual situation where "plain meaning" must give way in order to

avert an absurd result. *See Consumer Prod. Safety Comm'n v. GTE*, 447 U.S. 102, 108 (1980) (indicating "clearly expressed legislative intent" that is contrary to statutory language may alter ordinary rule that statutory language is regarded as conclusive). Accordingly, we conclude the cited provision was applicable to the worksite, despite the job's commencement prior to the standard's effective date.

Nonetheless, in view of the complexity of the issue and exception to the usual "plain meaning" interpretation, we agree with Manganas' contention that it lacked fair notice that the written program requirement applied to it under the circumstances of this case. *E.g., Diebold v. Marshall*, 585 F.2d 1327, 1337-39 (6th Cir. 1978) (dismissing citations where cited standard's general wording failed to provide sufficient warning of its applicability). Accordingly, we vacate the citation item for lack of fair notice.

E. Item 9: 29 C.F.R. § 1926.62(f)(3)(ii) (respirator fit testing)

Under this item, the Secretary alleged that Manganas failed to perform respirator fit testing "at all, or by the required date." The section in effect at the time the citation issued provided as follows:

> 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 judge rejected Manganas' argument that the cited provision was inapplicable. He affirmed a serious violation based on his finding that "[t]he term 'initial fitting' is broad enough to encompass the first time a respirator is worn, not necessarily the time when work on the project began." For the following reasons, we reverse the judge and vacate this citation item.

Manganas argues that the judge's decision "does not address how the provision applies to employers who began working on a project prior to the effective date and who had already conducted initial fit testing and who, therefore, could not comply with this provision." It contends that the time for "initial" fitting here occurred prior to the June 3, 1993 effective date of the standard and, in any event, the evidence showed that its employees were properly fit tested. The Secretary does not address the applicability of this provision on review. In her post-hearing reply brief, she argued only that "[t]he term 'initial fitting' in the standard refers to the point at which the employee first wears a respirator, not the point in time at which the project begins." Although she also notes that under the prior standard, 29 C.F.R. § 1926.103(g)(3), an opportunity

for respirator fitting was to be provided, she did not cite Manganas for a violation of that standard.

While we agree with the judge that an "initial fitting" for a particular employee can occur at any time during the project, such as for newly-hired or reassigned employees, that does not resolve the applicability question for employees who began work and wore respirators prior to the standard's effective date or end of the start-up period. We read the provision – "at the time of initial fitting" – to mean that the required fit tests must be performed at the time the respirator is selected for first use. Here, the record indicates that the employees' first use of the respirators that required fit-testing occurred prior to the standard's effective date and end of the start-up period. Moreover, in contrast to the written program item discussed above, we do not find non-applicability of the fit-testing requirement here contrary to the overall intent of the standard, particularly because such testing must occur "at least every six months" regardless of whether and when it was initially performed. In these circumstances, we vacate this citation item.

F. Item 10: 29 C.F.R. § 1926.62(g)(1) (protective clothing)

Under this item, the Secretary alleged that Manganas failed to provide protective clothing to employees exposed above the PEL without regard to the use of respirators. The cited provision requires that under such circumstances, the employer must provide at no cost, and assure the use of, protective work clothing and equipment that prevents contamination of the employee and the employee's garments.[19] IH Sweeney testified that he observed Manganas employees not wearing the protective clothing required by the standard during the August

[19] The standard states in full:

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

inspection, and that his interviews with employees at that time indicated that none had been provided. When Sweeney returned in late September, the employees who regularly worked in the containments had been provided with coveralls, but he observed that no work shoes or disposable shoe coverlets had been provided, and the grit recycling employees had no coveralls. In addition, employee [redacted] testified that during his work moving the containments from August 9 until Labor Day, he was never provided with work clothes or footwear.

The judge affirmed a serious violation based on this unrebutted evidence.[20] He also rejected Manganas' argument that the conditions were *de minimis*,[21] stating that "[l]ead is a hazard where it can be absorbed, ingested or inhaled – all routes of entry to which employees were exposed due to the lack of appropriate protective clothing. These hazards existed at least until Manganas initiated and enforced a full protective clothing policy." He further found that the seriousness of the violative conditions was increased by the employees' repeated use of unlaundered clothing, of which Manganas was aware.

We see no basis for setting aside the judge's disposition. The unrebutted testimony of the Ohio Department of Transportation (ODOT) project engineer, Mark Wilson, establishes that Manganas performed abrasive blasting from August 2-8 and August 17-31. Moreover, Manganas admitted that the abrasive blasting during August released airborne lead into the containment atmosphere in amounts that exceeded the PEL, and did not rebut Sweeney's testimony that it failed to provide its exposed employees with required protective equipment. Accordingly, we affirm a serious violation.

G. Item 11: 29 C.F.R. § 1926.62(g)(2)(i) (laundering of protective clothing)

The only issue before us with regard to this citation item is characterization. The cited standard requires clean protective clothing, as follows.

> (2) *Cleaning and replacement*. (i) The employer shall provide the protective clothing required in paragraph (g)(1) of this section in a clean and dry condition at least weekly, and daily to employees whose exposure levels without regard to a

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[20] Under section 17(k) of the Act, 29 U.S.C. § 666(k), a violation is serious where there is a "substantial probability that death or serious physical harm could result" from the cited condition.

[21] Section 9(a) of the Act, 29 C.F.R. § 658(a), defines *de minimis* violations as having "no direct or immediate relationship to safety or health."

respirator are over 200 μg/m^3 of lead as an 8-hour TWA.

It is undisputed that Manganas failed to provide for the laundering of employee work clothing until September 1993. Manganas employees were exposed to the risk of lead exposure due to contaminated clothing from before the August 2 end of the start-up period until sometime in September when Manganas commenced compliance.

The judge affirmed the serious classification, noting that the hazards discussed under the protective clothing citation item, above, are also applicable here. He supported his decision, as follows.

> Employees not provided with properly cleaned . . . clothing were exposed for longer periods of time and to greater accumulations of lead dust than would have occurred had Respondent been in compliance with the standard. Given the consequences of lead exposure the violation is serious.

Manganas argues that laundering of protective clothing "was provided immediately after OSHA arrived," and that any violation should be reclassified as other-than-serious. Manganas' argument, however, does not address the judge's reasoning or the statutory basis of a serious characterization. As noted above, a violation is serious where there is a "substantial probability" of death or serious physical harm. Commission cases have held that "[t]his does not mean that the occurrence of an injury must be a substantially probable result . . . but, rather, that a serious injury is the likely result if injury does occur." *Schuler-Haas Electric Corp.*, 21 BNA OSHC 1489, 2005 CCH OSHD ¶ 32,816 (No. 03-0322, 2006) (citation omitted) (affirming as serious violation for single-day entry into asbestos-regulated area without respirator use). Based on the evidence that abrasive blasting occurred on August 2-8 and 17-31, from which it is undisputed that lead dust and particulate were released into the containment atmospheres in amounts that Manganas admits exceeded the PEL, we find that the lead exposure from contaminated clothing during this period posed a risk of serious injury. Accordingly, we affirm the judge and characterize this violation as serious.

H. Item 12(a) and (b): 29 C.F.R. § 1926.62(g)(2)(v) (clothing containers) and (vii) (container warning label)

Under this grouped citation item, the Secretary alleges that prior to September 1993, lead contaminated work clothing was placed "in close proximity to street clothes, respirators and food containers" or "tossed onto the floor" inside the changing area of the worksite trailer, and that barrels, drums and boxes into which lead contaminated clothing and equipment was discarded did not display the required warning label. The cited provisions state:

> (v) The employer shall assure that contaminated protective clothing which is to be cleaned, laundered, or disposed of, is placed in a closed container in the change area which prevents dispersion of lead outside the container.
>
> (vii) The employer shall assure that the containers of contaminated protective clothing and equipment required by paragraph (g)(2)(v) of this section are labeled as follows:
>
> > Caution: Clothing contaminated with lead. Do not remove dust by blowing or shaking. Dispose of lead contaminated wash water in accordance with applicable local, state, or federal regulations.

The judge affirmed, as serious, a single grouped violation of the two cited sections and assessed a single penalty. He found that "there was no particular container into which contaminated clothing would be placed" and that "even after specific containers were provided for the placement of protective clothing, they were not labeled as such for some period of time." Based on our review of the evidence, we vacate instance (a) relating to provision of a container, and affirm instance (b) regarding the failure to properly label the container.

IH Sweeney initially testified that inside the worksite changing trailer, he observed "lead contaminated work clothing" hanging on nails driven into the trailer walls. Sweeney also stated that he "saw no container for the storage of lead contaminated work clothing prior to September of 1993[,]" but that during the week of September 21st through 24th, he observed such clothing inside and on top of containers such as boxes, drums and barrels. On cross-examination, however, Sweeney was asked whether he was aware that Manganas had clothing disposal containers prior to September – to which he replied, "I think they did." Sweeney also testified that the required container label was "not attached to any containers until late in the week of September 24th." Foreman Lang testified that "at some point on the project" Manganas began to provide coveralls that would be discarded "in a 55 gallon drum" labeled "contaminated clothing."

We find that the evidence as a whole, in particular Sweeney's contradictory testimony on cross examination, preponderates against a finding that Manganas failed to provide the required container. In these circumstances, we vacate instance (a) of the citation item. However, Sweeney's testimony as to the lack of required warning labels was unequivocal and not rebutted by Lang's testimony, which did not specify a time period. Moreover, the label that Lang testified Manganas placed on the barrels warned only of "contaminated clothing" rather than the

full "caution" delineated under the cited standard, § 1926.62(g)(2)(vii). Accordingly, we affirm instance (b) for Manganas' failure to properly label its contaminated clothing containers.

I. Item 13: 29 C.F.R. § 1926.62(g)(2)(vi) (lead warnings to clothing launderers)

Under this item, the Secretary alleged that Manganas failed to provide written information about the potentially harmful effects of lead to employees who cleaned and laundered lead contaminated respirators and work clothing at home. The cited section provides:

> The employer shall inform in writing any person who cleans or launders protective clothing or equipment of the potentially harmful effects of exposure to lead.

The judge affirmed a serious violation. He held that "[t]here could hardly be a plainer meaning of 'any person' than that urged by the Secretary[,]" who argued that the required warning "must be in writing and must be given to any person who launders the clothing, including the employee himself." The judge also rejected Manganas' contention that employees were adequately trained, noting that the alleged training provided by Foreman Lang was "described vaguely, at best[,]" and that "the more thorough and complete lead training provided by Respondent occurred after the dates of the alleged violation." He acknowledged, however, that a "violation of the Act might not exist . . . if an employee who launders his/her own clothing has previously been given written notice of the dangers of lead exposure as a result of employment training."

Manganas does not dispute that employees laundered their own work clothes during the relevant period. Rather, it argues that because employee lead hazard training is required by a different provision of the standard, the information that must be conveyed specifically to launderers relates only to those who are not also employees covered by the other provision. It also contends that it advised employees of the "the harmful effects of lead."[22]

Of the three types of information/training citations at issue in this case, only the launderer lead training standard specifically requires that the information be provided in writing. For this item, the Secretary relies on IH Sweeney's testimony that, "prior to September," numerous

[22] We reject Manganas' suggestion that the cited provision can only apply to individuals hired solely as launderers. Regardless of the discussion Manganas references in the general industry lead standard's preamble, there is no such limitation contained in the plain wording of the standard cited here.

employees, including [redacted], laundered their own work clothes at home and received no lead training. Although the record contains a HazCom training acknowledgment signed by [redacted], it is dated April 6, 1994, long after the period covered by the citation. In the absence of any other evidence that Manganas provided the required training to [redacted], we find that the unrebutted evidence establishes that Manganas failed to provide written lead hazard information to [redacted] at the time he laundered his work clothing at home. Accordingly, we affirm this citation item.

J. Item 14: 29 C.F.R. § 1926.62(h)(3) (sweeping up lead particles)

Under this item, the Secretary alleged that Manganas improperly removed debris from the trailer floor by dry sweeping rather than vacuuming with proper equipment. The cited section provides:

> (h) *Housekeeping*—(1) All surfaces shall be maintained as free as practicable of accumulations of lead.
>
> . . .
>
> (3) Shoveling, dry or wet sweeping, and brushing may be used only where vacuuming or other equally effective methods have been tried and found not to be effective.

The judge affirmed a serious violation, and Manganas does not dispute that two employees swept grit and dust from the floor of the storage trailer rather than use an approved type of vacuum. Manganas argues only that the citation should be vacated because there was no evidence that the grit or dust contained lead. The judge disagreed, stating that "it is logical and reasonable to infer that a trailer used to store equipment, including respirators, used on a site at which significant amounts of airborne lead exist, will have included in the dust and grit admittedly accumulated on its floor, some amount of lead."

We agree with the judge. The Commission and courts have held that "reasonable inferences can be drawn from circumstantial evidence." *N. Landing Line Constr.Co.*, 19 BNA OSHC 1465, 1469, 2001 CCH OSHD ¶ 32,391, p. 49,825 (No. 96-0721, 2001) (finding prima facie showing based on expert testimony that was "consistent with" physical evidence) (citation omitted). *Accord Kaspar Wire Works, Inc.*, 268 F.3d 1123 (D.C. Cir. 2001) (upholding factual finding based on reasonable inference from circumstantial evidence). Here, the record establishes that the employees' work created a significant amount of lead dust and debris, and that these employees entered the worksite trailer to change clothes during the relevant period.

We find that the judge properly inferred from this evidence that employees were more likely than not to have deposited some amount of lead-containing dust and debris as they walked into the trailer wearing their work shoes and clothing, some of which was deposited in "contaminated clothing" barrels located inside the trailer. Accordingly, we affirm this citation item.

The judge did not explain the basis of his characterization of this item as serious. Although the Secretary argues that inhalation of lead "scattered in the air as dust" is "the most important source of occupational lead absorption[,]" she does not address the lack of record evidence concerning the concentration of lead in the debris that Manganas employees swept up from the trailer floor. In these circumstances, we find the evidence insufficient to establish that the employees' exposure to lead from sweeping the debris created a "substantial probability that death or serious physical harm could result." Section 17(k) of the Act, 29 U.S.C. § 666(k). *See Foster-Wheeler Constructors, Inc.*, 16 BNA OSHC 1344, 1349-50, 1993-95 CCH OSHD ¶ 30,183, pp. 41,525-26 (No. 89-287, 1993) (acknowledging difficulty in resolving characterization issue where evidence of airborne asbestos fiber level was limited). Accordingly, we affirm this citation item as other-than-serious.

K. Item 15: 29 C.F.R. § 1926.62(h)(5) (lead dust removal methods)

Under this item, the Secretary alleged that Manganas used compressed air without proper ventilation to remove lead-containing dust from the steel bridge in preparation for repainting. According to the Secretary, the dust could have been removed "by vacuuming or wipe down methods." The cited section provides:

> Compressed air shall not be used to remove lead from any surface unless the compressed air is used in conjunction with a ventilation system designed to capture the airborne dust created by the compressed air.

The judge affirmed this item, finding that the alleged facts were undisputed, and he rejected Manganas' arguments that the standard was inapplicable and its contract with ODOT required that it blow down the dust with compressed air. For the following reasons, we affirm the judge.

With respect to applicability, Manganas essentially argues that use of a ventilation system in these circumstances amounts to an engineering control that was not yet required under the standard's start-up dates. However, the 120-day start-up exemption from the implementation of engineering controls is applicable, by its terms, only to those "engineering controls specified by paragraph (e)(1) of this section." 29 C.F.R. § 1926.62(r)(1) and (2). The item cited here is a "housekeeping" measure listed under paragraph (h), with an applicable start-up date that is "no

later than 60 days from the effective date of this section." 29 C.F.R. § 1926.62(r)(1). Moreover, as the Secretary points out, Manganas was not required to use compressed air and its concomitant ventilation system to remove the dust. According to IH Sweeney, alternative removal methods included vacuuming and wiping down the surfaces with cloth. Although Manganas contends that its contract with ODOT required compressed-air dust-removal, the contract terms permit pre-painting residue removal "with a vacuum system equipped with a brush-type cleaning tool, or by double blowing." ODOT project engineer Wilson testified that Manganas could have vacuumed the steel to remove the necessary material. In these circumstances, we find that the judge correctly held that the standard applies.

We also reject Manganas' contention that it had an appropriate truck vacuum system on site, which "was installed as an engineering control in October, as the standard requires." The vacuum trucks were used to remove the abrasive residue from the containments *after* blasting for transport to the recycling yard. There is no evidence that this vacuum system was "designed to capture the airborne dust created by the compressed air," as required by the cited provision. Moreover, Manganas' installation and use of the vacuum truck system post-dates the inspection. Accordingly, we affirm this citation item.

L. Item 16: 29 C.F.R. § 1926.62(i)(1) (eating, drinking, and smoking in lead contaminated areas)

Under this item, the Secretary alleged that Manganas permitted the presence and consumption of tobacco products in the grit recycling area. The cited section provides:

> (i) *Hygiene facilities and practices*. (1) The employer shall assure that in areas where employees are exposed to lead above the PEL without regard to the use of respirators, food or beverage is not present or consumed, tobacco products are not present or used, and cosmetics are not applied.

The judge affirmed a violation based on his findings that OSHA established exposure above the PEL in the grit recycling area, and that "unrefuted" testimony established that employees "ate, drank and smoked inside the containment area and the grit recycling area."

For the reasons previously discussed, we reject Manganas' contention that this item is unproven because OSHA's sampling results are unreliable. We also reject its contention that the Secretary failed to show that food, beverages, or tobacco were present or used during the periods

when the ambient lead level exceeded the PEL. The record contains IH Sweeney's unrefuted testimony that he observed Manganas "employee [redacted] smoking in the grit recycling area on September 21, 1993."[23] When asked whether [redacted] was "an employee who was exposed to lead above the permissible exposure limit[,]" Sweeney stated: "Yes. I had air sampling equipment attached to him on that day and the result of the air sampling was that he was exposed to almost triple the permissible limit." Sweeney's sampling worksheet shows that the sampling device was attached to [redacted] on September 21 from 8:16 a.m. until 11:53 a.m., and from 12:23 p.m. until 3:36 p.m., during which time [redacted] wore a respirator "around the neck but not over the face" and worked in the recycling area "dumping grit from barrels into the recycling system." Based on this evidence, we find that tobacco was present and/or used in the recycling area on September 21 sometime during the six and one-half hours that [redacted] was monitored and during which his lead exposure exceeded the PEL. Accordingly, we affirm this citation item.

M. Items 17, 18, and 19: 29 C.F.R. §§ 1926.62(i)(2)(ii), (iii), and (i)(3)(i) (hygiene)

Under these items, the Secretary alleged that Manganas did not provide separate storage facilities for work clothing/equipment and street clothes (Item 17), did not ensure that employees left any contaminated equipment and clothes at the worksite (Item 18), and did not provide shower facilities (Item 19). The cited sections provide:

> (i) *Hygiene facilities and practices.*
>
> . . .
>
> (2) *Change areas.*
>
> . . .
>
> (ii) The employer shall assure that change areas are equipped with separate storage facilities for protective work clothing and equipment and for street clothes which prevent cross-contamination.
>
> (iii) The employer shall assure that employees do not leave the workplace wearing any protective clothing or equipment that is required to be worn during the work shift.
>
> (3) *Showers.* (i) The employer shall provide shower facilities, where feasible, for use by employees whose airborne exposure to lead is above the PEL.

[23] Manganas does not claim that it was unaware that [redacted] smoked in the containment, and May and [redacted] testified that employees, including supervisor [redacted] smoked "everywhere" on the worksite, including inside the containments.

The judge affirmed all three violations based on the following factual findings, which we find are supported by the record.

> Testimony which is unchallenged and unrebutted by Respondent establishes that work clothes and street clothes were stored alongside one another and that prior to the installation of laundry facilities, employees left the worksite at the end of their shift still wearing work clothing. The lack of shower facilities prior to the inspection is also unchallenged. These conditions were admittedly known to management personnel.
>
> . . .
>
> Each of the violations . . . contributed to increasing the amounts of lead to which the affected employees were exposed and could absorb. As such, they are serious violations.

With respect to Item 17, Manganas does not deny that separate storage facilities for work clothing/equipment and street clothes were not provided. Rather, it contends that this item is duplicative of Item 12(a), regarding its failure to provide the required closed container for contaminated clothing. As discussed above, however, we have vacated Item 12(a) due to insufficient evidence of a failure to provide a lead-contaminated clothing *container*. Here, Manganas does not deny that it failed to provide the required separate *facilities* for storing work clothes and street clothes. Accordingly, we affirm Item 17.

With respect to Item 18, Manganas contends that the evidence of its failure to ensure that employees did not leave the worksite with work clothes and equipment is unreliable. It did not, however, elicit any rebuttal evidence, and relies only on assertions that it provided protective coveralls on September 21, before which, it claims, "no blasting was taking place." We find that the evidence supports affirming the judge. IH Sweeney testified that employee [redacted] told him that he wore his lead contaminated work boots home approximately half the time, and that employee [redacted] told him that he also wore his work shoes home. Moreover, ODOT project engineer Wilson testified that Manganas performed abrasive blasting from August 2-8 and August 17-31, and Manganas admitted that "the amount of airborne lead within the containment while blasting operations were in progress during the month of August 1993 exceeded 50 $\mu g/m^3$. In these circumstances, we find that the evidence establishes Manganas' noncompliance with the cited standard, and affirm Item 18.

With respect to Item 19, Manganas does not deny that it failed to provide shower facilities until September 14, but claims that any violation should be *de minimis* because that was the soonest it could feasibly comply "after learning of the possible applicability of the Lead

Standard" and there was little employee exposure until then in the absence of full blasting. Based on the wording of the standard and record evidence, we affirm the violation. *See Froedtert Mem. Lutheran Hosp., Inc.*, 20 BNA OSHC 1500, 1509, 2002-04 CCH OSHD ¶ 32,703, p. 51,738 (No. 97-1839, 2004) (citation omitted) (rejecting employer defense of ignorance that standards applied).

We also affirm the judge's serious characterization. As previously discussed, the record establishes that employees were overexposed to lead during abrasive blasting in early August, prior to Manganas' acquisition of shower facilities. Based on the well-established adverse health effects of lead exposure, we see no basis on which to conclude that Manganas' failure to provide the required showers had "no direct or immediate relationship to safety or health." Section 9(a) of the Act, 29 C.F.R. § 658(a) (defining *de minimis)*.

N. Item 20(a-c): 29 C.F.R. § 1926.62(i)(4)(iii) (hygiene – facilities and practices)

Under this item, the Secretary alleged three instances of employee failures to wash hands or faces in the following circumstances: (a) on September 21, abrasive blasting employees stepped out of the containment and drank water; (b) on September 21, a laborer smoked a cigarette in the grit recycling area; and (c) on September 22, an abrasive blaster and a bridge-top worker smoked cigarettes on the bridge deck. The cited section provides:

> The employer shall assure that employees whose airborne exposure to lead is above the PEL, without regard to the use of respirators, wash their hands and face prior to eating, drinking, smoking or applying cosmetics.

The judge affirmed a serious violation as to all three items. Manganas argues that the Secretary failed to establish overexposure and knowledge of the violation, and that any violation should be grouped with Item 16, which also involves eating, drinking, and smoking in lead contaminated areas. Based on our review of the evidence, we affirm instances (a) and (c), and vacate instance (b).

Initially, we reject Manganas' contention that this citation item should be grouped with Item 16. As the Secretary's correctly argues, the standard cited in Item 16 pertains to activities performed "in[side] areas with toxic atmospheres[,]" while the standard cited here pertains to the same activities performed "after the employee has left the toxic atmosphere." We note, however, that the smoking allegation addressed in instance (b), is based on the same factual circumstances cited in Item 16. The evidence pertaining to both items shows that employee [redacted] smoked *inside* the recycling area, which is prohibited under the provision cited in Item 16, regardless of

hand or face washing. Because it would be illogical to separately cite Manganas for its failure to ensure proper hygiene for employee participation in a prohibited practice, we vacate instance (b).

Turning to instances (a) and (c), we find that the evidence establishes non-compliance. IH Sweeney testified that he personally observed the cited conditions, and his air sampling showed that abrasive blasting on September 21 and 22 exposed employees to airborne lead above the PEL. Based on this evidence, we find that the abrasive blasters who drank water on September 21 outside the containment, and who smoked on September 22 on the bridge deck, were required to wash their hands/faces before engaging in these activities.

With respect to knowledge, it is undisputed that the record lacks evidence of actual knowledge of these particular events. We find, however, that with the exercise of reasonable diligence, Manganas could have known of them. *E.g. Pride Oil Well Serv.*, 15 BNA OSHC 1809, 1814, 1991-93 CCH OSHD ¶ 29,807, p. 40,583 (No. 87-692, 1992). The incidents, though in "plain sight," were of short duration. The record shows, however, that employees regularly ate, drank, and smoked at the worksite without regard to washing. In particular, the record shows that Manganas failed to caution employees against eating and drinking without washing, and that employees did so "right under the bridge." Moreover, two employees testified that food and drink were regularly consumed inside the containment, where foremen/managers such as [redacted] worked. Although Nick Manganas testified that at the outset of the job the company told employees to wash their hands and faces after working in a containment area or after getting paint or dust on their hands, Manganas does not dispute or rebut the testimony of its employees that this request was routinely and openly ignored. Accordingly, we find that, with the exercise of reasonable diligence, Manganas could have known about the violative conditions. *See N & N Contractors, Inc.,* 18 BNA OSHC 2121, 2124, 2000 CCH OSHD ¶ 32,101, p. 48,240 (No. 96-0606, 2000) (finding constructive knowledge where evidence showed that company knew that its employees "regularly" engaged in violative conduct and employer "d[id] not contend otherwise"), *aff'd*, 255 F.3d 122 (4th Cir. 2001). Therefore, we affirm instances (a) and (c) of this item.

O. Item 21(a-o): 29 C.F.R. § 1926.62(j)(2)(ii) (medical surveillance – follow-up blood tests)

Under this citation item, the Secretary alleged that Manganas failed to provide repeat blood lead level tests to fifteen employees within two weeks of receiving test results that showed their blood lead levels were above 50 µg/dl. The cited section provides:

> *Follow-up blood sampling tests.* Whenever the results of a blood lead level test indicate that an employee's blood lead level exceeds the numerical criterion for medical removal under paragraph (k)(1)(i) of this section [50 µg/dl], the employer shall provide a second (follow-up) blood sampling test within two weeks after the employer receives the results of the first blood sampling test.

The judge affirmed a serious violation, based on evidence showing that the follow-up tests were untimely. Manganas argues that there is no proof that it "received the results of the first blood sampling test" more than two weeks before it provided follow-up testing. It does not deny, however, that it provided the first testing on August 5, that the results were accurate, and that it did not provide repeat testing until September 1. In fact, the evidence also shows that for instances (b), (c), (e), and (n), Manganas provided no repeat tests at all, which alone establishes a violation. In these circumstances, and based on evidence that Manganas had ample notice of the initial blood test results, we affirm this citation item.[24]

As the judge noted, Manganas hired Bethesda Share Occupational Health (Bethesda Share) at the onset of the OSHA inspection to perform employee blood lead testing. By letter dated August 9, 1993, Bethesda Share's Occupational Health Program director, Linda Ford, R.N., notified Manganas of the August 5 test results, pointing out that "there was 1 within the normal range and 23 outside the normal range." At the hearing, Ford testified that in addition to mailing the letter, she faxed a copy to Mr. Manganas at the number he provided and, consistent with her regular practice, spoke with him by telephone him that day to alert him to the fax and told him of her concern about the "23 that were above normal limits."

Although Manganas denies that it received the fax, it does not deny that Ford conveyed the test results by telephone on August 9. The cited provision does not predicate re-testing on *written* receipt of results. In addition, Manganas does not contend that it never received the August 9 letter, which it would have received more than two weeks prior to the September 1 re-testing. *Cf.* Fed. Rules Civ. Proc., Rule 6(e) (adding three calendar days to prescribed service periods when regular mail used); *Powell v. Comm'r*, 958 F.2d 53, 54 (4th Cir. 1992) (applying

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[24] We also reject Manganas' claim that its ignorance of the need for re-testing should excuse its noncompliance. It is well-settled that any misunderstanding about a respondent's legal obligations would not be relevant to whether it violated the standard. *See Froedtert Mem. Lutheran Hosp., Inc.*, 20 BNA OSHC at 1509, 2002 CCH OSHD at p. 51,736 (rejecting employer defense of ignorance that standards applied).

presumption that postal service officials properly discharge their official duties). We find that Ford's unrebutted testimony is sufficient to show noncompliance.

We also note that the judge specifically found that in addition to Ford's phone call, she faxed the testing results to Manganas on August 9. The judge rejected Manganas' assertion that "[t]here is every reason in the world not to believe Ms. Ford[,] [s]he has engaged in a classic cover-up." Manganas notes that Ford admitted that she had no written confirmation of the fax despite her usual practices to keep one and to maintain copious notes. Resolving this contrasting testimony, the judge credited Ford over Mr. Manganas, as follows.

> Andrew Manganas' demeanor while testifying, not reflected in the transcript, was observed to be more consistent with a less than candid witness tha[n] with a forthright one. He often hesitated in answering as if to consider possible alternative answers. He frequently lacked spontaneity and generally behaved as one lacking candor. He was clearly recalcitrant if not openly hostile on cross examination.

Those findings are specific, clearly explained, and based in substantial part on observations of the witness' demeanor – matters peculiarly within the knowledge of the judge. *See Valdak Corp.*, 17 BNA OSHC 1135, 1137 n.3, 1993-95 CCH OSHD ¶ 30,759, p. 40,740 (No. 93-0239, 1995) (articulating Commission's reluctance to reject judge's credibility findings based on first hand observation of witnesses' demeanor), *aff'd*, 73 F.3d 1466 (8th Cir. 1996). Accordingly, we affirm this citation item.

P. Item 22: 29 C.F.R. § 1926.62(j)(2)(iv) (medical surveillance – employee notification)

Under this citation item the Secretary alleged that Manganas failed to provide employees with the written results of blood lead level testing. The cited section provides, in pertinent part:

> *Employee notification.* (A) Within five working days after the receipt of biological monitoring results, the employer shall notify each employee in writing of his or her blood lead level . . . .

The judge affirmed a violation based on his finding, noted above, that Andrew Manganas was not credible when he testified that he provided the required results, and his testimony was outweighed by other more credible evidence. We find that the record evidence supports the judge's findings.

IH Sweeney testified that two employees told him on September 23, 1993, that they had not received written results of their blood lead level tests, and one said that he had received the information verbally. Employee [redacted] testified that despite repeated requests to Andrew Manganas and Joe Lang shortly after each test, he never saw the results of any of the three blood

lead tests that were taken nor was he verbally informed of the results. Bethesda Share Director Ford testified that when she told Andrew Manganas he was required to give the blood test results to the employees, his reply was "something like, 'I showed them their results.'" Mr. Manganas testified that when he received blood-monitoring results from Bethesda Share, he "made two copies of them. One was sent to [his] office in Pittsburgh, one [he] kept in [his] truck, and one [he] gave to the men." He further testified that he tried to give each employee a written copy of his monitoring results, but "sometimes they gave them back, sometimes they threw them away, [and] sometimes they took them."

The judge rejected Mr. Manganas' testimony as "not credible for the reasons set forth in the discussion of Item 21." As indicated in our discussion of that item, we see no basis upon which to reverse the judge's demeanor-based credibility findings. We also note that Mr. Manganas did not testify that he specifically provided any written test results to the three employees in question. In these circumstances, we find that the evidence establishes that Manganas did not "notify each employee in writing of his or her blood lead level." Accordingly, we affirm this citation item.

Q. Items 23 and 24: 29 C.F.R. §§ 1926.62*(l)*(1)(ii) and *(l)*(1)(iii) (information and training)

Under these citation items, the Secretary cited Manganas for two distinct factual conditions, each under separate paragraphs of the standard. Under Item 23, the Secretary alleged that "[f]or some employees, a training program covering [the lead in construction standard] was never provided[.]" The cited paragraph provides:

> (ii) For all employees who are subject to exposure to lead at or above the action level [30µg/m³] on any day . . . the employer shall provide a training program in accordance with paragraph (*l*)(2) of this section and assure employee participation.

1926.62*(l)*(1)(ii). The judge affirmed the violation based on IH Sweeney's testimony that employee Griffis told him on September 23 "that he . . . ha[d] not received any training about lead from Manganas." Sweeney sampled [redacted] for lead exposure on September 21, and calculated an exposure level of 149 µg/m³, well above the action level of 30 µg/m³.

Also in evidence, however, is a signed acknowledgment dated April 1993, showing that [redacted] received HazCom training from Manganas, which foreman Lang testified focused on lead hazards. Although, as discussed below, such training would not have fully satisfied the requirements of the lead standard, which had not yet been promulgated, [redacted] unequivocal

statement as to his lack of *any* lead training is inconsistent with his signed acknowledgment. We find that [redacted] inconsistency and lack of specificity – factors the judge did not address – cast sufficient doubt on the reliability of his testimony as to undermine the Secretary's allegation that he *never* received the required lead training. In these circumstances, we vacate Item 23.

Under Item 24, the Secretary alleged that Manganas "did not begin to provide a training program which covered the contents of OSHA's Lead Exposure in Construction Standard . . . until late August of 1993[,]" and that the training was required by the standard's August 2 start-up date. The cited section provides:

> (iii) The employer shall provide the training program as initial training prior to the time of job assignment or prior to the start up date for this requirement, whichever comes last.

29 C.F.R. § 1926.62*(l)*(1)(iii). The judge affirmed this item as other-than-serious, finding that the Secretary failed to show that the delay between early August [the required date] and September 9, the date on which Manganas ultimately provided lead training, "created a serious hazard independent of the hazard already existing due to the lack [of] proper training" (for which he affirmed a violation in Item 23).

Manganas argues that "these standards are inapplicable since the Secretary did not establish that the employees were exposed above the action level[,]" and it is "unlawfully being required to comply with the standard prior to its start up date." We find that the evidence shows otherwise. As previously discussed, Manganas admits overexposure for abrasive blasters in August, and Sweeney's sampling results establish overexposures during September. IH Sweeney's unrebutted testimony also establishes that Rust Environmental provided information pursuant to an OSHA subpoena indicating that Manganas first provided lead training under the new standard on September 9, 1993. Because the cited provision states that the training was to have been provided prior to the end of the start up date (August 2, 1993), we find that Manganas' delay until September 9 did not satisfy this requirement. Accordingly, we affirm Item 24.

We also find, however, that there is insufficient evidence in the record from which to conclude that this violation is serious. The record shows that Manganas provided lead training to its employees in April 1993, prior to the new standard's promulgation. Foreman Lang's testimony indicates that the April training covered the severe hazards of lead exposure. Although it obviously could not have tracked all of the specific requirements of the new standard, there is no evidence in the record of the training's particular deficiencies. In these

circumstances, we are unable to determine whether the training deficiencies posed a "substantial probability that death or serious physical harm could result." Section 17(k) of the Act, 29 U.S.C. § 666(k). Accordingly, we affirm this citation item as other-than-serious.

R. Item 25: 29 C.F.R. § 1926.62(*l*)(3)(i) (access to information – copy of standard)

Under this item, the Secretary cited Manganas for failing to have a copy of the lead standard available for employees at the worksite. The cited section provides:

> (3) *Access to information and training materials*. (i) The employer shall make readily available to all affected employees a copy of this standard and its appendices.

This provision is also subject to the sixty-day start-up period, pursuant to which compliance was required "no later than 60 days from the effective date" of the standard. 29 C.F.R. § 1926.62(r)(1). The judge affirmed this item, and we agree.

IH Sweeney testified that on "either August 2 or August 3 of 1993" he had a conversation with Andrew Manganas during which "[Mr.] Manganas indicated . . . that there weren't copies of this standard on site." However, Mr. Manganas testified that there was a copy of the standard on the worksite at some time, though he did not remember "how or when" it was obtained. We find that Mr. Manganas' testimony fails to rebut Sweeney's because it does not refer to any particular time period. We also note that the judge discredited Mr. Manganas for the same reasons earlier discussed, adding that "[Andrew Manganas'] answers to the specific questions regarding this item are again evasive and non-committal." Accordingly, we find that the record establishes that Manganas failed to have a copy of the standard on site on August 2, but we are unable to determine whether this failure extended to August 3.

Manganas contends that this item should be vacated because the standard's startup date provision did not require compliance until August 3, but the record does not show, nor does Manganas contend, that it complied with the cited provision by that time. Nonetheless, based on a straightforward mathematical calculation concerning the relevant dates, we agree with the Secretary that August 2 is the sixtieth day following the standard's June 3 effective date, and the date on which the standard's wording unambiguously prescribes compliance. *E.g., Arcadian Corp.*, 17 BNA OSHC 1345, 1347, 1995-97 CCH OSHD ¶ 30,856 p. 42,916 (No. 93-3270, 1995) ("'when a statute speaks with clarity to an issue[,] judicial inquiry into the statute's meaning, in all but the most extraordinary circumstances, is finished'" (citations omitted)), *aff'd*,

110 F.3d 1192 (5th Cir. 1997).[25] In these circumstances, we find that the evidence establishes a violation and affirm this citation item.

S. Item 26: 29 C.F.R. § 1926.62(m)(2)(i) (lead warning signs)

Under this item, the Secretary alleged that Manganas failed to have required warning signs on the jobsite, which the judge affirmed as a serious violation. Before us is only the characterization of this citation item. The cited section provides:

> (m) *Signs*—(1) *General.*
> . . .
> (2) *Signs.* (i) The employer shall post the following warning signs in each work area where an employee's exposure to lead is above the PEL.
>
> WARNING
> LEAD WORK AREA
> POISON
> NO SMOKING OR EATING

The judge found that "[f]ailing to warn employees on a site as to locations where airborne lead exceeds the PEL is a serious hazard. Those work areas pose particular dangers and extensive precautions are required in those areas." Manganas does not contest these factual findings, but argues that the violation should be characterized as other-than-serious because it provided the required signs by September 24, "shortly over one month after the standard became effective." We reject this argument, because Manganas lacked the required warning signs while it performed abrasive blasting on August 2-8 and 17-31, a period for which it admits employee overexposure to lead – an indisputably serious hazard. *See Schuler-Haas Electric Corp.*, 21 BNA OSHC 1489, 2005 CCH OSHD ¶ 32,816 (affirming as serious violation for single-day entry into asbestos-regulated area without respirator use). Accordingly, we affirm this citation item as serious.

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[25]We note that Manganas could not have been misled or confused by OSHA's apparent error in a subsequently issued instruction regarding inspection and compliance procedures under the lead standard. Although that instruction incorrectly states that compliance "was to have been accomplished by August 3, 1993[,]" it was not issued until more than four months after the events here occurred. *Lead Exposure in Construction, Interim Final Rule— Inspection and Compliance Procedures*, app'x A at A-9 (Dec. 13, 1993).

T. Item 27: 29 C.F.R. § 1926.62(n)(1)(ii) (recordkeeping)

Under this item, the Secretary alleged that Manganas failed to maintain complete records of all monitoring data associated with employee exposure assessments.[26] The judge affirmed a serious violation, finding that the lead exposure monitoring "calculation sheets" that Rust provided to Manganas did not include "much of the data required" and that Manganas specifically asked that Rust "not prepare a written report." Before us is only the characterization of this citation item.

In affirming the violation as serious, the judge stated as follows:

> While a "record keeping" violation might generally be considered to be other than serious, in this matter I find otherwise. Intentionally arranging to have a consultant deliver data in a format which is incomplete, whether done for economic or venal reasons, effectively deprives the employer of tools necessary for properly plan[n]ing for employee protection and required follow ups. It also deprives the employees as well as OSHA of the opportunity to fully assess conditions at the work site.

We agree with Manganas that the judge's classification of this item is largely based on his assessment that Manganas showed a lack of good faith, a factor not relevant to the question of whether a violation is serious. As set forth in section 17(k) of the Act, the test of seriousness speaks to the consequences of a violation, not the violator's state of mind.

Here, we find the evidence insufficient to show that Manganas' failure to maintain all of the information prescribed by the standard rises to the level of a serious violation. The

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[26] The full text of the cited provision states:

> (n) *Recordkeeping*—(1) *Exposure assessment.*
> . . .
> (ii) Exposure monitoring records shall include:
> (A) The date(s), number, duration, location and results of each of the samples taken if any, including a description of the sampling procedure used to determine representative employee exposure where applicable;
> (B) A description of the sampling and analytical methods used and evidence of their accuracy;
> (C) The type of respiratory protective devices worn, if any;
> (D) Name, social security number, and job classification of the employee monitored and of all other employees whose exposure the measurement is intended to represent; and
> (E) The environmental variables that could affect the measurement of employee exposure.

calculation sheets that Rust provided contain information pertaining to the consultant's exposure monitoring from August and September 1993, including the date and location of the sampling or name of the sampled employee, the duration of the sampling, and calculated exposure level. Although written in "rough draft" form, and lacking some of the details required under the standard, we find no basis on which to conclude that the cited deficiencies posed a risk of "death or serious physical harm." Moreover, as the judge acknowledged, recordkeeping violations are generally characterized as other-than-serious, including the statutorily prescribed records of serious workplace injuries and illness that may require work restrictions or job transfers. Section 24(a) of the Act, 29 U.S.C. § 673(a). *See Kaspar Wire Works, Inc.*, 18 BNA OSHC 2178, 2185 (No. 90-2775, 2000), 2000 CCH OSHD ¶ 32,134, p. 48,410, *aff'd*, 268 F.3d 1123 (D.C. Cir 2001). In view of the fact that Manganas' records included much of the basic information required under the cited provision, we are unable to distinguish the recordkeeping failures here from those that are routinely characterized as non-serious. Accordingly, we affirm this citation item as other-than-serious.

U. Item 30: 29 C.F.R. § 1926.62(f)(1) (provision of appropriate respirator)

Under this item, the Secretary alleged that employee [redacted], whose lead exposure measured 587 µg/m³ inside his blasting helmet on September 22, wore no "air purifying respiratory protection." The cited provision states:

> (f) *Respiratory protection*—(1) *General*. Where the use of respirators is required under this section the employer shall provide, at no cost to the employee, and assure the use of respirators which comply with the requirements of this paragraph. Respirators shall be used in the following circumstances:
>
> (i) Whenever an employee's exposure to lead exceeds the PEL.

The judge affirmed the violation based on Sweeney's sampling results and his testimony that [redacted] reported to him that he did not wear a respirator inside his blasting hood that day. As previously discussed, we reject Manganas' arguments that OSHA's sampling results were not reliable and that adequate respiratory protection was infeasible. We also note that the cited standard specifies not only that respiratory protection be provided, but that the employer "assure" its use.

Nonetheless, we vacate this item based on the Secretary's failure to establish that Manganas had actual or constructive knowledge of its non-compliance. IH Sweeney testified that Manganas could have known that [redacted] was not wearing his respirator while working inside the containment, because Manganas supervisors "can observe what the blasters do in regard to

what procedures they follow when they're exi[]ting the containment." We agree with Manganas, however, that Sweeney's testimony was purely hypothetical. There is simply no evidence in this record regarding whether supervisors present inside the containment during blasting could have seen, in the dusty conditions, that [redacted] was not wearing his respirator inside his blasting hood, and whether supervisory presence at the containment exit was consistent and/or necessary. In these circumstances, we find that the Secretary has not established knowledge, and vacate this citation item.

III. Willful Citation 2

A. Item 1: 29 C.F.R. § 1926.62(d)(1)(i) (initial determination of exposure)

1. Merits

Under this item, the Secretary alleged that Manganas failed to timely initiate air sampling to determine employees' lead exposure levels. The cited provision states:

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

The basis for making this initial determination is set out in § 1926.62(d)(3). Under that requirement, an employer must make the initial determination of employee exposure to lead based on (1) monitoring results and relevant considerations as set out in paragraphs (d)(3)(i)(A)-(C), or (2) previous monitoring results which were obtained within the past 12 months during work operations in accordance with paragraph (d)(3)(iii), or (3) objective data demonstrating that operations cannot result in lead exposure over the action level. Here, Manganas chose to determine whether there was employee exposure to lead based on monitoring results.

It is undisputed that Manganas commenced sampling on August 4, 1993, after the end of the startup period, and completed the sampling on September 24, 1993. The Secretary contends that the sampling should have occurred "as soon as possible after June 3, 1993, but in no event later than August 2, 1993." At issue is whether the cited standard's requirement to "initially determine" the exposure level applies to work that commenced prior to the standard's effective date and, if so, whether Manganas' effort to assess the exposure levels was timely.

The judge found that the cited section applies, but vacated the item. He found that "[t]he term 'initially' refers to the first sampling" and does not, unlike other standards, "require that an action take place before the commencement of a project." The judge also reasoned, however, that because "sampling was begun within one day and completed within 25 days of the effective

date of the cited provision, . . . personal sampling was performed within a reasonable time after the effective date of the standard." While Manganas agrees, it also contends that the cited provision is inapplicable because "[t]he Lead Standard was not effective until August" and it was too late to "initially determine" exposure in August for a project that "started in April." For the following reasons, we reverse the judge and affirm this citation item.

The term "initial" is used in various ways in a number of provisions of the lead in construction standard. Here, the term pertains to a required action – to determine employee exposure – that is not tied to any other event, such as commencement of the job. The required action, however, is subject to the sixty-day startup period, under which compliance was required by August 2, 1993. In these circumstances, we agree with the judge that the word "initial" in this provision is most reasonably interpreted to refer to the first determination of lead exposure, in this case the first sampling, and is required upon effectuation of the standard and pursuant to its applicable startup dates. Accordingly, we find the standard applicable.

With respect to timeliness, Manganas commenced employee sampling on August 4, 1993, after the end of the sixty-day startup period, and the evidence shows that there was a six-day period of abrasive blasting that began on August 2. Manganas does not contend that earlier compliance with this provision was infeasible and does not dispute that, absent the standard applicability issue, the initial determination would be required immediately upon the release of lead into the atmosphere.[27] Based on the wording of the cited provision and standard's startup

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[27] In the preamble, OSHA explained the startup dates, as follows.

> OSHA believes that expeditious action by employers to achieve compliance with the provisions of this standard is warranted. Construction employees under the current standard are being exposed to lead at concentrations that present significant risk of adverse health impairment.
>
> . . .
>
> Employers performing lead operations in construction to some extent have already instituted protective measures voluntarily or in response to existing OSHA or other regulations . . . . Thus, OSHA believes that it is a reasonable and appropriate judgment that compliance with the new burdens imposed under this interim rule in the time frames specified is achievable.

58 Fed Reg. at 26,608.

dates, we find that an initial determination was required beginning August 2, when Manganas resumed abrasive blasting. Accordingly, we reverse the judge, and affirm this citation item.

2. Characterization

The Secretary alleged that Manganas' delay in commencing the required air monitoring until August 4, two days after OSHA began its inspection, was willful. Although the judge vacated this item, he characterized all of the citation items that he affirmed in Citation 2 as willful. The judge recited a chronology of events that occurred between March 1993 (five months prior to commencement of the OSHA inspection) and September 1993 (when IH Sweeney conducted air sampling at the worksite). These events included a number of circumstances from which he believed that Manganas could have learned of the new OSHA standard and its applicability to Manganas' ongoing work. Based on these circumstances, the judge found that "Respondent, for all intents and purposes, pulled the wool over its own eyes . . . and took no action until the very moment a compliance officer showed up at its doorstep." He also rejected Manganas' argument that the violations were not willful because it had made a good faith effort to comply with the standard once it knew of its applicability.

As numerous cases have held, the Commission and courts make a distinction between mere negligence and willfulness, holding that the former is sufficient for affirming a non-willful violation, but that willfulness is characterized by an intentional, knowing failure to comply with a legal duty. *E.g., Am. Wrecking*, 351 F.3d 1254, 1264 (D.C. Cir. 2003) (reversing willful finding where employer "should have known" of hazardous condition, court stated that willfulness requires "an intentional or conscious disregard for the applicable safety standard or for employee safety"). Thus, "to sustain a willful violation, '[t]he Secretary must show that the employer was actually aware, at the time of the violative act, that the act was unlawful, or that it possessed a state of mind such that if it were informed of the standard, it would not care.'" *AJP Constr. Inc. v. Sec'y*, 357 F.3d 70, 75 (D.C. Cir. 2004) (emphasis and citations omitted.) Moreover, the courts and the Commission recognize that willfulness "will be obviated by a good faith, albeit mistaken, belief that particular conduct is permissible." *Froedtert Mem. Lutheran Hosp.*, 20 BNA OSHC at 1510, 2002-04 CCH OSHD at p. 51,738 (citations omitted) (affirming violations as non-willful where facts established employer's good faith belief that it owed no legal duty to temporary workers). *Accord Am. Wrecking*, 351 F.3d at 1263 (observing that "[a] company cannot be found to have willfully violated a standard if it exhibited a good faith,

reasonable belief that its conduct conformed to law . . . or if it made a good faith effort to comply with a standard or eliminate a hazard") (citations omitted).

Chairman Railton and Commissioner Thompson find that the record here bears out Manganas' claim that it believed that the standard did not apply to this ongoing project because it commenced prior to the standard's effective date, and also shows that Manganas was not alone in that belief. By letter dated June 25, 1993, ODOT notified contractors that it would hold a Federal Highway Administration (FHWA) approved seminar concerning the new OSHA lead in construction rules on July 20, 1993, which was "a mandatory meeting for all contractors who wish to bid on bridge painting projects after July 20, 1993."[28] Because Manganas had already bid and been awarded the bridge project as of January 6, 1993, and began work in April 1993, the meeting notice would appear not to have applied to this particular project.

In addition, Andrew Manganas testified that beginning in late July, he discussed the applicability of the new OSHA rules with ODOT engineers Mark Wilson and Raymond Koch, and was told that the rules did not apply to the project. Koch's testimony corroborates that of Andrew Manganas, in that he told Andrew Manganas late in the summer of 1993 that FHWA personnel had contacted OSHA and believed that the bridge project was exempt from compliance with the new lead in construction rules. Wilson testified about discussions with Koch, as well as his November 2, 1993 letter to OSHA in which he requested an "official decision" about enforcement of the new lead standard as it pertained to the ongoing bridge project. Wilson explained in the letter, and confirmed at the hearing, that ODOT agreed with Manganas' claim for a cost adjustment for the unforeseen expense of compliance with OSHA"s new requirements for administrative and engineering controls, but that FHWA rejected the claim as "[a]pparently they were informed by the national office of OSHA that these regulations would not be enforced on projects awarded before June 3, 1993 . . . ." Finally, in his July 23, 1993 letter to Manganas concerning employee [redacted], Dr. Martin acknowledged Manganas' belief that the new standard did not apply to the ongoing project – "I know that it is your understanding that this job is exempt from those rules because [] it was bid before the rules were

[28] ODOT engineer James Barnhart testified that he stated during the seminar that the new OSHA rules applied to ongoing projects. However, the record lacks evidence that Nicholas Manganas was present when Barnhart addressed the applicability of the standard to ongoing projects.

passed." Likewise, IH Sweeney testified that upon arriving at the worksite for the inspection, Manganas stated that the new standard did not apply.

In these circumstances, Chairman Railton and Commissioner Thompson find that until the commencement of the OSHA inspection on August 2, Manganas reasonably believed that the new lead in construction standard did not apply to its ongoing project based, at least in part, on information obtained from ODOT and FHWA officials. *See Froedtert Mem. Lutheran Hosp.*, 20 BNA OSHC at 1510, 2002-04 CCH OSHD at p. 51,736 (stating that "willfulness will be obviated by a good faith, albeit mistaken, belief that particular conduct is permissible") (citations omitted). Accordingly, Chairman Railton and Commissioner Thompson conclude that Manganas' two-day delay in commencing exposure monitoring was not willful,[29] and affirm this citation item as serious.[30]

B. Item 2: 29 C.F.R. § 1926.62(j)(1)(i) (initial blood sampling)

Under this item, the Secretary alleged that Manganas failed to timely make available blood sampling and analysis for lead or zinc protoporphyrin to employees exposed to lead at or above the action level (30 μg/m³). The cited section provides:

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[29] Commissioner Rogers agrees that Manganas could have had a plausible good faith belief that the new lead in construction standard did not apply to its ongoing project, but only until July 23, 1993. She believes that any plausible good faith belief to that effect was vitiated on that date – more than a week before the OSHA inspection began – when John Manganas had a telephone conversation with Dr. Thomas Martin, the Medical Director, Toxicology Treatment Program, University of Pittsburgh Medical Center. The conversation concerned a patient under Dr. Martin's care for acute lead poisoning – a worker at the site - and was documented by a letter of the same date to Mr. Manganas. The letter describes the patient's condition, including a "very high" blood lead level, and some of the work practices at the site. It noted Manganas' understanding that the job was exempt, but that Dr. Martin had suggested Manganas "contact the local OSHA office to confirm whether this job is indeed exempt." Dr. Martin also enclosed explanatory material about the new standard, including a newsletter noting that the rule had to be complied with, except for engineering controls, no later than 60 days after the June 3, 1993 effective date. Despite having been put on notice by Dr. Martin, there is no evidence that Manganas took any actions to follow up with OSHA or to begin the exposure monitoring until after the OSHA inspection began. Under these circumstances, Commissioner Rogers would affirm the delay in commencing exposure monitoring as willful.

[30] The Secretary's amended complaint alleges that the violations contained in Willful Citation 2 were serious under section 17(k) of the Act.

> The employer shall make available initial medical surveillance to employees occupationally exposed on any day to lead at or above the action level. Initial medical surveillance consists of biological monitoring in the form of blood sampling and analysis for lead and zinc protoporphyrin levels.

It is undisputed that Manganas began providing blood testing to some employees on August 5, 1993, three days after the end of the sixty-day startup period. The judge vacated this item, finding that Manganas made the required testing available within a reasonable time after August 2, 1993, and that, in any event, the Secretary did not show whether any employees were exposed at or above the action level as a time weighted average prior to September 21, 1993. We affirm the judge and vacate this item, but for different reasons.

Although the blood testing requirement is subject to the sixty-day startup period, it is triggered by employee exposure above the action level. In circumstances where such air monitoring provides the basis for determining the need for blood testing, we find that receipt of the monitoring results would be a predicate for the applicability of the blood testing requirement. Here, despite evidence that Manganas had earlier been aware that some employees suffered lead overexposure, there is no evidence in the record that identifies the type of work each employee performed prior to August 2. Therefore, there is no evidence from which we might infer that Manganas knew that any particular employees had been exposed above the action level prior to that time. In addition, even if Manganas had timely commenced the required air sampling on August 2, it would not have known of the test results showing overexposure for some time thereafter.[31] In these circumstances, we find that Manganas timely commenced blood monitoring on August 5, and conclude that the judge properly vacated this citation item.

[31] We note that the standard also provides for "protection of employees during assessment of exposure" for tasks listed in paragraph (d)(2). Such tasks, when performed in the presence of lead, trigger basic protective provisions, including biological monitoring pending receipt of exposure testing results. 29 C.F.R. § 1926.62(d)(2)(v)(E). The Secretary, however, did not cite Manganas for violating this "interim protection" provision of the standard.

C. Items 3-9: 29 C.F.R. § 1926.62(k)(1)(i) (medical removal protection (MRP))

1. *Merits*

Under this item, the Secretary alleged that Manganas did not remove from blasting work each of seven enumerated employees whose periodic and follow-up blood sampling tests showed a blood lead level at or above 50µg/dl. The standard provides, as follows:

> (k) *Medical removal protection*—(1) *Temporary medical removal and return of an employee*—(i) *Temporary removal due to elevated blood lead level*. The employer shall remove an employee from work having an exposure to lead at or above the action level on each occasion that a periodic and a follow-up blood sampling test conducted pursuant to this section indicate that the employee's blood lead level is at or above 50 μg/dl[.] . . .

The judge affirmed all seven citation items, finding that the identified employees "meet the criteria of the standard." He relied on the blood lead level evidence contained in the following table.

Item/Employee	Blood Test 1 (8/5/93)	Blood Test 2 (9/1/93)	Blood Test 3 (9/13/93)
(3) [redacted]	68.5 μg/dl	55.3 μg/dl	48.9 μg/dl
(4) [redacted]	- - -	59.6 μg/dl	56.4 μg/dl
(5) [redacted]	80.7 μg/dl	60.0 μg/dl	52.2 μg/dl
(6) [redacted]	88.3 μg/dl	56.9 μg/dl	56.4 μg/dl
(7) [redacted]	79.6 μg/dl	66.0 μg/dl	63.3 μg/dl
(8) [redacted]	61.3 μg/dl	55.1 μg/dl	54.7 μg/dl
(9) [redacted]	59.4 μg/dl	58.1 μg/dl	55.0 μg/dl

With respect to subsequent exposure, the judge found that each of these employees worked on September 21, 22, or 24 in areas where air-lead levels exceeded the action level, as the Secretary alleged. Our review of the evidence shows that three of the seven employees – [redacted] (Item 3), [redacted] (Item 5), and [redacted] (Item 7) – met those criteria, as each was personally

sampled during IH Sweeney's air monitoring on September 21 and 22, which showed that the ambient air-lead level for each far exceeded the action level.[32]

Although employees [redacted] (Item 4) and [redacted] (Item 8) were not sampled, payroll records show that each worked eight hours on the three days during which Sweeney performed air sampling. Sweeney testified that his failed attempt to sample [redacted] occurred "on September 22, 1993[,] a day on which he was performing abrasive blasting inside the containment[,]" and that "during the week of September 21" [redacted] "stated that he ha[d] been continuing to perform abrasive blasting in spite of having high blood levels and that he was scheduled to perform abrasive blasting on September 23rd[,] but Andy [Manganas] took him off of abrasive blasting at the last minute on that day." We find that the judge reasonably inferred from this evidence that [redacted] and [redacted] each worked inside the containment where blasting was performed for at least one hour on the days Sweeney performed air sampling, which the judge's uncontested calculation showed would have resulted in a time-weighted exposure exceeding the 30 μg/m³action level. However, unlike the others, employee [redacted] was first tested on September 1, and re-tested on September 13, and we could find no indication in the record as to when Manganas learned of the second test result. Because Bethesda Share sent other test results as late as eight days after testing, we find the evidence insufficient to show that Manganas would have received Finnefrock's test results by September 22. In these circumstances, we affirm Item 8 ([redacted]), but vacate Item 4 [redacted]).

Superintendent Lang (Item 9) was also not sampled, but Sweeney testified that he observed Lang "periodically entering the grit recycling area . . . to deliver materials" "on September 21st[.]" Sweeney's air sampling that day in the grit recycling area showed airborne-lead exposure significantly above the action level. As the judge noted, Lang described his work as including entry into the containments when blasting was being performed for periods of "15 [m]inutes to a[] half hour maybe" and that he would go into the grit recycling area "[m]aybe a few times a day, sometimes 20 minutes, sometimes 5 minutes, sometimes an hour . . . ." Based

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[32] We reject Manganas' contention that [redacted] was not subject to medical removal because his September 13 test showed a blood lead level below 50 μg/dl. The standard clearly provides that a return to job status for a removed employee must follow "two consecutive blood sampling tests indicat[ing] that the employee's blood lead level is at or below 40 μg/dl." 29 C.F.R. § 1926.62(k)(1)(iii)(A)(*1*).

on the judge's uncontested calculation that just fifteen minutes in that environment would have resulted in a time-weighted exposure exceeding the action level, we find that the evidence supports the judge's conclusion that Lang was exposed above the action level on September 21.

Finally, with respect to employee [redacted] (Item 6), who also was not sampled, payroll records show he worked eight hours on September 21 and 24, and four hours on September 22, and was listed as a painter, as were the abrasive blasters discussed above. Sweeney testified that he "observed [redacted] coming out of the containment with other abrasive blasting employees during the week of September 21, 1993[.]" We find the judge reasonably inferred from this evidence that [redacted] "was [inside the containment] for at least one hour while blasting was going on." As with [redacted] and [redacted], such exposure would have exceeded the action level.

Based on this evidence, we affirm Item 3 and Items 5-9 for Manganas' failure to remove these employees from lead exposure as required. We also vacate Item 4, based on insufficient evidence to establish a violation.

2. Characterization

In contrast to the circumstances surrounding the exposure monitoring citation item, the conditions cited here all occurred in late September, more than six weeks after IH Sweeney advised Manganas that OSHA considered the standard applicable to the project, and after Manganas had commenced its efforts to comply. As Manganas admits, it "took the Compliance Officer at his word" when it "chose to begin compliance." We find that by this time Manganas could not plausibly have maintained a good faith belief that it was exempt from complying with the standard's requirements, and the evidence shows that it did not. *Cf. Froedtert Mem. Lutheran Hosp., Inc.*, 20 BNA OSHC at 1511, 2002-04 CCH OSHD at p. 51,732 (finding willfulness obviated by mistaken but sufficiently plausible belief that hospital was not temporary workers' employer).

The evidence also shows that Manganas was fully aware of the standard's medical removal requirement. Dr. Martin, by letter dated July 23, 1993, and Linda Ford, by letter dated September 8, 1993, each advised Manganas of the hazards of lead overexposure and warned of the need to medically remove overexposed employees well before the employees continued work in an overexposed environment in late September. Manganas acknowledges that Bethesda Share recommended it medically remove particular employees, and claims it did so. Moreover, Manganas provided for the required blood testing for each of the six employees that occurred on

August 5, September 1, and September 13. When each employee's first two readings showed blood lead levels above 50 mg/dl, section 1926.62(k)(l)(i) required that their removal from work assignments exposing them to ambient lead levels above the 30 µg/m³ action level. Nonetheless, Manganas permitted these six employees to work on September 21, 22, and/or 24 in conditions where the ambient lead exceeded the action level. In these circumstances, we find that the evidence shows that Manganas' failure to medically remove these six employees demonstrated a conscious disregard for the requirements of the standard. *AJP Constr. Inc. v. Sec'y*, 357 F.3d at 75. *See also Gunite Corp.*, 20 BNA OSHC 1983, 1989, 2005 CCH OSHD ¶ 32,762, p. 51,126 (No. 98-1986, 2004) (consolidated) (finding that employer's "dilatory" response to safety recommendations of outside consultant can be factor in determining willfulness), *rev'd and remanded on other grounds*, 442 F.3d 550 (7th Cir. 2006).[33]

3. Per-employee citation authority

The Secretary cited, and the judge affirmed, these items on a per-employee basis with individual penalties assessed for each item. Manganas argues that such instance-by-instance citation is inappropriate based on its contention that the cited provisions prohibit a single course of action rather than individual acts. We reject Manganas' argument, and affirm a willful violation for each of these citation items.

The Commission has addressed the legality of the Secretary's instance-by-instance policy in numerous cases, including one under the general industry lead standard – *Sanders Lead Co.*, 17 BNA OSHC 1197, 1993-95 CCH OSHD ¶ 30,740 (No. 87-260, 1995). There, the Commission stated:

> It is now settled that the Commission has the authority to assess separate penalties for separate violations of a single standard. *Caterpillar, Inc.*, 15 BNA OSHC 215[3], 2172-73, 1991-93 CCH OSHD ¶ 29,962, p. 41,005 (No. 87-922, 1993).

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[33] Manganas points out that upon learning of the standard's applicability it took numerous steps towards compliance, including obtaining a decontamination trailer, laundry equipment, protective clothing, and dust collectors, as well as commencing air and blood monitoring. However, where Manganas had sufficient notice of the need to remove these six employees, yet allowed them to continue working under conditions that exposed them to lead above the action level, we find no merit in Manganas' claim that its compliance efforts should obviate willfulness as to these citation items. *See Caterpillar Inc.*, 17 BNA OSHC 1731, 1733, 1995-97 CCH OSHD ¶ 31,134, p. 43,484 (No. 93-373, 1996) (willfulness not obviated by patently inadequate abatement measures).

> 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.

17 BNA OSHC at 1200, 1993-95 CCH OSHD at p. 42,692 (footnote omitted). As the Commission emphasized, "[t]he 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." 17 BNA OSHC at 1203, 1993-95 CCH OSHD at p. 42,695. In *Caterpillar*, the Commission affirmed separate citations for each failure to record an illness or injury despite its characterization of the violations as non-willful. 15 BNA OSHC at 2173, 1991-93 CCH OSHD at p. 41,005.

Rejecting per-employee citations for multiple violations of a single standard in *Hartford Roofing Co.*, the Commission differentiated between those standards that permit multiple units of prosecution, and those that do not.

> Some standards implicate the protection, etc. of individual employees to such an extent that the failure to have the protection in place for each employee permits the Secretary to cite on a per-instance basis. However, where a single practice, method or condition affects multiple employees, there can be only one violation of the standard.

17 BNA OSHC 1361, 1365, 1995-97 CCH OSHD ¶ 30,857, p. 42,935 (No. 92-3855, 1995). Most recently, in *Eric K. Ho*, the Commission noted that it was "not persuaded . . . to depart from those precedents[,]" and that "[t]he key to all these decisions was the language of the statute or the specific standard or regulation cited." 20 BNA OSHC 1361, 1370-71, 2002-04 CCH OSHD ¶ 32,692, pp. 51,580-581 (No 98-1645, 2003) (consolidated), *aff'd in relevant part*, 401 F.3d 355 (5th Cir. 2005).

Based on this precedent, we find that the Secretary properly cited the medical removal protection violations of section 1926.62(k)(l)(i) on a per-employee basis. The language of the

cited provision is virtually identical to that of section 1910.1025(k)(l)(i), which the Commission found susceptible to per-employee citation in *Sanders Lead.*[34] On review, Manganas has not acknowledged this precedent, which the Commission adhered to in *Eric K. Ho*. Accordingly, we affirm as willful each of the six violations of section 1926.62(k)(1).[35]

D. Items 10-18: (sampled employees other than abrasive blasters)
10(a)-18(a) – 29 C.F.R. § 1926.62(c)(1) (lead overexposure)
10(b)-18(b) – 29 C.F.R. §§ 1926.62(f)(1) or (2)(i) (respirator use and selection)

1. Merits

For each of these items, the Secretary issued two grouped sub-items, (a) and (b). Under each sub-item (a), she alleged that the employee was overexposed to lead (PEL sub-items). Under each sub-item (b), she alleged that the employee did not use proper respiratory protection (respirator sub-items). The Secretary proposed a single penalty for each of the nine items that

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[34] The construction industry standard, section 1926.62, provides, in pertinent part:

> (k) *Medical removal protection*—(1) *Temporary medical removal and return of an employee*—(i) *Temporary removal due to elevated blood lead level*. The employer shall remove an employee from work having an exposure to lead at or above the action level on each occasion that a periodic and a follow-up blood sampling test conducted pursuant to this section indicate that the employee's blood lead level is at or above 50 μg/dl[.] . . .

The general industry standard, section 1910.1025, provides, in pertinent part:

> (k) *Medical removal protection*—(1) *Temporary medical removal and return of an employee*—(i) *Temporary removal due to elevated blood lead levels*.
> . . .
> [T]he 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 µg/100 g of whole blood . . . .

[35] Manganas also contends that the Secretary did not apply the per-instance citation policy "in a fair and impartial manner[,]" that the penalties were excessive, and that the judge erroneously rejected Manganas' proffer of the Secretary's press releases as evidence of the Secretary's alleged effort to "punish Manganas in order to warn other employers to comply with the [l]ead [s]tandard." Our consideration of the Secretary's citation policy here is based on applicable precedent in light of the facts of the case. Moreover, the assessment of appropriate penalties is considered solely under the statutory factors. *Hern Iron Works*, 16 BNA OSHC 1619, 1621-23, 1993-95 CCH OSHD ¶ 30,363, pp. 41,881-83 (No. 88-1962, 1994).

included each item's two grouped sub-items. The evidence of lead exposure and respirator usage is summarized in the following chart.

Item No.	Employee	Date	Job	Lead Exp.	Respirator Use
10 (a & b)	[redacted]	9/21/93	grit recycling	182 μg/m³	None
11 (a & b)	[redacted]	9/21/93	grit recycling	647 μg/m³	None or ½ Face
12 (a & b)	[redacted]	9/21/93	grit recycling	149 μg/m³	None for 90% of Shift
13 (a & b)	[redacted]	9/22/93	bridge deck	82.2 μg/m³	None for Most of Shift
14 (a & b)	[redacted]	9/24/93	vacuum grit	4,620 μg/m³	½ Face air purifying
15 (a & b)	[redacted]	9/24/93	vacuum grit	4,570 μg/m³	½ Face air purifying
16 (a & b)	[redacted]	9/24/93	vacuum grit	4,100 μg/m³	½ Face air purifying
17 (a & b)	[redacted]	9/24/93	vacuum grit	4,240 μg/m³	½ Face air purifying
18 (a & b)	[redacted]	9/24/93	blow down	1,850 μg/m³	½ Face air purifying

The judge affirmed all of the alleged PEL sub-items, 10(a)-18(a), based on his finding that IH Sweeney's sampling results were reliable and established overexposure for each of the identified employees. He also affirmed all but one of the respirator sub-items, 10(b)-12(b) and 14(b)-18(b)), based on his finding that the evidence established the alleged failures to either use any respiratory protection or appropriate respiratory protection.[36]

We have already found that the record supports the judge's factual findings of lead overexposure for each of the PEL sub-items. However, because the only abatement for the PEL overexposures sought by the Secretary and required under the standard at the time covered by the citation was that the employer provide and ensure the use of proper respiratory protection, we find that these items are duplicative of the respirator use sub-items, which require the identical abatement. Accordingly, we vacate PEL sub-items 10(a)-12(a) and 14(a)-18(a) as duplicative. *E.g., Trinity Indus.*, 20 BNA OSHC at 1064, 2002-04 CCH OSHD at p. 51,410 (vacating

[36] The judge vacated Item 13(b) because, although employee Roberts wore no respiratory protection while he worked on the bridge deck, the Secretary provided no evidence of lead exposure at that location. This item was not listed in the Briefing Notice, nor addressed by the Secretary on review. Accordingly, we do not address it here.

duplicative citation involving "substantially the same violative conduct [that requires] the same means of abatement") (citations omitted).

With respect to Item 13(a) concerning employee [redacted] overexposure, the allegation of his respirator non-use (Item 13(b)) was vacated for a failure to establish exposure at the cited location. Although any duplicativeness is thereby eliminated, we nonetheless vacate this PEL overexposure sub-item for lack of proof. In addition to the time he worked on the bridge deck for which there is no evidence of lead exposure, [redacted] measured ambient lead exposure of 82.2 μg/m³ covered his brief entry into the containment, during which the record shows that he wore an air-purifying respirator. Because the standard identifies that type of respirator as adequate for [redacted] exposure level, the Secretary has failed to prove that his exposure exceeded the PEL. *See* 29 C.F.R. § 1926.62(c)(3) (employee exposure may take into account respirator protective factor), and discussion regarding Citation 1, Item 6, above.

The first three respirator use sub-items, Items 10(b)-12(b), involve employees who allegedly wore no respiratory protection for at least part of their shifts.[37] As to these items, CO Medlock and IH Sweeney testified that based on their intermittent observations over a period of several days, employees [redacted] either wore no respirators, or wore them intermittently while working in the grit recycling area. Based on that unrebutted testimony and on the air sampling that we find establishes exposure exceeding the PEL, the record supports the judge's findings of non-compliance with the cited provision for these employees.

The remaining five items, 14(b)-18(b), involve employees who wore respirators that the Secretary alleges were inadequate.[38] As with the previous respirator items, the record supports the judge's findings of non-compliance for Items 14(b)-18(b). The undisputed evidence shows

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[37] These citations alleged a violation of 29 C.F.R.§ 1926.62(f)(1), which states as follows:

> *Respiratory protection*—(1) *General.* Where the use of respirators is required under this section the employer shall provide, at no cost to the employee, and assure the use of respirators which comply with the requirements of this paragraph[.]

[38] These citations alleged a violation of 29 C.F.R. § 1926.62(f)(2)(i) which, at the time the citations issued, stated as follows:

> *Respirator selection*. (i) Where respirators are used under this section the employer shall select the appropriate respirator or combination of respirators from Table I below.

that these employees wore half-face, air purifying respirators while working in the containment which, under Table 1 of the standard, would be adequate only up to exposure levels not exceeding 500 μg/m³. As earlier discussed regarding the reliability of OSHA's air sampling, and based on the particularly high levels of overexposure measured for this group of employees, we find that the sampling evidence is sufficiently reliable to show that the exposures relating to these employees exceeded 500 μg/m³. Accordingly, we conclude that the employees' respirators were inadequate under the standard.

Manganas contends that these violations should be vacated because sufficiently protective respirators were unavailable, and because they were due to unpreventable employee misconduct. We find that the judge properly rejected the infeasibility defense for these items, as the measured exposure did not exceed 5,000 μg/m^3, a level within the protective range of respirators listed in Table 1 of the standard. Manganas has made no attempt to show that these respirators were unavailable. *See SSPC's Lead Paint Bulletin*, June 1993 (describing available positive pressure respiratory protection for exposures greater than 1250 μg/m³).

We also find that the judge properly rejected Manganas' claim of unpreventable employee misconduct (UEM). To establish this defense, an employer must show that it had: (1) established work rules designed to prevent the violative conditions from occurring; (2) adequately communicated those rules to its employees; (3) took steps to discover violations of those rules; and (4) effectively enforced the rules when violations were discovered. *E.g., GEM Indus., Inc.*, 17 BNA OSHC 1861, 1863, 1995-97 CCH OSHD ¶ 31,197, p. 43,688 (No. 93-1122, 1996), *aff'd per curiam*, 18 BNA OSHC 1358 (6th Cir. 1996) (unpublished). The judge based his rejection of the UEM defense as to Items 10(b) - 12(b), concerning the three grit recycling employees' failure to use respiratory protection, on the lack of a work rule, as well as supervisory awareness of employees working without respirators.

Manganas argues that it "established at the hearing that it had unwritten work safety rules relating to lead exposure that were . . . effectively communicated . . . [and] enforced." According to foreman Lang, respiratory protection was required whenever employees worked in any area where dust was being generated, including the recycling area. He added that on those occasions when he was present in the recycling area to "oversee" the workers there, he would remind employees to use respirators. The record shows, however, that the three grit recyclers worked without respiratory protection in plain view over a period of several days. Moreover, IH

Sweeney testified that foreman Lang and Andrew Manganas could have seen these employees because Sweeney had observed Lang periodically enter the grit recycling area, and also observed Andrew Manganas "frequently" drive close by on the forklift while yelling comments towards the area as he looked at it. Sweeney further testified that when he pulled out his video camera on September 21, Andrew Manganas was watching and yelled to the employees in that area to put on their respirators, which they all did "for awhile." Based on this evidence, we find that Manganas failed to exercise reasonable diligence to either discover violations of its work rule requiring the use of respirators, or to effectively enforce it. *E.g., N & N Contractors, Inc.*, 18 BNA OSHC 2121, 2126, 2000 CCH OSHD ¶ 32,101, p. 48,242 (No. 96-0606, 2000) (rejecting UEM defense where employer not diligent in discovering or discouraging non-compliance with safety program). Accordingly, we affirm Items 10(b)-12(b).

We also find that the judge correctly rejected Manganas' UEM defense with respect to Items 14(b)-18(b) concerning the use of inadequate respirators. As the judge noted, "[e]ach of the employees . . . was in fact using a respirator while working in the containment[,]" but the respirators used were inadequate. Relying on Manganas' failure to show that it had a work rule regarding the selection of a proper respirator, which Manganas does not contest on review, the judge properly concluded that it "has not shown the necessary elements of its asserted affirmative defense of unpreventable employee misconduct." *See Danis-Shook v. Sec'y*, 319 F.3d 805, 812-13 (6th Cir. 2003) (rejecting UEM defense where employer lacked work rule related to cited hazard). Accordingly, we affirm Items 14(b)-18(b).

2. Characterization

While the evidence shows with respect to Items 10(b)-12(b), that the three grit recyclers worked in an overexposed environment in plain view over several days when supervisors were present, the record lacks direct evidence that any particular Manganas supervisor observed these employees perform work without respirators. Similarly, with respect to Items 14(b)-18(b), there is no direct evidence that Manganas knew of the employees' use of improper respirators on September 24. In rejecting Manganas' UEM defense for all of these items, we noted the insufficiency of Manganas' efforts to effectively communicate its work rules, take steps to discover violations, and discipline lapses. As a whole, this evidence shows that Manganas had constructive rather than actual knowledge of these violations. Under applicable precedent, the factual circumstances here would not support a willful characterization. *Am. Wrecking*, 351 F.3d

at 1264 (reversing willful finding where employer "should have known" of hazardous condition). Accordingly, we affirm Items 10(b)-12(b) and 14(b)-18(b) as serious violations.

3. Per-employee citation authority

The Secretary cited, and the judge affirmed, all of the respirator items on a per-employee basis. In considering whether the language of the respirator provision supports per-employee citation, we note it specifically states that where respirator use is required, it must "*comply with the requirements of this paragraph.*" 29 C.F.R. § 1926.62(f)(1) (emphasis added). Included in the respiratory protection "paragraph" is a fit-testing requirement. 29 C.F.R. § 1926.62(f)(3)(ii). The Commission has previously concluded that a respirator fit-testing requirement is susceptible to per-employee citation as it "must of necessity be individualized." *Eric K. Ho*, 20 BNA OSHC at 1372, 2002-04 CCH OSHD at p. 51,582. *See also Sanders Lead*, 17 BNA OSHC at 1203, 1993-95 CCH OSHD at p. 42,695 (finding that respirator fit-test standard requires individual employee evaluation under "unique circumstances peculiar to each employee" and "permits a per-instance assessment").

Although the Commission found that the cited provision of the asbestos respirator standard in *Eric K. Ho* did not authorize per-employee citation, that standard was worded differently than the lead respirator standard cited here. 20 BNA OSHC at 1371-73, 2002-04 CCH OSHD at p. 51,581. The asbestos provision then in effect stated that employers "shall provide respirators, and ensure that they are used, where required by this section." 29 C.F.R. § 1926.1101(h)(1)(i). Compliance with the cited section was not predicated on compliance with all provisions of the asbestos respirator standard, which included a fit-test requirement in another section. In contrast, we find that the plain wording of the provision cited here prescribes that respirator use is predicated upon compliance with all "requirements of th[e] paragraph[,]" including fit-testing. Accordingly, we conclude that the lead standard respirator provisions may be cited on a per-employee basis.

As noted above, however, we affirm Manganas' violations of the respirator use and respirator selection provisions as serious. We also find it appropriate to assess a total penalty of $4,900 for Manganas' failure to comply with 29 C.F.R.§ 1926.62(f)(1), the respirator use provision of the standard, and a total penalty of $4,900 for Manganas' failure to comply with 29 C.F.R. § 1926.62(f)(2)(i), the respirator selection provision of the standard. *See Hoffman Constr. Co.*, 6 BNA OSHC 1274, 1275-76, 1977-78 CCH OSHD ¶ 22,489, p. 27,119 (No. 4182, 1978)

(assessing single combined penalty for two separate non-willful violations). *See also Chao v. Saw Pipes USA, Inc.*, No. 05-61089, 2007 WL 519865 (5th Cir. Feb. 21, 2007) (rejecting single penalty for multiple willful violations where total amount failed to satisfy statutory minimum penalty for each violation). In these circumstances, we need not determine whether Manganas' noncompliance with these provisions comprises a single violation of each provision, or multiple violations of each of the cited provisions. *Cf. Atl. Battery Co.*, 16 BNA OSHC 2131, 1993-95 CCH OSHD ¶ 30,636 (No. 90-1747, 1994) (declining to resolve disputed characterization where "[r]esolution of th[e] issue w[ould] not affect the abatement requirement or penalty …, and neither party's rights w[ould] be adversely affected").

IV. Penalties

The Secretary proposed penalties of $63,000 for each willful violation and $6,300 for each serious violation. She accorded Manganas a ten percent credit for its small size (thirty-five employees), but no credit for history based on the previous citations issued to Manganas on the same project in April 1993. Noting Manganas' small size and lack of prior violations involving lead or toxic exposure, the judge reduced the proposed penalty amounts to $44,100 for each willful violation, $4,410 for each serious violation, and $440 for the items he affirmed as other-than-serious. Although he stated that his intent was to reduce the penalties to "70% of the maximum allowable under the Act," his calculations reflect an amount that is less than seventy percent of the maximum allowable.

Manganas contends that the penalties are excessive, punitive, and lack a rational basis, and that it should be accorded a reduction for its "good faith attempts to comply with the Lead Standard." The Secretary contends that the proposed penalty amounts are "reasonable," emphasizing the "extremely high" gravity of the violations based on the nature of the hazard and number of exposed employees. She also notes that Manganas had been previously inspected in April 1993, when it was cited for alleged fall protection violations, and exhibited bad faith here by deceiving OSHA in an attempt to delay the August 1993 inspection.

The judge accurately described the four statutory penalty factors – size, gravity, good faith, and history. Section 17(j) of the Act, 29 U.S.C. § 666(j). He also identified what he characterized as "Respondent's lack of good faith [a]s the most salient feature of this case and [its] most significant penalty aspect." He cited Manganas' failure to follow its own "elaborate" safety program, which he found resulted in managerial tolerance of, and participation in,

hazardous activities such as eating and smoking in areas contaminated with lead. The judge also noted Manganas' lack of cooperation with OSHA personnel, including misleading the CO in order to delay "personal sampling of exposed employees while it rushed to . . . come into compliance." We agree that Manganas' delay of the OSHA inspection by advising the CO on August 3, 1993, that abrasive blasting would be suspended for at least a week, when in fact blasting continued daily through August 8, 1997, in conjunction with its slow response to repeated warnings from Linda Ford and Dr. Martin about the harmful effects of the lead exposure its employees were subjected to at the worksite, undermines any claim of good faith credit for penalty assessment purposes. *See Valdak Corp.*, 17 BNA OSHA at 1139, 1993-95 CCH OSHD at p. 30,401 (according no good faith penalty credit where employer held cavalier attitude toward employee safety).

With respect to gravity, the judge found that it was "very high," noting the inherent dangers of lead, the high ambient exposure readings here, and evidence that several employees were hospitalized for treatment due to lead toxicity. Indeed, the record shows that fifteen Manganas employees had blood lead levels exceeding the removal threshold of 50µg/dl, which Linda Ford characterized as "dangerously elevated." In addition, Dr. Martin diagnosed employee [redacted] in July 1993 with "acute lead poisoning" based on a blood lead level of 120 µg/dl, necessitating chelation therapy. Based on this evidence, we find that the gravity of lead exposure in this case was very high, and comprises a significant penalty factor. *See J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2214, 1993-95 CCH OSHD ¶ 30,301, p. 41,753 (No. 87-2059, 1993) (observing that four penalty factors not necessarily accorded equal weight, and gravity is often cited as "the primary element in the penalty assessment").

In these circumstances, we find the record supports the judge's findings under the four section 17(j) penalty factors. Therefore, with the exception of Citation 1, Items 12, 19, and 20, we find that it is appropriate to assess a penalty of seventy percent of the maximum allowable under the Act for each affirmed violation – $49,000 for each willful violation, $4,900 for each serious violation, and $490 for each other-than-serious violation. Citation 1, Item 12(a) and (b) involved two allegations concerning contaminated clothing storage, for which the Secretary proposed a single penalty. Because we vacated instance (a), we reduce the penalty for affirmed instance (b) to $2,450. Similarly, Citation 1, Item 20(a-c) involved three hygiene-related allegations for which the Secretary proposed a single penalty. Because we vacated instance (b),

we reduce the penalty for affirmed instances (a) and (c) to $3,270. Finally, with respect to Citation 1, Item 19, concerning Manganas' failure to timely provide shower facilities, we find that some penalty reduction is appropriate based on the infeasibility of having acquired the showers any sooner once Manganas ordered the showers. Accordingly, we assess a penalty of $4,000 for this violation.

ORDER

Based on the foregoing discussion, we vacate Citation 1, Items 12(a) and 20(b), and Citation 2, Items 2, 4, and 10(a)-18(a). We affirm Serious Citation 1, Items 5, 14, and 24 as other-than-serious violations. We affirm Serious Citation 1, Items 7, 10, 11, 12(b), 13, 15, 16, 17, 18, 19, 20(a & c), 21(a-o), 22, 25, 26, and 27 as serious violations. We affirm Willful Citation 2, Items 1, 10(b)-12(b), and 14(b)-18(b) as serious violations. We affirm Willful Citation 2, Items 3, 5, 6, 7, 8, and 9 as willful violations. Accordingly, for the items we affirm herein, we assess a total penalty of $383,590, as follows:

Serious Citation 1: Item 5 - $490; Item 7 -$4,900; Item 10 - $4,900; Item 11 - $4,900; Item 12(b) - $2,450; Item 13 - $4,900; Item 14 - $490; Item 15 - $4,900; Item 16 - $4,900; Item 17 - $4,900; Item 18 - $4,900; Item 19 - $4,000; Item 20(a & c) - $3,270; Item 21(a-o) - $4,900; Item 22 - $4,900; Item 24 - $490; Item 25 - $4,900; Item 26 - $4,900; Item 27 - $4,900.

Willful Citation 2: Item 1 - $4,900; Item 3 - $49,000; Item 5 - $49,000; Item 6 - $49,000; Item 7 - $49,000; Item 8 - $49,000; Item 9 - $49,000; Items 10(b)-12(b) - $4,900; Items 14(b)-18(b) - $4,900.

SO ORDERED.

/s/_____
W. Scott Railton
Chairman

/s/_____
Thomasina V. Rogers
Commissioner

/s/_____
Horace A. Thompson III
Commissioner

Dated: March 23, 2007

SECRETARY OF LABOR, Complainant, v. MANGANAS PAINTING COMPANY, INC., Respondent.	DOCKET NO. 94-0588

Appearances: Mary Ann Garvey, Heather A. Joys and Elizabeth R. Ashley
Office of the Solicitor
U. S. Department of Labor
For Complainant

Roger L. Sabo, Robert H. Nichols and Denise L. Hanson
Schottenstein, Zox and Dunn
Columbus, Ohio
For Respondent

BEFORE: MICHAEL H. SCHOENFELD,
Administrative Law Judge

DECISION AND ORDER

Procedural History

This case arises under the Occupational Safety and Health Act of 1970, 29 U.S.C. § § 651 - 678 (1970) ("the Act").

This case stems from an inspection conducted at Respondent's work site in August and

September 1993. As a result of the inspection two citations, one alleging thirty (30) serious violations and one alleging eighteen (18) willful violations were issued to Respondent. Civil penalties in totaling $1,319,850 were proposed by OSHA. Respondent timely contested both citations. Pursuant to a notice of hearing, the case came on to be heard in Columbus, Ohio. No affected employees sought to assert party status. Both parties have filed post-hearing briefs.

Jurisdiction

Complainant alleges and Respondent does not deny that it is an employer engaged in industrial painting. It is undisputed that at the time of this inspection Respondent was blasting and repainting an interstate highway bridge. Respondent does not deny that it uses tools, equipment and supplies which have moved in interstate commerce. I find that Respondent is engaged in a business affecting interstate commerce.

Based on the above finding, I conclude that Respondent is an employer within the meaning of § 3(5) of the Act.[1] Accordingly, the Commission has jurisdiction over the subject matter and the parties.

Background

Respondent, an industrial painting company, was engaged by the Ohio Department of Transportation ("ODOT") as a result of competitive bidding, to re-paint (including blasting to remove old paint and repainting) a highway bridge known as the Jeremiah Morrow Bridge. The company had performed similar work in the past but this project was the largest ever undertaken by Respondent. The bridge is actually a pair of parallel bridges spanning a gorge north of Cincinnati, Ohio through which the Little Miami River flows. The bridges provide the river crossings for Interstate Highway 71. The structure consists of two spans, each made up of a concrete road bed supported by steel structure framework below.

[1] Title 29 U.S.C. § 652(5).

The old paint, some of which contained lead, was removed from the structural steel framework by "blasting" the paint covered steel surfaces with "grit" consisting of fine steel pellets propelled by compressed air fed by hoses into hand-held spray nozzles operated by employees classified as painters. The blasting was performed inside canvas "containments." The containments were tent-like structures consisting of a series of canvas tarpaulins draped down from the outer edges of the concrete bridge deck. They were long enough to be below the lowest point of the steel framework. Each containment was completed by additional tarpaulins underneath the entire width of the bridge forming a floor. The steel grit blasted loose the old paint from the steel surfaces and, with the debris from the paint, fell to surfaces below the point of blasting including other steel beams on the floor of the containment. The process of blasting also released into the atmosphere inside the containment, considerable amounts of lead dust and particles. Fine dust, including lead dust, stayed suspended, cloud-like, in the atmosphere inside the containment during blasting. The expended grit was vacuumed, along with debris, by other employees (grit suckers) and collected on the bridge deck for cleaning and re-use. The grit was cleaned to remove debris by a recycling machine after which it was transferred for further use. Once all of the structural steel inside a particular containment had been blasted, fine cleaned and painted, the containment was dismantled. The tarpaulins would be checked and, if necessary, repaired or repaired then used again in the building of other containments.

Exposure Finding - Generally

This case contains numerous alleged violations which require the Secretary of Labor to prove as an element of the alleged violation that employees were exposed to airborne lead either equal to or exceeding a specified level permitted by a particular standard.[2] Throughout the Lead

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[2] In general, to prove a violation of a standard, the Secretary must demonstrate by a preponderance of the evidence (1) that the cited standard applies, (2) non-compliance with the terms of the standard, (3) employee exposure or access to the hazard created by the non-compliance, and (4) the employer knew or, with the exercise of reasonable diligence, could have known of the condition. *Astra Pharmaceutical Products, Inc.*, 9 BNA OSHC 2126, 2129 (No.

(continued...)

in Construction Standard, 29 CFR 1926.62, various actions are required to be taken by employers (or actions are prohibited to be taken by them) depending on whether employees are exposed to airborne lead at or above a particular level. Regardless of whether the action proscribed or prescribed under the particular alleged violation is based upon exposure of employees to more than the "action level"[3] or more than the "permissible exposure level"[4] of airborne lead.[5] Such exposure measurements are time weighted averages. Thus, the measure of exposure to airborne lead, for the purposes of the Lead in Construction Standards, necessarily contains two essential components - first; how MUCH lead exposure was there (quantity of exposure) and, second, for how LONG did the exposure last (duration of exposure).

Some items in each of the citations in this case encompass various alleged violations which require the Secretary to prove the airborne lead exposure of employees who may, for analytical purposes, be categorized into two groups. First, those employees for whom there is evidence of actual personal sampling results based upon which there is a calculated documentation of an 8-hour time weighted average exposure to airborne lead. ("Sampled employees.")(See, Appendix A). Second, those employees who were not sampled. The evidence and arguments as to each of these groups of employees is different and require separate analyses.

Exposure Finding - Sampled Employees

Compliance Officer Sweeny conducted personal sampling of a number of Respondent's

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[2](...continued)
78-6247, 1981).

[3] The "action level" is lead at or above 30 micrograms per cubic meter of air averaged over an 8-hour period. (30 $\mu g/m^3$).

[4] The permissible exposure limit ("PEL") for airborne lead equal to or greater than 50 micrograms of lead per cubic meter of air averaged over an 8-hour time period (50 $\mu g/m^3$).

[5] The Lead in Construction Standard generally refers to concentrations of airborne lead as measured in units of micrograms per cubic meter of air ($\mu g/m^3$). One microgram equals 1 one-millionth of a gram.

employees on September 21, 22 and 24, 1993. He testified as to his method of attaching the sampling devices, checking on them during the day and removing the samples at the end of the day. The filters on which airborne lead was captured in the process of sampling were shipped to the OSHA laboratory in Salt Lake City, Utah for analysis. (Tr. 184, 223.) The filters were examined there and analyzed for the presence of lead. If lead was found, the amount was determined. The lab results were returned to the Compliance Officer who then calculated the employees' time-weighted average exposure levels. (Tr.184, 188-189, 223; C-8, C-9, C-11, C-12). The results for each employee sampled showed exposure to airborne lead above the PEL[6].

Respondent elicited extensive testimony from Robert Leighton, an expert industrial hygienist specializing in the painting of steel structures to the effect that he had "questions" or "reservations" about the methods used by Compliance Officer Sweeney in conducting the sampling and the validity of the results obtained as a result of that sampling. He opined that several steps in the Compliance Officer's sampling procedures raised questions and problems which inferred that the sampling procedure used rendered the results unreliable. He was particularly concerned that the workers were not observed while performing their duties or at least at their work stations during the testing, that the filters were placed on their lapels and they were instructed to re-attach them after entering the containment and putting their blasting hoods in place and that the flow rates of some of the pumps were adjusted during the lunch break (*e.g.*, Tr. 2305, *generally*, Tr. 2277-2289, 2302-2319, 2331, 2350, 2382). Respondent also elicited testimony from Mr. John Cignatta, a professional engineer and expert in corrosion, called by Complainant, to the effect that airborne lead sampling of employees while blasting operations are underway could be problematic. (Tr. 2279-80, 2287-89, 2300, 2539-2540). On cross examination, the Compliance Officer conceded that the sampling procedure used on this worksite did not fully comport with the instructions in the OSHA Technical Manual. (Tr. 670-679). Mr. Cignatta specifically disagreed with Mr. Leighton as to whether it was appropriate to adjust the sampling pump flow rate during sampling. (Tr. 2479-2480).

Respondent argues that the procedure for sampling as used by the Compliance Officer did

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[6] The specific results of Compliance Officer Sweeney's sampling are set forth in Appendix A.

not fully comport with the OSHA Technical Manual (R-46) as well as certain "inherent problems associated with conducting personal sampling of employees doing abrasive blasting in containment areas. (Brief, p. 12). A Compliance Officer's failure to conduct testing in a manner fully consistent with the contents of OSHA's Technical Manual, or other similar bulletins or compliance manuals does not, by itself, provide a basis for rejecting the results of the testing. See, *Caterpillar, Inc.,* 15 BNA OSHC 2153, 2173 n. 24 (No. 97-0922, 1993) (Bulletins, compliance manuals and the like do not create substantive rights in employers.)

Respondent maintains that inconsistencies in the sampling results obtained by Compliance Officer Sweeney is a basis upon which the results are to be rejected or, at least, considered unreliable to the degree that a violation cannot be based upon them. Respondent points out that the airborne lead levels arrived at by Compliance Officer Sweeney for the cited employees, even those four in the same containment area, appeared to vary considerably, from 430 $\mu g/m^3$ (TWA) to as much as 1,850 $\mu g/m^3$ (TWA) Respondent finds significance in the differences between Compliance Officer Sweeney's morning and afternoon sampling results as well as the differences between the Compliance Officer's results and those reported by Rust (C-7). In sum, Respondent claims that the sampling results are unreliable.

Complainant counters that there may be differences in the results obtained at different times, in different places and/or reached by different testing but that in the absence of a showing by Respondent that there were different conditions or work being performed at each testing, that the differences do not rise to any significance as to the reliability of the sampling evidence obtained by the Compliance Officer. (Sec. Reply brief, p. 8). The Secretary goes on to point out that "when one compares the results of sampling performed under similar conditions ...the consistency of OSHA's samples is evident." (*Id.*) In addition, Complainant discounts Mr. Leighton's questioning the accuracy of CO Sweeney's test data because Mr. Leighton admitted that he had not reviewed complete copies of OSHA's sampling worksheets.

The Commission and its judges rely on reasonably reliable relevant evidence in reaching a factual finding. There need not be uncontrovertible or perfect evidence. The standard of proof in supporting an alleged violation of the Act is a preponderance of reasonably reliable evidence. The overall consistency of the sampling as well as the lack of any significantly different test

results leads to the finding that Compliance Officer Sweeny's sampling data is reasonably reliable. In this regard, contrary to Respondent's claim, I do not find the differences between Compliance Officer Sweeny's results and Rust's results on this record, to be highly significant or a reasonable basis upon which to find Compliance Officer Sweeny's results unreliable. Respondent's reliance on data supplied by Rust (Resp. brief, p. 13; C-7) is questionable. A review of the Rust data reveals an important lack of information as to the procedures used for sampling, numerous apparent samples considered invalid, many samples identified only by the employee's name without any identification or correlation as to where the employee was located or what he was doing during sampling (*e.g.*, sample #005 on 8/19/92; samples #001 & #002 on 8/5/93; samples #001 & #002 of 8/8; and samples #002 & #003 of 9/16.) Of the Rust samples, the only two clearly identified as having been taken "in the containment area" (#3 of 8/5 and #004 of 9/16). They yielded results of 1371 $\mu g/m^3$ and 803 $\mu g/m^3$, respectively[7]. Indeed, many, if not most of the faults and "questions" Respondent had regarding Compliance Officer Sweeney's test results, apply with equal force to the Rust sampling.

Finally, to the degree that they conflict or are inconsistent, I accord more evidentiary weight to the expert opinions of Mr. Cignatta than those of Mr. Leighton. Mr. Cignatta's experience, particularly with designing containments and systems to measure exposure to airborne lead is far greater. He was specifically trained and has qualified for licensing as a professional engineer and many of the matters addressed are engineering type problems. Cignatta carefully approached the questions in this case. He studied drawings of the bridge and photographs of various stages of the work. He visited the bridge with the ODOT project engineer, and he even reviewed daily inspection reports filed by ODOT inspectors (Tr 2441-2449). He prepared a far more complete and detailed basis for formulating his opinions about the work done at the Jeremiah Morrow Bridge than did Mr. Leighton who spoke in more general terms. Mr. Cignatta, in dealing with the methods of containment and how blasting was conducted, demonstrated that although he never visited the bridge during its painting by

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[7] A third Rust sample (#004 of 9/17) identified as having been taken in the containment area is noted to have been "based on previous sample when the pumped stopped in the first hour." This sample is disregarded.

Respondent, was careful in seeking out dimensions and measurements of the bridge and its components. He sought and relied on far more detailed information regarding the equipment, tarps, Etc. used at the bridge than did Mr. Leighton. It also appeared that Mr. Cignatta had more thoroughly reviewed the file and relevant data in the file. In addition, he more fully explained and justified his conclusions. In light of these factors, I find that the opinion testimony of Mr. Cignatta warrants more evidentiary weight than that of Mr. Leighton.

I find that under all of the circumstances of this case, the sampling results reached by Compliance Officer Sweeney are reliable evidence upon which a factual finding of exposure may rest.

The results of the personal sampling, by themselves, established the amount of airborne lead to which sampled employees were exposed. The duration of that exposure, necessary to calculate the time weighted average exposure, was based upon the number of minutes the sampling pump ran. Based upon that measure, the Compliance Officer calculated the time weighted exposure of each of the sampled employees. (C-9, C-12 through 24 and C-36). His arithmetical calculations have not been challenged. I find established as fact that the time weighted average exposures to airborne lead of the sampled employees on the date(s) on which the samples were taken are those as calculated by the Compliance Officer and set forth in Appendix A.

Exposure Finding - Employees Not Sampled

A number of the items in the citations issued to Respondent in this case must rest on the level of employee exposure to airborne lead which was never measured by the Compliance Officer or, for that matter, by anyone else. Exposure findings in those instances can only be made by determining what evidence exists in each instance which would warrant a reasonable inference that the lead level to which the employees affected were exposed was at a level equal to or higher than that established by the standard in the item cited so as to constitute a violative condition.

It is reasonable to infer that employees who were not sampled were exposed to airborne

lead in the same or similar amounts as those sampled employees who are shown to have worked under substantially similar conditions. Respondent's expert, Mr. Leighton, testified that;

> Air sampling is done to represent a worker's exposure for not just that day, but for many days, for the entire project, perhaps. It's there to represent that worker as well as workers who have similar positions as that worker.
> Other blasters who perhaps were not working that day, or were working that were not sampled so we need to know if there was anything unusual that happened with that worker that would not represent exposure of other workers, so there's a lot of information that had to be taken during the course of the day either from personal observations of from interviewing the person who is being sampled as well, or ask other people.
> If you want to say that a particular air sample represents all of the blasters, you're going to have to speak to the other people who you didn't sample and find out what they did. You're actually going to have to observe all the people there, not only the ones you did sample, but the ones that you didn't sample if you want to use that data to represent other people, so there's a lot of things that you have to look out for.

(Tr. 2286-2287). The context in which Mr. Leighton made the above statement was that of a caveat to the Secretary's case. It is, however, a matter of logic and reason to accept the proposition that if it can be shown that under a certain set of circumstances the employee exposure to airborne lead was a certain amount then under reasonably similar circumstances, and in the absence of evidence of unusual or dissimilar circumstances, employee exposure to airborne lead will be similar.

Based on the above and on the following reasons, I find that the evidence on this record and the reasonable inferences arising therefrom demonstrate that the amount of airborne lead within a containment in which blasting was done exceeded 50 $\mu g/m^3$ during any time blasting was being conducted.

As discussed previously, the blasting and repainting of the structural steel progressed in sections across one span then the other. A series of containments, each one, an area enshrouded on three sides by canvas tarpaulins draped over the sides of the bridge deck and suspended completely from one side of the bridge to the other across the bottom of the structural steel

framework, was erected as the blasting progressed. Additional canvas tarps closed off each end of the containment. Each containment was thus a fully enclosed, tent like structure. As the work progressed from one end of a span to the other, a sequence of containments was erected, each being set up, used until blasting and repainting of the sections was complete, then dismantled. Virtually all blasting and grit vacuuming on the bridge took place within a containment.

First, Respondent conceded that the amount of airborne lead within the containment while blasting operations were in progress during the month of August 1993 exceeded 50 $\mu g/m^3$ (PEL). (Response to Request for Admissions No. 23).

Second, computer simulations and modeling done by Mr. Cignatta, showed that high concentrations of airborne lead dust, far exceeding the level of 50 $\mu g/m^3$ were present in the vast majority of the areas within the containments when blasting was going on. Daily inspection reports by ODOT inspectors indicate that when blasting took place, between 2 and four blasters operated simultaneously. (C-48). Mr. Cignatta thoroughly explained the computer modeling he performed (Tr. 2429-2460). He presented results which showed that in a containment similar or close to the size and type in place during the inspection with two to four blasters operating, a "cloud" of lead dust with a concentration from 1,000 to 8,000 $\mu g/m^3$ would be present which would cover a majority of the areas in the containment (Tr. 2527). He outlined the areas of the dust cloud within which concentrations of lead of 3,000, 2,000 and 1,000 micrograms per cubic meter would have been present. (Tr. 2462-2466; C-75, C-76 & C-77). Mr. Cignatta depicted a measurement below 700 $\mu g/m^3$ (fourteen TIMES the PEL) as "an exceedingly low level of lead dust exposure" within the containment. (Tr. 2466). Mr Cignatta pointed out that his computer modeling data presented results in terms of the amount of lead in the air at a given point in time. He was not discussing time weighted averages. (*Eg.*, Tr. 2476).

In sum, based upon the above evidence, I find it more likely than not that in any one of the series of containments used by Manganas employees in the blasting and repainting of the Jeremiah Morrow bridge, the quantity of airborne lead exceeded 50 $\mu g/m^3$ while blasting operations were underway.

Pursuant to the above finding, where a particular citation item requires proof that an employee of Manganas was exposed to a <u>quantity</u> of airborne lead, irrespective of time weighted

average, at or above 50 $\mu g/m^3$ as a necessary element, I also find that the computer modeling and related testimony presented by Mr. Cignatta is *prima facie* evidence of such exposure of all employees within a containment while blasting was taking place.[8]

Citation 1, Alleged Serious Violations

Citation 1, Items 3a and 3b
29 CFR § 1926.59(e)(1)
Hazard Communications.

Item 3a charges that Respondent failed to develop, implement and maintain at the worksite a written hazard communications program as required by the standard[9] while Item 3b charges Respondent with the failure to include in such a program a specific list of all hazardous chemicals known to be present at the site.

Complainant's case is built around the testimony of the Compliance Officer that he requested a copy of Respondent's hazard communication program and a list of the hazardous chemicals used on the site and received neither document. (Sec. brief, p. 11; Tr. 348-351). He did acknowledge receiving "some material safety data sheets and some sheets relating to when some employees had been trained." (Tr. 348).

Respondent first argues that the standard, as cited in the citation (29 CFR §

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[8] The other required element of exposure, duration, is discussed where relevant to an item.

[9] Title 29 CFR § 1926.59(e)(1) and .59(e)(1)(i) provide as follows:

> (e) *Written hazard communication program.* (1) Employers shall develop, implement, and maintain at each workplace, a written hazard communication program which at least describes how the criteria specified in paragraphs (f), (g), and (h) of this section for labels and other forms of warning, material safety data sheets, and employee information and training will be met, and which also includes the following:
> (i) A list of the hazardous chemicals known to be present using an identity that is referenced on the appropriate material safety data sheet (the list may be compiled for the workplace as a whole or for individual work areas).

1926.29(e)(1)) "does not exist." The argument is rejected since the item was amended in the complaint without having prejudiced Respondent. More importantly, the Compliance Officer's cross examination seems to contradict, or at least fatally modify his testimony on direct. He stated that he saw Respondent's safety program at the site during the inspection and that he received a copy of Chapter 40 of Respondent's safety manual (C-6) (relating to lead) "in approximately mid-September of 1993." (Tr. 449-450) He then states that he asked for a copy of the program and none was produced or shown to him (Tr. 506). He concedes that he saw such a program at a later point in time, but could not recall when that occurred. (Tr. 507). The Compliance Officer's cross examination on this matter demonstrates that during the course of the inspection he was shown a company safety and health program and that he "took notes" about the manual. He recommended the issuance of this item on the basis that he does not recall "a chapter on chemical hazard communication on site at that time." (Tr. 719). The Secretary has not meet his burden of proving the alleged violation. It is less than reasonable to infer, as would be required to find this violation, that a chapter (chapter 39 out of 45 chapters) was "missing" from the manual shown to the Compliance Officer at the site and that his notes specifically fail to reflect that. His testimony at the hearing that he could not remember finding a chapter on hazard communications in the manual at the site does not amount to a preponderance of the reliable evidence that such a chapter either did not exist or was not present at that time. Item 3a is VACATED.

Item 3b, as interpreted by the Compliance Officer requires a list of chemicals quite separate and apart from the relevant material safety data sheets being maintained on site. (Tr. 715-716). Although the Compliance Officer received three MSDS Sheets, he cited Respondent for the lack of a separate sheet of paper listing every hazardous chemical at the site. There is no dispute that Respondent had posted MSDS Sheets in the office trailer and there is no allegation or evidence that the sheets were inadequate or that there were chemicals at the site for which Respondent did not have MSDS Sheets. The lack of a separate list, however, fails to comply with the clear wording and meaning of the regulation. Respondent's argument that having all of the appropriate MSDS Sheets present at the site meets the requirement to have a list of such chemicals is rejected. Item 3b is AFFIRMED as a violation of the cited standard.

The Compliance Officer, in attempting to describe what, if any, hazard was created by the lack of a list of such chemicals repeatedly sought to describe the consequences of an employee coming into contact with the chemicals. The hazards presented by the chemicals are, however, not the hazards presented by the lack of a list of such chemicals. This is especially so where, as here, there is no violation alleged or found for a failure to have an MSDS Sheet for each of the hazardous chemicals at the site. The Secretary sought to demonstrate that hazards were "associated with exposure to the chemicals" for which MSDS Sheets were present on the site. There never was any evidence that the lack of one list of such chemicals presented any hazard. (Tr. 353-356). Accordingly, I find that the failure to comply with the standard cited in item 3b is other than serious. Given the lack of any demonstrated hazard whatsoever, no monetary penalty is assessed.

Citation 1, Items 4a and 4b
29 CFR § 1926.59(f)(5)(i) and (ii)
Lack of label(s) on gasoline can.

Respondent was cited under these two standards because, according to the Compliance Officer, a safety can containing gasoline had neither an "identity" label nor a "hazard information" label.[10]

The Secretary merely states that the record shows that "a five-gallon safety can...contained gasoline." (Sec. brief, p. 11) That gasoline was present in the unlabeled safety can is based on the following testimony by the Compliance Officer:

> Q How did you determine that the unlabeled can contained gasoline?
> A I asked I believe it was Andy Manganas that I asked that

[10] The citation items refer to the following standards:

> (f) *Labels and other forms of warning*. (1) The chemical manufacturer, importer, or distributor shall ensure that each container of hazardous chemicals leaving the workplace is labeled, tagged or marked with the following information:
> (i) Identity of the hazardous chemical(s);
> (ii) Appropriate hazard warnings....

question of.
Q What did Mr. Manganas tell you?
A He told me that it contained gasoline and that he had identity and hazard information labels for gasoline stored in his trailer but that it had been awhile since he had checked to make sure that all containers of chemicals had proper labels on them.

(Tr. 356-357). This rather central fact is controverted.

Respondent maintains that the evidence fails to establish "that the can actually contained any hazardous element." (Resp. brief, p. 33.) Manganas points to testimony by Andrew Manganas that he told the Compliance Officer that the can, which was in an area with broken equipment, had a hole in the bottom and could have no gasoline in it. (Tr. 2128).

For the following reasons, I find that the Secretary has failed to show by a preponderance of the evidence that the can contained gasoline, an essential element of the alleged violation.

In this instance, I find that the Compliance Officer's testimony is less reliable and warrants far less weight than that of Andrew Manganas because Mr. Manganas' testimony is more consistent with other, uncontroverted facts. First, the Compliance Officer's initial description of the contents rests upon his somewhat unclear (or at least attempted non-committal) response to the question of how he determined the contents of the can. Second, the Compliance Officer, on cross examination, when asked if the gasoline can was stored with other scrap material, replied, "I don't recall garbage or waste being stored near it (the gasoline can)." (Tr. 543) This reply is equivocal or evasive as to whether the gasoline can was stored with other scrap material. At best, it is an unclear recollection. Third, the Compliance Officer further testified on cross-examination to the effect that he never observed any employee using the cited gasoline can and he acknowledged that he was aware of no instance of any employee on the site using gasoline from any can rather than fueling their cars "from a (gasoline) station." (Tr. 544). These facts are more consistent with Mr. Manganas' description of the cited gasoline can than that of the Compliance Officer. Fourth, and not the least, the Compliance Officer's failure to take the few moments to check the contents of an unmarked safety can raises the inference that the matter was not that important to him at the time. It surely would have been a simple matter for the Compliance Officer to check the can, especially since merely lifting it or turning it over

would have revealed whether it was empty or whether there were holes in the bottom which would have rendered it useless. The lack of basic evidence needed to support the charge is thus properly laid at the feet of the Secretary.

Under these circumstances, I find that the evidence does not show that the can contained any hazardous chemical or substance. Accordingly, items 4a and 4b are VACATED.

Citation 1, Item 5
29 CFR § 1926.59(h)
Lack of Hazcom Training.

Item 5 of Citation 1 alleges that;

> [n]umerous employees at this worksite were not trained about (1) the hazards which are linked to Manganese, Lead, Methyl Ethyl, Ketone, Diesel Fuel, Gasoline and the paints which were sprayed at this worksite; (2) The contents of OSHA's Chemical Hazard Communication Standard (1926.59); and (3) The location, availability and contents of any written hazard communication program which may have been developed by or for this employer.

The standard cited requires that:

> (h) *Employee information and training*. (1) Employers shall provide employees with effective information and training on hazardous chemicals in their work area at the time of their initial assignment, and whenever a new physical or health hazard the employees have not previously been trained about is introduced into their work area. Information and training may be designed to cover categories of hazards (e.g., flammability, carcinogenicity) or specific chemicals. Chemical - specific information must always be available through labels and material safety data sheets.

The Compliance Officer testified as to several statements signed by employees of Manganas that they had never received any training with regard to chemical hazard communication or hazards linked to certain chemicals or substances (arsenic, manganese, gasoline, diesel fuel or exhaust, cambium (sic.) or "any chemical other than lead." (Tr. 359 - 362, 360). He also testified about the hazards of several of the materials at the worksite and concluded they were, in fact used at the site, based upon the presence at the worksite of MSDSs

for those items. (Tr. 362-364).

As to training regarding specific materials, Respondent argues that since no arsenic was found at the worksite and the levels of manganese found there were below the PEL that training regarding chemicals which are not present, is not required." (Resp. brief, Pp. 31-32). While Respondent's argument might be correct theoretically, it is incorrect factually. First, a reasonable interpretation of the standard requires dissemination of effective information and training as to hazardous materials present at the site regardless of whether the amount present exceeded the PEL. Any other interpretation would render employees ignorant of materials at the site which could present a health hazard if there was an increase in exposure either through an increase in the amount present or the time exposed. Second, the Compliance Officer's testimony covered more than just arsenic and manganese. Other hazardous chemicals and materials were present at the worksite. I thus find as fact that employees of Respondent at the worksite were not provided with either effective information or training regarding hazardous chemicals in their work areas as required by the cited standard.

Respondent also argues that the Secretary's evidence as to lack of Hazcom training in general is lacking because it is based on the Compliance Officer's testimony which, in turn, was based on written statements made and signed by employees of Respondent. Respondent maintains that such testimony was improperly admitted into evidence. The evidentiary ruling made at the hearing is affirmed. In addition, Respondent claims that the "hearsay testimony" to the effect that employees interviewed received no hazard communication training is "in direct conflict with the documentary evidence." (Resp. brief, p. 32) (Footnote omitted.) Respondent points to a series of statements signed by various employees acknowledging that they received training "relevant to Hazard Communication 1926.59." (R-4). This exhibit consists of approximately 42 pages, several of which are dated long after the inspection and dates of alleged violation. The acknowledgments include at least four from the five employees identified by the Compliance Officer as those who gave statements indicating they had not received training (Tr. 359). Three such acknowledgments are, however, dated April 6, 1994. Two others are dated "4/13/93". Such evidence shows that at least some employees did not receive Hazcom training until after the inspection in this case and after the employee statements on which the Compliance

Officer relied were taken. Respondent also relies (proposed finding of fact, ¶ 7) on the testimony of three of its supervisory personnel (Lang, McCully and Andrew Manganas) that there were weekly safety meetings at which new chemicals being introduced were discussed. Such general evidence does not directly rebut the employee statements relied upon by the Secretary. Finally, Respondent's reliance on the attendance of some of its experienced employees at training courses at other locations is misplaced. The evidence shows that the training course provided by the union consisted of training in general safety, fall protection and lead abatement. (Tr. 1900-1901). Respondent points to no evidence that employees received the necessary training regarding Hazcom generally or the hazards at the Jeremiah Morrow Bridge worksite at any other location at any other time.

For the above reasons, I find that at least some employees of Respondent failed to receive effective information and training as required by the cited standard. Accordingly, Citation 1, Item 5 is AFFIRMED.

In seeking to support the classification of the alleged violation as serious, the Secretary relied on Compliance Officer Sweeney's testimony that exposure to some of the chemicals and materials listed in the citation could "produce adverse effects to the central nervous system." (Sec. brief, p.12). The Secretary has not, on this evidence sustained his burden of showing the violation is serious within the meaning of § 17(k) of the Act. The violation is not based on actual exposure to any amounts of any chemicals or materials. It is based solely on the failure of Respondent to fully inform and train its employees in the hazards which could be present. Of course, that assumes that proper training would prevent or, at least lessen the likelihood of employee exposure to the dangerous materials. It does not, however guarantee no exposure. Moreover, the Compliance Officer did not relate the specific dangers to specific materials which were shown to be present at the worksite. One of the problems engendered by OSHA's apparent policy of issuing citations with separate alleged violations of numerous subparts of more comprehensive standards is demonstrated here. The Secretary simply cannot always show hazards specific arising from an employers failure to comply with each subpart of a larger, more encompassing requirement. Since the Secretary has not shown that Respondent's failure to comply with the standard cited in this item gave rise to a particular hazard, he cannot sustain an

allegation that this violation is serious. Accordingly, I find that the violation is other than serious.

Citation 1, Item 6
1926.62(c)(1)
Exposure of Employees to Airborne Lead Above Permissible Levels.

The regulation requires that employees not be exposed to airborne lead in excess of the Permissible Exposure Level (PEL).[11]

Each of the employees identified in this item were sampled. The results for each showed exposure to airborne lead above the PEL[12]. (See, *Exposure Finding - Sampled Employees*).

Respondent conceded that the amount of airborne lead within the containment while blasting operations were in progress during the month of August 1993 exceeded the PEL. (Response to Request for Admissions No. 23).

On these facts, and for the reasons set forth in the discussion of *Exposure Finding -*

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[11] The standard provides:

> (c) *Permissible exposure limit.* (1) The employer shall assure that no employee is exposed to lead at concentrations greater than fifty micrograms per cubic meter of air (50 $\mu g/m^3$) averaged over an 8-hour period.

[12] The specific results of the sampling of the blasters are as follows:

Item No.	Employee	Date Sampled	Lead Exposure g/m^3	Exceeds PEL by Factor Of
6a	[redacted]	9/21/93	4,960	99.2
6b	[redacted]	9/22/93	4,070	81.4
6c	[redacted]	9/22/93	3,700	74.0
6d	[redacted]	9/22/93	1,620	32.4
6e	[redacted]	9/22/93	430	8.6

.

Sampled Employees, I find that the Secretary has demonstrated that the cited employees were exposed to lead in excess of the PEL.

Respondent argues that the cited standard "is merely an overall admonition" (Brief, p. 10) which cannot, by itself, be the basis of a separate violation. Respondent's argument is rejected. It is true, as Respondent suggests, that the exposure of employees to airborne lead above the PEL, which is defined by 1926.62(c), "triggers" subsequent requirements. So stating, however, does not mean that a violation of 1926.62(c) alone cannot stand. The structure of the standards is such that engineering and work practice controls must be implemented to the extent feasible. Only where their implementation fails to reduce employee exposure to or below the PEL, is an employer permitted to use respirators, and then only in a manner that complies with other subsections of the standard. (1926.62(e)). Where the Secretary alleges that there is employee exposure to airborne lead at levels above the PEL and improper respirator selection or usage, violations of both the "general admonition" and the specific respirator requirements can and do exist.

Because the sampling was unreliable, argues Respondent, it did not know at the time of the inspection that its employees working in the containment were so exposed. It presents virtually no details or other arguments regarding its knowledge. Respondent's argument is rejected because the evidence presented by the Secretary is found to be reliable. Finally, there is no dispute that overexposure to airborne lead is a serious hazard. Accordingly, Citation 1, Item 6 is AFFIRMED.

Citation I, Item 7
29 CFR 1926.62(d)(8)(1)
Inform employees in writing of results of air sampling for lead.

The cited standard[13] requires that employees be notified in writing of the "exposure

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[13] The cited standard reads;

> (8) *Employee notification.* (i) Within 5 working days after completion of the exposure assessment the employer shall notify each employee in writing of the results which represent that

(continued...)

assessment" results "which represent that employee's exposure." Such an "exposure assessment" must be made by employers to determine whether its employees are exposed to airborne lead above the "action level."[14] Several employees were the subject of personal air sampling, *e.g.* [redacted] was tested but never received written results (Tr. 1338-1339). Written test results were provided to Respondent (Molander deposition, p. 38).[15]

Respondent maintains that the Compliance Officer's testimony as to the contents of employee statements that they never received written test results was improperly admitted at the hearing. (Brief, Pp. 15, n. 2.) That holding is affirmed. Respondent also argues that in the absence of proof of when Respondent received the test results from Rust, there can be no violation of the standard because the five-day notification deadline is measured from the date of the receipt of the results by the employer. While Respondent's argument may be logical, it is not applicable to the facts of record. Rusts sampling results, according to Respondent, were transmitted to Manganas, albeit sometime after September 29, 1993. At least one employee who was sampled had not received any written results, at least as of the day he testified on November 1, 1995. Finally, posting the results in the company trailer is not sufficient notification in writing to the employees. Accordingly, Citation 1, Item 7, is AFFIRMED.

Citation 1, Item 8
29 CFR 1926.62(e)(2)(i)
Lack of complete written compliance program.

The cited standard, 29 C.F.R. § 1926.62(e)(2)(i), provides, in pertinent part, that, "[p]rior to the commencement of the job each employer shall establish and implement a written

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[13](...continued)
employee's exposure.

[14] Title 29 CFR § 1926.62(b).

[15] By agreement of the parties, the testimony of Lars E. Molander was taken by deposition after the hearing. The transcript of that deposition has been marked as document J-87 and is part of the record in this case as would be the transcription of his testimony as if it were taken in open court. The exhibits proffered by Complainant at the time of the deposition are also admitted over Respondent's objections.

compliance plan to achieve compliance with paragraph (c) of this section."

The Secretary argues that the Compliance Officer asked Respondent's officials on the job "if it had a program designed to meet the requirements" of the standard. He was presented with a "generic safety and health program" which did not contain "any of the job specific information required by the standard." (Sec. Brief, p. 14.)

The Secretary's argument ignores the clear and plain wording of the standard. As argued by Respondent (Resp. brief, p. 17) the Lead in Construction Standard became effective after the commencement of the job. Thus, the cited standard, which requires that certain actions be taken "before the onset of work," could not possibly apply to the work Respondent was performing at the Jeremiah Morrow Bridge.

Inasmuch as the cited standard does not apply, Item 8 of Citation 1 is VACATED.

Citation 1, Item 9
29 CFR § 1926.62(f)(3)(ii)
Respirator fit testing not performed by required date.

The standard cited requires an employer to perform respirator fit testing "at the time of initial fitting and at least every six months thereafter.[16]

The Secretary maintains that a violation of the cited standard is shown by the facts that Respondent's employees, who used negative pressure respirators, who were interviewed by the Compliance Officer, were not fit tested until September of 1993. A representative of Rust Engineering, hired by Respondent, testified that she performed qualitative fit testing of Respondent's employees in September of 1993. (Tr. 1232).

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[16] The standard provides;

> (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. The tests shall be used to select facepieces that provide the required protection as prescribed in Table I.

Respondent first argues that it could not take any "initial" steps after work on the project began. Respondent's argument is rejected. The term "initial fitting" is broad enough to encompass the first time a respirator is worn, not necessarily the time when work on the project began. (See, Citation 1, Item 8). Respondent also argues that the Compliance Officer's testimony regarding employees' statements to him that they were not fit-tested is insufficient to carry the Secretary's burden of proof. At the hearing the Compliance Officer testified that he spoke to seven employees. He isolated "as an example" two of those seven employees ([redacted]) who reportedly told him they had not received fit tests until September 1993. (Tr. 374-375). Respondent notes that one of the two employees specifically identified by the Compliance Officer as having claimed to have not been fit tested until September 1993 ([redacted]) signed a statement that he had been fit tested in April 1993. (R-12). The record as to the other specifically identified employee (Foley) shows no such thing. Moreover, Respondent notes that the only "live" testimony as to lack of fit testing by employees at the hearing was made by two former employees who both have civil suits pending against Respondent. The record includes a statement signed by [redacted], one of those employees, in which he acknowledging fit testing in April 1993. (R-12).

Respondent is incorrect in urging rejection of a finding of failure to conduct initial fit testing after the Compliance Officer referred to statements made to him by seven employees. A fair and reasonable reading of the Compliance Officer's testimony, interrupted by Respondent's objection, is that the seven employees he identified all told him what amounted to the same thing. This is not, as asserted by Respondent at the hearing, a "generic response." Here a group of people all gave similar statements to the Compliance Officer. There need not be testimony as to the statement of each one individually. Complainant was free to summarize their similar individual statements. This is so especially in light of Respondent's failure to show that the summary offered by the Compliance Officer was inaccurate in any significant respect. Moreover, there is clear, uncontroverted evidence that whatever fit testing was done by Respondent prior to September 1993 was accomplished by Mr. Lang on the worksite. (Tr. 983). While he claimed that he made a record of the initial fit testing for each employee tested, he conceded on cross examination that there was no record of fit testing for several employees whom he conceded

worked at the site wearing respirators. (Tr. 984-987).

Under this standard, it is the Secretary's burden to show by a preponderance of the evidence that at least one or more employees worked at the site wearing respirator without first having undergone fit testing. He has done so. The fact that documentation exists which shows that some employees were fit tested does not, by itself, raise an inference that all employees were fit tested and that it is merely the documentation which is missing. Further, any such inference is negated by Lang's testimony that there are no records for some employees who wore respirators on the job. If Mr. Lang did indeed make a record of everyone he tested and there were men on the job using respirators for whom there are no test records, either Mr. Lang; 1) tested them but did not make a record: or, 2) tested them and made a record which is not included in the evidence for some reason: or, 3) did not test them . In light of the statements and testimony of some employees who used respirators that they were not tested, the most reasonable inference is that some employees were not fit tested before they began working on the site using a respirator. Accordingly, I find as fact that Respondent failed to provide initial fit testing of respirators for all employees who, during their employment used respirators. Citation 1, Item 9 is AFFIRMED.

The violation is serious as alleged. Employees sent into an environment where these is actual or likely exposure to significant levels of toxic materials without first fit testing their respirators run the risk of exposure to higher levels of the toxic material than would occur in the presence of properly fitted equipment. In this case, that toxic material is airborne lead. Exposure to airborne lead is serious.

Citation I, Item 10
29 CFR 1926.62(g)(1)
Failure to Provide Protective Clothing.

Citation 1, Item 10 alleges that Respondent did not provide appropriate work clothing in that work shoes or disposable covers were not provided to any employees as of September 24, 1993 and Coveralls were not being provided to or worn by grit recycling area employees as of September 21, 1993.

The standard cited, 29 CFR § 1926.62(g)(1), requires that employers provide at no cost to

certain employees (and assure their use of) appropriate protective work clothing and equipment.[17] The employees specified are those;

> exposed to lead above the PEL without regard to the use of respirators, where employees are exposed to lead compounds which may cause skin or eye irritation...and as interim protection for employees performing tasks as specified in paragraph (d)(2) of this section.

The Secretary, referring to 29 CFR 1926.62(d)(2)(v)(B), maintains that the cited standard requires that, even "prior to initial personal monitoring, the employer "provide such clothing to employees performing any of the tasks enumerated in 29 CFR 1926.62(d)(2)." (Sec. Brief, p. 15). He maintains that full protective clothing should have been provided and used by the employees who were tested and found to be exposed to airborne lead above the PEL and, regardless of exposure, to all employees who were performing tasks enumerated in 29 CFR 1926.62(d)(2). (Sec. Brief, p. 16.).

The Secretary points to uncontroverted testimony of the Compliance Officer that when he arrived at the worksite for the first time no protective clothing was being provided by Respondent to its employees. He also relies on unrebutted employee testimony that some employees (those working in the grit recycling area) were never provided with coveralls and additional testimony

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[17] The standard provides:

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

that neither shoes nor shoe covers were ever provided to any employees.

Respondent states that it took several remedial actions including the purchase of a washer and dryer, purchase of a decontamination trailer, hiring an individual to launder work clothes at the site, Etc., in "September" (of 1993). (Tr. 2130-2131.) Respondent claims that there was "little, if any duration of time when employees lacked protection" because blasting on the bridge had ceased for the Labor Day holiday and commencement of blasting operations on the northbound span did not begin until after the holiday. (Resp. brief, p. 18). Respondent relies on the decision of an administrative law judge in *Central Brass Manufacturing,* 13 BNA OSHC 1609, 1610 (Nos. 86-0978 and 86-1610, 1987) holding that a failure to administer a hearing conservation program was a *de minimis* violation because hearing protection was available while two "less important" standards were not complied with.

The Secretary's essential factual allegation is unrebutted. Employees exposed to airborne lead above the PEL were not provided with the protective clothing required by the standard.[18] Respondent's argument as to short duration is relevant, if at all, to the possible consequences or gravity of the violation, or both. Its reliance on *Central Brass Manufacturing, Co.*, is rejected. The decision of an administrative law judge, even one as instructive as that of Judge Salyers, is not precedental to the Commission. Moreover, the facts of that case are so different as to render it distinguishable from this case. There, the judge found as fact that the two less important parts of the cited standard not complied with had little or no impact on the safety or health of employees. Respondent has made no such showing here.

Respondent was aware of the hazards of lead as well as the repeated use of unlaundered clothing. Lead is a hazard where it can be absorbed, ingested or inhaled - all routes of entry to which employees were exposed due to the lack of appropriate protective clothing. These hazards existed at least until Manganas initiated and enforced a full protective clothing policy. Accordingly, Citation1, Item 10 is AFFIRMED.

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[18] Since the identified employees were overexposed by actual measurement, the requirement to provide protective clothing as "interim protection" to persons performing certain specific tasks under 29 CFR 1926.62(d)(2) is not an issue in this case.

Citation 1, Item 11
29 CFR 1926.62(g)(2)(i)
Provision of cleaned or laundered protective equipment.

The cited standard[19] requires that an employer provide appropriately laundered or cleaned protective equipment at least weekly or daily to employees whose exposure to airborne lead (without regard to the use of a respirator) exceeds 200 $\mu g/m^3$.

The Secretary again points out that it is undisputed that Respondent did not provide for the laundering of employee work clothing until September 1993. He alleges that Respondent's failure to do so was recognized by it as hazardous because such a provision is included in its own safety program and that "cross contamination" of employee personal clothing with lead dust and residue was a serious hazard.

Respondent, as it did in regard to Citation 1, Item 10, argues merely that it put the controls into place as soon as possible (after the inspection began.) For the reasons stated in regard to Item 10, even if the non-compliance lasted only a short duration after the initiation of the inspection, there is a violation on the undisputed facts. Citation 1, Item 11 is thus AFFIRMED.

Even though the standards require somewhat different actions, the hazards discussed in Item 10 are generally applicable here. Employees not provided with properly cleaned or laundered clothing were exposed for longer periods of time and to greater accumulations of lead dust than would have occurred had Respondent been in compliance with the standard. Given the consequences of lead exposure the violation is serious.

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[19] The standard provides:

> (2) Cleaning and replacement. (i) The employer shall provide the protective clothing required in paragraph (g)(1) of this section in a clean and dry condition at least weekly, and daily to employees whose exposure levels without regard to a respirator are over 200 µg/m(3) of lead as an 8-hour TWA.

Citation 1, Items 12a and 12b
29 CFR 1926.62(g)(2)(v) and (vii)
Container for contaminated clothing.

The two subparts of Item 12 allege violations of standards requiring an employer to assure that lead contaminated clothing is placed in a closed container which is separated from street clothing and that such a container is properly labeled.[20]

The Secretary relies on the testimony of the Compliance Officer and two employees that work clothes were hung in the changing trailer intermingled with or, at least right next to, soiled work clothes and that prior to the inspection there was no particular container into which contaminated clothing would be placed. (Sec. brief. p. 18). According to the Secretary's evidence, even after specific containers were provided for the placement of protective clothing, they were not labeled as such for some period of time.

Respondent complains that at least one witness (Lang) stated that there was a clothing drum in place with a warning label affixed to it. Respondent further argues that the Compliance Officer made no determination that the soiled clothing hanging in the changing trailer in fact was worn by employees exposed to lead levels above 200 $\mu g/m^3$. Respondent also argues to the effect that there can be only one violation in that the Secretary "cannot require Respondent to label a container and at the same time conclude that it does not exist." (Respondent, Brief, p. 19)(Citation omitted.)

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[20] The standards provide:

> (v) The employer shall assure that contaminated protective clothing which is to be cleaned, laundered, or disposed of, is placed in a closed container in the change area which prevents dispersion of lead outside the container.
>
> (vii) The employer shall assure that the containers of contaminated protective clothing and equipment required by paragraph (g)(2)(v) of this section are labeled as follows:
>
> > Caution: Clothing contaminated with lead. Do not remove dust by blowing or shaking. Dispose of lead contaminated wash water in accordance with applicable local, state, or federal regulations.

Respondents arguments are rejected. First, the Compliance Officer did not have to determine that the contaminated clothing in the trailer was worn by employees exposed to airborne lead at any level higher than the PEL under the terms of the standard's applicability provision, 29 CFR 1926.62(g)(1). Lang's testimony is accorded less weight than that of the Compliance Officer, [redacted] taken together. The latter witnesses corroborated one another independently. There is no such corroboration or independent affirmation of Lang's testimony. Moreover, Lang's testimony is less specific and less clear as to the time frame than is that of the Compliance Officer. Finally, Respondent, in arguing that the two separate violations could not exist, overlooked the time factor. That is - the facts here are consistent with providing no container at all then providing an appropriate type of container, albeit, without proper labeling. As a matter of fact, Respondent violated both cited standards. Accordingly, Citation 1, Items 12a and 12b are AFFIRMED.

As with other, similar items, failure to separate out contaminated clothing serves to spread contamination further and leave employees exposed for longer periods of time. The hazards of lead exposure are serious and further aggravation and extension of such exposure is also serious.

Citation 1, Item 13
29 CFR 1926.62(g)(2)(vi)
Warning clothing launderers about lead.

Respondent, it is alleged by the Secretary, failed to provide written notice of the effects of lead to those who laundered contaminated clothing worn by its employees as required by the standard cited. The standard provides:

> (vi) The employer shall inform in writing any person who cleans or launders protective clothing or equipment of the potentially harmful effects of exposure to lead.

The basis of the Secretary's claim in support of this alleged violation is that prior to the installation and use of laundry facilities at the worksite, two employees, [redacted] took contaminated clothing from the worksite and laundered it themselves. (Tr. 384-385, 1410-1411). The required warning, according to the Secretary must be in writing and must be given to

any person who launders the clothing, including the employee himself. The Secretary also notes that such a warning would not have been redundant since the employees had not had training in the hazards of lead exposure prior to the time they were laundering their own work clothes.

Respondent maintains that "the regulation can apply only to individuals hired by the employer to provide cleaning and laundering services at the work site." (Brief, p. 19)(Citation omitted.) It cites a portion of the Federal Register discussing the intent of the general industry lead standard. Regardless of the intent of the drafters of the general industry standard, or even the lead in construction standard, resort to the language accompanying the issuance of a standard is simply irrelevant where, as here, the language of the standard is clear and unambiguous. There could hardly be a plainer meaning of "any person" than that urged by the Secretary. A violation of the Act might not exist if a person other than an employee does the laundering or cleaning, or if an employee who launders his/her own clothing has previously been given written notice of the dangers of lead exposure as a result of employment training. That does not mean that the standard's requirements are necessarily redundant or superfluous when applied as it is here, to employees who laundered their own work clothes. Respondent also maintains that its employees had been advised of the harmful effects of lead. The record does not support Respondent's factual assertion. The "training" it relies on was described vaguely, at best, by Foreman Lang. It is not at all clear that specific warnings about the dangers of lead exposure were provided. Moreover, the more thorough and complete lead training provided by Respondent occurred after the dates of the alleged violation. Item 13 is thus AFFIRMED.

The hazard created by this violation adds to the duration and routes of exposure to lead experienced on the worksite. It is thus a serious violation

Citation 1, Item 14
29 CFR 1926.62(h)(3)
Brushing/sweeping lead dust instead of vacuuming.

The Secretary alleges that two employees swept grit and dust from the floor of the storage trailer instead of using a properly equipped vacuum to capture lead particles. The cited standard states;

> (3) Shoveling, dry or wet sweeping, and brushing may be used only where vacuuming or other equally effective methods have been tried and found not to be effective.

Respondent admitted that the sweeping took place but denied that it was directed by any management official. The Compliance Officer reached the conclusion that the employees were directed to sweep the trailer by Andrew Manganas because;

> Andy Manganas was the person who directed what employees should perform which task and activities and he spoke to them very shortly before they began to perform this task.

(Tr. 386-387).

Respondent argues only that the Secretary never tested the trailer's floor to determine whether there was lead.

Respondent's argument, while a true statement of fact, would require rejecting a logical and reasonable inductive conclusion based on the evidence. While the standard does not set any threshold amount of lead but merely requires that some lead be on the surface to be cleaned, it does not preclude the application of logic and reasonable inference. It is logical and reasonable to infer that a trailer used to store equipment, including respirators, used on a site at which significant amounts of airborne lead exist, will have included in the dust and grit admittedly accumulated on its floor, some amount of lead. I so find. Accordingly, Item 14 of Citation 1 is AFFIRMED.

Citation 1, Item 15
29 CFR 1926.62(h)(5)
Blowing lead dust with compressed air.

The cited standard prohibits the use of compressed air to remove lead from surfaces unless it is used in conjunction with "a ventilation system designed to capture the airborne dust created by the compressed air."[21]

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[21] The standard provides:

(continued...)

There is no dispute that, as a matter of fact, Respondent's employees used compressed air to "blow down" the steel girders after blasting the old, lead based, paint off and in preparation for repainting. It is also undisputed that the compressed air system was not used in conjunction with a ventilation system designed to capture the airborne dust created by the operation.

Respondent maintains that the standard, appearing in a section entitled "housekeeping," does not apply to actual construction operations. In addition, Respondent maintains that it was required to "blow down" the steel under its contract with ODOT. It also argues that by vacuuming the surface of the steel girders prior to blow down it was engaging in an "engineering control". It notes that it had three vacuum trucks to do this work.

The standard is applicable. Respondent points to no definition or other provision of the lead in construction standards which excludes actual construction activities from "housekeeping" provisions. Also, it fails to identify any specific provision of its contract with ODOT requiring the use of compressed air, as opposed to other methods, to remove residual dust from blasted beams. Moreover, even if the ODOT contract contained such a requirement, there is no claim and no evidence that the contract precluded the use of compressed air within a system designed to capture the dust created by its use. Respondent has shown no contractual bar to compliance with the OSHA standard. Finally, its argument that vacuum trucks "to do this work" were in use is rejected in the absence of any showing that the ventilation system powered by the trucks included consideration of capturing blow down dust as part of its design. Accordingly, Item 15 of Citation 1 is AFFIRMED.

Citation 1, Item 16
29 CFR 1926.62(i)(1)
Eating and Smoking.

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[21](...continued)

> Compressed air shall not be used to remove lead form any surface unless the compressed air is used in conjunction with a ventilation system designed to capture the airborne dust created by the compressed air.

Employers are responsible, under the cited standard, for assuring that food, beverage or tobacco products are not present or used in areas where employees are exposed to lead above the PEL."[22]

Testing by OSHA showed that employees in the grit recycling area and on top of the bridge (deck) had been exposed to airborne lead above the PEL. (*Exposure Finding - Sampled Employees,* Appendix A). Employees testified that they ate, drank and smoked inside the containment area and the grit recycling area. (Tr. 1336-1338, 1411-1412). The testimony is unrefuted. Respondent's post hearing brief directs its attention solely to the Compliance Officer's testimony. Item 16 of Citation 1 is AFFIRMED.

Highly credible and reliable expert testimony establishes that ingestion or inhalation of lead or smoking in the presence of lead exacerbates the dangers of exposure to airborne lead. The violation is thus serious.

Citation 1, Items 17, 18 and 19
29 CFR 1926.62(i)(2)(ii), (iii) and .62(i)(3)(i).
Contaminated clothing.

The "hygiene" standards involved seek to prevent cross contamination of lead from work clothes to street clothes by requiring separate storage facilities for work and street clothing (subsection (ii)), preventing employees from leaving the worksite wearing any work clothing (subsection (iii)) and mandating that shower facilities be provided for employees who have been exposed to lead in excess of the PEL (62(i)(3)(ii)).[23]

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[22] The standard provides;

> (i) *Hygiene facilities and practices.* (1) The employer shall assure that in areas where employees are exposed to lead above the PEL without regard to the use of respirators, food or beverage is not present or consumed, tobacco products are not present or used, and cosmetics are not applied.

[23] The standards provide;

> 1926.62(i)(2)
> (ii) The employer shall assure that change areas are equipped with

(continued...)

Testimony which is unchallenged and unrebutted by Respondent establishes that work clothes and street clothes were stored alongside one another and that prior to the installation of laundry facilities, employees left the worksite at the end of their shift still wearing work clothing. The lack of shower facilities prior to the inspection is also unchallenged. These conditions were admittedly known to management personnel.

In response to Item 17, Respondent argues only that since abatement of Citation 1, Item 12a would result in the abatement of the hazard generated by the violation in Item 17, "no basis exists for separate violations." This argument is rejected for the reasons set forth in the discussion regarding the validity of the Secretary's employee by employee citation policy. (The same rationale requires rejection of Respondent's claim that Citation 1, Items 16 and 20 should have been "grouped together."

Respondent incorrectly argues that Item 18 is based solely on the testimony of the Compliance Officer. The violation is established through employee testimony as well. (See, Eg., Tr. 1333-1334, 1410).

Regarding Item 19, Respondent's providing a shower facility "as soon as it could" but only after the inspection commenced constitutes abatement - the promptness of which may be indicative of good faith but cannot serve as the basis to diminish the degree of employee exposure at the time of the alleged violations.

For the above reasons, Citation 1, Items 17, 18 and 19 are AFFIRMED.

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[23](...continued)

> separate storage facilities for protective work clothing and equipment and for street clothes which prevent cross-contamination.
>
> (iii) The employer shall assure that employees do not leave the workplace wearing any protective clothing or equipment that is required to be worn during the work shift.
>
> 1926.63(i)(3)
> (i) The employer shall provide shower facilities, where feasible, for use by employees whose airborne exposure to lead is above the PEL.

Each of the violations alleged in Citation 1, Items 17, 18 and 19 contributed to increasing the amounts of lead to which the affected employees were exposed and could absorb. As such, they are serious violations.

Citation 1, Item 20, Instances a, b & c
29 CFR 1926.62(i)(4)(iii)
Washing hands and faces.

The cited standard states;

> (iii) The employer shall assure that employees whose airborne exposure to lead is above the PEL, without regard to the use of respirator, wash their hands and face prior to eating, drinking, smoking or applying cosmetics.

The item, alleges that on September 21 and 22, 1993, employees of Respondent, without first washing hands or face; stepped out of the containment and drank water (instance a); smoked a cigarette in the grit recycling area (instance b); and smoked cigarettes on the bridge deck (instance c).

Each of these three instances were testified to by the Compliance Officer as observations he made during his inspection of the worksite. (Tr. 400-403). Each of these areas, the containment, the grit recycling area, and the bridge deck have been found to have been areas where employees were exposed to airborne lead in excess of the PEL. (Appendix A, *Exposure Finding - Sampled Employees*). It is undisputed that management did not explicitly require washing before smoking or drinking and that at least one supervisory employee smoked without washing first.

Respondent does not disagree with the facts but rather argues that the Secretary has not established that the identified employees were exposed to lead above the PEL at the time of their smoking or drinking. It also relies on the Compliance Officer's failure to state "conclusively" that management officials observed the conduct.[24] The arguments are rejected.

The standard speaks to requirements for "employees whose airborne exposure to lead is

[24] Respondent also argues that this alleged violation should have been "grouped" with Item 16 of Citation 1. This argument was rejected in the discussion of Item 16.

above the PEL." It cannot be read to apply only while such employees are exposed to lead above any particular level of airborne lead measured solely in terms of μg/m³ because the PEL is a time weighted average. Thus, depending upon the amount of lead and the time exposed, an employee could be above the PEL after one, two or three hours, or any other amount of time, within one working day. Moreover, the regulation would have no meaning whatsoever under Respondent's interpretation in light of the prohibition against even the "presence" of food or beverage, no less "eating or drinking or smoking" in areas where employees are exposed above the PEL as discussed in regard to Citation 1, Item 16. The standard cited in Item 16 refers to areas while this standard refers to overexposed employees throughout their work day regardless of their location.

The Compliance Officer's inability to testify "conclusively" as to supervisory observation of the violations cited is not fatal to Complainant's case. General knowledge of supervisory personnel that employees smoked and drank coupled with their knowledge that wash-up facilities did not exist in those areas where there was smoking or drinking is a sufficient basis to infer that such supervisors knew or reasonably should have known that employees were smoking or drinking without first washing their hands and faces. Item 20, instances a, b and c are AFFIRMED.

As previously stated, eating, drinking and smoking without removing excess lead accumulated on the person and clothing serves to accelerate or increase the absorption of lead. The violation is thus serious.[25]

Citation 1, Item 21, Instances a - o
29 CFR 1926.62(j)(2)(ii)
Follow-up blood sampling.

Citation 1, Item 1 consists of fifteen instances (a-o) each referring to a specific employee. In each instance the Secretary alleges that an employee whose blood lead level testing results showed more than 50 μg/dl was not provided with a timely follow-up blood test.

The cited standard provides:

> (ii) *Follow-up blood sampling tests.* Whenever the results of a

[25] Here, the Secretary has exercised his discretion in "grouping" the violations.

blood lead level test indicate that an employee's blood lead level exceeds the numerical criterion for medical removal under paragraph (k)(1)(i) of this section, the employer shall provide a second (follow-up) blood sampling test within two weeks after the employer receives the results of the first blood sampling test.

The data (C-27, 29 and 37) relating to each of the instances is summarized in the table below:

Item 21 Instance	Employee Number	Name	8/5/93 Blood Lead Level (µg/dl)	Follow Up Testing
a	1	[redacted]	81.6	9/1/93
b	2	[redacted]	80.8	None
c	3	[redacted]	87.1	None
d	4	[redacted]	50.4	9/1/93
e	5	[redacted]	50.2	None
f	6	[redacted]	102.0	9/1/93
g	7	[redacted]	68.5	9/1/93
h	8	[redacted]	61.3	9/1/93
i	9	[redacted]	80.7	9/1/93
j	10	[redacted]	88.3	9/1/93
k	11	[redacted]	59.4	9/1/93
l	12	[redacted]	74.6*	9/1/93
m	13	[redacted]	54.4**	None
n	14	[redacted]	103.5	None
o	15	[redacted]	52.5	9/1/93

*/ Apparent typographical error. C-27, p.3, shows [redacted] blood lead level to have been 79.6 µg/dl.
**/ Test date 9/1/93.

Ms. Linda Ford, the director of the "Share" program for a company, Bethesda Share

Occupational Health ("Bethesda"), specializing in providing occupational health services to employers at their work sites, testified that her company was contacted by Andrew Manganas who "very anxiously (said) that OSHA was coming the next day" and that "he needed to be in compliance by the next morning." (Tr. 1159). He hired Bethesda to take and analyze blood samples. (Tr. 1163). Blood samples were taken of Manganas employees at the site on August 5, 1996. Fourteen of those samples yielded results showing blood lead levels exceeding 50 µg/dl (C-12, C-37), as did a blood sample taken on September 1, 1993 at the site from employee Kevin Padgelek. (C-29). Ms. Ford testified that on August 9, 1993, following her company's usual procedure, she spoke to Andrew Manganas by phone and expressed her concern that 23 out of the 24 tests taken gave results above normal limits of lead. She stated unequivocally that she also sent the results of the testing of the August 5, 1993 blood samples to Andrew Manganas by fax at a fax number he provided to her and also by mail to an address also given to her by Andrew Manganas (Tr. 1170-1171).

Andrew Manganas claimed that Ms. Ford called regarding the results of the August 5, 1993 testing but "told me that it was no good, it was totally invalid, it wouldn't work for the standard." He also claims that it was Bethesda which selected the date for retesting. (Tr. 2126-2127).

Respondent takes the position that since the testing done on August 5, 1993 was an "initial monitoring" not a "periodic" blood test it did not invoke the periodic testing requirement. Respondent also relies on Andrew Manganas' testimony that he was told the results were invalid as the basis for arguing that Respondent had no knowledge that the results would require follow-up testing. In addition, Respondent maintains that the evidence fails "for lack of proof." (Resp brief, p. 23). It claims that there is no evidence as to when Respondent received the test results and that since retesting is required within two weeks of an employer's receipt of the first results, there can be no violation. Respondent claims that the record contains "no proof" that Bethesda sent the fax or the fax number to which it might have been transmitted. It points to the lack of "facsimile transmission cover sheets or phone numbers printed on the document showing that the results were actually sent via fax." (*Id.*)

For the following reasons Respondents arguments are rejected. Respondent's claim that

the standard does not apply to the first blood testing because it is "initial" rather than "periodic" does not stand up to the scrutiny of the language of the standard which merely requires "second (follow-up) blood sampling." Andrew Manganas' factual assertions regarding receipt of the results of the first test are not credible. His testimony is fraught with contradictions, equivocation and evasion. For example, after being reminded that the parties stipulated that he had received a document containing test results from Bethesda he conceded "Yes, I imagine I did." (Tr. 2125). When asked if he knew which, if any, documents were sent by fax to him, he said "I don't remember which one, she faxed me some at one time or another." (*Id.*) He could not remember if Exhibit C-29 was sent by fax to him. In addition Andrew Manganas' demeanor while testifying, not reflected in the transcript, was observed to be more consistent with a less than candid witness that with a forthright one. He often hesitated in answering as if to consider possible alternative answers. He frequently lacked spontaneity and generally behaved as one lacking candor. He was clearly recalcitrant if not openly hostile on cross examination.

Respondent's post hearing claim that it "had no fax capability (at the site)" (Resp. brief, p. 23) lacks evidentiary reliability or weight in light of Ms. Ford's testimony that she sent the fax to a number provided by Andrew Manganas and his own testimony that Respondent had previously received faxes sent to the machine at the state job trailer. (Tr. 1474). Respondent's claim that no "proof" exists that Bethesda sent the results by fax is hyperbole at best. While there may be no documentary evidence, there is no reason to disbelieve Ms. Ford's testimony. Based on the above, I find that the standard is applicable, that the results from the August 5, 1993 blood tests were received by Respondent on August 9, 1993 by telephone and fax, that Respondent knew or should have known that prompt follow-up testing was required and that Respondent failed to comply with the standard as alleged. Accordingly, Item 21, including all instances, 21a through 21o, are AFFIRMED.

The violation is serious within the meaning of the Act. Delaying or not performing follow-up blood tests on employees shown to have had over 50µ/dl of lead in their blood delays or denies them the information necessary to seek proper treatment. Hiding a potentially dangerous medical condition from the employee has serious consequences. In addition, without the proper information there can be no assurance that employees with continuing (or increasing)

high blood lead levels are separated from further lead exposure.

Citation 1, Item 22
29 CFR 1926.62(j)(2)(iv)
Notification of employees of blood test results.

This citation item alleges that Respondent failed to comply with the cited standard which requires the employer to provide to employees written blood lead level test results within 5 days of its receipt of them.[26]

The record shows that employee blood samples were taken on August 5, September 1 and September 13. Results of these tests were faxed to Respondent on August 9, September 8 and September 16, (Tr. 1184) respectively. Respondent did not provide written notice of these results to the employees whose blood was tested. Despite Respondent's claim that the evidence rests upon hearsay, Complainant has demonstrated the violation by a preponderance of the evidence. Compliance Officer Sweeney's testimony as to what he was told by employees in matters relating to their employment are not hearsay under the Federal Rules of Evidence (Rule 801(d)(2)) which is fully applicable in Commission Proceedings (Rule 71, 29 CFR 2200.71). Moreover, there is specific testimony from employees that they never received written test results (Tr. 1430, 1341-1343). Consistent with and supporting an inference that employees did not get written results from their employer is evidence that some Manganas employees called Bethesda Share requesting copies of their results. (Tr. 1187- 1188). Respondent's contention that employees were "shown" their results, even if true, does not fulfill the requirements of the standard. Andrew Manganas' statement that he tried to give written copies of the results to all employees (Tr. 1507-1508) is rejected as not credible for the reasons set forth in the discussion of Item 21. In addition to the reasons set forth previously, a claim that his attempt to provide employees with written results is inconsistent with otherwise credible testimony that at least some employees contacted Bethesda seeking copies of the results. I find that the weight of the credible evidence

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[26] The cited standard provides;

> (iv) *Employee notification.* (A) Within five working days after the receipt of biological monitoring results, the employer shall notify each employee in writing of his or her blood lead level...

of record is that Respondent failed to notify each tested employee in writing of their blood lead level test results. Accordingly, Item 22 of Citation 1 is AFFIRMED.

For the reasons set out in Item 21, lacking full information about their condition inhibits if not prevents employees from seeking medical attention and assuring that their continued exposure to airborne lead is properly limited. The hazard created by failing properly to inform employees is serious.

Citation 1, Item 23 and 24
29 CFR 1926.62(l)(1)(ii) and 62(l)(1)(iii)
Employee training regarding lead.

Complainant alleges in these items that Respondent failed to assure adequate training, including all of the required subjects, to all employees who were exposed to airborne lead at or above the action level (Item 23) and that the training done by Respondent was instituted after the "start up date" of the standards (Item 24).

The standard cited in Item 23 provides, in pertinent part;

> (l) *Employee information and training* - (1) *General*
>
> * * *
>
> In addition, employers shall comply with the following requirements:
> (ii) For all employees who are subject to exposure to lead at or above the action level on any day . . . the employer shall provide a training program in accordance with paragraph (l)(2) of this section and assure employee participation.

The standard cited in Item 24 states:

> (iii) The employer shall provide the training program as initial training prior to the time of job assignment or prior to the start up date for this requirement, whichever comes last.

The Compliance Officer identified by name only one employee who stated to him that he had received no training regarding the hazards of lead.(Tr. 417-419, 422). One other employee testified similarly at the hearing. (Tr. 1411). The Compliance Officer also testified that the lead training arranged for by Respondent did not begin until September 9, 1993.

The terms of the standard's applicability are quite specific. It applies to "all employees who are subject to exposure to lead at or above the action level on any day...." The Secretary's post hearing brief states that all of the employees sampled, whether by OSHA or by Respondent's contractor, Rust, were exposed to airborne lead above the action level. Respondent does not argue that the standard is not applicable. It is thus reasonable to infer that virtually all employees of Manganas who worked on the site were exposed to lead at or above the action level for at some time or another.[27]

Respondent depicts the allegations as unnecessarily overlapping. It states that if an employer does not have a training program, it perforce did not provide such training on or before the required date. It maintains that the standard cited in Item 24 is not applicable because "it requires the employer take actions before the provision was even published, or in effect." (Resp. brief, p. 24). It also points to testimony that its job superintendent, Lang, conducted training which included information about the effects of lead and the necessity for using respirators.

The standards do "overlap," but only under certain circumstances. If there had been no training at all there could not have been timely training. This obvious statement does not, however, resolve the matter. The Secretary's construct of these two items could amount to allegations that Respondent was late in starting its training program, and even when the program was up and going, it failed to train all of the employees required to be trained in all of the aspects required to be included in a compliant training program. This is not, however, the Secretary's argument. In arguing that training commenced late, Complainant maintains that "Respondent did not provide the required training until September 9, 1993...." (Sec. Reply Brief, p. 24). The gravamen of these two alleged violations is that prior to its late commencement of training, Respondent did not assure the proper training of its employees regarding lead and the appropriate training commenced after the required date. Both of these two factual allegations are correct. Thus what training was provided prior to the required start up date did not comply with the

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[27] It is also noted that the one employee identified by name, [redacted], was among those employees whose exposure was sampled by OSHA. He was exposed to 149 $\mu g/m^3$ TWA (Appendix A), an amount almost three times the PEL (50 $\mu g/m^3$) (1926.62(c)) and almost five times the action level (30 $\mu g/m^3$) (1926.62(b)).

standards in either Item 23 or Item 24. The appropriate training which commenced after the required start up date complied with the standard cited in Item 23 but not that cited in Item 24.

Respondent's argument regarding the non-applicability of the standard in Item 24 fails to distinguish, as it should, between the standard in this case which requires instituting a program prior to assigning the employee to a job or "prior to the start up date...which ever is later" and a standard which required an employer to take certain actions "prior to the commencement of the job" which was vacated in *Smalis Painting Company, Inc.*, Docket No. 94-1979 (ALJ, *slip op.*, at p. 36)(Pending review before the Commission). The standard in Item 24 here does not suffer the same incurable defect given the facts of this case. It is applicable.

Pursuant to the above discussion, I find that the training provided by Respondent prior to September 9, 1993 was inadequate and that appropriate training was initiated after the start up date. Thus, both violations occurred as alleged. Items 23 and 24 are AFFIRMED.

A complete lack of training or giving employees inadequate training in the hazards of lead generates a serious hazard in and of itself. Employees without any or proper training could not recognize dangerous situations, were not prepared to avoid or do all that could be done to limit exposure to airborne lead and lacked awareness of the signs and symptoms of lead intoxication. All of these factors reduced the employees ability to protect and defend themselves. I thus find that Item 23 of Citation 1 is a serious violation of the Act. On the other hand, since Complainant itself recognizes that the institution by Respondent of appropriate training was delayed only for several weeks, that delay did not independently generate a serious hazard. The Secretary has not shown that the difference between proper training commencing in August 1993 (the required start up date) and such training beginning in September 1993 (as occurred in this case) created a serious hazard independent of the hazard already existing due to the lack proper training. The violation of Item 24 is thus found to be other than serious.

Citation 1, Item 25
29 CFR 1926.62(l)(3)(i)
Availability of lead standard.

The cited standard states;

> (3) *Access to information and training materials.* (i) The employer must make readily available to all affected employees a copy of this standard and its appendices.

The Compliance Officer reported that during his conversations with Andrew Manganas on either September 2 or 3, 1993, Andrew Manganas "indicated" that there were not copies of the lead in construction standard at the site. (Tr. 425-426). Andrew Manganas, however, claimed that a copy of a booklet containing the Lead In Construction Standard was posted in the trailer and "there was one in my brief case - quite a few copies of it after a while." (Tr. 2140). He could not recall how or when he got copies of the booklet. (*Id.*)

I credit the testimony of the Compliance Officer over that of Mr. Manganas and thus find that copies of the standard were not readily available. I do so for the following reasons. First, as discussed previously, I have found Mr. Manganas to be less than a fully credible witness in general. Second, his answers to the specific questions regarding this item are again evasive and non-committal. Third, even if the Lead In Construction Standard was "posted in the trailer," the state job trailer was not Manganas' facility at the work site. At least that is what Respondent previously argued in regard to the fax machine at the same trailer to which blood test results were sent by Bethesda. (See discussion regarding Citation 1, Item 21, supra.).

Respondent's argument that the violation, if any, has not been shown to have occurred after the effective date of the standard is rejected. September 2 or 3 are the dates of the conversation between the Compliance Officer and Andrew Manganas, not necessarily the dates on which the Lead In Construction Standard was not readily available. Moreover, I find that Andrew Manganas' statement to the Compliance Officer raises the inference that there were no copies of the Lead In Construction Standard at the site on the day of the conversation or at any time before that date. Accordingly, Item 25 of Citation 1 is AFFIRMED.

I find the violation is serious. Failing to provide appropriate information and training to exposed employees about lead exposure and its consequences have been found elsewhere in this decision to have been serious violations. The failure to have the Lead In Construction Standard "readily available" is also serious because it deprived affected employees from any opportunity to determine quickly such things as whether their blood test results triggered any requirement for

changes in their job assignments, type or nature of protection, follow up blood tests, Etc.. The standard lays out for an exposed employee as well as his/her employer just what protections and remedies must be taken under differing circumstances and degrees of exposure to airborne lead. It is thus a statement of employee rights as well as a statement of employers responsibilities.

Citation 1, Item 26
29 CFR 1926.62(m)(2)(i)
Lead warning signs.

Respondent, it is alleged in Item 26, failed to post the required signs in work areas where employee exposure to airborne lead exceeded the PEL.[28]

Various areas, upon sampling, showed airborne lead in excess of the PEL (50 $\mu g/m^3$). These areas included the containment, grit recycling area and the bridge deck. (Appendix A). According to the Compliance Officer, appropriate signs were not posted in any of these areas during August 1993 and the signs were not completely in place until about September 24, 1993 (Tr. 427, C-1, Request for Admission No. 24).

Respondent's sole argument, that the warning signs were posted "well prior to the reblasting date," (Resp. brief, p. 25) appears to be a claim that no blasting was occurring during the time period during which, admittedly, no signs were posted. Respondent's argument is factually incorrect in that blasting is shown on this record to have taken place during August 1993 (Molander deposition, Pp 13 - 14). Item 26 is thus AFFIRMED.

Failing to warn employees on a site as to locations where airborne lead exceeds the PEL is a serious hazard. Those work areas pose particular dangers and extensive precautions are required in those areas.

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[28] The standard provides;

> (2) *Signs.* (i) The employer shall post the following warning signs in each work area where an employees exposure to lead is above the PEL.
>
> WARNING
> LEAD WORK AREA
> POISON
> NO SMOKING OR EATING

Citation 1, Item 27
29 CFR 1926.62(n)(1)(ii)
Lead exposure records.

The cited standard requires employers to establish and maintain records regarding airborne lead exposure monitoring which include a series of items of specific information.[29]

The consultant hired by Respondent, Rust Environmental, conducted lead exposure monitoring in August 1993 and provided to Respondent copies of the "calculation sheets" containing written results of the sampling. (C-7. Molander deposition, Pp. 64-65). A review of the record shows that much of the data required to be recorded and maintained in the exposure monitoring records was not included. Respondent has produced no other material purporting to be exposure monitoring records.

Respondent argues that it "was entitled to rely on its consultants." (Resp. brief, p. 25)(Citations omitted.) Respondent's reliance is misplaced. Respondent cannot "rely" on a consultant where, as here, there is no evidence that the consultant was engaged for and agreed to provide reports which would meet the requirements of the standard. More importantly, however, is the testimony of Rust's representative that Manganas specifically asked that Rust not prepare a

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[29] The standard reads as follows;

> (n) "Recordkeeping" - (1) "Exposure assessment". (i) The employer shall establish and maintain an accurate record of all monitoring and other data used in conducting employee exposure assessments as required in paragraph (d) of this section.
> (ii) Exposure monitoring records shall include:
> (A) The date(s), number, duration, location and results of each of the samples taken if any, including a description of the sampling procedure used to determine representative employee exposure where applicable;
> (B) A description of the sampling and analytical methods used and evidence of their accuracy;
> (C) The type of respiratory protective devices worn, if any;
> (D) Name, social security number, and job classification of the employee monitored and of all other employees whose exposure the measurement is intended to represent; and
> (E) The environmental variables that could affect the measurement of employee exposure.

written report. (Molander deposition, p. 39). I thus find as fact that Respondent's instructions to its consultant precluded even the possibility that it might provide a record which complied with the cited standard. Item 27 is thus AFFIRMED.

While a "record keeping" violation might generally be considered to be other than serious, in this matter I find otherwise. Intentionally arranging to have a consultant deliver data in a format which is incomplete, whether done for economic or venal reasons, effectively deprives the employer of tools necessary for properly planing for employee protection and required follow ups. It also deprives the employees as well as OSHA of the opportunity to fully assess conditions at the work site.

Citation 1, Item 28
29 CFR 1926.29 CFR 1910.20(g)(1)
Training of employees exposed to toxics.

Item 20 of Citation 1 alleges, in pertinent part, that;

> training...concerning exposure and medical records was not provided at least initially and annually to all employees who are exposed to any hazardous substance (such as Lead) or to any harmful physical agent (such as noise).

The Citation as issued, cited the standard at 29 CFR 1910.20(g)(1), a general industry standard included in Subpart C - General Safety and Health Provisions. The standard provides, in pertinent part;

> *Employee information*. (1) Upon an employee's first entering into employment, and at least annually thereafter, each employer shall inform current employees covered by this section of the following: (i) The existence, location, and availability of any records covered by this section.

The Secretary, in his post hearing brief moves to amend the alleged violation to cite the standard at 29 CFR 1926.33(g)(1). Respondent objects in its post hearing brief (Resp. brief, p.33, n. 52). Respondent's objection is overruled because the wording of the two standards is identical.

The evidence in support of this allegation is insufficient to even make out a *prime facie*

case that a non-complying condition existed.

The Compliance Officer first described the requirements of the standard, in part as "[i]t requires that there be initial a manual informing employees about what medical and exposure records exist...." (Tr. 431). He testified that he determined that Respondent did not inform employees about the matters covered by this standard "by talking to employees and to management." (Tr. 432). I find this thin reed of evidence insufficient to show by a preponderance that the requirements of the standard had not been met. A non-complying condition has not been shown by this one question and answer and Complainant points to nothing else in the record which would tend to prove the alleged violation. The Compliance Officer's one statement is merely a description of his conclusion. It is not a recitation of any factual basis for reaching that conclusion. The Compliance Officer's testimony as to this item provides no relevant or probative facts. It is so vague it fails to even assert that the content of statements made by employees or management led him to that conclusion. The sole evidence the Secretary relies upon does not identify, specify or even paraphrase what it was that employees or management said or did but only that some part of the Compliance Officer's conversations with them caused him to conclude the violation existed. A violation cannot be found In the absence of reliable probative evidence that a non-complying condition existed.. Accordingly, Item 28 is VACATED.

Citation 1, Item 29
29 CFR 1910.134(d)(2)(ii)
Checking carbon monoxide in breathing air.

Item 29 of Citation 1 alleges that Respondent was in serious violation of the Act in that the compressor supplying breathing air to employees was oil lubricated and had neither a carbon monoxide monitor nor was it frequently tested to assure that the breathing air met the specifications for Grade D of the Compressed Gas Association Commodity Specification #G7-11966.

The cited standard states:

> (ii) The compressor for supplying air shall be equipped with necessary safety and standby devices. A breathing air-type

> compressor shall be used. Compressors shall be constructed and situated so as to avoid entry of contaminated air into the system and suitable in-line air purifying absorbent beds and filters installed to further assure breathing air quality. A receiver of sufficient capacity to enable the respirator wearer to escape from a contaminated atmosphere in event of compressor failure, and alarms to indicate compressor failure and overheating shall be installed in the system. If an oil-lubricated compressor is used, it shall have a high-temperature or carbon monoxide alarm, or both. If only a high-temperature alarm is used, the air from the compressor shall be frequently tested for carbon monoxide to insure that it meets the specifications in paragraph (d)(1) of this section.

The Compliance Officer testified that when he inspected the air compressors they had no carbon monoxide alarms (Tr. 434). He stated that he asked for any records relating to monitoring of carbon monoxide levels and received a copy of a log (C-35) which, he described showed "gaps of up to 20 days occurred between testing for carbon monoxide...." (Tr. 436). Joe Lang, the Superintendent of the project and son-in-law of Nicholas Manganas (Tr. 976-976), testified that he was the person on the site responsible for testing the breathing air that went into the hoods for carbon monoxide (Tr. 988, 1860-1861). He identified exhibit C-35 as the records of "air purifier checks" conducted on the compressor. (Tr. 989) He also testified he "would also check the machine occasionally and I wouldn't record every time that I visually inspected it, but daily, or weekly." (Tr. 989). Joe Lang also stated;

> The carbon dioxide monitor is something that you hooked up and it gave you a continuous readout and I would document it maybe once and then visually look at it periodically thought the day just to see if the numbers were fluctuating or not but I wouldn't record it every time I looked at it.

Andrew Manganas identified Joe Lang as the person responsible for testing the air from the compressor and "as far as" he could "remember, Joe did it about two or three times a week. (Tr. 1513). Andrew Manganas also testified that carbon monoxide alarms had been put on the compressors. (Tr. 2142).

Complainant maintains that the oil lubricated compressor used to supply air to the Bullard

hoods worn by blasters had no carbon monoxide alarm. The compressor, according to the Secretary, was thus required to be tested for its air quality as often as was "reasonable."

The Secretary, providing transcript references, claims that Joe Lang "admitted the compressor had no carbon monoxide alarm. (Tr. 988, 1513, 1861)." (Sec. brief, p. 31). A careful review of the testimony specified by the Secretary above demonstrates that he is incorrect. Joe Lang did not admit any such thing in the pages cited or anywhere else in his testimony. I find that a fair reading of Joe Lang's testimony is; 1) there was a carbon monoxide gauge installed which continually gave readings as to the amount of carbon monoxide in the breathing air[30]; 2) he checked the gauge visually several times a day; and, 3) he recorded the results of his visual checks sporadically. Since "log" entries were not made every time the carbon monoxide gauge was examined, it is not persuasive evidence as to the frequency with which visual inspection of the carbon monoxide was checked. The evidence of record thus demonstrates that Respondent did not fail to comply with the cited standard. Because there is no non-complying condition, Item 29 is VACATED.

Citation 1, Item 30
29 CFR 1926.62(f)(1)
Lack of respirator.

Item 30 of Citation 1 alleges that;

> [n]o air purifying respiratory protection was worn by an employee who recorded an 8-hour Time Weighted Average Lead exposure of 587 $\mu g/m^3$ inside his blasting helmet on 9-22-93.

The standard provides, in pertinent part;

> (f) *Respiratory protection* - (1) *General*. Where the use of respirators is required under this section the employer shall provide, at no cost to the employee, and assure the use of respirators which comply with the requirements of this paragraph. Respirators shall be used in the following circumstances:
> (i) Whenever an employee's exposure to lead exceeds the PEL

[30] In this regard it is noted that the Compliance Officer, an experienced industrial hygienist did not testify that the compressors lacked carbon monoxide gauges or continuous carbon monoxide measuring devices.

The Compliance Officer based this alleged violation on the sampling he conducted at the site on September 22, 1993. He testified that the sampling of [redacted] showed that he had been exposed to 587 $\mu g/m^3$ of airborne lead inside the blasting hood he was wearing. (Appendix A, *Exposure Finding - Sampled Employees*). He also testified that [redacted] had reported to him that he had worn no respirator inside the hood that day. (Tr. 436-440).

Respondent presents no new defense to this item other than the general position regarding the Lead in Construction Standards, its claims regarding this standard made in conjunction with Items 10b through 18b of Citation 2 and the general arguments as to infeasibility and employee misconduct, all of which are rejected elsewhere. and the evidentiary objection which was overruled at the hearing (Tr. 439-440). Complainant has proven the violation. Accordingly, item 30 of citation 1 is AFFIRMED.

Citation 2 - Alleged Willful Violations

Citation 2, Item 1
29 CFR 1926.62(d)(1)(I)
Initial air sampling.

Item 1 of Citation 2 alleges[31] that Respondent's air sampling, initiated on August 4,1993 and completed on September 24, 1993, did not comply with the cited standard which states;

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

The Lead in Construction Standard made provisions as to its effective dates as follows:

> (p) *Effective date.* This standard (1926.62) shall become effective

[31] This item reads;

> No air sampling of any kind was initiated by this employer until August 1993, even though the bridge blasting and repainting project began during March of 1993. The air sampling required by 1925.52(d)(1) [Sic.] was not completed until September 24, 1993.

June 3, 1993.

* * *

(r) *Startup dates*. (1) The requirements of paragraphs (c) through (o) of this section, including administrative controls and feasible work practice controls, but not including engineering controls specified in paragraph (e)(1) of this section, shall be complied with as soon as possible, but no later than 60 days from the effective date of this section.
(2) Feasible engineering controls specified by paragraph (e)(1) of this section shall be implemented as soon as possible, but no later than 120 days from the effective date of this section.

(57 F.R. 26627, May 4, 1993, as amended at 58 F.R. 34218, June 24, 1993]. In December of 1993, OSHA instructed its personnel that the effective date was August 3,1993. (R-42, pp. 3, 9, 15).

The parties do not disagree on the basic, determinative facts. Respondent's air monitoring did not begin until August 4, 1993.

Respondent maintains that the standard does not apply. It argues that since the work on the project commenced in April 1993, August 1993 was too late to require an employer to "initially determine" exposure. Respondent's interpretation of the language of the standard is rejected. The term "initially" refers to the first sampling. It does not, as do other standards, require that an action take place before the commencement of a project.[32]

The Secretary argues that Respondent's air monitoring failed to comply with the standard even though it began one day after the effective date of the section requiring such monitoring. Under the Secretary's view, Respondent's monitoring should have been conducted before August 2, 1993.

The standard does apply, but because Respondent commenced sampling within a reasonable time after the effective date of the requirement to sample, there has been no violation shown by the evidence. The Secretary's claim that a similar argument has been rejected in *E. Smalis Painting Company, Inc.*, (No. 94-1979)(ALJ)(slip op., at p. 35) is unpersuasive. The judge's decision in *Smalis* is pending review before the Commission, thus it is not precedent

[32] Compare, 29 CFR 1926.62(e)(2)(i); Item 8, Citation 1, *supra; Smalis*, *supra.*, *slip op.* at p. 36.

since it is not a final order of the Commission. *Leone Construction Co.,* 3 BNA OSHC 1979 (No. 4090, 1976). Even if that holding applied, I would find that under the facts of this case, in which Respondent's sampling was begun within one day and completed within 25 days of the effective date of the cited provision, is one in which the required personal sampling was performed within a reasonable time after the effective date of the standard.

Inasmuch as I find that Respondent conducted its initial air monitoring within a reasonable time after the applicable date of the cited requirement, Item 1 of Citation 2 is VACATED.

Citation 2, Item 2
29 CFR 1926.62(j)(1)(i)
Initial blood sampling.

The standard cited provides that;

> (j) *Medical Surveillance* - (1) *General*. (i) The employer shall make available initial medical surveillance to employees occupationally exposed on any day to lead at or above the action level. Initial medical surveillance consists of biological monitoring in the form of blood sampling and analysis for lead and zinc protoporphyrin.

The Secretary's citation alleges that:

> The employer did not begin to provide blood sampling and analysis for lead or for zinc protoporphyrin to any employees who worked on the I-71 bridge project until August 5, 1993, and then only approximately 59% of the non-supervisory employees were tested on this date.

The Compliance Officer testified that employees of Manganas had reported to him that Respondent had had no blood testing done prior to August 5, 1993 (Tr. 273). The Compliance Officer explained that he arrived at the conclusion that "approximately 59%" of the non-supervisory personnel were tested on August 5, 1993, based on his review of blood lead level testing results and payroll records. He explained that he compared the names of Manganas employees identified by Bethesda Share as having had their blood drawn on August 5, l993 to a list he compiled of the names of Manganas employees shown to be working on that day

according to weekly payroll records submitted by Manganas to ODOT. (C-27, 28 and 37; Tr 274-279). It would appear that the Compliance Officer assumed that any employee listed on the payroll record as having worked that day for whom he did not have a blood lead level test result was not tested. Complainant identifies eleven employees of Respondent whom he asserts were not tested on August 5, 1993, although "each of these employees engaged in activities which exposed him to airborne lead levels in excess of the action level" and were "onsite and available for testing on August 5, 1993." (Sec. brief, p. 38).

The Secretary's position as to the nature of the employer's obligation, is not quite clear. In his brief he states, "Respondent was to have completed this testing by August 2, 1993." (Sec. brief, p. 38). In his reply brief he says, "[t]here is no reason why compliance could not have been accomplished within a reasonable time after the effective date." (Sec. reply brief, p. 30).

As with the previous item, Respondent argues that there can be no "initial surveillance" as of the effective date of a standard where the effective date of the standard is later than the start up date of the project. That blanket rationale is rejected again. As in Item 1 of Citation 2, I am of the opinion that a fair and reasonable reading of the standard requires an employer come into compliance with the standard within a reasonable time after the effective date of the standard. The cited standard requires that blood testing be made available. It is reasonable to hold that in order to be in compliance with this standard, blood testing must be found to have been made available to eligible employees within a reasonable time after the effective date of the standard. In this case, blood testing was actually commenced within two days of the effective date. If based solely on the issue of the effective date of the requirement, I would find Respondent in compliance.

The medical surveillance requirement[33] of the Lead in Construction Standard, however, requires rather closer examination to resolve this alleged violation.

The regulatory scheme for medical surveillance is well described in the preamble to the publication of the lead in construction standard, *Preamble to OSHA's Interim Rule Governing Lead in Construction Work,* 58 F.R. 26590 - 26627 (May 4, 1993) (*"Preamble").*

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[33] Subsection (j) of 1926.62.

> The medical surveillance provisions contemplate two phases of medical surveillance: one is initial medical surveillance, the other is a medical surveillance program. The employer is required to provide initial medical surveillance to employees occupationally exposed to airborne concentration of lead on any one day at or above the action level.
>
> * * *
>
> If an employee's airborne lead exposure is at or above the action level for more than 30 days a year, the employer shall provide a medical surveillance program to the employee....

(*Preamble*, 58 F.R. at 26603).

The two "phases" of medical surveillance are established by the standards involved, 29 C.F.R. § § 1926.62(j)(1)(i) and (ii). They provide:

> (j) *Medical surveillance*-(1) *General.* (i) The employer shall make available **initial medical surveillance to employees occupationally exposed on any day to lead at or above the action level.** Initial medical surveillance consists of biological monitoring in the form of blood sampling and analysis for lead and zinc protoporphyrin levels.
> (ii) The employer shall institute **a medical surveillance program** in accordance with paragraphs (j)(2) and (j)(3) of this section **for all employees who are or may be exposed by the employer at or above the action level for more than 30 days in any consecutive 12 months.**

(Emphasis added.)

The "phases" of medical surveillance differ in two very important respects: first, there are different "triggers" and, second, each phase imposes a different obligation upon employers.

The "triggers" are "the criteria by which the applicability of the standard and of particular provisions of the standard" are invoked. The preamble notes that "[t]he most basic trigger determines whether an employer is covered by the [lead in construction] standard at all. In addition, specific provisions of the standard can be triggered by other criteria or exposure levels." *Preamble*, 58 F.R. at 26593. Based upon the unambiguous wording of § § 62(j)(1)(i) and (ii), as well as the explanatory material in the *Preamble*, it is clear that the "trigger" which invokes the requirement that an employer "make available initial medical surveillance" is the

exposure of the employee **"on any day to lead at or above the action level."** [34]

Initial medical surveillance requires biological monitoring in the form of blood sampling and analysis for lead and zinc protoporphyrin levels. (§ 62(j)(1)(i); *Preamble,* 58 F.R. at p. 26603). In the parlance of occupational safety and health law, the "triggers" control the applicability of the requirements contained in the subsequent sub-parts of § 62(j). As with any other alleged violation of § 5(a)(2) of the Act, for alleged violations under § 62(j) or any of its sub-parts, the Secretary must demonstrate that the cited standard is applicable.. *Astra Pharmaceutical Products, Inc.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981).

Regardless of which subsection of § 62(j) is cited in a particular item, in order to demonstrate that any of the provisions under any part of § 62(j) apply, the Secretary must show that Manganas employee(s) were exposed to airborne lead either at or above the action level on any day, or at or above the action level for more than 30 days in any consecutive 12 months before the requirement is triggered.

Even if the standard were to be interpreted as requiring "initial surveillance" prior to its effective date, the Secretary has not identified any evidence which shows that any Manganas employee who was exposed "on any day to lead at or above the action level" within the meaning of the cited standard prior to the standard's effective date was not tested. The eleven employees described in the Secretary's post-hearing brief (p. 38) as "engaged in activities which exposed him to airborne lead levels in excess of the action level" does not withstand closer scrutiny of this standard's effective date. For evidence of exposure to airborne lead in excess of the action level the Secretary relies on evidence that of the eleven identified employees, eight were the subject of air sampling which revealed airborne lead exposure above the PEL on September 21,22, 23 or 24, 1993. While such evidence shows their exposure on the date of sampling it is not evidence of their exposure on any other date, time or place. As to the remaining three

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[34] It is equally clear that the "trigger" which invokes the requirement that an employer "institute a medical surveillance program" is the exposure of employees "**at or above the action level for more than 30 days in any consecutive 12 months.**"

employees, Complainant cites no evidence at all as to their degree of exposure to airborne lead.[35] The Secretary fails to cite or to identify any evidence that any of the employees identified were exposed to airborne lead at or above the action level at any time before September 21, 1993. Instead, the Secretary makes only the sweeping argument that since Manganas' safety program identified the need for testing and since Manganas was made aware that one of its employees suffered lead poisoning that Manganas should have recognized the need for initial testing. Even if factually correct, perhaps Managans should have, but neither of these indicia "trigger" the initial testing requirement. In sum, the Secretary has not shown that employees exposed to lead at or above the action level on any day prior to the day on which they were tested. I thus find that the cited standard does not apply to the facts of this case. Accordingly, Citation 2, Item 2 is VACATED.

Citation 2, Items 3 - 9
29 CFR 1926.62(k)(1)(i)
Medical removal.

The cited standard provides:

> (k) *Medical removal protection* - (1) *Temporary medical removal and return of an employee*- (i) *Temporary removal due to elevated blood lead level*. The employer shall remove an employee from work having an exposure to lead at or above the action level on each occasion that a periodic and a follow-up blood sampling test conducted pursuant to this section indicate that the employee's blood lead level is at or above 50 µg/dl.

Under the cited standard, if an employee has two successive blood lead tests showing levels at or above 50 µg/dl, the employee must be precluded from further work assignments which would expose him to lead at or above the action level (30 $\mu g/m^3$ TWA).

The seven items (3 - 9, inclusive) each allege that Respondent failed to remove a

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[35] Even if it is considered that under the exposure finding, an inference is raised that these employees were exposed to a quantity of lead exceeding 50 $\mu g/m^3$ at some time prior to the effective date of the standard, there is no evidence as to the amount of time (duration) of such exposure. Without both parts, quantity and duration, there can be no showing that the action level, which is a time weighted measurement, was equaled or exceeded.

particular employee from work which exposed him to lead at or above the action level after having received two successive blood lead level test results each showing lead in the employees' blood exceeding 50 µg/dl.

Each of the employees identified, [redacted] (Item 3), [redacted] (Item 4), [redacted] (Item 5), [redacted] (Item 6), [redacted] (Item 7), [redacted] (Item 8) and [redacted] (Item 9) meet the criteria of the standard. First, each had at least two blood lead level tests showing at least 50 µg/dl of lead as follows:

Item and Employee	Blood Test 1 (8/5/93)	Blood Test 2 (9/1/93)	Blood Test 3 (9/13/93)
(3) [redacted]	68.5 µg/dl	55.3 µg/dl	- - -
(4) [redacted]	- - -	59.6 µg/dl	56.4 µg/dl
(5) [redacted]	80.7 µg/dl	60.0 µg/dl	52.2 µg/dl
(6) [redacted]	88.3 µg/dl	56.9 µg/dl	56.4 µg/dl
(7) [redacted]	79.6 µg/dl	66.0 µg/dl	63.3 µg/dl
(8) [redacted]	61.3 µg/dl	55.1 µg/dl	54.7 µg/dl
(9) [redacted]	59.4 µg/dl	58.1 µg/dl	55.0 µg/dl

Three of these employees, identified in Items 3, 5 and 7 [redacted] were among those sampled and thus have been shown to have been exposed to airborne lead in excess of the PEL (and, perforce, the action level) on September 21 or 22, 1993. (See, *Exposure Finding-Sampled Employees*) I so find.

The rationale regarding employees [redacted] is somewhat different. As discussed previously (*Exposure Finding - Employees Not Sampled*), non-sampled employees who worked in the containment on any date were exposed to an amount of airborne lead of at least 50 µg/m while blasting was underway in the containment. The exposure finding establishes the amount of lead to which these employees were exposed while blasting was underway. It does not, however, establish the duration of that exposure, the other element necessary to establish a time weighted average to compare to the limits of exposure under either an action level (TWA) or a PEL (TWA).

Respondent's payroll record is uncontroverted evidence that, with one exception, the employees identified in Items 4, 6 and 8 [redacted] each worked for a full work day (8 hours) during the days (September 21, 22 and 24, 1993) on which personal sampling was conducted.[36] (C-28, p. 29). Although classified as Painters on Respondent's payroll records, there is ample evidence that men so classified did both painting and blasting and that within a particular containment painting and blasting did not occur simultaneously. Thus, it is reasonable to infer that an employee paid for 8 hours work and known to be inside the containment where blasting was being done, was there for at least one hour while blasting was going on. Even assuming that any of the employees identified in Items 4, 6 or 8 worked as little as one hour inside the containment while blasting was underway, applying the appropriate formula for calculating a time weighted average results in an exposure exceeding the action level of 30 $\mu g/m^3$ (TWA).[37] I thus find that the employees identified in Items 4, 6 and 8 were exposed to lead at or above the action level of 30 $\mu g/m^3$ (TWA) on September 21, 22 and 24, 1993.

Finally, the employee identified in Item 9, [redacted], worked "throughout the entire project and worked in all areas including the containment and the grit recycling area" according the to the Secretary. (Sec. brief, Pp. 41-42). The evidence cited by the Secretary appears to establish that Mr. Lang, the project superintendent, spent little of his working time in the containment. [redacted] specific testimony, however, places him inside containments for 15 to 30 minutes while blasting was being done. (Tr. 981). A 15 minute exposure to airborne lead at a level of 2,000 $\mu g/m^3$ exceeds the action level of 30 $\mu g/m^3$ (TWA) even assuming that [redacted] was exposed to no lead whatsoever for the rest of his 8 hour workday.[38] The Secretary has thus

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[36] The same record shows that [redacted] worked only 4 hours on September 22, 1993.

[37] An employee working in an environment of 2,000 $\mu g/m^3$ for a period of one hour out of an eight hour work day would have an 8 hr TWA exposure of 250 $\mu g/m^3$. (1 hour @ 2,000 + 7 hours @ 0.0 = 2,000. 2,000 ÷ 8 = 250.) Note that 250 $\mu g/m^3$ is 5 TIMES the permissible exposure limit of 50 $\mu g/m^3$ (TWA) .

[38] Exposure to an environment of 2,000 $\mu g/m^3$ for a period of fifteen minutes (0.25 hour) out of an eight hour work day would have an 8 hr TWA exposure of 62.5 $\mu g/m^3$. (0.25 hour @ 2,000 + 7 hours @ 0.0 = 500. 500 ÷ 8 = 62.5.) Note that 62 $\mu g/m^3$ exceeds both the action level (30

(continued...)

shown that Mr. Lang was exposed to airborne lead over the action level.

Respondent posits several arguments which are rejected. First, its claim that the August 5, 1993 blood tests are "initial" not "periodic" tests ignores the possibility that the same test could be, and is, both initial (the first one in a series) and periodic (one amongst several performed at established intervals of time). Respondent's claim that Manganas hired Bethesda Share "to do all things necessary for it to comply" (Resp. brief, p. 9) is rejected legally and factually. An employer cannot wash its hands of its responsibilities under the Act especially where, as here, the "consultant" had no ability or authority to alter working conditions. Moreover, Ms. Fields of Bethesda Share credibly testified that she identified to Andrew Manganas job duties at the site which offered lower exposures (Tr. 1242). The employees identified here were not so assigned.

In addition, Manganas, to the extent it transferred employees at all based on their blood lead levels, transferred them to jobs for which it did not know whether the exposure level. Medical removal, to be meaningful, must place an employee with high blood lead level in a work atmosphere where his/ her exposure will be below the action level. Compliance with the cited standard thus requires an employer to place the "removed" employee in a work circumstance known by the employer at the time of the transfer to be at an airborne lead level below 30 $\mu g/m^3$. Placing a removed employee into an unknown atmosphere does not accomplish the purpose of the standard. Successful removal cannot rely on mere serendipity. The burden of showing that the exposure level about to be entered into by the transferred employee was known beforehand to be below 30 $\mu g/m^3$ is thus upon the employer. In this case, Manganas had no knowledge of the lead levels into which it placed employees.

Based on the above, Citation 2, Items 3, 4, 5, 6, 7, 8 and 9 are AFFIRMED

Citation 2, Items 10a - 18a
29 CFR 1926.62(c)(1)
Lead exposure exceeding Permissible Exposure Limit.

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[38](...continued)
$\mu g/m^3$ TWA) as well as the PEL (50 $\mu g/m^3$ TWA).

The Secretary alleges that nine specifically identified employees who were not engaged in blasting were, nonetheless, exposed to airborne lead exceeding the permissible limits on September 21, 22 or 24, 1993.

The regulation states;

> (c) *Permissible exposure limit.* (1) The employer shall assure that no employee is exposed to lead at concentrations greater than fifty micrograms per cubic meter of air (50 $\mu g/m^3$) averaged over an 8-hour period.

Compliance Officer Sweeny conducted personal sampling of Manganas employees on September 21, 22 and 24, 1993. He testified as to his method of attaching the sampling devices, checking on them during the day and removing the samples at the end of the day. The filters on which airborne lead was captured in the process of sampling were shipped to the OSHA laboratory in Salt Lake City, Utah for analysis. (Tr. 184, 223.) The filters were examined there and analyzed for the presence of lead. If lead was found, the amount was determined. The lab results were returned to the Compliance Officer who then calculated the employees' time-weighted average exposure levels. (Tr.184, 188-189, 223; C-8, C-9, C-11, C-12). Each of the employees identified in this item were sampled. The results for each of the individual employees identified in Items 10a through 18a are set forth in the accompanying table.

Item No.	Employee Name	Date	Job	Airborne Lead Exposure $\mu g/m^3$
10a	[redacted]	9/21/93	Grit Recycling	182.0
11a	[redacted]	9/21/93	Grit Recycling	647.0
12a	[redacted]	9/21/93	Grit Recycling	149.0
13a	[redacted]	9/22/93	Bridge Deck	82.2
14a	[redacted]	9/24/93	Vacuum Grit	4,620.0

Item No.	Employee Name	Date	Job	Airborne Lead Exposure µg/m³
15a	[redacted]	9/24/93	Vacuum Grit	4,570.0
16a	[redacted]	9/24/93	Vacuum Grit	4,100.0
17a	[redacted]	9/24/93	Vacuum Grit	4,240.0
18a	[redacted]	9/24/93	Blowing Down	1,850.0

All of the samples showed exposure to airborne lead above the PEL. As set forth and for the reasons in the Exposure Finding, I find that the employees identified in Items 10a - 18a of Citation 2 were exposed to airborne lead exceeding the PEL on the dates on which they were sampled.

Respondent argues that the cited standard "is merely an overall admonition" (Brief, p. 10) which cannot, by itself, be the basis of a separate violation. Respondent's argument is rejected. It is true, as Respondent suggests, that the exposure of employees to airborne lead above the PEL, which is defined by 1926.62(c), "triggers" subsequent requirements. So stating, however, does not mean that a violation of 1926.62(c) alone cannot stand. The structure of the standards is such that engineering and work practice controls must be implemented to the extent feasible. Only where their implementation fails to reduce employee exposure to or below the PEL, is an employer permitted to use respirators, and then only in a manner that complies with other subsections of the standard. (1926.62(e)). Where the Secretary alleges that there is employee exposure to airborne lead at levels above the PEL and improper respirator selection or usage, violations of both the "general admonition" and the specific respirator requirements can and do exist.

Based on the above, Items 10a through and including Item 18a of Citation 2 are AFFIRMED.

Citation 2, Items 10b - 18b
29 CFR 1926.62(f)(1) (Items 10b-13b)
29 CFR 1926.62(f)(2)(i) (Items 14b-18b)
Improper respirator protection.

Items 10b through 13b allege that employees in the grit recycling area and on the bridge deck who were exposed to airborne lead levels exceeding the permissible exposure limits (Items 10a-13a) were not provided with and required to use appropriate respiratory protection. The standard cited, 1926.62(f)(1) requires an employer to assure the use of proper respirators when an employee's exposure exceeds the PEL. The standard states;

> (f) *Respiratory protection* - (1) *General.* Where the use of respirators is required under this section the employer shall provide, at no cost to the employee, and assure the use of respirators which comply with the requirements of this paragraph. Respirators shall be used in the following circumstances:
> (i) Whenever an employee's exposure to lead exceeds the PEL;

Items 14b through 18b, somewhat similarly rely on a standard provides;

> (2) "Respirator selection". (i) Where respirators are used under this section the employer shall select the appropriate respirator or combination of respirators from Table I below.

The allegations of Items 10b through 18b are summarized in the following table.

Item	Employee	Date	Job	Respirator
10b	[redacted]	9/21/93	Recycle Grit	None
11b	[redacted]	9/21/93	Recycle Grit	None For Most of Shift ½ Face For Rest
12b	[redacted]	9/21/93	Recycle Grit	None For 90% of Shift
13b	[redacted]	9/22/93	Bridge Deck	None For Most of Shift
14b	[redacted]	9/24/93	Vacuum Grit	½ Face

15b	[redacted]	9/24/93	Vacuum Grit	½ Face
16b	[redacted]	9/24/93	Vacuum Grit	½ Face
17b	[redacted]	9/24/93	Vacuum Grit	½ Face
18b	[redacted]	[redacted]24/93	Blowing Down	½ Face

Items 10b - 13b concern four Manganas employees whose exposure was sampled and found to exceed the PEL (Items 10a-13a)(Appendix A). This alleged violation claims that these four employees, despite their overexposure, were not required to use respiratory protection. The charges lie in the fact that each of these employees, according to the Secretary, wore a respirator, if at all, for only a small portion of his work shift. There is no dispute that one or both of the Compliance Officers who testified stated that their observations intermittently over a period of several days was to the effect that employees [redacted], identified in Items 10, 11 and 12, respectively, either did not wear respirators or wore them intermittently during the day while working in the grit recycling area. (Tr. 72, 315, 319, 322). In light of the exposure finding and the undisputed testimony, the Secretary has made a *prima facie* showing of a violation as alleged in Items 10b, 11b and 12b.

Item 13b presents a somewhat different question. As discussed in some detail previously, the sampling resulted in a measurement of the sampled employees' exposure to airborne lead over the entire period during which the sampler pump was running. In the case of employee [redacted], the evidence is that he worked on the bridge deck but "intermittently" went into or near the containment. (Tr. 599). In fact, Compliance Officer Sweeney testified that [redacted] put on respiratory protection "for a very brief quantity of time less than six minutes when he briefly went down the ladder and entered the containment." (Tr. 329) Further, on cross-examination the Compliance Officer conceded that he had no data as to what the exposure level of [redacted] would have been had he not entered the containment. (Tr. 599-600). There is no quantification of the amount of exposure to airborne lead of this employee while he was on the bridge deck.

without any respirator. His failure to wear a respirator while on the deck is thus found not to be a violation of the cited standard. Item 13b is VACATED.

Employees [redacted], identified in Items 14b through 18b, respectively were all the subject of sampling and all worked inside the containment on the day of their sampling. All have thus been found to have been exposed to airborne lead exceeding the PEL. There is no dispute that each of these employees wore half-face, air purifying respirators while working in the containment. Moreover, there is no dispute that the respirators they wore did not provide a sufficiently high protection factor under Table I of 1926.62(2)(i) if the exposures as sampled were correct. Since the exposures as sampled and calculated by Compliance Office Sweeney have been found to be accurate and reliable, *prima facie* violations in Items 14b through 18b have been proven.

Respondent raises several arguments. Relying on a holding in *Smalis Painting Company, Inc.,* Supra., it claims that compliance was infeasible because appropriate respirators did not exist at the time of the alleged violations. (Resp. brief, p. 11). The decision in *Smalis*, is inapposite. There, lead levels were measured at 12,600 $\mu g/m^3$ to 33,500 $\mu g/m^3$ (TWA). It was found as fact that at that time there was no known respirator on the market which would have properly protected those individuals. All exposures in this case measured below 5,000 $\mu g/m^3$ (TWA), the levels of airborne lead, although violative of the PEL. Respondent has not shown that the lead exposures were at such a level that respirators which were appropriate under Table I were not, as was shown in *Smalis*, available. Respondent claim of infeasibility (or impossibility) of compliance is rejected.

Respondent also claims that any failure by employees to use their respirators resulted from unpreventable employee misconduct. Respondent's arguments are rejected for the following reasons. The Commission has long recognized an affirmative defense of unpreventable employee misconduct. It has consistently held that in order to prevail on this affirmative defense an employer must show by a preponderance of the evidence that; (1) it established work rules designed to prevent the violative conditions from occurring; (2) the work rules were adequately communicated to its employees; and (3) it took steps to discover violations of those rules; and (4) it has effectively enforced the rules when violations were discovered.

Jensen Construction Co., 7 BNA OSHC 1477, 1479 (No. 76-1538, 1979).

In regard to Items 10b - 13b, Respondent points only to Mr. Lang's testimony that it had a work rule requiring employees working on the bridge deck or recycling area to wear respirators. (Tr. 1866-1867). Mr. Lang's testimony, however, is unpersuasive. It lack specificity and while claiming to have enforced such a rule, the only documentary evidence it cites concerning enforcement (R-8) contains only two "warning forms" regarding the wearing of respirators, one dealing with entering the containment without any respirator at all and the other entering an "empty bin" without one. (R-8, Pp. "mag 330, 331"). In the absence of a showing of the existence of a work rule requiring the use of respirators on the bridge deck or the enforcement of such a rule, it cannot prevail on the affirmative defense it seeks to raise in regard to Items 10b-13b. Moreover, the evidence that the unprotected employees were in the open on the bridge deck, in full view of all of Manganas' supervisors, not only shows that Respondent knew that employees worked without any respirators at all in those areas but also shows that no enforcement of such a rule, if it existed, was done.

Nor can Respondent prevail on the defense of unpreventable employee misconduct regarding employees who worked inside the containment while using improper respiratory protection. Each of the employees identified in Items 14b-18b was in fact using a respirator while working in the containment. The gravamen of the violation is that the respirators they used were inadequate. An employee could be fully compliant with Respondents only applicable work rule by wearing any type of respirator even if that respirator did not protect the employee. Employees could thus be further endangered by using respirators which they thought protected them but which were actually exposing them to lead. Respondent has shown no work rule regarding the selection of a proper respirator. Accordingly, I find that Respondent has not shown the necessary elements of its asserted affirmative defense of unpreventable employee misconduct.

Based on the above, Items 10b, 11b, 12b, 14b, 15b, 16b, 17b and 18b are AFFIRMED.

Item 13b is VACATED.

Serious Classification of Violations

The Secretary maintains that each alleged violation is serious within the meaning of § 17(k) of the Act, 29 U.S.C. § 666(j). That section provides;

> (k) For purposes of this section, a serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

There is virtually no debate that lead is highly toxic and that absorption of airborne lead has important and serious medical consequences. A highly qualified expert, Dr. Thomas Martin, testified extensively as to the toxic effects of lead, the importance of blood lead level testing of those exposed to lead, the health risks to families of workers who have been exposed to lead, the dangers of eating, smoking or drinking in the presence of airborne lead, the medical significance of initial blood lead level testing, the health risks in not providing follow-up blood testing on schedule and the danger of failing to provide appropriate medical examinations and consultations. Dr. Thomas' testimony covered the OSHA lead standard's major requirements and the relationship between violations of the Lead in Construction Standards requirements and the likelihood that an employee so affected would suffer serious injury or death. The doctor's testimony was comprehensive and persuasive. It stands unrebutted. On the basis of his testimony, I find that each of the violations which result in increasing employee exposure to lead are serious within the meaning of the Act.

Almost all of the alleged violations in this case directly resulted in increased lead exposure and are serious. Unless specifically discussed and designated otherwise in regard to the individual violation, all violations in this case are found to be serious within the meaning of the Act.

Citation 2, Willful Classification

The Secretary alleges that all violations alleged in Citation 2 were willful.

For the following reasons, I conclude that the violations of the Lead in Construction standards which are contained in Citation 2, and have been affirmed, are willful within the meaning and spirit of the Act.

A chronology of events which took place prior to OSHA's air sampling provides the background for this determination.

March 1993. John Manganas, a Manganas vice-president, attended a multiple day seminar conducted by the Steel Structures Painting Council (SSPC), a professional society to which Respondent belongs. The seminar included a session entitled "Update on the Interim Construction Industry Lead Standard" which it noted was "mandated by law for April 1993." (Tr. 1037, C-46).

April 1993. OSHA first inspected the Jeremiah Morrow Bridge worksite. The inspection dealt with safety aspects of the work and did not include any lead issues. During the inspection Compliance Officer Steven Medlock learned that the bridge paint might contain lead (Tr. 61, 83). He informed Andrew Manganas that there was a "new" lead standard and that the Cincinnati OSHA Office had a local emphasis program for lead in construction (Tr. 60, 89). He also gave Andrew Manganas an OSHA pamphlet entitled "Working With Lead in the Construction Industry." The pamphlet is dated April 1991 and makes no mention of OSHAs new Lead in Construction standard. (Tr. 62; C-4). CO Medlock told Mr. Manganas that additional information could be obtained by contacting the industrial hygiene supervisor at the Cincinnati OSHA Office.(Tr. 60).

May 4, 1993. OSHA published in the Federal Register its Lead Exposure In Construction: Interim Final Rule (58 FR 26590 - 26635, May 4, 1993.) It became effective on June 3, 1993. (29 C.F.R. 1926.62). Administrative controls and feasible work practice controls were to be put in place "as soon as possible, but no later than 60 days from the effective date (August 2, 1993)...." (August 2, 1993) (1926.62(r)(1). Engineering controls were required to be implemented "as soon as possible, but no later than 120 days from the effective date....(October 1, 1993)" (1926.62(r)(2).

June 1993. The SSPC published a special issue of its lead paint bulletin, *Pb* which contained details about the new OSHA Lead In Construction Standard. The bulletin stated that

new standard applied to “all construction work in which lead is present in any amount" (C-47, p. 1).

July 20, 1993. The Ohio Department of Transportation ("ODOT") conducted a meeting which it said was mandatory “for all contractors who wish to bid on bridge painting projects after July 20, 1993.” The purpose was to explain the new rules issued by OSHA on May 4, 1993 and would “serve to advise all persons involved in the removal of lead paint of the current OSHA requirements....” Included in the material “handouts” was a booklet which included a copy of the Federal Register publication of the new lead standard. (C-42, Tr. 1009-1010). During the seminar, James Barnhart, a structural maintenance and inspection engineer with ODOT, “basically” told the attendees that "if there was a job already under contract the (new OSHA) rules still applied. (Tr. 1011) Nicholas Manganas, Respondent's founder and President, was at the meeting place. He maintains, however, that he was ill and not in the meeting room for a good part of the time, and that he did not bring back a handout. (Tr. 2062-2063).

July 23, 1993. Dr. Thomas Martin, who had been treating a Manganas employee diagnosed as suffering from “acute lead poisoning,” telephoned and wrote to John Manganas. His letter confirmed the phone call and repeated descriptions of practices at the work site given to him by the employee. He stated that if those descriptions were true “they would suggest that this work site is not following OSHA’s new interim rule on lead in construction.” Dr. Martin went on to acknowledge that Mr. Manganas had taken the position that the Jeremiah Morrow bridge job was not covered by the new OSHA rule because it had been bid and awarded before the rules were “passed.” Dr. Martin advised that even if the new OSHA rule did not apply, that Manganas should have other workers who were at risk to have blood tests and be reminded to “wear their protective equipment the entire time that they are in the containment area.” Dr. Martin included with the letter materials regarding the new Lead in Construction standard. (C-61)

July 28, 1993. Dr. Martin telephoned the Cincinnati OSHA Office. He said that he was treating a patient for lead poisoning who had told him that OSHA had done air sampling. He requested copies of the air sampling results. (C-5; Tr. 1585).

August 2, 1993. OSHA Compliance Officer James Sweeney commenced the inspection of Respondent's worksite at the Jeremiah Morrow Bridge. (Tr. 142). When CO Sweeney told

Manganas officials that he intended to do personal air sampling he was advised by Andrew Manganas that he could begin to sample the next day (Tr. 150).

August 3, 1993, morning. When CO Sweeney arrived at the worksite Andrew Manganas advised him that the Respondent had decided not to blast that day and that it would be at least a week before any work which could generate airborne lead would be performed (Tr. 151-52).

August 3, 1993. John Manganas replied to Dr. Martin's letter of July 23, 1993. He described actions in which employees did not cooperate and some actions being taken by Manganas. He stated that such matters are of great concern to the employer. (C-62).

August 3, 1993, night. Rust Environment and Infrastructure, a consultant firm (formerly known as SEC Donohue) was contacted for the first time by Manganas who wanted Rust to "start right away" on air monitoring. (Molander deposition, p. 8).

August 4, 1993. Bethesda Health Care, a consulting company which provides health care services, was first contacted by Andrew Manganas who was "very anxious saying that OSHA was coming the next day, there was a new regulation out for lead testing, he needed to be in compliance by the next morning and would we come to the work site that next morning and collect the lead levels" on some Manganas employees. (Tr. 1159). Mr. Manganas specifically declined to have a local university conduct testing and evaluation at the worksite free of charge because "he didn't want any more people out there snooping around." (Tr. 1177).

August 4, 5, 7 & 8, 1993. Air sampling is conducted at the site by Rust.

August 6, 1993. CO Sweeney returned to the worksite and found that blasting was performed on both August 4 and 5 and that Rust had collected samples. (Tr. 159; C-48, pp. 51-55).

August 2, 3, 4, 5, 6 & 30, 1993. September 21, 22, 23 & 24, 1993. CO Sweeney on-site inspection of the Jeremiah Morrow Bridge worksite of Manganas Painting Company.

August 18, 1993. Calculations of Rust's August sampling completed. Rust representative telephoned and met with Andrew Manganas explaining that Rust's results showed that employees doing blasting were overexposed to airborne lead. Rust was instructed by Manganas not prepare a written report because Manganas wanted "to save fees." (Molander deposition, pp. 35-39.)

September 21, 22 & 24, 1993. CO Sweeney conducted personal air sampling at the Jeremiah Morrow Bridge site.

I am of the opinion that the requisite state of mind to support a finding of willful is amply demonstrated on this record.

The principles for testing whether a violation of the Act is willful have been stated numerous times. Most basically, a violation is willful "if it is committed with intentional, knowing or voluntary disregard of the requirements of the Act.....A willful violation is differentiated from a non-willful violation by a heightened awareness, a conscious disregard or plain indifference to employee safety." *Hartford Roofing Co.*, 17 BNA OSHC 1361, 1363 (No. 92-3855, 1995. (Citations omitted.) (*Hartford*). The Commission in *Hartford* declined to classify as willful violations involving standards it described as "complex and not perfectly clear" where such violations were "the product of negligence and misunderstanding rather than an intentional disregard or plain indifference to the Act." *Id.*, at p. 1364. The Commission's observations in *Hartford* are apt in this case.

Relatively few facts bearing on the issue of willfulness are truly in dispute. Rather, the parties emphasize different aspects of the facts and differ greatly as to their impact. The Secretary, looking at the above facts, maintains that they demonstrate plain indifference or conscious disregard for employee safety. Respondent says that the same facts show a whole-hearted, good faith attempt to comply with the Lead in Construction Standards as soon as possible once they were known to be applicable. I reject Respondent's interpretation of the facts.

Respondent's version might be acceptable if one were to look at only those events after Compliance Officer Sweeney showed up for the first time and announced an inspection which would specifically include monitoring the men inside the containment for airborne lead exposure. An examination of events preceding the inspection by as much as five months provides example after example where warnings regarding the new standards, if not placed in Respondent's hands, were flashed before its very eyes. The industry in which Respondent has been active for many years was actively informing its members of the potential impact of new standards. Meetings took place, brochures and newsletters were handed out, issued and published. Manganas seeks to emphasize that the Lead in Construction Standard is highly complex and there was significant,

and perhaps not unreasonable, confusion as to its effective date and whether it was applicable to projects underway. Yet despite all of the warning signs, it presents no reason why it took no meaningful action prior to the inspection to determine if the standard was, indeed, applicable to it at the Jeremiah Morrow Bridge. In my opinion, under the circumstances presented by this record, Respondent's claim that it had a good faith belief that the standards were not applicable to its worksite is untenable in light of the facts. This is not a matter of holding an employer responsible under a general theory that it is responsible to know the law. Respondent, for all intents and purposes, pulled the wool over its own eyes. In the face of any number of significant warnings it made no inquiries and took no action until the very moment an OSHA compliance officer showed up at its doorstep. An employer may be negligent in not seeking to find its legal responsibilities but one deliberately failing to respond to warnings from any number of sources constitutes a willful disregard of the law, in this case, the Act. Respondent cannot avoid the charge of willfully failing to comply with standards it knew existed, was warned were applicable, and which it deliberately refused to investigate.[39] Accordingly, I find that the violations contained in Citation 2 which have been affirmed are willful within the meaning of the Act.

Instance by Instance Citations

Respondent's post-hearing brief again challenges the Secretary's authority to seek and the Commission's authority to apply "instance by instance" penalties. The issue in this case has been resolved in the denial of Respondent's Motion for Partial Summary Judgment. (See, Order - Denial of Respondent's Motion for Partial Summary Judgment).

Respondent's post-hearing brief raises four arguments as to why the "egregious policy" under which the Commission has approved "instance by instance" citations is not applicable in this case under existing Commission precedent. (Resp. brief, p. 42). Respondent is incorrect in

[39] Respondent's relationship with OSHA Compliance Officers is discussed as it relates to the element of good faith in assessing penalties. Its dealings with OSHA's Compliance Officers is relevant to the willfulness issue in that those actions clearly reflect Respondent's degree of concern for employee safety.

all four of its arguments.

First, Respondent agues that the egregious policy can only be applied where the cited standard prohibits individual acts as opposed to a single course of action.

The Secretary's authority to issue separate citations (or items in one citation) and separate proposed penalties for each “instance” of a violation committed by an employer has been upheld by the Commission in several recent decisions, beginning with *Caterpillar, Inc.*, 15 BNA OSHC 2153 (No. 87-0922, 1993) and in *Hartford Roofing Co.*, 17 BNA OSHC 1361 (No. 92-3855, 1995). Under these decisions the Commission has held that;

> Some standards implicate the protection, etc. of individual employees to such an extent that the failure to have the protection in place for each employee permits the Secretary to cite on a per-instance basis.

Hartford Roofing, Co., supra. 17 BNA at 1365.

In this case the standards cited on an “instance-by-instance” basis are appropriately identified as separate violations of the Act because the clear language of each of the standards on which they rely contemplates protection for each employee covered by the standard.

Items 3 through 9 of Citation 2, cite 1926.62(k)(1)(i), which, in turn, sets forth its principal requirement in terms of removing "an employee":

> The employer **shall remove an employee** from work having an exposure to lead at or above the action level on each occasion that a periodic and a follow-up blood sampling test conducted pursuant to this section indicate that the employee's blood lead level is at or above 50 µg/dl...

Items 10a through 18a of Citation 2, as well as Item 6 (Instances a-e) of Citation 1, cite 1926.62(c)(1) which states its principal requirement in terms of protecting individual employees from excessive lead exposure:

> [T]he employer shall assure that **no employee** is exposed to lead at concentrations greater than fifty micrograms of cubic meter of air (50 $\mu g/m^3$) averaged over an 8-hour period.

Items 10b through 13b and 14b through 18b of Citation 2 rely on 1926.62(f)(1) and 1926.62(f)(2)(i), respectively. These two standards contain requirements for the use and

selection of respirators. By their very nature as personal protective equipment, these are requirements which contemplate protection of the individual employees who are covered.

Respondent's descriptions of the alleged violations supports viewing the cited standards as among those designed to protect individual employees.[40] Finally, even if Respondent is correct in its interpretation of the standards under which it was cited for willful violations as those which could be abated by the single act of installing appropriate engineering controls, its argument would be rejected because such engineering controls were not required to be in operation at the time of the alleged violation.[41]

Second, Respondent maintains that instance by instance citations can only be issued where the violations cited are willful. Reliance on decisions by administrative law judges of the Commission which have not been reviewed by the Commission, however informative or instructive, is misplaced. They are not regarded as precedent by the Commission. *Leone Construction Co.*, 3 BNA 1979 (No. 4090, 1976). In addition, both judges' decisions approved the application of the policy in cases in which the instance by instance violations were alleged to have been willful. Neither decision, however, limited the policy to only willful violations.

Third, Respondent maintains that instance by instance citations can only be issued where the underlying violations are found to be "flagrant." Again, Respondent relies on unreviewed administrative law judges' decisions which are not binding precedent on the Commission. While not before this administrative law judge at this time, the possibility of finding on this record that the violations were, in fact, flagrant cannot be excluded.

Fourth, Respondent maintains that "the application of the egregious case policy is limited by policy considerations." (Citations omitted.") In essence, Respondent claims that the amounts of the proposed penalties and the manner in which those amounts were determined, constitute

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[40] *E.g.*, "[t]he abatement (under 1926.62(f)(2)) required is the single act of providing the employees within the particular area with the appropriate respirator." (Resp. brief, p. 43). Providing a number of respirators to a number of employees is hardly a "single act" as asserted by Respondent.

[41] Under 1926.62(r)(2) engineering controls were required to be implemented by October 1, 1993.

evidence that the penalties in this case were intended, at least in part, to be punitive under *S.A. Healy Co.*, 17 BNA OSHC 1145 (No. 89-1508, 1995)(*Healy II*). Inasmuch as Manganas has not "previously been criminally convicted and sentenced to criminal fines for the same conduct" as was Healy, the Commission's decision in *Healy II* is not applicable.

For the above reasons, I conclude that "instance by instance" citations are appropriate in this case.

Penalty Assessments

An administrative law judge is required "to state an adequate factual basis for his assessment of a penalty." *J.A. Jones Construction Co.*, 15 BNA OSHC 2201, 2214 (No. 87-2059, 1993) (*Jones*).

Under the Act each willful violation is subject to a civil penalty ranging from $5,000 minimum to $70,000 (§ 17(a)); each serious violation is subject to a civil penalty ranging from $1 to $7,000 (§ 17(b)), and each other-than-serious violation is subject to a penalty ranging from $ 0 to $7,000) (§ 17(c)). Once a contested case is before the Commission the amount of the penalties proposed by the Secretary in the Citation and Notification of Proposed Penalties is merely a proposal. What constitutes an "appropriate" amount is a matter for the Commission's determination. Section 17(j) of the Act, 29 USC 661(i); *Nacerima Operating Company, Inc.*, 1 BNA OSHC 1001 (No. 0004, 1972) (*Nacerima).*

In determining appropriate penalties "due consideration" must be given to the four criteria under section 17(j) of the Act, 29 U.S.C. 666(j). These "penalty factors" include; the size of the employer's business, the gravity of the violation, the employer's good faith and its prior history. While the Commission has noted that the gravity of the violation is generally "the primary element in the penalty assessment, it also recognizes that the factors "are not necessarily accorded equal weight. *Jones*, supra. p. 2214.

Of the four "penalty factors" size, gravity, good faith and history, Respondent's lack of good faith is the most salient feature of this case and is the most significant penalty aspect.

Early in its history the Commission said that good faith includes;

> a review of the employer's own occupational safety and health program, its commitment to the objective of assuring safe and healthful working conditions and its cooperation with other persons and organizations (including the Department of Labor) seeking to achieve that objective.

Nacerima, supra., p. 1002. Respondent often refers to its safety program. The program, on paper, is elaborate, lengthy and detailed. Respondent has not, however, shown that its actions to make the program known, train employees in its requirements or enforce its provisions were as impressive as the document itself. Managers were unsure and ambiguous as to its contents and specifics and allowed (or themselves committed) violations of it such as eating and smoking in lead areas to go relatively unchecked.. Moreover, as discussed, given the frequency of violations of requirements found in the program (as described by the employees themselves), the number of employees sanctioned is small. Finally, other than a few sheets of paper purporting to document "reprimands" given to employees there is no reliable evidence showing that significant enforcement was undertaken by the company.

As discussed previously, prior to the impetus instilled by an OSHA inspection, Respondent's commitment to assure safe and healthful working conditions for its employees exposed to lead was minimal at best.

The lack of cooperation of Manganas officials and supervisory personnel with OSHA is legion on the record in this case. Manganas managers intentionally misled CO Sweeney from the outset. Manganas deliberately delayed OSHA's personal sampling of exposed employees while it rushed to take actions which would make it look as if it were trying to come into compliance. The delay was deceitful at best. In addition, this record documents activities by Manganas management officials not merely tolerating but instigating, encouraging and participating in abusive and insulting behavior towards the compliance officer. (Tr. 556-558). Mr. Andrew Manganas' attitude towards OSHA and the enforcement of the Act was also evident during his testimony at the hearing. As discussed previously, he was a witness whose testimony was unreliable. Based on the above, I find that the evidence of record as a whole demonstrates that Manganas acted with little or no good faith in matters concerning employee safety and health regarding lead exposure until such time as an OSHA inspection concerning lead exposure

commenced.

The other penalty factors, size, gravity and history warrant brief discussion.

Respondent is a family owned business which has operated in the industrial painting industry for many years. It employed approximately 35 employees on Jeremiah Morrow Bridge. Respondent is a seasonal employer normally employing forty to forty-five employees but not more than seventy employees. It is noted that for the year 1993, the year of the alleged violations, Respondent's profit was "about a million 3." ($1,300,000.00). (Tr. 2070). Respondent also pointed out that the amount of the penalties proposed by the Secretary exceed its net worth.

Gravity is considered to be very high. Exposure to lead and its accumulation in the body is slow and insidious. Lead produces highly toxic and at some point, irreversible damage. Moreover, in this case a significant number of employees have been exposed to very high concentrations of airborne lead. Every employee who entered the containment while blasting was underway was exposed to a high dose of airborne lead. Several employees have been hospitalized for treatment. In addition, the carrying away from the site of respirable lead in clothing and due to lack of required showering, changing and laundering facilities, continued the employee exposure to lead even after they left the worksite. It also exposed families of the employees to lead.

Respondent, at the time of this inspection, had no prior violations involving lead or toxic exposures.

Under the above circumstances, in this case I find that the imposition of a civil penalty of $44,100 (70% of the maximum allowable under the Act) is appropriate for each willful violation of the Act. Similarly, I find that the imposition of a civil penalty of $ 4,410, is appropriate for each serious violation of the Act and a civil penalty of $440 is appropriate for each other-than-serious violation of the Act.[42]

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[42] Where a single penalty was proposed for an item consisting of multiple sub-parts or "instances," some of which are affirmed and others vacated, the amount of the penalty assessed is in proportion to the number of sub-parts or instances affirmed.

FINDINGS OF FACT

All findings of fact necessary for a determination of all relevant issues have been made above. Fed. R. Civ. P. 52(a). All proposed findings of fact and conclusions of law inconsistent with this decision are hereby denied.

CONCLUSIONS OF LAW

ORDERS

1. Respondent was, at all times pertinent hereto, an employer within the meaning of § 3(5) of the Occupational Safety and Health Act of 1970, 29 U. S. C. § § 651 - 678 (1970).

2. The Occupational Safety and Health Review Commission has jurisdiction over the parties and the subject matter.

3. Citation 1, Item 1, alleging a violation of § 1926.52(a), has been withdrawn.

4. Citation 1, Item 2. alleging a violation of § 1926.52(d), has been withdrawn

5. Citation 1, Item 3a, alleging a violation of § 1926.59(e)(1), is VACATED.

6. Citation 1, Item 3b, alleging a violation of § 1926.59(e)(1), is AFFIRMED as an other than serious violation of the Act. A penalty of $0 is assessed therefor.

7. Citation 1, Item 4a, alleging a violation of § 1926.59(f)(5)(i) is VACATED.

8. Citation 1, Item 4b, alleging a violation of § 1926.59(f)(5)(ii), is VACATED.

9. Citation 1, Item 5, alleging a violation of § 1926.59(h), is AFFIRMED as an other than serious violation of the Act. A penalty of $440 is assessed therefor.

10. Citation 1, Item 6, Instances a-e, inclusive, alleging a violation of § 1926(c)(1), is AFFIRMED as a serious violation of the Act. A penalty of $4,410 is assessed therefor.

11. Citation 1, Item 7, alleging a violation of § 1926.62(d)(8)(i), is AFFIRMED as a serious violation of the Act. A penalty of $4,410 is assessed therefor.

12. Citation 1, Item 8, alleging a violation of § 1926.62(e)(2(i), is VACATED.

13. Citation 1, Item 9, alleging a violation of § 1926.62(f)(3)(ii), AFFIRMED as a serious violation of the Act. A penalty of $4,410 is assessed therefor.

14. Citation 1, Item 10, alleging a violation of § 1926.62(g)(1), is AFFIRMED as a serious violation of the Act. A penalty of $4,410 is assessed therefor.

15. Citation 1, Item 11, alleging a violation of § 1926.62(g)(2)(ii), AFFIRMED as a serious violation of the Act. A penalty of $4,410 is assessed therefor.

16. Citation 1, Items 12a and 12b, alleging violations of § § 1926.62(g)(2)(v) and 1926.62(g)(2)(vii), respectively, are AFFIRMED as a single serious violation of the Act. A penalty of $4,410 is assessed therefor.

17. Citation 1, Item 13, alleging a violation of § 1926.62(g)(2)(vi), is AFFIRMED as a serious violation of the Act. A penalty of $4,410 is assessed therefor.

18. Citation 1, Item 14, alleging a violation of § 1926.62(h)(3), is AFFIRMED as a serious violation of the Act. A penalty of $4,410 is assessed therefor.

19. Citation 1, Item 15, alleging a violation of § 1926.62(h)(5), is AFFIRMED as a serious violation of the Act. A penalty of $4,410 is assessed therefor.

20. Citation 1, Item 16, alleging a violation of § 1926.62(i)(1), is AFFIRMED as a serious violation of the Act. Penalty of $4,410 is assessed therefor.

21. Citation 1, Item 17, alleging a violation of § 1926.62(i)(2)(ii), is AFFIRMED as a serious violation of the Act. A penalty of $4,410 is assessed therefor.

22. Citation 1, Item 18, alleging a violation of § 1926.62(i)(2)(iii), is AFFIRMED as a serious violation of the Act. A penalty of $4,410 is assessed therefor.

23. Citation 1, Item 19, alleging a violation of § 1926.62(i)(3)(i), is AFFIRMED as a serious violation of the Act. A penalty of $4,410 is assessed therefor.

24. Citation 1, Item 20, Instances a-c, alleging a violation of § 1926.62(i)(4)(iii), is AFFIRMED as a single serious violation of the Act. A penalty of $4,410 is assessed therefor.

25 Citation 1, Item 21, Instances a-o, alleging a violation of § 1926.62(i)(2)(ii), is AFFIRMED as a single serious violation of the Act. Penalty of $4,410 is assessed therefor.

26. Citation 1, Item 22, alleging a violation of § 1926.62(j)(2)(iv), is AFFIRMED as a

serious violation of the Act. A penalty of $4,410 is assessed therefor.

27. Citation 1, Item 23, alleging a violation of § 1926.62(l)(1)(ii), is AFFIRMED as a serious violation of the Act. A penalty of $4,410 is assessed therefor.

28. Citation 2, Item 24, alleging a violation of § 1926.62(l)(iii), is AFFIRMED as an other than serious violation of the Act. A penalty of $440 is assessed therefor.

29. Citation 1, Item 25, alleging a violation of § 1926.62(l)(3)(i), is AFFIRMED as a serious violation of the Act. A penalty of $4,410 is assessed therefor.

30. Citation 1, Item 26, alleging a violation of § 1926.62(m)(2)(i), is AFFIRMED as a serious violation of the Act. Penalty of $4,410 is assessed therefor.

31. Citation 1, Item 27, alleging a violation of § 1926.62(n)(1)(ii), is AFFIRMED as a serious violation of the Act. A penalty of $4,410 is assessed therefor.

32. Citation 1, Item 28, alleging a violation of § 1910.20(g)(1), is VACATED.

33. Citation 1, Item 29, alleging a violation of § 1910.134(d)(2)(ii), VACATED.

34. Citation 1, Item 30, alleging a violation of § 1926.62(f)(1), is AFFIRMED as a serious violation of the Act. A penalty of $4,410 is assessed therefor.

35. Citation 2, Item 1, alleging a willful violation of § 1926.62(d)(1)(i) is VACATED.

36 Citation 2, Item 2, alleging a willful violation of § 1926.62(j)91)(i) is VACATED.

37. Citation 2, Item 3, alleging a willful violation of § 1926.62(k)(1)(i), is AFFIRMED as a willful violation of the Act. Penalty of $44,100 is assessed therefor.

38. Citation 2, Item 4, alleging a willful violation of § 1926.62(k)(1)(i), is AFFIRMED as a willful violation of the Act. Penalty of $44,100 is assessed therefor.

39. Citation 2, Item 5, alleging a willful violation of § 1926.62(k)(1)(i), is AFFIRMED as a willful violation of the Act. Penalty of $44,100 is assessed therefor.

40. Citation 2, Item 6, alleging a willful violation of § 1926.62(k)(1)(i), is AFFIRMED as a willful violation of the Act. Penalty of $44,100 is assessed therefor.

41. Citation 2, Item 7, alleging a willful violation of § 1926.62(k)(1)(i), is AFFIRMED as a willful violation of the Act. Penalty of $44,100 is assessed therefor.

42. Citation 2, Item 8, alleging a willful violation of § 1926.62(k)(1)(i), is AFFIRMED as a willful violation of the Act. Penalty of $44,100 is assessed therefor.

43. Citation 2, Item 9, alleging a willful violation of § 1926.62(k)(1)(i), is AFFIRMED as a willful violation of the Act. Penalty of $44,100 is assessed therefor

44. Citation 2, Items 10a and 10b, alleging willful violations of § § 1926.62(c)(1) and 1926.62(f)(1), respectively are AFFIRMED as a single willful violation of the Act. A penalty of $44,100 is appropriate therefor.

45. Citation 2, Items 11a and 11b, alleging willful violations of § § 1926.62(c)(1) and 1926.62(f)(1), respectively are AFFIRMED as a single willful violation of the Act. A penalty of $44,100 is appropriate therefor.

46. Citation 2, Items 12a and 12b, alleging willful violations of § § 1926.62(c)(1) and 1926.62(f)(1), respectively are AFFIRMED as a single willful violation of the Act. A penalty of $44,100 is appropriate therefor.

47. Citation 2, Items 13a and 13b, alleging willful violations of § § 1926.62(c)(1) and 1926.62(f)(1), respectively are AFFIRMED as a single willful violation of the Act. A penalty of $44,100 is appropriate therefor.

48. Citation 2, Items 14a and 14b, alleging willful violations of §§ 1926.62(c)(1) and 1926.62(f)(2)(i), respectively are AFFIRMED as a single willful violation of the Act. A penalty of $44,100 is appropriate therefor.

49. Citation 2, Items 15a and 15b, alleging willful violations of § § 1926.62(c)(1) and 1926.62(f)(2)(i), respectively are AFFIRMED as a single willful violation of the Act. A penalty of $44,100 is appropriate therefor.

50. Citation 2, Items 16a and 16b, alleging willful violations of § § 1926.62(c)(1) and 1926.62(f)(2)(i), respectively are AFFIRMED as a single willful violation of the Act. A penalty of $44,100 is appropriate therefor.

51. Citation 2, Items 17a and 17b, alleging willful violations of § § 1926.62(c)(1) and 1926.62(f)(2)(i), respectively are AFFIRMED as a single willful violation of the Act. A penalty of $44,100 is appropriate therefor.

52. Citation 2, Items 18a and 18b, alleging willful violations of § § 1926.62(c)(1) and 1926.62(f)(2)(i), respectively are AFFIRMED as a single willful violation of the Act. A penalty of $44,100 is appropriate therefor.

/s/
Michael H. Schoenfeld
Judge, OSHRC

Dated: September 13, 1996
Washington, D.C.

APPENDIX A

Secretary of Labor v. Manganas Painting Company, Inc.,
OSHRC Docket No. 94-0588
Results of Personal Air Sampling for Exposure to Airborne Lead
Conducted by OSHA at the Jeremiah Murro Bridge Work Site

Date Sampled	Employee Sampled	Work While Sampled	Notes	Lead Exposure $\mu g/m^3$ (TWA)
9/21/93	[redacted]	Recycling		16.1
9/24/93	[redacted]	Blowing Down		1850.0
9/21/93	[redacted]	Recycling		149.0
9/21/93	[redacted]	Blasting	Outside Hood	3700.0
9/22/93	[redacted]	Blasting	Inside Hood	None
9/21/93	[redacted]	Recycling		182.0
9/21/93	[redacted]	Recycling		647.0
9/21/93	[redacted]	Blasting	Outside Hood	4960.0
9/22/93	[redacted]	Blasting	Outside Hood	4070.0
9/22/93	[redacted]	Blasting	Inside Hood	587.0
9/22/93	[redacted]	Blasting	Outside Hood	430.0
9/22/93	[redacted]	Blasting	Inside Hood	52.9
9/22/93	[redacted]	Blasting	Outside Hood	1620.0
9/22/93	[redacted]	Blasting	Inside Hood	49.0
9/22/93	[redacted]	Deck		82.2
9/24/93	[redacted]	Vacuuming		4100.0
9/24/93	[redacted]	Vacuuming		4620.0
9/24/93	[redacted]	Vacuuming		4240.0
9/24/93	[redacted]	Vacuuming		4570.0

Source of data: Exhibits C-8, C-9, C-12 - 24 and C-36; Tr. 184, 188-189, 223..