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SECRETARY OF LABOR,	:	:	
	:	:	
Complainant,	:	:	
	:	:	
v.	:	:	OSHRC Docket No. 90-1747
	:	:	
ATLANTIC BATTERY COMPANY, INC.,	:	:	
	:	:	
Respondent.	:	:	
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DECISION

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

BY THE COMMISSION:

The Respondent, Atlantic Battery Company, Inc. ("Atlantic"), has a workplace in Watertown, Massachusetts, where it is engaged in the manufacturing and selling of batteries, including automobile batteries. At issue on review are nineteen items and one subitem of four citations alleging willful, repeated, serious, and other than serious violations of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act"), primarily based on Atlantic's failure to comply with standards published by the Occupational Safety and Health Administration ("OSHA") governing exposure to lead and hazard communication. Commission Administrative Law Judge Richard W. Gordon ("the judge") affirmed each violation, accepted the Secretary of Labor's classification of the violation, and assessed the Secretary's proposed penalties totalling \$31,240. Atlantic, appearing before us *pro se*, petitioned for review of the judge's decision.¹ For the reasons that follow, we affirm the judge's disposition of three of the items on review, as well as the one subitem on review; we modify the judge's disposition of eight other items; and we reverse

¹ The judge also affirmed one other subitem (citation no. 1, item 2b) and one other item (citation no. 4, item 3) that are not at issue on review, due to Atlantic's decision not to seek review of those items.

the judge with respect to the remaining eight items, which we vacate. We assess penalties totaling \$7240 for the violations that we affirm.

BACKGROUND

A. Compliance History

Atlantic had been cited for failing to comply with various provisions of OSHA's standard governing exposure to lead, as well as other standards, as early as 1972. It was also cited in 1975, 1979, and 1982. The present case has its roots in a January 28, 1986 action in which OSHA issued citations alleging serious and other than serious violations of the Act, involving violations of virtually every aspect of OSHA's lead standard. These citations resulted in an "informal" settlement agreement.

After the last abatement date specified in this informal settlement agreement had passed, OSHA conducted a follow-up inspection to determine whether the employer had met its abatement commitments. On October 30, 1986, OSHA issued Atlantic a notification of failure to abate ("the FTA notification"), alleging that Atlantic had failed to abate 24 of the 33 serious violations that had been cited in January 1986. OSHA also issued a citation alleging three other than serious violations of 29 C.F.R. § 1910.1200, the Secretary's hazard communication standard for general industry ("the HCS"). Atlantic contested both the FTA notification and the new citation.

That case was docketed as OSHRC Docket No. 86-1761 and assigned to a Commission administrative law judge before the parties entered into a formal settlement agreement ("the 1987 Settlement Agreement"). In paragraph 6 of the agreement, Atlantic agreed to implement a compliance program it developed by "performing and enforcing all tests, tasks, measures, and other obligations noted in the . . . program." A seven-page document captioned "Health and Safety Compliance Program" ("the 1987 Compliance Program") is attached to the agreement.

A second attachment to the settlement agreement, captioned "Atlantic Battery Company Quarterly Progress Report," separated the employer's legal obligation under the lead standard into its component parts. It contained several blanks that were to be filled in by Atlantic before submission to OSHA. Atlantic also agreed in paragraph 6 to "perform[] in a timely manner all tests, tasks and other obligations noted in the Quarterly Progress Report" and to "submit[] fully completed copies" of the report to OSHA quarterly for two years, ending with a final submission by October 30, 1989. A Commission administrative law judge issued an order approving the 1987 Settlement Agreement and incorporating its terms by reference.

This case began with an inspection during the winter of 1989-90 at the end of the 2-year observation period that had been created under the 1987 Settlement Agreement. The inspection took place to determine whether the citation items listed in the October 1986 FTA notification had

in fact been abated (as promised and/or as reported) and to determine whether Atlantic was in compliance with the settlement agreement. Following the inspection, OSHA issued the citations that are now before us. After a 4-day hearing, in which the parties introduced several exhibits and the testimony of three witnesses (the two compliance officers and company president Bruce Migell), the judge issued his decision, in which he affirmed all of the contested citation items and assessed all of the proposed penalties. It is that decision that is now before us on review.²

B. Workplace and Operations

Atlantic's battery manufacturing process involves several steps. First, lead ingots are placed in a melting pot. Some of the molten lead "is [then] drawn [from the pot] into molds where it's cast into an open metal work called the grid [or plate]." Other molten lead is "ladled out of the melting pot and poured into a small mold to make lead solder sticks and bars." Ordinarily, when the grids have been cast, they are pasted and buffed. However, neither of these procedures was performed at the Watertown facility at the time of the inspection. Once completed, the plates/grids are vertically stacked, with separators between them, into groups. In group burning, groups of grids are bound together with lead embedded across the tops of the grids, and terminals burnt onto the ends. In the assembly and repair department, the connected groups of plates are placed into battery cases. Once the battery is assembled and, if necessary, repaired, it is filled with sulfuric acid and then charged. Occasionally, the battery cases are spray painted. Finally, in the shipping and receiving area, completed batteries are put into boxes, stacked on pallets, and sent out to customers.

The most significant and pervasive occupational hazard associated with battery manufacturing is employee exposure to lead, particularly in the form of dust or fumes. The primary exposure during the casting operation is to lead fumes, which are given off as the lead

²Overlapping the administrative enforcement actions is a parallel enforcement proceeding in the federal courts. In paragraph 7 of their 1987 Settlement Agreement, the parties took the unusual step of agreeing "to execute and file a proposed Consent Decree in the Court of Appeals for the First Circuit, which Consent Decree shall order enforcement of this Settlement Agreement and the Order of the Occupational Safety and Health [Review] Commission based thereon." Sometime thereafter, the Secretary, acting pursuant to section 11(b) of the Act, 29 U.S.C. § 660(b), and "with the consent of Atlantic Battery," sought and obtained a decree from the First Circuit ordering "summary enforcement" of the Commission's November 1987 final order in OSHRC Docket No. 86-1761. One year after Atlantic filed its notice of contest of the OSHA citations that are currently pending before us, the Secretary filed a motion in the First Circuit to hold Atlantic in contempt of the court's July 28, 1988 order. The First Circuit deferred action on the Secretary's contempt motion pending resolution of this administrative proceeding.

ingots are heated in the melting pot. Stacking creates a potential for exposure to lead dust, which is primarily generated by the dried lead oxide paste that is contained on and in the plates. Because molten lead is applied to the groups during group burning, that process results in airborne fumes. Employee exposure in the assembly and repair department may be to fumes "because there may be some minor soldering done" or to dust from the lead oxide paste on the plates.

C. The Scope of Review

In his direction for review in this case, Commissioner Foulke stated that the Commission's review would extend to all issues raised by Atlantic in its petition for discretionary review. The Secretary sought an order narrowing the scope of our review, but the Commission denied that request. We conclude that, with respect to each of the nineteen items and the one subitem that are before us, the direction for review covers (a) the judge's affirmance of the alleged violation, (b) his classification of the violation, and (c) his assessment of the proposed penalty.

This case differs from the Secretary's parallel enforcement action before the First Circuit, which involves a determination of whether the conditions discovered by OSHA during the 1989-90 inspection violated the requirements of the 1987 Settlement Agreement. In some instances, the court is also called upon to determine whether Atlantic failed to abate violative conditions that were previously cited in 1986, despite its order that Atlantic abate those violations. While these distinctions may appear to be technical or unimportant, we conclude that they are sometimes critical, particularly in those situations we discuss herein where the requirements of the 1987 Settlement Agreement go beyond or differ from the requirements of the cited standards.

THE ALLEGED VIOLATIONS

I. CITATION NO. 2, ITEM 2

A. Background

Item 2 of citation no. 2 alleged a willful violation of 29 C.F.R. § 1910.1025(c)(1)³ and proposed a penalty of \$3600. The citation alleged that Atlantic violated the cited standard in the following manner:

On 2/15/90, an employee working in the assembly area was exposed to airborne concentrations of lead in excess of the permissible exposure limit (PEL) of fifty micrograms per cubic meter. An employee engaged in burning groups was exposed

³ The cited standard provides, as follows:

§ 1910.1025 Lead.

....
 (c) *Permissible exposure limit (PEL)*. (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/m³) averaged over an 8-hour period.

to fifty six (56) micrograms per cubic meter of lead. The exposure was derived from samples collected over a 334 minute period. Zero exposure was assumed for the remainder of the 8-hour day.

OSHA Industrial Hygienist ("IH") Myrtle Turner testified that this citation item was based on air contaminant sampling that she had conducted and conditions that she had observed on the third day of her 1989-90 inspection: "[W]hat I observed on 2/15/90 was that employee Weston Gregory was exposed to an eight-hour time weight[ed] average of 56 micrograms per meter cubed, and during that time he was group burning." Atlantic has not mounted any credible challenge to OSHA's sampling results. We therefore affirm the judge's finding that Atlantic employee Gregory was exposed on February 15, 1990, to an 8-hour TWA concentration of airborne lead that exceeded the lead standard's PEL of 50 $\mu\text{g}/\text{m}^3$.

Atlantic disputes Turner's testimony that Gregory's overexposure resulted from group burning, which was his primary work activity during the sampling period, and that OSHA's sampling results were representative of Gregory's typical or normal exposure. Although resolution of these issues is not necessary to resolve the merits of the instant item, they do affect a number of items that are before us. *See infra* Parts III-VI. We will consider them here.

B. Group Burning & Representative Sampling

Atlantic argues that Gregory was not burning groups on February 15, 1990. For the reasons stated *infra* at Part VI, we agree with Atlantic that Turner did not see Gregory burning groups on February 15, 1990, and that Exh. C-22, a photograph Turner took of Gregory, does not depict Gregory burning groups. Nevertheless, we conclude that a preponderance of the evidence does support the judge's finding that Gregory was group burning. Support for the judge's finding comes from the testimony of president Migell that Gregory's measured exposure to lead on February 15 was not representative of the employee's typical exposure. Significantly, the witness made no claim at that time that Gregory had not performed group burning on the date in question. Nor did Migell attempt to establish some other source of the lead dust or fumes that had caused Gregory's overexposure. Instead, the witness suggested that the reason for the measured overexposure was that Gregory had been allowed to work in the stacking and group burning areas for a longer period of time than he normally did.

Most importantly, Atlantic's president ended his explanation of the violative conditions with the following statement: "But I contend that this man working a full day in this area, yes, was in fact--could have been exposed to higher concentrations of lead, but this was not his normal method of operation." The only plausible reading of Migell's testimony is that some type of production activity was occurring in the stacking and group burning areas when Gregory's exposure was being monitored. Because Migell testified that no *stacking* operations were performed during this sampling, we read his testimony quoted above to indicate that Gregory performed *group burning* on February 15, 1990.

The other disputed factual issue relating to this citation item is whether the sampling results obtained by Turner on February 15, 1990, were "representative" of Gregory's exposure. Migell testified that the exposure measured in the stacking and group burning areas on February 15, 1990, was not representative of conditions in Atlantic's plant or of employee Gregory's usual exposure because Gregory had worked in the stacking and group burning areas on February 15 for longer than normal.⁴ Migell explained that Atlantic's method of maintaining exposures in those two adjacent production areas within permissible limits was by restricting "the number of hours" employees worked there. Thus, Gregory normally burned groups "[no] more than two or three hours a day." This testimony finds support in the evidence concerning the amount of time spent in stacking operations, which Migell testified generally correlates with the amount of time spent in group burning operations. Although Atlantic apparently kept no records of its group burning operations, it did keep records of its stacking operations throughout the 2-year observation period, as required under the 1987 Settlement Agreement. Based on his review of those records, Migell testified at the hearing that, "when this particular man worked in . . . [stacking], he never worked more than two hours a day." With one possible exception (Gregory *may* have worked as long as 2 hours 45 minutes on June 10, 1988), the nine quarterly progress reports submitted by Atlantic fully support this assertion.

IH Turner's summary and analysis of the nine quarterly progress reports (Exh. C-11) provides further support for president Migell's claim that Gregory's exposure sampling on February 15, 1990, was not representative of his typical exposure. Over the course of the 2-year observation period, Atlantic monitored Gregory's exposure to airborne lead on seven different occasions, each separated by an interval of at least three months. On four of those occasions, Gregory was engaged in either repair or assembly operations at the time of his sampling, and the sampling revealed that his exposure was below the lead standard's PEL. (Indeed, three of these readings were well below the PEL). On a fifth occasion, when Gregory was apparently again working in repair operations, his calculated exposure was recorded as an extraordinarily high 194 $\mu\text{g}/\text{m}^3$. However, Atlantic noted in reporting that result that sample contamination or a "bad test" was suspected, and this indeed seems likely, given the other test results obtained over the course of the 2-year observation period.⁵ On a sixth occasion, Gregory was engaged in shipping operations when his exposure was

⁴ The total sampled exposure time on February 15 was just over 5½ hours, and the Secretary's unrebutted evidence suggests that Gregory worked in the stacking and group burning areas throughout that entire time period. Conversely, there is no evidence that Gregory worked in any other area of the plant at any time during the sampling period.

⁵ The nine quarterly progress reports, along with Turner's summary and analysis of those reports, establish that Atlantic was generally successful, throughout the 2-year observation period, in

sampled. The results of that test are unknown because the sample was damaged (the cassettes were placed on backwards). Only the first of the seven reported tests, taken on September 17, 1987, before Atlantic entered into the 1987 Settlement Agreement, showed Gregory working in the group burning operations and exposed to airborne lead concentrations above the PEL--specifically, an 8-hour TWA concentration of 72 or 73.99 $\mu\text{g}/\text{m}^3$. [The record reveals no other instance of overexposure in either the stacking or group burning operations until Gregory's exposure 2½ years later (on February 15, 1990) to an 8-hour TWA concentration of 56 $\mu\text{g}/\text{m}^3$].

During his rebuttal case, the Secretary attempted to refute president Migell's testimony that Gregory's sampled exposure on February 15 was unrepresentative. IH Turner was asked if she had "ever had any conversations with [Atlantic's] employees concerning whether the observations that [she] had observed were typical or normal." She answered that she had discussed that issue with employees Gregory and Gallman and that they had both indicated that "the operations that they were doing during the time I was there" were essentially the same as "what they were doing that [same] time last year." The Secretary, however, never tied this rebuttal testimony into Gregory's work activities *on February 15, 1990*. On the contrary, the record strongly suggests that the witness was testifying about a conversation that she had had with Gregory on December 5, 1989, a day on which Gregory performed no group burning. The Secretary also called Industrial Hygienist ("IH") Carol Shum as a rebuttal witness and asked her about the same subject. Again, however, the Secretary failed to connect Shum's generalized responses to Gregory's activities on February 15, 1990.⁶

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reducing the concentrations of airborne lead at its workplace to levels that were below the lead standard's PEL. Indeed, several of the samples revealed only negligible exposure to airborne lead, and most showed exposures that were not only below the PEL but also below the lead standard's action level (30 $\mu\text{g}/\text{m}^3$). Out of the many airborne lead level samples that were reported in the nine quarterly progress reports, only three indicated employee exposures to 8-hour TWA concentrations in excess of 50 $\mu\text{g}/\text{m}^3$ (the PEL). Of those three, one was the disputed test result set forth above, which was suspected to be in error.

⁶ IH Turner testified that she had also talked to Gregory about these matters. She recalled that Gregory had told her that group burning was "part of his job title," but did not recall what he had said as to when he had last performed the task prior to February 15. The Secretary claims in his review brief that Turner learned from president Migell that *Gregory* conducted group burning at the workplace at least twice a month, but Turner's two references to this conversation do not refer to Weston Gregory ("I . . . asked [Migell] how often group burning was done and in what place . . . [a]nd his response was at least twice a month"; "[W]hen I [Turner] spoke with you [Migell] in one

C. Merits of the Alleged Violation

In order to establish a violation of an occupational safety or health standard, the Secretary has the burden of proving: (a) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, (c) employee access to the violative conditions, and (d) the employer's actual or constructive knowledge of the violation (*i.e.*, the employer either knew, or with the exercise of reasonable diligence could have known, of the violative conditions). *E.g.*, *Kulka Constr. Management Corp.*, 15 BNA OSHC 1870, 1873, 1991-93 CCH OSHD ¶ 29,829, p. 40,687 (No. 88-1167, 1992). Insofar as the instant citation item is concerned, we conclude that the Secretary has met his burden of proving all four of these elements.

Applicability. The general industry lead standard, 29 C.F.R. § 1910.1025, applies to "all occupational exposure to lead," with the limited exceptions of exposures that occur in the construction industry or in agricultural operations. See section 1910.1025(a). Atlantic correctly points out that some of the provisions of the lead standard apply only to employees who are exposed to excessive amounts of lead for a specified number of days during the year. *E.g.*, section 1910.1025(e) ("any employee . . . exposed to lead above the permissible exposure limit for more than 30 days per year"). However, the particular provision that is at issue here, section 1910.1025(c)(1), contains no such limitation on its scope.

Noncompliance and Access. We have previously affirmed the judge's finding that Atlantic employee Weston Gregory "was exposed on February 15, 1990, to 56 micrograms [of lead] per cubic meter of air," averaged over an 8-hour period (Part I.A). This establishes Atlantic's noncompliance with the cited standard and employee access to the violative conditions.

Knowledge. We find that Atlantic had constructive knowledge of the violation. Its own sampling of employee Gregory's exposure on September 17, 1987, established that this potential existed (Part I.B). Indeed, president Migell recognized the hazard in the stacking and group burning areas when he testified that "this is definitely an area where there would be more lead than other areas of the plant. We don't deny that." In addition, Migell's explanation for Gregory's overexposure, *i.e.*, he worked there longer than usual on February 15, establishes that Migell should have recognized the potential for overexposure. **D. Classification and Penalty**

During her testimony, IH Turner gave the following explanation for the Secretary's classification of the alleged violation as willful:

[T]he employer had knowledge. Sampling had been conducted in the past. It clearly demonstrated that stacking, which was adjacent to, and also the group burning

(.continued)

of our closing conferences, you indicated to me that group burning was done roughly twice a month.")

operation, was over the permissible exposure limit. And, additionally, because of the citation that was issued in 1 of '86.⁷

To prove that a violation was willful, the Secretary must show that the violation "was committed voluntarily with either an intentional disregard for the requirements of the Act or with plain indifference to employee safety." *Sal Masonry Contrac., Inc.*, 15 BNA OSHC 1609, 1611, 1991-93 CCH OSHD ¶ 29,673, p. 40,208 (No. 87-2007, 1992) (quoting *A.C. Dellovade, Inc.*, 13 BNA OSHC 1017, 1019, 1986-87 CCH OSHD ¶ 27,786, p. 36,341 (No. 83-1189, 1987)). "A willful violation is differentiated from other classifications of violation by the employer's state of mind toward the requirements imposed by a standard." *Beta Constr. Co.*, 16 BNA OSHC 1435, 1444, 1993 CCH OSHD ¶ 30,239, p. 41,652 (No. 91-102, 1993), *petition for review filed*, No. 93-1817 (D.C. Cir. Dec. 3, 1993). The willfulness charge relates to the employer's "underlying state of mind" at the time it committed the violation and requires proof of a "greater degree of culpability" on the employer's part than the "simple knowledge or awareness of hazardous conditions that is a prerequisite for any violation." *Hackney, Inc.*, 15 BNA OSHC 1520, 1524, 1991-93 CCH OSHD ¶ 29,618, p. 40,109 (No. 88-391, 1992); *Bay State Refining Co.*, 15 BNA OSHC 1471, 1475, 1991-93 CCH OSHD ¶ 29,579, pp. 40,024-25 (No. 88-1731, 1992).

"If an employer has made a good faith effort to comply with the Act's requirements, a finding of willfulness is not justified, even though the employer's efforts are not entirely effective or complete. However, the test of good faith in this regard is an objective one--whether the employer's efforts to comply were reasonable under the circumstances." *Tampa Shipyards, Inc.*, 15 BNA OSHC 1533, 1541, 1991-93 CCH OSHD ¶ 29,617, p. 40,104 (No. 86-360, 1992) (consolidated cases). *See also R & R Builders, Inc.*, 15 BNA OSHC 1383, 1392-93, 1991-93 CCH OSHD ¶ 29,531, pp. 39,865-66 (No. 88-282, 1991) (despite employer's history of previous citations, the instant violations were improperly classified as willful, given the employer's "overall pattern of responsive behavior," both prior to and after the instant violations).

We find the Secretary has failed to establish that the violation was willful. In portraying Atlantic as a recalcitrant employer stubbornly resisting the requirements of the OSHA lead

⁷ The witness also gave two other reasons for the willful classification. She testified that the violation was willful because Atlantic had voluntarily done testing in the group burning area of the plant in the past, but had not done any re-testing since September 17, 1987. In addition, she stated, "[i]t's also classified willful because of the fact that this employee should have been on medical removal and he should not have been in an area which was over 30 micrograms per meter cubed." Because these two additional contentions serve as the factual basis of two separate, independent citation items--citation no. 2, item 3, and citation no. 2, item 5, respectively, and because both of these items are also alleged to be willful, we find that it is inappropriate to rely on them here.

standard, the Secretary and the judge have failed to consider Atlantic's good faith efforts to bring its workplace into compliance with section 1910.1025(c)(1). Following its entry into the 1987 Settlement Agreement, Atlantic implemented several engineering and administrative controls for the express purpose of lowering airborne lead levels or limiting employee exposure to airborne lead. In addition, Atlantic made three major changes in its business operations that resulted in further significant reductions in the extent of employee exposure at the Watertown plant. First, it eliminated one of the two major contributors to the excessive airborne lead levels at that plant by discontinuing pasting and buffing operations in Watertown. Second, it severely restricted the amount of time that employees engaged in stacking, which was the other major contributor to high lead levels. Finally, it shifted away from manufacturing its own batteries and toward purchasing partially- manufactured or completed batteries from others for resale.

As a result of these changes, the working conditions of Atlantic's employees improved dramatically between 1987 and November 7, 1989, when the 1989-90 inspection began. During October and November of 1985, Atlantic had had airborne lead exposures of 456 $\mu\text{g}/\text{m}^3$ in its stacking operations and 420 $\mu\text{g}/\text{m}^3$ in its buffing operations. However, the airborne lead sampling conducted by OSHA during the 1989-90 inspection confirmed the impression, already conveyed by two years of quarterly progress reports, that the workplace was, for the most part, free of excessive airborne lead levels. *See supra* note 5. Only one of OSHA's air contaminant sampling tests conducted during this inspection demonstrated the exposure of an Atlantic employee engaged in battery manufacturing operations to excessive levels of airborne lead and that test result exceeded the PEL by only 6 $\mu\text{g}/\text{m}^3$. Moreover, Atlantic correctly argues that even that showing of minimal overexposure is not representative of either the normal conditions in its workplace or the typical exposure of the sampled employee. We therefore conclude that here, as in *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2211, 1991-93 CCH OSHD ¶ 29,964, p. 41,030 (No. 87-2059, 1993), the employer's past history of citations and its inability to "eliminate all instances of a hazardous condition" were "not sufficient to place [it] on notice of any serious or fundamental flaws in its overall safety program."

We also find that the violation was not willful because the Secretary has not established that "heightened" level of "knowledge" or "awareness" that is necessary to sustain an allegation of willfulness. *See Hackney, Inc.*, 15 BNA OSHC at 1524, 1991-93 CCH OSHD at p. 40,109. Although Atlantic was fully aware of the requirements of the cited standard and the potential for excessive lead levels during its stacking and group burning operations, Atlantic was also aware that the changes it had made since the 1985 and 1986 inspections had for the most part brought the workplace into compliance with section 1910.1025(c)(1). We therefore conclude that here, as in *Sal Masonry*, the employer lacked sufficient awareness of the cited conditions at the time of the

instant violation to support a determination that it had consciously disregarded the cited standard's requirements. *See* 15 BNA OSHC at 1612-13, 1991-93 CCH OSHD at pp. 40,208-09.

After considering the penalty factors listed at 29 U.S.C. § 666(j), we assess a penalty of \$300 for Atlantic's nonwillful violation of 29 C.F.R. § 1910.1025(c)(1). Atlantic is a small employer with five full time employees working for some part of the time in the manufacturing area of the plant. The gravity of the violation appears to be in the low to moderate range. A single employee was exposed on one day to levels of lead that only marginally exceeded the PEL. The employer's small size and its good faith in attempting to bring the plant into compliance with the cited standard warrant further reductions in the proposed penalty. The employer's negative past history, however, weighs in favor of a penalty of the level assessed.

II. CITATION NO. 1, ITEM 4

A. Background

Item 4 of citation no. 1 alleged a serious violation of 29 C.F.R. § 1910.1025(c)(2)⁸ and proposed a penalty of \$420. The citation alleged that Atlantic violated the cited standard in the following manner:

On 12/5/89, an employee was exposed to levels of lead for more than eight (8) hours during the work day in excess of the reduced permissible exposure limit (PEL). The reduced PEL for 492 minutes (8.2 hours) is 48.78 micrograms per cubic meter. An employee working in the establishment engaged in shipping, loading and unloading, was exposed to a time weighted average of one hundred twenty four (123.75) micrograms per cubic meter of lead; approximately 2.54 times the maximum PEL. The exposure level was derived from samples collected over a 492 minute (8.2 hour) period.

IH Turner testified that this citation item was based on the exposure of employee Franklin Augustine, on the second day of her inspection (December 5, 1989), to airborne lead in excess of the reduced PEL for 8.2 hours worked.⁹ After analyzing the Augustine samples, the

⁸ The cited standard provides, as follows:

§ 1910.1025 Lead.

....
(c) *Permissible exposure limit (PEL)*. . . .

(2) If an employee is exposed to lead for more than 8 hours in any work day, the permissible exposure limit, as a time weighted average (TWA) for that day, shall be reduced according to the following formula:

Maximum permissible limit (in $\mu\text{g}/\text{m}^3$) = $400 \div \text{hours worked in the day}$.

⁹ The witness gave detailed, step-by-step testimony as to how she had arrived at the total sampling/exposure/work time of 8.2 hours. According to Turner, two different monitoring devices

OSHA-affiliated laboratory in Salt Lake City reported that $.02 \text{ mg/m}^3$ of lead had been collected in the morning sample and $.230 \text{ mg/m}^3$ had been collected in the afternoon sample.

IH Turner explained the operation of the cited standard, section 1910.1025(c)(2), as follows:

When the employee, under the lead standard, works greater than eight hours, we take into account a calculation that would give us a reduced exposure limit. . . . In this particular instance, it gave me a reduced exposure limit for Franklin Augustine of 48.78 micrograms per meter cubed. . . . So instead of comparing his [actual, sampled] exposure to 50, it's compared to 48.7 micrograms per meter cubed.

More specifically, Turner obtained the reduced PEL of $48.78 \text{ } \mu\text{g/m}^3$ by inserting the figure "8.2" (representing the "hours worked in the day" by Augustine) into the formula that is set forth in the cited standard. *See supra* note 8. She then compared this figure with Augustine's TWA exposure on December 5, 1989, which she calculated using the figures that have been set forth above (the durations of the two sampling periods and the amounts of lead collected in each period). Based on her calculations, she concluded that Atlantic had violated section 1910.1025(c)(2) on December 5 because Augustine's time-weighted average exposure of $123.75 \text{ } \mu\text{g/m}^3$ was 2.54 times the reduced PEL of $48.78 \text{ } \mu\text{g/m}^3$.

During her testimony, IH Turner described employee Augustine's activities on the day of the alleged violation, as follows:

Primarily on that day, Mr. Augustine was doing some shipping and some packing. He did a small amount of repair work. He did some spray painting. The air sample report sheet for that particular sample . . . [has] noted on it exactly what he did.

Exh. C-40, the worksheet in question, added the following details about the employee's work schedule:

AM loading and unloading batteries
 PM " " "
 3:23 painting metal "shelves" with aerosol paint
 PM Loading and unloading

(.continued)

had been placed on Augustine over the course of his work day. The first was placed on him at 8:47 a.m. and removed at 1:03 p.m. The second was placed on him at 1:45 p.m. and removed at 4:41 p.m. Based on these recorded times, Turner calculated that Augustine had worn the first monitoring device for 256 minutes and the second for 236 minutes. Adding these two figures together, she arrived at a total exposure time of 492 minutes or 8.2 hours. Exh. C-40, the air sampling report and worksheet prepared by Turner in conjunction with this sampling, fully corroborates the witness' testimony concerning the above-stated times and her mathematical computations.

Turner doubted that the spray painting was the cause of the overexposure. She testified that "[t]he only way that would generate lead would be if that paint contained lead and checking with Mr. Augustine and looking at what he was using, it did not indicate that it contained lead." Nevertheless, while she disagreed with president Migell's explanation for the overexposure, Turner offered no explanation of her own.

In his decision, the judge held that the allegations of citation no. 1, item 4, were supported by the testimony of IH Turner. He also found that, "due to the periodic testing that Respondent took throughout the plant, as shown in Exhibit C-8, Respondent knew or should have known of the situation to which the employee was exposed."

B. Analysis

IH Turner's determination that the cited conditions were governed by the requirements of section 1910.1025(c)(2), *see supra* note 8, rather than the requirements of section 1910.1025(c)(1), *see supra* note 3, was based upon a mathematical error. As detailed *supra* note 9, Turner calculated that Augustine had worn the second monitoring device, during the afternoon of December 5, 1989, for 236 minutes. In fact, however, Augustine wore that device for only 176 minutes (the time differential between 1:45 p.m. and 4:41 p.m.). There was therefore no need to calculate a *reduced* PEL. Because Augustine's exposure was in fact less than eight hours (256 minutes + 176 minutes = 432 minutes = 7.2 hours), his exposure was governed by the lead standard's regular PEL of 50 $\mu\text{g}/\text{m}^3$, as set forth in section 1910.1025(c)(1).¹⁰ Accordingly, because the cited standard (section 1910.1025(c)(2)) applies by its terms only "[i]f an employee is exposed to lead for more than 8 hours in any work day" and because Augustine worked for only 7.2 hours on December 5, 1989, we conclude that the cited standard did not apply to the cited conditions.¹¹

¹⁰ During his testimony, Migell implied that the cited standard was not applicable to the cited conditions because Augustine "probably works less than 15 or 20 days a year" in "high lead areas" and "OSHA provides that if 30 days or less are worked above the PEL, that's acceptable." We disagree. The provisions of the lead standard prohibiting exposure to high concentrations of airborne lead apply even if an employee is exposed to lead on only one day during the course of an entire year. *See supra* Part I.C.

¹¹ Turner's mathematical error also resulted in a second mistake in her calculations. This mistake was in her computation of Augustine's TWA exposure. Using the correct figure of "176" rather than "236" results in a revised time-weighted average exposure of 95 $\mu\text{g}/\text{m}^3$ rather than 124 $\mu\text{g}/\text{m}^3$. We therefore set aside the judge's finding and enter our own finding that Franklin Augustine was exposed on December 5, 1989, to an airborne lead concentration of 95 $\mu\text{g}/\text{m}^3$, averaged over an 8-hour period.

Even if the standard did apply, we also find that the record does not show that Atlantic knew or should have known of Augustine's overexposure to airborne lead on December 5.¹² Atlantic's past citations and its quarterly progress reports do not provide a framework for evaluating its knowledge of conditions on December 5, 1989. The record shows that the workplace conditions it had been cited for previously had changed dramatically after its receipt of those prior citations. *See supra* Part I.D. As for the progress reports, the judge correctly stated that "exposure above the PEL in this area of the plant had not been found previously."

Nor do we find any evidence to support the Secretary's theory, advanced in his review brief, that Augustine's overexposure was due to the fact that he was moving throughout the plant on the day his exposure was being monitored. The record indicates that, by the time of the 1989-90 inspection, ambient levels of airborne lead had been reduced to the point where they were normally below the PEL throughout the workplace.

Conversely, we find considerable evidence in the record to support Atlantic's argument that it lacked actual or constructive knowledge of the violative conditions at issue here. IH Turner's testimony, her diagram of the workplace (specifically, the circled "E" between "shipping" and "repairs"), and her air sampling report and worksheet all suggest that, on December 5, 1989, employee Augustine's work kept him largely confined to the shipping and repair areas, areas in which Atlantic's past experience indicated that he would not be exposed to excessive levels of lead while engaged in his usual work activities.

We further conclude that IH Turner's sampling results on December 5 *confirmed* Atlantic's belief that Augustine was *not* exposed to a risk of overexposure in his normal, daily activities. As president Migell emphasized during his cross-examination of the compliance officer, the monitoring device that Augustine wore during the first 60 percent of his work day revealed exposure to a relatively low level of airborne lead (.02 mg/m³). During that time period, which ended at 1:03 p.m., the employee apparently worked exclusively in shipping operations (the loading and unloading of batteries), with the possible exception of "a small amount of repair work." (The record does not disclose the time of day when Augustine performed that task). Accordingly, the test result for the morning sample, particularly when viewed in the context of Atlantic's past experience with shipping and repair operations, strongly suggests that Augustine's overexposure on December 5 could *not* have been the result of these shipping and repair activities, which were

¹² Chairman Weisberg agrees that a mathematical error led OSHA to the incorrect conclusion that the cited conditions were governed by section 1910.1025(c)(2). He therefore joins in vacating item 4 of citation no. 1 on the ground that the cited standard did not apply. In view of this disposition, he finds it unnecessary to decide whether Atlantic knew or should have known of Augustine's overexposure.

probably a part of his normal, everyday work routine. The only plausible explanation for Augustine's overexposure on December 5 was his use of a lead-based paint in a spray painting operation. We therefore find that Augustine's overexposure on December 5, 1989, was due to his use of a lead-based paint while spray painting metal shelves.¹³

We find no support for the Secretary's claim that Atlantic could have known of the paint's lead content with the exercise of reasonable diligence. The Secretary overlooks the testimony of IH Turner that after "checking with Mr. Augustine and looking at what he was using," she determined that the paint he was using to paint the shelves did not contain any lead. Turner also suggested, in the course of supporting a different alleged violation, that she had reviewed all of the material safety data sheets ("MSDS's") in Atlantic's possession. (See citation no. 2, item 6, alleging that Atlantic failed to make its MSDS's for specified chemicals, including "spray enamel," readily accessible to its employees). This testimony lends credibility to Atlantic's post-hearing claim that neither the label nor the MSDS it had obtained for the spray paint made any "mention of lead content." We therefore vacate item 4 of citation no. 1 on the ground that the Secretary failed to prove the alleged violation.

III. CITATION NO. 2, ITEM 5

A. Background

¹³ The most persuasive support for this finding is the Secretary's evidence concerning the disparity in the test results for the two separate samples that Turner took of Augustine's exposure. As indicated, the morning sample, which covered the first 60 percent of the employee's work day, revealed exposure to a relatively low level of airborne lead. However, the second sample showed that, during the afternoon, Augustine had been exposed to airborne lead levels at a concentration of 230 $\mu\text{g}/\text{m}^3$, an extremely high reading in comparison to the levels that prevailed throughout the workplace. Augustine's overexposure was the result of his activities, or the activities of others, between 1:45 p.m. and 4:41 p.m. The Secretary's evidence shows only one significant change in Augustine's work schedule over the course of his work day. At 3:23 p.m., IH Turner observed the employee "painting metal 'shelves' with aerosol paint."

Item 5 of citation no. 2 alleged a willful violation of 29 C.F.R. § 1910.1025(k)(1)(i)(D)¹⁴ and proposed a penalty of \$4200. The citation alleged that Atlantic violated the cited standard in the following manner:

Blood leads were drawn for an employee on medical removal yielding the following results:

Date Drawn	Results in micrograms per 100 grams of whole blood
5/10/89	57
6/10/89	53
9/7/89	43

The average of this employee's blood leads was 51 micrograms/100 grams of whole blood.

On 2/15/90 this employee[,] while burning groups, was exposed to fifty six (56) micrograms per cubic meter of lead, time weighted average. The exposure level was derived from samples collected over 334 minutes. Zero exposure was assumed for the remainder of the 8 hour period. Medical removal employees should not be assigned to work in areas where the concentration of lead is greater tha[n] the action level (30 micrograms per cubic meter).

¹⁴ The cited standard provides, as follows:

§ 1910.1025 Lead.

.....
 (k) *Medical Removal Protection--(1) Temporary medical removal and return of an employee--(i) Temporary removal due to elevated blood lead levels. . . .*

.....
 (D) *Fifth year of the standard and thereafter.* Beginning with the fifth year following the effective date of the standard, the employer shall remove an employee from work having an exposure to lead at or above the action level on each occasion that the average of the last three blood sampling tests conducted pursuant to this section (or the average of all blood sampling tests conducted over the previous six (6) months, whichever is longer) indicates that the employee's blood lead level is at or above 50 µg/100 g of whole blood; provided, however, that an employee need not be removed if the last blood sampling test indicates a blood lead level at or below 40 µg/100 g of whole blood.

IH Turner testified that this citation item, like item 2 of citation no. 2, was based on the exposure of employee Weston Gregory on February 15, 1990, to an airborne concentration of lead of 56 $\mu\text{g}/\text{m}^3$ while Gregory was engaged in burning groups. *See supra* Part I.B. After determining that Gregory was overexposed, Turner analyzed Atlantic's quarterly progress reports and determined that Gregory should have been on medical removal on February 15, 1990, because 51 $\mu\text{g}/100\text{ g}$, the average of his three most recent blood lead level tests, exceeded the cited standard's threshold removal level (50 $\mu\text{g}/100\text{ g}$). This required that Gregory be placed in an area which was not over 30 $\mu\text{g}/\text{m}^3$, the action level. According to Atlantic and Exh. C-14, Gregory and a second employee, John Gallman, were placed on medical removal on June 5, 1987, after tests had revealed that they had blood lead levels of 71 $\mu\text{g}/100\text{ g}$ and 59 $\mu\text{g}/100\text{ g}$, respectively.¹⁵ Both employees should have been on medical removal throughout the entire period when OSHA conducted its 1989-90 inspection. Gregory was later "return[ed]" from medical removal in July 1990, after two consecutive blood lead level tests met section 1910.1025(k)(1)(iii)(A)(3)'s criteria governing such returns.

The information set forth in the preceding paragraph is derived from Exh. C-14, which was described by the judge as "a medical removal chart created by Mr. Migell and submitted to the Secretary in response to a subpoena." Exh. C-14 graphically illustrates the fluctuations in the blood lead levels of both Gregory and Gallman over a 2½-year period, as follows:

<u>Date</u>	<u>Gregory</u>	<u>Gallman</u>
6/5/87	71	59
7/23/87	64	50
9/30/87	60	...
12/4/87	71	53
3/15/88	51	50
6/24/88	...	44
7/15/88	41	...
12/7/88	65	65
12/14/88	...	56
12/28/88	54	...
1/1/89	47	47
3/29/89	46	44

¹⁵ Atlantic seems to be claiming that it had complied with the standard because it had changed Gregory's job duties so that they no longer "resembled his previous job assignment prior to MRP." However, the record contains no evidence as to what Gregory's "previous job assignment prior to MRP" was.

5/12/89	57	...
6/11/89	53	...
9/7/89	43	44
[1989-90 inspection]		
2/21/90	46	50
6/5/90	27	...
7/31/90	37	44
10/16/90	38	44

B. Merits of the Alleged Violation

We conclude that the Secretary has sustained his burden of proving the violation alleged in item 5 of citation no. 2.

Applicability. Contrary to Atlantic's arguments, this is not a situation where the cited conditions fell only marginally within the scope of the cited standard. However, the employer's confusion on this matter is understandable. The citation alleges (and Turner testified) that employee Gregory should have been medically removed on February 15, 1990, because his average blood lead level on that date, calculated on the basis of his three most recent test results, exceeded (by 1 $\mu\text{g}/100\text{ g}$) the standard's removal level of 50 $\mu\text{g}/100\text{ g}$. However, Exh. C-14 clearly demonstrates that the *correct* reason why Gregory should have been medically removed on February 15, 1990, was because he should have been medically removed on a continuous basis ever since June 5, 1987, if not earlier.¹⁶ On June 5, 1987, when Atlantic initially placed him on medical removal, his test results showed a blood lead level of 71 $\mu\text{g}/100\text{ g}$, which was far above the standard's threshold removal level of 50 $\mu\text{g}/100\text{ g}$.

Under the terms of both the cited standard and the 1987 Compliance Program, once Atlantic had removed Gregory because of his high blood lead level, it could not then return him to his regular job, or to any other job with an exposure above the action level, until his "blood lead level decline[d] to no more than 40 micrograms in two consecutive tests."¹⁷ Exh. C-14 reveals that these

¹⁶ According to Exh. C-14, June 5, 1987, was the date that Atlantic placed both Gregory and Gallman on medical removal status. Whether Gregory should have been medically removed even before that date cannot be determined on this record because there is no evidence of any earlier blood lead level test results for him.

¹⁷ As the Secretary correctly points out on review, both the January 1986 citation, *see supra* Background, Section A, and the 1987 Compliance Program gave Atlantic clear notice not only of the requirements of the cited standard, but how it operated as a practical matter. Indeed, we conclude that Atlantic's understanding of the standard is beyond dispute, given Migell's role in drafting the following provisions of paragraph 8 of the 1987 Compliance Program:

conditions did not occur until July 31, 1990, more than five months *after* the date of the instant violation. In sum, Gregory was clearly within the standard's coverage, and application of a margin of error for blood lead level tests would not have affected this result.

Noncompliance. We have already affirmed the judge's finding that, on February 15, 1990, Weston Gregory was exposed to airborne lead at a concentration of $56 \mu\text{g}/\text{m}^3$, determined on an 8-hour TWA basis (Part I.A). Based on that finding, we conclude that Atlantic failed to comply with the standard cited here, section 1910.1025(k)(1)(i)(D). As the Secretary correctly argues on review, "[a]ny paper designation of Gregory as being on MRP on the date of the inspection" does not constitute a defense to this charge. The cited standard expressly states that "the employer shall *remove* an employee [who is covered under the standard's terms] *from work having an exposure to lead at or above the action level . . .*" (emphasis added). Atlantic could only comply with the standard by restricting Gregory to work that kept his exposure to airborne lead below the standard's action level of $30 \mu\text{g}/\text{m}^3$.

Access. The Secretary's evidence that Weston Gregory was actually exposed to an excessive level of airborne lead on February 15, 1990, also met his burden of proving access.

Knowledge. Exh. C-14 and the employer's quarterly progress reports conclusively establish Atlantic's actual knowledge that Gregory's high blood lead levels required him to be medically removed on February 15, 1990.¹⁸ Exh. C-14 suggests that Atlantic viewed both Gregory

(.continued)

- A) If the employee in question has a blood lead level of at least 50 micrograms per 100 grams of whole blood (average of last three or all tests performed over the last six months), he or she must be removed from any area where his or her airborne lead exposure without respirator protection would be at or above 30 micrograms per cubic meter of air (this is the "action level").
- B) Removal from the regular job will continue until the blood lead level declines to no more than 40 micrograms in two consecutive tests.

¹⁸ A note on Atlantic's sixth quarterly progress report stated that the writer (presumably president Migell) had noticed Gregory stacking on December 15, 1988, and had "removed & reprimanded [him] & advised [his] foreman that anyone on lead removal (medical) [as Gregory then was] may not work in contaminated areas" Another handwritten note, on the seventh quarterly progress report, explained the entry for April 26, 1989, when Gregory performed stacking for the first time since his December 15, 1988 removal and reprimand. That note stated that, after Gregory had performed stacking for 45 minutes on April 26, he had been "removed from this station & reprimanded" and told that "he may not work with raw plates until he's low enough to come off medical removal."

and Gallman as being on medical removal status continuously from June 5, 1987, up through the time of the 1989-90 OSHA inspection. The other knowledge issue with respect to this citation item is whether Atlantic had actual or constructive knowledge of Gregory's overexposure to airborne lead on February 15, 1990. We have already found that, with the exercise of reasonable diligence, Atlantic could have known of Gregory's exposure to a concentration of airborne lead *in excess of the standard's PEL* (50 $\mu\text{g}/\text{m}^3$) (Part I.C). It necessarily follows that Atlantic had an even greater awareness of Gregory's potential exposure to a concentration of airborne lead *in excess of the standard's action level*, which is only 30 $\mu\text{g}/\text{m}^3$.

C. Classification and Penalty

We also affirm the judge's classification of this violation as willful and his assessment of a \$4200 penalty. As indicated earlier (Part I.D), a willful violation is differentiated from a nonwillful violation by a "heightened" knowledge or awareness. Here, prior to the time of the instant violation, Atlantic had been given explicit and detailed information about its obligations under the cited standard. Atlantic also had a heightened awareness of its specific duty toward employee Weston Gregory, under the terms of both the standard and the 1987 Compliance Program. In addition, the employer had actual knowledge of the potential for overexposure to airborne lead in the areas where Gregory was observed working on February 15, 1990. Although we can only speculate concerning the extent to which the employer was aware of the employee's activities on February 15, 1990, and the resulting overexposure to airborne lead,¹⁹ we nevertheless conclude that Atlantic had a heightened awareness of Gregory's potential exposure to concentrations of airborne lead in excess of the action level. It was not at all uncommon for Gregory to be exposed to such levels of airborne lead. Of six test results from the 2-year observation period that ended just prior to the 1989-90 inspection, at least two showed Gregory exposed to airborne lead in excess of the action level.²⁰ Because Gregory should have been medically removed throughout the entire 2-year observation period, we find that the employer itself provided OSHA with evidence of at least two violations of the cited standard during the interval between OSHA inspections.

¹⁹ In the context of citation no. 2, item 2, we concluded that this weakness in the Secretary's showing was critical, and we therefore vacated the Secretary's allegation that that violation was willful (Part I.D). Here, however, we reach a different conclusion. At issue in citation no. 2, item 2, was the proper classification of a violation based on Atlantic's failure to maintain the exposure of all employees to airborne lead within levels that were at or below the lead standard's PEL (50 $\mu\text{g}/\text{m}^3$). Resolution of that issue required us to evaluate Atlantic's claim that it had made a good faith effort to reduce exposures to airborne lead throughout its workplace so that no employee would be exposed to a concentration in excess of the PEL. We also had to evaluate the degree to which Atlantic may have been aware that, despite its efforts, such overexposure was still possible.

After reviewing Gregory's medical removal chart (Exh. C-14), we can only conclude that Gregory remained on medical removal status for a far longer period of time than should have been necessary to reduce his blood lead level below 40 µg/100 g--particularly when we consider the 30 µg drop that occurred in a period of just seven months (December 1987-July 1988). Given this chart of fluctuating, but persistently high, blood lead level readings and the ample corroborating evidence in its quarterly progress reports, which indicated on their face that Gregory's exposure to airborne lead was not being kept below the action level, Atlantic had more than enough notice that its efforts to comply with the cited standard were inadequate. Its failure to take more effective measures in the face of that evidence is properly characterized as a willful violation of the Act.

We also affirm the judge's assessment of a \$4200 penalty. As the judge aptly stated in describing this violation, "[t]his condition poses one of the most serious dangers to employee health, because an employee who already has illegal lead exposure is being subjected to 1.7 times the permitted lead exposure before the employer has ensured that the employee's body burden has sufficiently improved." Indeed, at the time this violation occurred, resulting in his exposure to a concentration of airborne lead in excess not only of the action level but also the standard's PEL, this employee had been on medical removal status continuously for 2½ years, with a blood lead level that had never fallen below 40 µg/100 g. Under these circumstances, the assessment of a substantial penalty is "appropriate" within the meaning of 29 U.S.C. § 666(j).

IV. CITATION NO. 1, ITEM 8

A. Background

Item 8 of citation no. 1 alleged a serious violation of 29 C.F.R. § 1910.1025(j)(2)(i)(C)²¹ and proposed a penalty of \$420. The citation alleged that Atlantic violated the cited standard in the
(..continued)

The violation now under consideration, however, differs in two critical respects. First, we must evaluate here the adequacy of Atlantic's efforts to protect specific employees, *i.e.*, those who were or who should have been medically removed from high lead exposures (Weston Gregory and John Gallman). Second, the degree of protection at issue here is more stringent, *i.e.*, maintaining exposures below the action level of 30 µg/m³.

²⁰ The two clear instances of overexposure occurred on September 17, 1987, while Gregory was engaged in group burning, and on April 11, 1989, while he was engaged in repair operations.

²¹ The cited standard provides, as follows:

§ 1910.1025 Lead.

....

(j) *Medical surveillance*

following manner: "Assembly area: A medically removed employee was exposed to lead in excess of the permissible exposure limit (PEL) and was not provided monthly biological monitoring. Refer to citation no. 2, item 2, for exposure data." Citation no. 2, item 2, is the citation item discussed *supra* at Part I. The reference is therefore to the exposure of employee Weston Gregory to airborne lead at an 8-hour TWA concentration of 56 µg/m³ on February 15, 1990.

IH Turner testified that she had based this citation item on her review of the nine quarterly progress reports submitted by Atlantic over the course of the 2-year observation period (Exh. C-8). That review had revealed that Gregory "had not been getting his blood leads drawn on a monthly basis, as is directed in the standard." It apparently also revealed that, as of February 15, 1990, Atlantic was "in violation" of the requirements of paragraph 6 of the 1987 Compliance Program with respect to all five of its production employees. Nevertheless, both the language of the citation item now before us and the testimony of IH Turner clearly restrict this alleged violation to Atlantic's failure to provide adequate biological monitoring (specifically, monthly blood lead level testing) *for employee Gregory*.²²

During her testimony concerning this citation item, IH Turner relied on Exh. C-14, the document prepared by president Migell that lists the dates and results of blood lead level tests given to employees Gregory and Gallman while they were on medical removal status. *See supra* Part III.A (summarizing that exhibit's contents). She emphasized two gaps in the monitoring of

(.continued)

.....

(2) *Biological monitoring--(i) Blood lead and ZPP level sampling and analysis.* The employer shall make available biological monitoring in the form of blood sampling and analysis for lead and zinc protoporphyrin levels in each employee covered under paragraph (j)(1)(i) of this section on the following schedule:

.....

(C) At least monthly during the removal period of each employee removed from exposure to lead due to an elevated blood lead level.

The incorporated scope provision, paragraph (j)(1)(i), states that "[t]he employer shall institute a medical surveillance program for all employees who are or may be exposed above the action level for more than 30 days per year."

²²There is at least one major difference between the cited standard's requirements concerning medical surveillance of employees and the requirements of the parties' settlement agreement. The cited standard applies only to "employees who are or may be exposed above the action level for more than 30 days per year." The 1987 Compliance Program required Atlantic to establish a medical surveillance program for "each factory employee," regardless of the extent and/or frequency of his exposure to airborne lead.

Gregory's blood lead level: a 5½-month gap between the sampling conducted on September 7, 1989, and on February 21, 1990; and a 3½-month gap between that February 21 test and the sampling conducted on June 5, 1990. The witness observed that, even after her first visit to the worksite on November 7, 1989, the employer still failed to meet its obligation to give blood lead level tests to Gregory on a monthly basis.

When asked by the judge if Atlantic had provided monitoring on a monthly basis, Migell testified: "We had tests every month for the employees that needed it. The others . . . were supposed to be done quarterly." President Migell stated that employee Gregory bore the primary responsibility for the gaps that had occurred in his schedule of blood lead level testing because Gregory had deliberately evaded the biological monitoring that Atlantic had made available, despite numerous efforts to test him. Migell claimed that Atlantic had begun providing unannounced tests and tests toward the middle or end of the week, because Gregory had a tendency not to "show up" if a test was scheduled on Monday. Despite these efforts, the witness continued, Gregory still "repeatedly missed opportunities and we had to reschedule," which led to "delay[ed]" blood tests. Migell added that, "[i]f there were blood tests on a given day and [Gregory] was not included, that's because he wasn't there, and we have to try to schedule other tests."

B. Merits of the Alleged Violation

We conclude that the Secretary has proven that the cited standard applies. The evidence shows that Gregory was a "covered" employee within the meaning of the standard, *i.e.*, an employee who was or who might have been "exposed above the action level for more than 30 days per year." As we noted, *supra* Part III C, it was not at all uncommon for Gregory to be exposed to airborne lead concentrations exceeding the action level. We also find that, on this record, including particularly Exh. C-14, it is more likely than not that Gregory was exposed to such excessive concentrations for more than 30 days in a year. Based on this finding and our previously-entered finding that Gregory should have been on medical removal on February 15, 1990, *see supra* Part III.B, we conclude that the cited standard was indeed applicable to the cited conditions.

We further conclude that the Secretary has proved Atlantic's noncompliance with the cited standard's terms. The cited standard does not, as the judge reasoned, obligate Atlantic to compel its employees to take blood lead level tests. Instead, the standard expressly states that it is the employer's duty to "make available" biological monitoring for covered employees on a prescribed schedule. Atlantic has failed to persuade us that it did make blood lead level testing available to employee Gregory *on a monthly basis*, as the standard requires. Atlantic suggests that Exh. C-14 is not a complete list of the readings taken but it was unable to produce the required records even after being given at least two opportunities to do so (at the time it submitted its quarterly progress reports and, later, in response to the Secretary's discovery subpoena). Accordingly, the judge was fully

justified in inferring that no additional tests, beyond those already recorded on Exhs. C-8, C-11, and C-14, had been taken.

We further find that the Secretary has met his burden of proving the other two elements of his prima facie case--employee access and employer knowledge. We therefore affirm the Secretary's alleged violation of 29 C.F.R. § 1910.1025(j)(2)(i)(C).

C. Classification and Penalty

We conclude that this was not a violation that created "a substantial probability that death or serious physical harm could result."²³ In affirming the Secretary's classification of this violation, the judge concluded that the "seriousness of the violation is shown by the particularly acute danger that an employee with a high body burden of lead was not monitored so that it was not known whether exposure over the action level took place, and whether during this period the employee was exposed over the PEL." We find this reasoning unconvincing, particularly since Atlantic had conducted extensive *airborne* lead exposure sampling throughout the workplace, and that type of monitoring is a far more direct means of determining whether an employee is being "expos[ed] over the action level" or "over the PEL." Indeed, on this record, we find it very difficult to see how Atlantic's failure to conduct *additional* blood lead level testing on Gregory could have had any significant impact on his health.

We further conclude that the proposed penalty of \$420 is not "appropriate" for Atlantic's other than serious violation of 29 C.F.R. § 1910.1025(j)(2)(i)(C) in view of the statutorily-prescribed penalty factors. *See* 29 U.S.C. § 666(j). We consider the gravity of this violation to be relatively low, since Atlantic already knew enough about Gregory's blood lead level and airborne lead levels in its workplace to enable it to make informed decisions about Gregory's work assignments. In addition, Atlantic is entitled to credit for good faith for the special efforts it made to assure that Gregory was included in testing despite his apparent attempts to evade scheduled tests. Finally, the employer's small size also weighs in favor of a smaller penalty. On the other hand, the employer's adverse past history suggests a need to assess a more substantial penalty. Balancing these factors, we assess a penalty of \$100.

V. CITATION NO. 2, ITEM 3

²³ Section 17(k) of the Act, 29 U.S.C. § 666(k), provides, as follows:

[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.

A. Background

Item 3 of citation no. 2 alleged a willful violation of 29 C.F.R. § 1910.1025(d)(6)(iii)²⁴ and proposed a penalty of \$4200. The citation alleged that Atlantic violated the cited standard in the following manner:

On 9/17/87, employee monitoring for an employee engaged in group burning resulted in time weighted exposure of 73.99 micrograms per cubic meter. Employer has not conducted quarterly sampling for employee exposure at this work station. Sampling of employees conducting group burning ha[s] not been done since 9/17/87.

(a) On 2/15/90, an employee burning groups was exposed to fifty six (56) micrograms per cubic meter of lead, time weighted average. See citation no. 2, item 2, for exposure data.

Citation no. 2, item 2, is the citation item discussed in Part I, *supra*. Therefore, the second referenced exposure in the instant citation item is to the exposure of employee Weston Gregory to airborne lead at an 8-hour TWA concentration of 56 $\mu\text{g}/\text{m}^3$ on February 15, 1990.

IH Turner testified that the instant citation item, like the preceding item, was based on her review of the nine quarterly progress reports. That review revealed that employee Gregory had been exposed on September 17, 1987, to an 8-hour TWA airborne lead concentration of 73.99 $\mu\text{g}/\text{m}^3$, a concentration exceeding the 50 $\mu\text{g}/\text{m}^3$ PEL, while he was engaged in group burning. Turner's review of the other eight quarterly reports and the supporting documents submitted by Atlantic revealed that no further monitoring had been conducted in the group burning area after

²⁴ The cited standard provides, as follows:

§ 1910.1025 Lead.

....

(d) *Exposure monitoring.* . . .

....

(6) *Frequency.* . . .

....

(iii) If the initial monitoring reveals that employee exposure is above the permissible exposure limit[,] the employer shall repeat monitoring quarterly. The employer shall continue monitoring at the required frequency until at least two consecutive measurements, taken at least 7 days apart, are below the PEL, but at or above the action level, at which time the employer shall repeat monitoring for that employee at the frequency specified in paragraph (d)(6)(ii), except as otherwise provided in paragraph (d)(7) of this section.

September 17, 1987.²⁵ Yet, as we have found, *supra* Part I.B, Gregory was once again engaged in group burning when Turner sampled his exposure to airborne lead on February 15, 1990.

The record is silent as to the extent of Gregory's involvement in group burning activities during the 2½-year period between these two measured overexposures. President Migell testified that, on those occasions when employee Gregory performed group burning, "his normal operation would be he would not burn groups more than two or three hours per day." However, Migell gave no indication of what time period he was referring to in making that statement, and he said nothing about the frequency with which Gregory performed group burning. IH Turner testified that she had discussed group burning with both Gregory and president Migell. Gregory had told her that group burning was "part of his job title," but the compliance officer could not recall what the employee had told her when she had asked him about his most recent involvement in group burning prior to February 15, 1990. As for Turner's conversation with Migell, we conclude that it related only to the general question of how often group burning was performed at the workplace (by any Atlantic employee) and not to the more specific question of how often employee Gregory burned groups. *See supra* note 6.

In responding to this alleged violation, president Migell pointed out that Atlantic had conducted airborne lead sampling throughout the 2-year observation period, as recorded on its

²⁵ IH Turner further testified that this same pattern was repeated throughout the quarterly progress reports. As an example, she pointed out that the employer's first quarterly progress report had stated that airborne lead sampling was also conducted on Jean Simon on September 17, 1987, while that employee was engaged in battery filling; yet, the second report "does not show battery filling being monitored again, and it's like that throughout the reports." Yet, while the witness seemed to be claiming that she had seen a pattern of violative conduct throughout the employer's quarterly progress reports, the Secretary has restricted this alleged violation to Atlantic's admitted failure to conduct follow-up quarterly sampling *in the group burning area*. This suggestion of selective enforcement adds to our difficulty in trying to ascertain how the Secretary has interpreted and applied the cited standard in this case. At no point in her testimony did IH Turner explain the Secretary's interpretation of section 1910.1025(d)(6)(iii). Nor is that interpretation clear on the face of the citation. For example, the Secretary could be claiming that the "repeat" quarterly monitoring called for in the standard must be conducted in the same physical location where the "initial monitoring" was conducted, regardless of where the employee involved in the "initial monitoring" might be working at the time. Alternatively, the Secretary could be claiming that the "repeat" quarterly monitoring must be deferred until such time as the original employee is engaged in the same work activities that he or she was performing at the time of the "initial monitoring." Or the citation may embody some other interpretation that has not even occurred to us.

quarterly progress reports.²⁶ He also testified to the effect that the employer had not re-tested in the group burning area or on a day when Gregory was performing group burning operations because that work was done on such an infrequent and sporadic basis. In particular, he questioned how the employer was supposed to "conduct quarterly sampling of exposure to [a] work station that isn't used . . . [and that] might not be used for three months."

Neither party introduced into evidence work records that relate specifically to *group burning* operations at Atlantic's workplace, presumably because such records were not kept. However, the evidentiary record does contain detailed information about the timing and extent of *stacking* operations at the plant throughout the 2-year observation period, because Atlantic was required under the 1987 Settlement Agreement to keep accurate records of its stacking operations and to attach those rosters to its quarterly progress reports. Based on president Migell's un rebutted testimony about the correlation between time spent in group burning and time spent in stacking, we conclude that Atlantic's stacking rosters are also roughly indicative of both the timing and extent of group burning operations at Atlantic's workplace during the 2-year observation period.²⁷ We therefore further conclude that the evidentiary record fully supports president Migell's claims about the infrequent and sporadic nature of group burning operations at the cited facility.²⁸

²⁶ In fact, the Secretary's exhibits (C-8 & C-11) establish that, throughout the 2-year observation period, Gregory was the *only* Atlantic employee who was consistently included every time the employer conducted airborne lead sampling in its workplace. Nevertheless, Atlantic's failure to comply with its obligation, under paragraph 4 of the compliance program, to personally monitor "[e]ach employee" is not at issue here. Nor is this citation item concerned with Atlantic's deviations (generally by a month or two) from the required schedule of monitoring on a "quarterly basis." Instead, the *only* issue before us is whether Atlantic violated the cited standard by failing to conduct follow-up testing "of employees conducting group burning," as alleged in the contested citation item and the supporting testimony of IH Turner.

²⁷ President Migell referred to the connection between stacking and group burning at several points in his testimony. For example, he testified that group burning "relates to what was stacked" so that, "if there was only two hours of stacking, there was only enough material, normally, for the man to work the equivalent time in the group burning section." Elsewhere, he testified that only 42¼ hours were devoted to stacking in all of 1989 and that "this is commensurate with the amount of time used in the group burning operation." He further asserted that "the paperwork on the stacking operation . . . reflects the group burning operation."

²⁸ The nine quarterly progress reports revealed the following about the frequency and extent of stacking operations at Atlantic's workplace throughout the 2-year observation period:

In his decision, the judge accepted without comment the Secretary's contention that Atlantic's admitted failure to perform "quarterly air monitoring for lead . . . at the group burning station for over two years" after September 17, 1987, constituted noncompliance with the terms of the cited standard. He also agreed with the Secretary that this alleged violation was proven by the documentary exhibits in that "the lack of tests at the group burning station is evident from the quarterly reports."

B. Analysis

We conclude that the Secretary has failed to established Atlantic's noncompliance with the cited standard. In the absence of a more definitive statement of the Secretary's intent, we conclude that the clearest guidance as to the meaning of the cited standard is provided by two related subsections of the OSHA lead standard, 29 C.F.R. § 1910.1025(d)(1)(ii) & (iii). These two

(.continued)

October-December 1987--limited to six days, one hour per day

January-March 1988--five days, one hour per day

April & May--two days (both in April), one hour per day

June--limited to four days, no more than 2 hours 45 minutes in any one day

July-September--1½ hours on one day (in September)

October-December--11 days (seven in December), two hours or less per day

January 1989--stacking records lost by new employee assigned to replace Weston Gregory (following his December 15, 1988 removal)

February & March--no more than 4½ hours on one day (in March)

April--no more than 6½ hours on one day, no more than 4 hours 45 minutes on a second day

May & June--seven days, no more than four hours on any one day

July-October--two hours or less on one day (in August)

As noted previously, president Migell testified to the effect that Atlantic might go as long as three months without performing group burning at the workplace. The documentary evidence is compatible with that claim. Indeed, the quarterly reports reveal one 3-month gap in stacking operations (and therefore, presumably, in group burning operations as well) between June 14 and September 16, 1988, and another 3-month gap could have occurred at any time beginning on or after August 7, 1989. (There are no stacking rosters in the evidentiary record that go beyond October 1989).

subsections appear to establish guidelines that employers must follow in conducting the "repeat" monitoring that is required under the standard at issue here, section 1910.1025(d)(6)(iii). They provide, as follows:

- (d) *Exposure monitoring--(1) General. . . .*
- (ii) With the exception of monitoring under paragraph (d)(3), the employer shall collect full shift (for at least 7 continuous hours) personal samples, including at least one sample for each shift for each job classification in each work area.
 - (iii) Full shift personal samples shall be representative of the monitored employee's regular, daily exposure to lead.

We conclude that the Secretary's position in this case conflicts with the above-quoted guidelines. For example, by requiring full shift personal sampling rather than area sampling, the Secretary has revealed that his focus is indeed on "exposure monitoring," as the caption of section 1910.1025(d) suggests. Accordingly, the purpose of the monitoring that is mandated under section 1910.1025(d) is presumably to measure the amount of airborne lead that an individual employee is exposed to during the course of his or her work day. By the same reasoning, the presumed purpose of the follow-up sampling under the cited standard ((d)(6)(iii)) is to chart the personal history of the sampled employee's exposure to airborne lead rather than to create a record of the changes in ambient lead levels at a particular work station or to track the shifts in the amounts of lead that are generated by a particular work process. *See also supra* note 24 (cited standard's reference to "repeat[ed] monitoring for that employee"). The requirement in the instant citation item that Atlantic conduct quarterly sampling at a particular work station, apparently without regard to which employee may be working at that station at the time, seems to conflict with both the language and the purpose of the cited standard.

In addition, by specifying that the sampling in question must be "representative of the monitored employee's regular, daily exposure to lead" ((d)(1)(iii)), the Secretary has suggested that he is not concerned with exposures that are irregular and infrequent. Yet, as indicated, *see supra* note 28, the record fully supports president Migell's claim that group burning was both an irregular and infrequent occurrence at Atlantic's workplace. Gregory's performance of that group burning may have been even more sporadic and uncommon than the stacking rosters suggest since there is no indication of the timing and extent of his personal involvement in that activity throughout the 2½-year period that is at issue here. Moreover, president Migell testified without contradiction that, on those occasions when employee Gregory did perform group burning at the workplace, he performed that work for no more than two or three hours in any given day.

We also note that the Secretary seems to be suggesting that Atlantic should have assigned Gregory to perform group burning on at least a regular quarterly basis, so that follow-up monitoring could be conducted while he was engaged in that activity. Gregory, however, either was, or should have been, on medical removal status throughout the time period in question, and therefore should

have been kept out of high exposure areas. Moreover, there is *no* evidence that Gregory performed group burning at any time during the period between September 17, 1987, and February 15, 1990. Thus, there is no evidence to contradict Atlantic's claim that it could not have provided the testing sought by the Secretary throughout that time period. Finally, we note that the Secretary has made no showing that the monitoring conducted on Gregory on September 17, 1987, was "initial monitoring" within the meaning of the cited standard. Yet, under the terms of that standard, "repeat [quarterly] monitoring" is required only when "*the initial monitoring* reveals that employee exposure is above the permissible exposure limit" (emphasis added). We conclude that the term "initial monitoring" is probably a reference back to section 1910.1025(d)(2), which requires employers to make an "initial determination" as to whether employees at their workplaces "may be exposed to lead at or above the action level." If this is the meaning of the term "initial monitoring," then, on this record, it is clear that September 17, 1987, was *not* the date on which Atlantic made its "initial determination" about employee exposure to airborne lead at the cited workplace. On the contrary, evidence introduced by the Secretary establishes that air contaminant sampling had been conducted on Atlantic's behalf as early as March 21, 1985, if not earlier. Accordingly, we vacate item 3 of citation no. 2 on the ground that the Secretary has failed to prove Atlantic's noncompliance with the cited standard.

VI. CITATION NO. 1, ITEM 5

Item 5 of citation no. 1 alleged a serious violation of 29 C.F.R. § 1910.1025(f)(1)²⁹ and proposed a penalty of \$420. The citation alleged that Atlantic violated the cited standard in the following manner:

Respirators required under this section[,] for protection against lead, were not used:

- (a) Assembly Area/Group Burning: On 2/15/90 employer did not ensure that an employee wore a respirator while burning Groups. Refer to citation no. 2, item 2, for exposure information.

²⁹ The cited standard provides, as follows:

§ 1910.1025 Lead.

....

- (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:

....

- (ii) In work situations in which engineering and work practice controls are not sufficient to reduce exposures to or below the permissible exposure limit

Citation no. 2, item 2, is the alleged violation discussed *supra*, Part I. Accordingly, this is the last in a series of citation items that arose out of the overexposure of employee Weston Gregory to airborne lead on February 15, 1990.

IH Turner testified that this citation item was based on her observation of Gregory at the time when she took the photograph marked as Exh. C-22. She also correctly pointed out that the employee was not wearing a respirator at the time that the photograph was taken. More specifically, Gregory was wearing a respirator, but the device was hanging around his neck rather than being positioned over his face. Shortly after this first photograph was taken, the employee began wearing the respirator properly, as shown in a second photograph, Exh. R-1. Turner asserted that "[h]e placed the respirator on after he noted that I [had] observed him without it." The witness also expressed her opinion that, under the terms of the cited standard, the employee should have been wearing the respirator at the time that she observed him because his exposure to airborne lead on that day exceeded the lead standard's PEL of 50 $\mu\text{g}/\text{m}^3$. Turner thereby alluded to the provisions of section 1910.1025(f)(1)(ii), as quoted *supra* note 29.

We conclude that the evidence introduced by the Secretary in support of the instant citation item is neither reliable nor credible. During her initial appearance as a witness, Turner repeatedly testified that Exh. C-22 shows Gregory engaged in group burning, that Gregory had told her he was engaged in group burning at the time the photograph was taken, and that she had seen Gregory perform the activities he described as group burning at the work station depicted in Exh. C-22. However, president Migell directly contradicted this testimony, stating that photographic Exh. C-22 clearly reveals that Gregory was "setting his machine up, but there's no way he could be burning groups at that level, crouched over his machine." Migell further testified that the photograph depicts stacks of plates that have not yet been assembled into groups, while showing no signs of any groups that have already been burned. When IH Turner was subsequently recalled as a rebuttal witness, she in effect rescinded her earlier testimony, stating that group burning was done in the area directly behind the position where Gregory is shown in Exh. C-22 and speculating that the photograph might depict Gregory engaged in a stacking operation.

We therefore vacate item 5 of citation no. 1 on the ground that the Secretary has failed to sustain his burden of proving Atlantic's noncompliance with the cited standard. Specifically, we reject the compliance officer's testimony that photographic Exh. C-22 shows employee Gregory working without respiratory protection while engaged in burning groups. Instead, we find, based on president Migell's testimony, which we expressly credit, that the photograph depicts Gregory in the process of setting up a machine. Because the record provides us with no basis for finding that that operation exposed Gregory to any amount of airborne lead dust, we also have no basis for concluding that Gregory was required to wear a respirator, under the terms of the cited standard, while he was setting up the machine.

We further conclude that, while Gregory did engage in group burning on February 15, 1990, it is more likely than not that Turner did not see him burning groups. In support of this finding, we note in particular Turner's failure to make any mention of a burning instrument in her description of the operation that she had observed and her admission that she did not recall whether there had been a flame present in the operation. Yet, Migell testified that a flame from a torch is "a prerequisite [for] burning." We also note that, throughout her testimony, Turner referred to only one incident where she had assertedly observed Gregory burning groups and that is the incident shown in Exh. C-22; that Turner's testimony clearly reveals that she had no independent knowledge of what Gregory was doing at the time she observed him, but was totally dependent on what the employee told her; and that Turner's testimony further reveals that her observations of Gregory were both brief and from a distance. Since Turner did not observe Gregory burning groups on February 15, 1990, it necessarily follows that she did not observe him group burning without a respirator.

Alternatively, we vacate this citation item on the ground that the Secretary has failed to prove Atlantic's actual or constructive knowledge of any violative conditions that may have existed on February 15, 1990. In his decision, the judge, citing the opinion testimony of IH Turner, concluded that "employer knowledge is apparent through the fact that the employee was in open view at the time . . . , as well as the previous history of citations and a provision in the Settlement Agreement." However, the judge's reasoning ignores the fact that conditions had changed substantially between 1986 and 1990. Following its receipt of the earlier citations noted by the judge, Atlantic had adopted and implemented a respiratory protection program for its production employees. We infer from the record that these employees, including Gregory in particular, were well aware that they were required under Atlantic's program to wear respirators while engaged in production activities such as group burning. Moreover, Atlantic's experience since 1986 gave it solid ground for believing that Gregory would wear his respirator while performing group burning on February 15. As for the employee being in open view, we conclude that that fact standing alone does not establish constructive knowledge, particularly since Gregory was apparently working alone and unsupervised in the stacking and group burning areas and he may have worked only briefly without his respirator before putting it on, as shown in Exh. R-1.

VII. CITATION NO. 2, ITEM 1

A. Background--Item 1(a)

Item 1 of citation no. 2 alleged a willful violation of 29 C.F.R. § 1910.133(a)(1)³⁰ and proposed a penalty of \$3600. The citation alleged that Atlantic violated the cited standard in the following manner:

Protective eye and face equipment was not required where there was a reasonable probability of injury that could be prevented by such equipment:

- (a) Charging Area: Mandatory use of protective eye equipment was not enforced for employees filling batteries with sulfuric acid on 12/5/89 and 2/15/90. Employee wore prescription eye wear only.
- (b) Casting Area: Mandatory use of protective eye and face equipment was not enforced for an employee hand casting small parts on 2/15/90. There is a potential for injury due to the splashing of molten lead into the face and eyes.

As this description of the alleged violation indicates, item 1 is based on two independent and essentially unrelated incidents. We therefore consider the two subitems of this item separately.

IH Turner testified that item 1(a) of citation no. 2 was based on her observation of employee John Gallman when he was not wearing any eye or face protection other than prescription eyeglasses, which he wore "pretty much all [of] the time." She had asked him what was in the "squeeze type apparatus" he was holding and he had responded that it was sulfuric acid, which "he was applying . . . to the battery."³¹ At other points in her testimony, however, she claimed that

³⁰ The cited standard provides, as follows:

§ 1910.133 Eye and face protection.

- (a) *General.* (1) Protective eye and face equipment shall be required where there is a reasonable probability of injury that can be prevented by such equipment. In such cases, employers shall make conveniently available a type of protector suitable for the work to be performed, and employees shall use such protectors. No unprotected person shall knowingly be subjected to a hazardous environmental condition. Suitable eye protectors shall be provided where machines or operations present the hazards of flying objects, glare, liquids, injurious radiation, or a combination of these hazards.

³¹ Although Turner used the term "sulfuric acid" here and in other statements throughout her testimony, she also specifically acknowledged that, at the time that she had observed Gallman working in the battery charging area, he had *not* been working with pure sulfuric acid, but rather with a "sulfuric acid solution," *i.e.*, a mixture of acid and water. Nevertheless, she claimed, "[e]ven though [the acid] was diluted, there was still a possibility, potential for it to cause injury on

Gallman had told her that he was "filling batteries," as the citation charges in its description of the alleged violation.

The witness had previously identified Exhs. C-26 and C-27 as photographs of Gallman working in the battery charging area. Specifically, she had testified that Exh. C-26 shows the employee "doing some work on some batteries that [had] been set up for charging," while Exh. C-27 shows him leaning over one of those same batteries to put some acid in it with the "squeeze type apparatus." Turner now connected her earlier testimony to the violation alleged in item 1(a) of citation no. 2, indicating that the conditions depicted in Exh. C-27 formed the basis of the Secretary's allegation. The compliance officer expressed her opinion that the cited conditions were in violation of the cited standard because, "[whenever] you have any potential for any eye injury or exposure, the wearing of eye protection is required." She testified that, as Gallman had leaned over the batteries to put acid into them, his face had come as close as 18 inches to the battery.

On cross-examination, however, the compliance officer acknowledged that "the point of . . . insertion" of the hand-held object into the battery was "right about waist level." She also admitted that all of the batteries shown in Exh. C-26 and most of those shown in Exh. C-27 were "covered," meaning that caps were in place over the openings, and that "[i]f the battery is sealed, then there is no exposure" to the acid within the battery and thus no need for eye protection. During her rebuttal testimony, Turner again stated that all of the batteries shown in Exh. C-26 were "definitely closed." She added that all of the batteries shown in Exh. C-27 "are closed except the one that Mr. Gallman is working on." Even with respect to that one battery, she conceded that only one of the battery caps was open. Nevertheless, she contended that this one open cap posed "a danger" to Gallman: "With that cap being open, there is a . . . potential for exposure to sulfuric acid, which is in there."

President Migell expressly denied the Secretary's claim that Gallman had been engaged in "filling batteries" at the time of the alleged violation. He testified that it was clear from Exh. C-27 that Gallman had been engaged at the time in testing the batteries with a hydrometer.³² Migell described the hydrometer as a device that "vacuums a small amount of acid (.continued)

exposure." On cross-examination, she conceded that she did not know of *any* eye injuries due to contact with acid at Atlantic's workplace.

³² Earlier, during Migell's cross-examination of IH Turner, the compliance officer had stated that she was familiar with "a battery tester called the hydrometer." She had agreed with president Migell that the device shown in Exh. C-27 might have been a hydrometer, but added that that was not what Gallman "informed me of on that day." Later, in response to the judge's efforts to clarify this point, Turner and Migell argued over what the photographic exhibit depicts, with Turner claiming that "you can see from the picture, here" that the employee was holding "a syringe," and Migell objecting that Turner's testimony was "contrary to what the picture shows." Still later, on

into a glass tube to float a weighted cylinder to measure the weight of acid in relation to water or a specific gravity is the term." He emphasized that "99 percent of everything there was sealed or covered" and that "[t]here was only one vent on that one battery that was open to insert the hydrometer"

In his decision, the judge noted the evidentiary conflict over what Gallman had been doing at the time Exh. C-27 was taken, but he did not resolve this conflict. The judge construed president Migell's testimony about the one open vent as an admission "that at least one battery was open, exposing the employee to the danger of sulfuric acid inside the battery." He apparently sustained the alleged violation on the basis of this purported admission.

B. Analysis--Item 1(a)

Under long-established Commission case law, the scope of section 1910.133(a)(1) is narrow. In *Philadelphia, Bethlehem & New England R.R.*, 11 BNA OSHC 1345, 1347, 1983-84 CCH OSHD ¶ 26,512, p. 33,736 (No. 77-2200, 1983), the Commission held that "section 1910.133(a)(1), like section 1910.132(a), is so broadly-worded that it is appropriate to apply the reasonable person test in assessing compliance with the standard." Under that test, personal protective equipment ("PPE") is mandated only "if a reasonable person familiar with the circumstances surrounding an allegedly hazardous condition, including any facts unique to a particular industry, would recognize a hazard warranting the use of personal protective equipment." 11 BNA OSHC at 1346, 1983-84 CCH OSHD at p. 33,736.

Because this case arises in the First Circuit, the Secretary also bore the burden of proving that employee Gallman was exposed to a "significant" risk of harm. See *Donovan v. General Motors Corp, GM Parts Div.*, 764 F.2d 32, 35 (1st Cir. 1985) ("to establish that a hazard exists, it must be demonstrated that there is a *significant* level of risk"); cf. *Con Agra Flour Milling Co.*, 16 BNA OSHC 1137, 1141-42, 1993 CCH OSHD ¶ 30,045, p. 41,234 (No. 88-1250, 1993) (Commission applies "significant risk" test in vacating alleged violation of section 1910.132(a); citation based on claimed splashing hazard in battery filling operations).

We conclude that the Secretary has not met his burden of proof. Initially, we find that employee Gallman was *not* engaged in "filling batteries with sulfuric acid" at the time of the alleged violation. The evidence supports Atlantic's contention that batteries were filled at its workplace with a sealed vacuum machine that eliminated the possibility of employee contact with the sulfuric acid solution. Even IH Turner's testimony, when read as a whole, is consistent with a finding that Gallman was not in the process of "filling" the batteries that are depicted in photographic Exhs. C-26 and C-27. We need not decide whether Gallman was testing the specific

(.continued)

rebuttal cross-examination, Turner admitted that she had not "actually see[n]" a "transfer of liquids" from the device Gallman was using "to the battery."

gravity of the acid with a hydrometer, as Migell testified, or adding a small amount of acid to an already-filled battery, as Turner's testimony suggests. Either way, we find that Gallman's exposure was no greater than the routine exposure of a service station attendant while checking a car's battery fluid level. We therefore conclude, on this record, that Gallman was not engaged in an operation that created a "reasonable probability of injury" to the eyes or face within the meaning of the cited standard or a "significant risk of harm" within the meaning of the governing First Circuit case law. Accordingly, we vacate item 1(a) of citation no. 2 on the ground that the Secretary has failed to prove Atlantic's noncompliance with the cited standard.

C. Background and Analysis--Item 1(b)

IH Turner testified that item 1(b) of citation no. 2 was based on her observation of employee Franklin Augustine on February 15, 1990, while the employee was engaged in "small parts casting with molten lead, which he was pouring into grids." She concluded that this operation violated the cited standard, *see supra* note 30, because the employee was not wearing any eye or face protection at the time. In her opinion, "eye protection" was "required" during the cited operation because, "[i]n the process, there is a potential for it to splatter the lead." More specifically, "[w]hen [the molten lead] hits the cold grill, it could potentially splatter to the face." IH Turner testified that she had watched the operation from a distance for approximately five minutes. Turner identified Exhs. C-23 and C-28 as photographs of the cited operation.³³

On cross-examination, Turner conceded that she was unaware of and had seen no record of any injury in the casting department. She also had not been informed by any employee of any lead spillages or other near-miss situations. She had seen indications of "spillage of lead around the casting area," but she had not seen Augustine spill any lead. The compliance officer further acknowledged that she did not know the temperature of the molten lead used in the operation, and she was not familiar with either "the temperature ranges of molten lead" or "the chilling methods of lead when it's poured into a mold." Turner admitted that she had not asked Augustine "what happens if you miss the mark and spill your lead." In addition, she agreed with Migell's statement that it was "possible that the lead in a ladle has cooled sufficiently enough so that there's not that much of a temperature difference in a preheated mold and the chance of splatter is negligible."

Turner also discussed those portions of the employer's past history that formed the basis of the willfulness allegation. She claimed that the operation that she had observed Augustine performing on February 15 was the same activity that (a) had been cited previously, in January and

³³ The photographic exhibits reveal several striking features about the operation at issue, including notably the small size of the ladle and of the grid. (Perhaps the closest analogy would be to a cook pouring a ladle of batter onto a slightly oversized waffle iron). The photographs also show that the grid in question was placed on top of a small, table-like structure at the employee's mid-thigh level.

October 1986, and (b) had been regulated by paragraph 6 of the 1987 Settlement Agreement.³⁴ During Turner's cross-examination, president Migell questioned her claim. Turner conceded that she had not seen Augustine adding lead to the casting pot or melting the lead. Nevertheless, she argued that paragraph 6 was applicable to Augustine's activities because the employee had "informed me that the operation [he was performing] was called small parts casting."³⁵

In his testimony, president Migell disagreed with Turner's "assumption" that there was a "potential for injury [in the cited operation] due to the splashing of molten lead in the face and eyes." He asserted that the cited operation is distinguishable from the situation described in paragraph 6 of the 1987 Settlement Agreement. Thus, he stated, he had "totally agree[d]" with the Secretary's previous allegation that eye/face protection is needed when lead is added to the casting pot, because that operation does create "a danger of splash" and resulting "damage or injury from molten lead." In contrast, however, "[i]n this particular instance, [Augustine was] casting low temperature lead at arm's length." The witness stated that he himself had performed the casting

³⁴ The January 1986 citation alleged a violation of 29 C.F.R. § 1910.133(a)(1), the same standard at issue here, based on the following conditions: "Casting department: On 10/21/85, employees casting large plates and soldering sticks did not wear face shields or eye protection when adding lead to lead pots." The October 1986 FTA notification alleged a failure to abate this October 1985 violation, based on the following conditions: "Casting department: On 8/22/86, an employee casting small plates was observed without a face shield or eye protection." This last-quoted allegation was set forth in item 1-1 of the FTA notification. Paragraph 6 of the settlement agreement, which Turner also relied upon as support for the willfulness charge, specifically referred to item 1-1, as follows:

The parties agree that the respondent will also take the following additional corrective actions regarding the following noted items of Failure to Abate Violations:

1-1 In the casting department, when an employee adds materials to the casting pot or hand casts parts, (s)he will wear a face shield or safety goggles.

³⁵ Turner again addressed this issue in her rebuttal testimony. Upon being asked to substantiate her claim that Augustine had engaged in "hand casting small parts," the witness replied that photographic Exh. C-28 shows Augustine pouring molten lead into a grid after "dipping" the ladle into the casting pot where the lead had been melted and that this operation was therefore a "hand casting" operation.

operation depicted in Exh. C-28 since he was "a pre-teen," and he claimed that there was an "improbability of injury in [that] type of casting."³⁶

We conclude that the Secretary did not establish that Franklin Augustine was exposed on February 15, 1990, to "a reasonable probability of injury that can be prevented by" the wearing of "[p]rotective eye and face equipment" and that the Secretary has therefore failed to prove Atlantic's noncompliance with section 1910.133(a)(1). The compliance officer observed the operation in question from a distance and only for five minutes. She provided very little information as to how the operation was performed. Essentially all that is known about the operation is what is shown in photographic Exhs. C-23 and C-28. Yet, those exhibits reveal the employee pouring molten lead from a small, hand-held ladle onto a small grid, which has been placed on a table-like structure at the employee's mid-thigh level. Judging from the photographs alone, we would consider it improbable that the molten lead could splatter in such a manner that it would reach the employee's eyes or face. Moreover, Migell testified that an injury was not probable based on his years of performing this type of casting. We also note that the only evidence of "splattering" in this record is IH Turner's observation of "some spillage of lead around the casting area." There is no evidence of injuries or even of near-miss situations. Finally, we note the compliance officer's concession that, in the operation that she had observed, the lead in the ladle might have cooled sufficiently "so that there's not that much of a temperature difference . . . [between the lead and the] preheated mold and the chance of splatter is minimal."

We also conclude that the Secretary's reliance on the asserted connection between the instant alleged violation, Atlantic's prior citations, and paragraph 6 of the 1987 Settlement Agreement is misplaced. In the parallel contempt proceeding that is currently pending before the First Circuit, the Secretary has expressly alleged that the conditions observed by Turner on February 15, 1990, constituted a continuing failure to abate the same violation that was described in item 1-1 of the October 1986 FTA notification. *See supra* note 34. Here, however, the Secretary has charged, in item 1(b) of citation no. 2, that those conditions were in violation of 29 C.F.R. § 1910.133(a)(1). Therefore, the *only* issue that is before us for resolution is whether Atlantic violated section 1910.133(a)(1) on February 15, 1990, as alleged in the contested citation item. *See supra* Background, Section C. Whether employee Augustine was performing the same task or

³⁶ In its post-hearing brief, Atlantic asserted the following:

Contrary to comments by Ms. Turner, employee Franklin Augustine was not casting "small parts" but [instead was engaged in] multiple casting of lead ingots in a large preheated mold at relatively low temperature. He has always worn eyewear "when adding lead to the pot" Again no injury to eyes or face of record in 40 years.

These assertions are only partially supported by the record evidence, as set forth above.

a different task than the operation(s) described in the settlement agreement and the prior citations is irrelevant to the issue of noncompliance with the cited standard.

VIII. CITATION NO. 4, ITEM 2

A. Background

Item 2 of citation no. 4 alleged an other than serious violation of 29 C.F.R. § 1910.134(b)(2)³⁷ and proposed a penalty of \$360. The citation alleged that Atlantic violated the cited standard in the following manner:

Respirators were not selected on the basis of hazards to which the worker was exposed:

- (a) Establishment: On 11/7/89 and 2/15/90, it was determined that employees are provided with 3M 8710 dust and mist respirators to perform small parts casting and spray painting. This type of respirator is for dusts and mists. It is not approved for fumes, gases, or vapors.

IH Turner testified that she based this citation item on her determination that "employees were provided with 3M 8710 respirator[s]" for use in small parts casting and in spray painting operations, despite the fact that "that type of respirator is not effective to protect against that exposure." She explained that fumes are generated during small parts casting, while vapors are generated during spray painting. Yet, the 3M 8710 respirator is "manufactured to protect against . . . only . . . dust and mist"; "[i]t was not made to protect against fumes and vapors." More specifically, Turner testified that she had based her determination of noncompliance on her observations of employee Franklin Augustine and her interviews with him. However, she did not expressly state that she had seen Augustine wearing a 3M 8710 respirator at any time while he was engaged in either small parts casting or spray painting. Instead, she indicated that Augustine had told her that the "type of respirator he was required to wear or was given to wear" during the casting operations and "the type of respirator he used while spray painting" was the 3M 8710.³⁸

³⁷ The cited standard provides, as follows:

§ 1910.134 Respiratory protection.

....

(b) *Requirements for a minimal acceptable program.* . . .

- (2) Respirators shall be selected on the basis of hazards to which the worker is exposed.

³⁸ Notwithstanding the compliance officer's testimony that she had based this citation item on *both* her observations of Augustine and her discussions with him, it is not clear on this record that any part of this alleged violation was based on her observations. Turner testified that she "[could not] say exactly" how long she had observed Augustine engaging in small parts casting or in spray

Atlantic does not dispute the Secretary's allegation of respirator usage. Thus, it entered into a pre-hearing stipulation stating that, "[d]uring the 1989-90 OSHA inspection, Atlantic Battery employee Franklyn Augustine was wearing a 3M 8710 type dust and mist respirator, while hand casting small parts, and while spray painting." The stipulation, however, provides no details about either (or any) of these agreed-upon incidents.

On cross-examination, Turner agreed with Migell's statement that a respirator is not required in a work area "if the area is not above the action level," and she conceded that Atlantic had not been cited for overexposure to airborne lead in the casting department during the 1989-90 inspection. Nor did she recall whether Atlantic had ever been cited for overexposure resulting from casting operations.³⁹ Turner also admitted that she had not taken any tests to determine the

(.continued)

painting operations, but she suggested that her observations had been fleeting, occurring as she moved about throughout the workplace: "You may see him a minute here, a minute there." She also testified (in the context of other citations items) that she had not observed any employee spray painting batteries at the workplace and that the only spray painting that she had observed at any time during the inspection was the special maintenance project (painting of metal shelves) that Augustine had been engaged in *on December 5, 1989*, while his exposure to airborne lead was being sampled. *See supra* Part II. Yet, the instant citation item alleged that the "determin[ation]" of noncompliance with the cited standard was made *on November 7, 1989, and February 15, 1990*.

(We also note that, in describing the December 5 incident, Turner made no mention of respiratory protection). As for casting operations, the evidence introduced by the Secretary in support of citation no. 2, item 1(b), establishes that Augustine engaged in hand casting on February 15, 1990. *See supra* Part VII.C. However, the two photographs taken by Turner of that operation both show Augustine working *without* a respirator, although he may have had a respirator hanging around his neck.

³⁹ Under 29 C.F.R. § 1910.1025(f)(1), the lead standard's provision on respirator usage, *see supra* note 29, a respirator is generally not required if the levels of airborne lead are below the *permissible exposure limit*. Sampling results reported by Atlantic to OSHA during the 2-year observation period revealed concentrations of airborne lead in the casting department that were well below not only the PEL ($50 \mu\text{g}/\text{m}^3$) but also the action level ($30 \mu\text{g}/\text{m}^3$). These readings were apparently corroborated by OSHA during the 1989-90 inspection. Based on Exh. C-15, Turner's diagram of Atlantic's workplace, and the compliance officer's testimony describing that exhibit, we find that OSHA did conduct airborne lead exposure monitoring in the casting department during the 1989-90 inspection and further that OSHA determined through that monitoring that the concentration of airborne lead in that area was below the lead standard's PEL.

exposure level, and thus, whether respirator usage was required, during spray painting operations. Whether respirators are required in a spray painting operation would "[d]epend[] on what you're using" because "[e]ach substance has a different permissible exposure limit."⁴⁰ Yet, the witness did not recall what kind of paint was involved in the cited spray painting operation.

In his testimony, president Migell asserted that this citation item should be dismissed because the cited standard had been "misapplied." He emphasized that Atlantic's employees were "not required to wear a respirator" in either the parts casting operation or the spray painting operation.⁴¹ Nevertheless, he commented, "from a practical standpoint," wearing even a dust and mist respirator "seems to be better than wearing no respirator at all."

Migell further testified that Atlantic provided "a commercial spray booth," which was "a double ducted spray booth," for its spray painting operations. He claimed that this booth eliminated any requirement that respiratory protection be provided for an employee engaged in spray painting. The witness added that respirator usage was "desirable" even though not "necessarily required." Thus, he explained, the 3M 8710 respirator "does offer some protection in painting, whether it's approved or not." In particular, it has the beneficial effect of keeping the paint itself out of the employee's nostrils.

B. Analysis

We conclude that the Commission's decision in *Gulf Oil Corp.*, 11 BNA OSHC 1476, 1983-84 CCH OSHD ¶26,529 (No. 76-5014, 1983), is controlling here. In *Gulf Oil*, the Commission vacated an alleged violation of 29 C.F.R. § 1910.134(b)(3)⁴² on the ground "that a

⁴⁰ 29 C.F.R. § 1910.134(a)(2) states, in pertinent part, that "[r]espirators shall be provided by the employer when such equipment is necessary to protect the health of the employee." In a contested case, the Secretary can prove such exposure to a health hazard by showing that the employee was exposed to an airborne contaminant at a level that exceeded the established PEL for that substance (as set forth in an OSHA standard, such as 29 C.F.R. § 1910.1000).

⁴¹ Migell implicitly contradicted the compliance officer's testimony that Atlantic had "provided" the 3M 8710 dust and mist respirator to Augustine for use in the casting and spray painting operations. Specifically, he testified that the 3M 8710 dust and mist respirator had been provided to Atlantic's employees for use "if they're doing any operation in the plant, *other than casting or painting*" (emphasis added). This testimony is consistent with Atlantic's formal work rule, paragraph 9(C) of the 1987 Compliance Program, which states that the 8710 respirator "is only to be used for dust and mists. . . . [and] not to be used for fumes, gases or vapors."

⁴² The standard at issue in *Gulf Oil* provides, as follows:

§ 1910.134 Respiratory protection.

hazard requiring the use of respirators must be shown before an employer is obligated to provide respirator training." 11 BNA OSHC at 1480, 1983-84 CCH OSHD at p. 33,819. Here, Migell gave un rebutted testimony of low lead levels in the casting operation, testimony that is corroborated by the results of exposure monitoring during the 1989-90 inspection, *see supra* note 39, and the results of exposure monitoring during the 2-year observation period. As for the spray painting operation, the Secretary failed to conduct any monitoring of employee exposure to the alleged contaminant or even to determine the composition of the materials that the employees were exposed to. Therefore, we must conclude that in both of these situations, as in *Gulf Oil*, "the Secretary [has] failed to prove [the existence of] a health hazard requiring the use of respirators" in the cited operations. *Compare*, 11 BNA OSHC at 1480-81, 1983-84 CCH OSHD at pp. 33,819-20.

IX. CITATION NO. 2, ITEM 4

A. Background

Item 4 of citation no. 2 alleged a willful violation of 29 C.F.R. § 1910.1025(i)(4)(iv)⁴³ and proposed a penalty of \$4200. The citation alleged that Atlantic violated the cited standard in the following manner:

(..continued)

....

(b) *Requirements for a minimal acceptable program. . . .*

....

(3) The user shall be instructed and trained in the proper use of respirators and their limitations.

Subsection (b)(3) immediately follows subsection (b)(2), which is the standard at issue in this case. *See supra* note 37. Nothing in the language of these two standards would provide a basis for distinguishing between the coverage of section (b)(2) and the coverage of section (b)(3).

⁴³ The cited standard provides, as follows:

§ 1910.1025 Lead.

....

(i) *Hygiene facilities and practices. . . .*

....

(4) *Lunchrooms. . . .*

....

(iv) The employer shall assure that employees do not enter lunchroom facilities with protective work clothing or equipment unless surface lead dust has been removed by vacuuming, downdraft booth, or other cleaning method.

The key phrase "protective work clothing or equipment" is in effect defined in a related provision, section 1910.1025(g)(1). That standard requires employers to provide various specified categories of protective work clothing and equipment whenever "an employee is exposed to lead above the

Establishment Lunchroom: On 11/7/89, 12/5/89, and 2/15/90, employees entering the lunchroom facilities with protective work clothing or equipment were not required to remove surface dust by vacuuming, downdraft or other cleaning methods. Employees were observed going in and out of lunchroom (breakroom) wearing protective work clothing. See citation 1, item 4 and citation 2, item 2 for exposure information.

Citation no. 1, item 4, is the citation item discussed *supra* Part II, and the referenced exposure is the alleged exposure of employee Augustine to 123.75 $\mu\text{g}/\text{m}^3$ on December 5, 1989. Citation no. 2, item 2, is the citation item discussed *supra* Part I, and the referenced exposure is the exposure of employee Gregory to an 8-hour TWA concentration of 56 $\mu\text{g}/\text{m}^3$ on February 15, 1990, while engaged in group burning.

IH Turner testified that she based this citation item on her observations throughout the 1989-90 inspection: "I observed on the dates that I visited the plant that there were employees going in and out of the lunchroom, who were in lead exposed areas, that were not removing their dust from their work clothes prior to coming in." She identified all five of Atlantic's production employees (Vasiliades, Gregory, Augustine, Gallman, and Simon) as being the employees that she had observed going in and out of the lunchroom. She asserted that the conditions she had observed were "a violation of the Act" because the cited standard "clearly states here that the lead contamination should be removed" from clothing prior to entry. The witness then added that, "[f]or two of [the] employees, Weston Gregory and Franklin Augustine, their level of exposure was clearly above the permissible exposure." However, she never linked the instant citation item to either citation no. 1, item 4, or citation no. 2, item 2, by testifying, for example, that she had seen Augustine entering the lunchroom on December 5, 1989, or Gregory entering the lunchroom on February 15, 1990. When Turner was asked to identify which employees she had observed entering the lunchroom without first removing the dust from their work clothes, she responded as follows:

I observed all the employees there coming in at one time or another. It was pretty common on the days that I was there. There was a heater in there. Employees would come in there periodically, on breaks or what have you, to simply warm up.

At the hearing, Atlantic first sought to prove that, under the cited standard, removal of surface lead dust is required only if the employee entering into the lunchroom has been "subjected

(..continued)

PEL, without regard to the use of respirators or where the possibility of skin or eye irritation exists."

In its reply brief, Atlantic asserted that it "made available" to its production employees the following types of protective work clothing and equipment: "professionally cleaned uniforms for each employee, aprons, rubber boots, face shield, hair nets, steel toes, knee pads, [and] welding masks, in addition to vented eye goggles, two types of safety glasses, five types of gloves, and four types of respirators." The record supports Atlantic's claims with respect to some, but not all, of these types of PPE.

to high lead in air," meaning levels of lead ``over the PEL." Under cross-examination, IH Shum initially agreed with this interpretation of the standard. However, she almost immediately shifted her position, apparently agreeing with the judge that employees were required to vacuum if they were ``exposed to lead one way or another."⁴⁴ President Migell later testified to the effect that Atlantic had taken adequate measures to prevent the introduction of surface lead dust into the lunchroom on the clothing or PPE of the production employees:

The employees were told to clean themselves repeatedly if they were in a high lead area and if they were actually in contact with surface lead on their clothes, they were supposed to and, in fact, did wear aprons or disposable paper uniforms. [For example,] Franklin Augustine used to wear the protective paper, complete overall type uniform. And he would wear that if he was in an area where he thought he would be subject to more or visible lead dust. Any other time, he did not wear that if the exposure was limited.

Migell asserted in effect that this practice was reasonable because employees who were ``not working in a high lead area" or ``an area where they came in contact with the lead . . . would have little or no lead on the uniform." In support of his position, he emphasized IH Turner's admission that she ``did not physically see any signs of lead dust on the uniform that would require vacuuming."⁴⁵

B. Merits of the Alleged Violation

We find that the Secretary has proven each of the four elements of his prima facie case by a preponderance of the evidence.

⁴⁴ Under the cited standard, *see supra* note 43, surface lead dust must be removed by ``vacuuming, downdraft booth, or other cleaning method." Here, the parties have stipulated that ``Atlantic Battery has never had a downdraft booth on the premises." However, the uncontradicted testimony of IH Shum establishes that, at the time of the 1989-90 inspection, Atlantic provided a hand-held vacuum that ``could have been used by employees to remove surface lead from their clothing before they entered the lunchroom." Based on this evidence, we set aside the italicized portion of the following judge's finding: ``A downdraft booth, one method of compliance, was not used, and *no other method of lead accumulations removal was provided* or enforced" (emphasis added).

⁴⁵ Turner conceded on cross-examination that she had not taken any wipe samples from the employees' clothing and that she had not seen any ``physical evidence" of lead being present on the employees as they entered the lunchroom. She agreed that she had ``assume[d]" that there was some lead dust on the employees, based on her sampling of employee exposure to airborne lead. However, she acknowledged the possibility that the employees might have had no lead dust on them. On the other hand, she asserted that ``it's not something you would be able to see. . . . because it is often somewhat microscopic."

Applicability. On its face, the standard applies whenever an employee enters a "lunchroom" wearing "protective work clothing or equipment." Although the room in question was used as an office and a break room, we find that the room also was used as a lunchroom. President Migell admitted as much in his testimony, and Atlantic repeated this admission in its reply brief ("[e]mployees *almost* never ate in the lunchroom")(emphasis added). Turner observed and photographed one employee (John Gallman) sitting at the blue table in the lunchroom taking a break "with his milk sitting out on the table,"⁴⁶ and she testified without contradiction that she had also seen Gallman eating lunch at that same blue table.

We also find that the room in question was a "lunchroom" within the meaning of the OSHA lead standard. See 29 C.F.R. § 1910.1025(i)(4)(i)-(iv).⁴⁷ Thus, Shum testified that, prior to the 1989-90 inspection, Atlantic "already had a lunchroom that they could have kept clean to prevent the possibility of ingestion of lead." Taken in context, it is clear that this witness was referring to a

⁴⁶ The parties dispute whether photographic Exh. C-30 shows Gallman wearing protective clothing in the lunchroom and whether the picture "demonstrates the very real [probability] that employees will ingest lead." Turner did not testify as to what Gallman was wearing at the time, and we are unable to determine from the photograph whether he was wearing protective work clothing or ordinary street clothing. As to the second point, the Secretary's own wipe samples establish that the surface of the blue table was *free* of lead dust (0 mg) at the time the photograph was taken, on December 5, 1989. Nevertheless, the record also establishes that Gallman was engaged in the same activities (reading a newspaper and drinking his milk) when Turner took two wipe samples on November 7, 1989. Those samples revealed that lead dust was present on the surface of the blue table at a time when Gallman was ingesting the milk (.0072 mg in the sample taken "next to [employee's] newspaper" and .031 mg in the sample taken "between [employee's] ash tray and milk, in front of newspaper").

⁴⁷ Section 1910.1025(i)(4)(iv), the standard cited in this citation item, has been quoted *supra* at note 43. Its three companion provisions provide, as follows:

- (4) *Lunchrooms.* (i) The employer shall provide lunchroom facilities for employees who work in areas where their airborne exposure to lead is above the PEL, without regard to the use of respirators.
- (ii) The employer shall assure that lunchroom facilities have a temperature controlled, positive pressure, filtered air supply, and are readily accessible to employees.
- (iii) The employer shall assure that employees who work in areas where their airborne exposure to lead is above the PEL without regard to the use of a respirator wash their hands and face prior to eating, drinking, smoking or applying cosmetics.

“lunchroom” within the meaning of the cited standard. In any event, other evidence establishes that Atlantic had a large, high-speed fan in the lunchroom that maintained the room under positive pressure, as required by the standard.

The Secretary also met his burden of proving that the employees in question entered into this “lunchroom” while wearing “protective work clothing” within the meaning of the cited standard. The record does not establish what any particular employee was wearing when Turner observed him entering the lunchroom. Nevertheless, while it is likely on this record that some employees wore ordinary street clothing and others removed protective clothing before entering the lunchroom, the record also creates a reasonable inference that one or more of the employees was wearing “protective work clothing.” The photographic exhibits of employees working throughout the plant indicate that the washable “protective work clothing” provided by Atlantic was indeed a “uniform,” *see supra* note 43, consisting of a dark blue shirt and matching pants, and that the wearing of these uniforms was sufficiently common that Turner undoubtedly observed an employee wearing such a uniform going in and out of the lunchroom. We conclude that Atlantic had an obligation under the cited standard to assure that the employees who wore these uniforms removed the surface lead dust from them before entering the lunchroom.

We reject Atlantic's claim, *supra* Part IX A, that the standard requires vacuuming of “protective work clothing or equipment” only if the employee in question has been working in a “high lead area,” resulting in exposure above the PEL. Under the principle “*expressio unius est exclusio alterius*,” the fact that the Secretary expressly limited section 1910.1025(i)(4)(i) & (iii) to “employees who work in areas where their airborne exposure to lead is above the PEL,” while failing to include that limitation in its companion provision--the cited standard, section 1910.1025(i)(4)(iv)--is considered compelling evidence that the Secretary deliberately decided *not* to limit the scope of the *cited standard* to employees who are exposed above the PEL. *See supra* note 47.

Further support for this conclusion is found in another recognized principle of regulatory construction, *i.e.*, that a standard should be interpreted in a manner that is consistent with the standard's purpose. *See, e.g., Hackney, Inc.*, 16 BNA OSHC 1806, 1808, 1994 CCH OSHD ¶ 30,486, pp. 42,112-13 (No. 91-2490, 1994). Here, Turner testified that the purpose of section 1910.1025(i)(4)(iv) is to prevent the transfer of lead from the workplace into the lunchroom, where employees could then ingest the lead while eating, drinking, smoking, etc. Since a clean lunchroom can be contaminated by an employee who has worked in low lead areas, the Secretary's interpretation of the standard clearly promotes achievement of the standard's objective.

Noncompliance. We reject Atlantic's argument to the effect that the Secretary failed to establish noncompliance with the cited standard because he failed to prove that any employee had “surface lead dust” on him when he entered the lunchroom “or that the employee's method of

removing surface lead dust from [himself] was inadequate." As indicated, there is no direct evidence that any employee observed by Turner actually had "surface lead dust" on his clothing. However, Atlantic failed to rebut Turner's testimony that the employees she observed had previously worked "in lead exposed areas" and yet "were not removing their dust from their clothes prior to coming in." We also rely on the compliance officer's testimony that, during her inspection, she had determined that "at one point or another" lead dust contamination was present on every surface in Atlantic's lunchroom, and that such surface lead dust was detected on each of the three days that she conducted wipe sampling in the lunchroom. These conditions reoccurred repeatedly despite Atlantic's regular, daily cleaning of the surfaces in the lunchroom. *See infra* Part X.

The inference that we draw from this set of facts is that lead was being introduced into the lunchroom through some means on a basis that was just as regular as the daily cleanings. Contrary to Atlantic's claims, this was not the result of drafts created when employees opened the door to the lunchroom. In a lunchroom like Atlantic's that was maintained under positive pressure, "if you open the door, the lead would not flow in, things would blow out." We also note IH Turner's testimony that she had not observed anything "other than exposed employees" entering the lunchroom that might have introduced lead into the lunchroom, but that "lead accumulations could come into the lunchroom" on the clothing of the employees. We therefore conclude that the presence of the lead in the lunchroom and the explanatory opinion testimony of IH Turner provide an adequate basis for finding (a) that the employees observed by Turner had lead on their clothing when they entered the lunchroom because (b) they had failed to remove it after working in "lead exposed areas."

Access. As we observed, *supra* note 46, the Secretary's evidence establishes that Gallman was exposed to a lead ingestion hazard on November 7, 1989, under circumstances that were essentially the same as those shown in photographic Exh. C-30. The evidence also establishes that Gallman was potentially exposed to a lead ingestion hazard at other times during the 1989-90 inspection, when Turner observed him eating his lunch at the blue table. Knowledge. The Secretary has also sustained his burden of proof on the knowledge issue. "As one means to discharge this burden [of proving actual or constructive knowledge of the violative conditions], the Secretary may show that: (1) conditions prohibited by an OSHA standard could occur unless . . . employees followed certain safety rules; and (2) the employer failed to take adequate steps to obtain their compliance with the necessary safety rules." *CF & T Available Concrete Pumping, Inc.*, 15 BNA OSHC 2195, 2197, 1991-93 CCH OSHD ¶ 29,945, p. 40,936 (No. 90-329, 1993). Here, the first part of the *CF & T* test has clearly been met. The cited standard by its terms requires the employer to "assure" certain, desired conduct on the part of the employees, *i.e.*, that the employees vacuum themselves (or use some other method to remove surface lead dust from their

protective clothing and equipment) before entering their lunchroom. The only realistic method for assuring that the employees act in this manner is to establish and enforce a work rule that requires them to do so.

Atlantic had a formal work rule that was more than adequate to ensure compliance with the cited standard. Paragraph 7(I) of the 1987 Compliance Program instructed employees to "*use vacuum before going into locker room, or wash room or lunch room*" (emphasis added). However, the record conclusively demonstrates that the rule was violated with impunity. Turner testified without contradiction that, over the course of the three days she specified, she had observed all five of Atlantic's production employees commit violations of the work rule embodied in paragraph 7(I). President Migell not only failed to rebut Turner's testimony, he essentially corroborated it, testifying that employees were only required to vacuum themselves if they had been working in "high lead areas," meaning areas where they were exposed to lead concentrations in excess of the PEL. We therefore find that Atlantic "failed to take adequate steps" to "assure" that its employees working in "lead exposed areas" removed surface lead dust from their work clothing before entering the lunchroom, and that it had the requisite constructive knowledge of the possibility that such employees might enter the lunchroom without using the vacuum.

C. Classification and Penalty

We also find that the violation was willful. Atlantic was well aware of its obligation under the cited standard, as consistently interpreted and applied by OSHA. It had been cited three times previously (an August 1979 citation, a January 28, 1986 citation, and the October 30, 1986 FTA notification) for violating that standard. Moreover, the language of at least one of those prior citations (the January 1986 citation) clearly informed Atlantic that *all* employees entering the lunchroom after working in "lead exposed areas" must remove the surface lead dust from their protective work clothing, regardless of whether the airborne lead levels in their work areas were above or below the PEL. We assume that the formal work rule quoted *supra* Part IX.B (paragraph 7(I) of the compliance program) was adopted for the purpose of abating the violation described in the October 1986 FTA notification ("[a]s of 8/22/86, employees exposed to lead . . . [in twelve specified areas of the plant] still enter the lunch/wash/change room or Bob Bramm's office, to eat, while wearing protective clothing, from which, surface lead dust, has not been removed"). Nevertheless it is clear that, sometime after it entered into the 1987 Settlement Agreement, Atlantic unilaterally decided to abandon its formal work rule and "to adopt a policy deviating from that which OSHA ha[d] pronounced to be the correct course of action under [the cited] standard." *Johnson Controls, Inc.*, 16 BNA OSHC 1048, 1051, 1993 CCH OSHD ¶ 30,018, p. 41,142 (No. 90-2179, 1993) (citing *RSR Corp. v. Brock*, 764 F.2d 355, 363 (5th Cir. 1985)). Such a decision "is willful behavior unless supported by a reasonable belief, held in good faith, that the company's policy is correct." *Id.* Even if we were to find that Migell believed that his position that

vacuuming was only required for employees from high exposure areas complied with the standard, we could not conclude that Migell or Atlantic had "a reasonable belief, held in good faith, that the company's [unilaterally adopted] policy [was] correct." *Id.* On the contrary, Atlantic knew or should have known, based on the prior citations, that its policy was incorrect. The instant violation is properly characterized as willful.

Despite our affirmance of the Secretary's charge that Atlantic willfully violated section 1910.1025(i)(4)(iv), we substantially reduce the penalty assessed by the judge, primarily because of the paucity of evidence concerning the most critical factor, the "gravity" of the instant violation. During her testimony, Turner failed to identify a single *specific instance* where she had first observed a particular employee wearing protective clothing in a work area where he was exposed to airborne lead or surface lead dust and then later observed that same employee entering into the lunchroom without removing the dust from his clothing. Thus, we could only speculate as to which, if any, of the five production employees observed by Turner may have actually had "somewhat microscopic" accumulations of lead dust on their clothing when they entered the lunchroom. This record also provides no indication what any particular employee may have worn into the lunchroom when he was observed by Turner or whether he entered wearing the same clothes he had previously worn at his work station without first removing disposable or removable protective garments. These distinctions are critical because only employees wearing "protective work clothing" are required under the terms of the cited standard to remove the surface lead dust from their clothing. Nor do we know how much lead dust the employees may have brought with them into the lunchroom and the extent of the hazard this may have created.

In assessing a penalty, we give Atlantic credit for taking significant steps to provide and maintain a lead-free lunchroom. The room in question was used for eating and drinking by only one or two employees, and the only eating surface in the room, the top of the blue table, was shown by the Secretary's own wipe samples to be free of any lead accumulations on three of the four occasions when samples were taken.

On the other hand, two factors--the employer's past history and our finding of willfulness--weigh against the assessment of a nominal penalty. Balancing all of the factors listed in section 17(j), we assess a penalty of \$800 for item 4 of citation no. 2.

X. CITATION NO. 3

Citation no. 3 alleged a repeated violation of 29 C.F.R. § 1910.1025(h)(1)⁴⁸ and proposed a penalty of \$720. The citation alleged that Atlantic violated the cited standard in the following manner:

⁴⁸ The cited standard provides, as follows:

All surfaces were not maintained as free as practicable of accumulations of lead:

Whatman smear wipe samples resulted in the following:

(a) On 11/7/89 an accumulation of lead was found on the following surfaces in the lunchroom/breakroom:

1. Blue lunch table = 7.577 micrograms/100 cm² and 32.621 micrograms/100 cm²;
2. Telephone = 50.510 micrograms/100 cm²;
3. Table with table cloth, next to the window = 11.575 micrograms/100 cm².

(b) On 12/5/89 an accumulation of lead was found on the following surfaces in the lunchroom/breakroom:

1. Table with table cloth, next to the window = 16.837 micrograms/100 cm²
= 19.994 micrograms/100 cm²,⁴⁹
2. Telephone = 662.949 micrograms/100 cm²;
3. Condiment canister (on table with table cloth) = 10.523 micrograms/100 cm².

(c) On 2/15/90 an accumulation of lead was found on the following surfaces in the lunchroom/breakroom:

1. Table with table cloth, next to the window = 18.941 micrograms/100 cm²;
2. Telephone = 136.799 micrograms/100 cm²;
3. Condiment canister (on table with table cloth) = 9.997 micrograms/100 cm².

The Atlantic Battery Co. Inc. was previously cited for a violation of this occupational safety and health standard or its equivalent standard 1910.1025(h)(1) which was contained in OSHA inspection number 100044082, citation number 1, item number 6a, issued on 1/28/86 and OSHA inspection number 101034478, citation number 1, item number 6b, issued on 10/30/86.

IH Turner testified that this citation specifies "the different days that I visited the facility and conducted wipe sampling in the lunchroom where . . . the results received from the lab noted that there [were] accumulations of lead on the work surfaces." Out of fifteen samples taken over the three days identified in the citation, eleven picked up some lead dust, while four contained no
(..continued)

§ 1910.1025 Lead.

(h) *Housekeeping--(1) Surfaces.* All surfaces shall be maintained as free as practicable of accumulations of lead.

⁴⁹ The dual listings under subitem 1(b)1 of citation no. 3 are not a typographical error. Instead, they represent two separate wipe samples that were both taken from the "table with table cloth" on the same day (12/5/89). See Exh. C-41.

lead dust. Three of the four lead-free samples were obtained from the blue table shown in photographic Exh. C-30, where employee Gallman consistently took his rest and lunch breaks. *See supra* note 46. There is no evidence that any other surface in the lunchroom was used as an eating surface. Specifically, there is no evidence that anyone ate or drank at the "[table with table cloth, next to the window," which is shown in photographic Exh. C-29. Turner testified without contradiction that her wipe sampling in the lunchroom established the presence of "some surface contamination" on "all" surfaces in the room "at one point or another."

This record also shows that Atlantic had made substantial efforts to comply with its obligation under the cited standard, after receiving the prior citation and FTA notification that are identified in the instant citation's description of the alleged violation, as quoted *supra*. Throughout the 2-year observation period preceding the 1989-90 inspection, Atlantic consistently reported that "[d]aily housekeeping to maintain work surfaces and eating surfaces free of lead accumulation" had been performed by employee Jean Simon, who worked at the plant (according to Atlantic's review brief) as a "full-time janitor assigned to clean and vacuum the plant daily." Atlantic also reported, in each of its nine reports, that Migell had personally observed Simon several times during each reporting period "using the vacuum, followed by wiping surfaces with wet paper towels, which are disposed of in the appropriate container." Beginning with the fourth report, Atlantic informed OSHA that Simon had begun following up on his vacuuming by hosing down the surfaces, and the sixth report indicated that Simon had begun using all three procedures (vacuuming, wiping, and hosing down).

Turner's investigation did not undermine Atlantic's claims. On the contrary, the compliance officer testified that she had also seen Simon cleaning the lunchroom "every day I was there." When she asked Simon how often he cleaned the lunchroom, he informed her that "he would do it generally twice a day." (Similarly, Migell testified that "we washed [the lunchroom] twice a day"). When president Migell solicited Turner's opinion about Simon's efforts, she agreed with Migell that Simon "was diligently trying to keep [the lunchroom] clean." Nevertheless, Turner concluded that Atlantic had failed to comply with the cited standard. In essence, she reasoned that, because three of the four times wipe samples were taken from the surface of the blue table, the sampling had shown a total absence of lead accumulations (0 μg), it was "possible" to maintain all of the surfaces in the lunchroom "free of lead." In particular, she testified, if tables "are wiped down appropriately, using something clean to wipe them down, you should not be able to find anything [in regards to lead accumulation], because that was documented in the situation with the blue table."

We disagree. On this record, it is undisputed that the lunchroom was cleaned and the surfaces of the tables were washed every day--in fact, twice a day. Indeed, Atlantic devoted a full 20 percent of its production workforce to the task of complying with OSHA's housekeeping

standard. One out of five production employees worked full time vacuuming and cleaning the workplace. Nor does this record create an inference that Atlantic's housekeeping program was deficient. Instead, we conclude that the recurring presence of lead dust accumulations in the lunchroom was due to Atlantic's failure to "assure" that its employees did not bring lead dust into the lunchroom with them, as found *supra* at Part IX.

For the reasons set forth above, we find that it was not "practicable" for Atlantic to implement a more stringent housekeeping program in its lunchroom. We therefore vacate citation no. 3 on the ground that the Secretary failed to prove Atlantic's noncompliance with the cited standard.

XI. CITATION NO. 1, ITEM 6

Item 6 of citation no. 1 alleged a serious violation of 29 C.F.R. § 1910.1025(g)(2)(vii)⁵⁰ and proposed a penalty of \$300. The citation alleged that Atlantic violated the cited standard in the following manner:

On 12/5/89, employer did not ensure that containers of contaminated protective clothing and equipment required by (g)(2)(v) were not (sic) labeled as follows: "CAUTION: CLOTHING CONTAMINATED WITH LEAD. DO NOT REMOVE BY DUSTING, BLOWING OR SHAKING. DISPOSE OF LEAD CONTAMINATED WASH WATER IN ACCORDANCE WITH APPLICABLE, LOCAL, STATE, OR FEDERAL REGULATIONS." Contaminated protective clothing stored in an unlabeled wooden container.

IH Turner testified that this citation item was based on her observation of a "closed" wooden container, partially filled with dirty work clothes, in the change room at Atlantic's workplace.⁵¹ The parties have stipulated that the compliance officer correctly identified the contents of this box:

⁵⁰ The cited standard and its companion provision, which is incorporated by reference, establish the following requirements:

§ 1910.1025 Lead.

....
(g) *Protective work clothing and equipment.* . . .

....
(2) *Cleaning and replacement.* . . .

....
(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-room 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) are labelled 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.

⁵¹ The record establishes that this same wooden container had been used for the same purpose at Atlantic's workplace for at least ten years. In August 1979, Atlantic had been cited for an other than serious violation of 29 C.F.R. § 1910.1025(g)(2)(v), *see supra* note 50, because "[c]ontaminated clothing to be laundered was not placed in a closed container to prevent dispersion of lead outside the container." Instead, the "[c]lothing was placed in a bin with no top inside the washroom/lunchroom." We find that the wooden box at issue in the instant citation item was the same "bin with no top" that was referred to in the 1979 citation, although a lid had been attached to the container sometime during the interval between the two inspections.

A container of clothing located near the shower during the 1989-90 OSHA inspection contained dirty clothing used by Atlantic Battery employees while working in the manufacturing part of the plant. Atlantic Battery employees who worked in the manufacturing part of the plant always placed their dirty work suits in that container after using them.

According to Turner, no sign or warning was affixed to the container at the time she observed it, and it was "unlabeled as far as what the contents of the container and the hazards are." She described the hazard created by the unlabeled box, as follows: "[I]f . . . [anyone comes by and disturbs the container, by shaking it or stirring up] the work clothes, they would be creating a high concentration of lead in air and contamination in . . . [a change room] should be minimal."

President Migell testified that, both before and after the 1989-90 inspection, Atlantic had provided various forms of labeling for its wooden container. Prior to the inspection, there had been "a small paper sign that was on the end of this container," but "somehow it was damaged and removed." Migell further testified that "there was some writing in yellow crayon on the cover of the container" at the time Turner photographed it, but that the side of the box on which the writing appeared is not shown in either of the photographic exhibits. Migell implicitly conceded, however, that neither the paper label nor the crayon writing used the specific language that is required under the cited standard. After the 1989-90 inspection, Atlantic obtained a new "manufactured" sign and affixed it to the container.

We conclude that the Secretary has clearly sustained his burden of proving this alleged violation. Even if we were to credit president Migell's claim concerning the yellow crayon writing on an unphotographed side of the box, we would nevertheless sustain the judge's finding that Atlantic failed to provide the specific hazard warning required under the cited standard. We also have little difficulty on this record in finding that the Secretary has additionally proved the other three elements of this alleged violation (applicability of the cited standard, employee access, and employer knowledge).

Accordingly, the only real issue concerning this citation item is the proper classification of the violation. In his decision, the judge implicitly credited Turner's opinion testimony, concerning the hazard created by the cited conditions. Citing the stipulation of the parties that the wooden box contained dirty work clothes and president Migell's description of that clothing as being "contaminated," the judge found that the clothing could "add to [the] lead particles in the air" if it were "shaken or stirred" and therefore concluded that the cited conditions clearly "create[d] a potential for increasing lead exposure." Based on this finding, he affirmed the Secretary's classification of the instant violation as "serious." On review, Atlantic takes exception to the finding.

We need not and do not resolve this dispute. Resolution of this issue will not affect the abatement requirement or penalty here, and neither party's rights will be adversely affected. *See Foster-Wheeler Constructors, Inc.*, 16 BNA OSHC 1344, 1349-50 (No. 89-287, 1993). We therefore exercise our discretion not to decide whether Atlantic's violation of the cited standard was serious and affirm the instant citation item as an unclassified violation of the Act. We also affirm the judge's assessment of a \$300 penalty, which is "appropriate" in light of the penalty factors listed in section 17(j) of the Act, 29 U.S.C. § 666(j). In particular, we emphasize Atlantic's receipt of a prior citation for violating a closely-related standard, section 1910.1025(g)(2)(v), as it applied to the same container that is at issue here and Atlantic's obvious awareness, at the time of the instant violation, that labeling of the container was required under the OSHA standards.⁵²

XII. CITATION NO. 1, ITEM 7

A. Background

Item 7 of citation no. 1 alleged a serious violation of 29 C.F.R. § 1910.1025(h)(3)⁵³ and proposed a penalty of \$300. The citation alleged that Atlantic violated the cited standard in the following manner:

Establishment: On 12/5/89 and 2/15/90, vacuums were not emptied in a manner which minimized the reentry of lead into the workplace. Lead emptied from the vacuum cleaner was placed in an open container in the workplace.

As this description of the alleged violation suggests, the instant citation item was based on IH Turner's observation of two distinct but similar situations ("the first incident" and "the second incident"). The witness described the first incident, as follows:

On 12/5/89, I spoke with employee Jean Simon, who was vacuuming. I asked him, where were the contents of the vacuum cleaner bags emptied when it was ready,

⁵² Commissioner Montoya would find the hazard described by the compliance officer and found by the judge to be at best a hypothetical possibility. She concludes that a penalty of \$100 would be appropriate for this violation.

⁵³ The cited standard provides, as follows:

§ 1910.1025 Lead.

....

(h) *Housekeeping*. . . .

....

(3) *Vacuuuming*. Where vacuuming methods are selected [for the cleaning of floors and other surfaces that is required under sections (h)(1) and (h)(2)], the vacuums shall be used and emptied in a manner which minimizes the reentry of lead into the workplace.

when it was time for a disposal. He took me to the battery charging area, to the rear end of it, and showed me an open . . . pan, in the workplace, and he told me that that's what it was.

When asked what she had seen in the metal container that Simon had shown her, Turner replied, "It was dust, dirt, dust."

As photographic Exhs. C-31, C-32 and C-33 and Turner's diagram of the workplace (Exh. C-15) reveal, the container observed by Turner was located inside the plant, in a relatively open area near a wall. Several stacked cans of paint were on one side of the container, and a large pail that was apparently used in mixing the paint was on the other. The storage area where all of these objects were found was not far from two manufacturing operations, battery charging and spray painting. The two manufacturing operations and the storage area were apparently all contained within one large room, and they were not separated from one another by internal barriers.

The primary factual dispute over this first incident relates to the extent of employee access to the storage area. Turner testified that the metal pan "was stored out in the open, in an area where employees would have frequent access to [it] and would be working and it could be disturbed." Later, she specified that "[e]mployees go through that area because they paint near that area and the paints are stored in that area." She identified one specific Atlantic employee (Franklin Augustine) whom she had observed "going in and out [of] that area during the time I was there."

President Migell testified that the Secretary's three photographic exhibits depicted the waste lead container in the midst of a skid of "house paints" used by the painting contractor and not the "industrial enamels" that Atlantic's employees use in painting batteries. Migell testified that the only time an Atlantic employee was "even near" the storage area shown in the photographs was when an employee painted batteries, using paints that are not shown in the photographs, and that, on average, less than 30 minutes a week were devoted to that operation. He suggested that the painting contractor, and not Atlantic's employees, had created the conditions that are at issue here, by (a) moving the waste lead container from its customary location (in the outdoors patio/storage area) and (b) failing to re-cover it after moving it. The judge apparently considered this testimony to be speculative. He therefore asked Migell to specify what he *knew* about the cited working conditions based on his own "personal knowledge." In response, Migell testified that the lead emptied from the vacuum cleaner was "normally . . . covered" and that it was certainly Atlantic's "intent" that it be covered.

Turner observed the second open container into which lead from vacuums was emptied, on the patio of the plant, on February 15, 1990. Laboratory analysis of a bulk sample taken from this "waste" subsequently revealed that it was 20 percent lead dust. Turner testified that access between the outdoor patio/storage area, where this second container was found, and the rest of the facility was through a "roll-up door," which was approximately 6 feet away from the container.

Again, the primary factual dispute between the parties is over the extent of employee access to the area where this second container was found, an area that Migell indicated was its proper location. Turner testified that the patio area was used for the storage of "some old equipment" and two "55-gallon containers of chemicals," which she believed were partially filled with ammonium hydroxide and toluene, respectively. Although she did not see any employees working in or walking through the patio/storage area and the roll-up door remained shut throughout her inspection, Turner concluded that the area was accessible to employees because they would have to go out to the patio to resupply themselves with the stored chemicals. Migell, however, testified (a) that Atlantic had *two empty drums of ammonium hydroxide* at the workplace because "[t]hey have to go back for credit" and (b) that both toluene and ammonium hydroxide were chemicals that Atlantic "used to use" in its operations.

Because both of the containers at issue were uncovered at the time Turner observed them, the Secretary argues (and the judge found) that they were both in violation of paragraph 1(I) of the 1987 Compliance Program, which provided, as follows:

The vacuum filters and collection bag will be replaced as often as assigned by supervision.

Discarded filters and bags will be placed in the covered "scrap" barrel.⁵⁴

Turner also relied on the absence of a cover as one of two determinative factors that led her to conclude that Atlantic had failed to store the debris emptied from its vacuum cleaner in a manner that "minimizes the reentry of lead into the workplace." She reasoned that Atlantic had failed to comply with the standard's requirement because (1) the debris was stored in uncovered containers and (2) the containers were located in areas that were accessible to employees. The record does not establish the length of time that either container had remained uncovered.

B. Analysis

We find that the Secretary has established Atlantic's noncompliance with the cited standard.⁵⁵ At the outset, we decline to adopt IH Turner's two-pronged test for determining

⁵⁴ In his decision below, the judge essentially affirmed the instant citation item based on his determination that Atlantic had failed to comply with paragraph 1(I), as quoted above. However, for the reasons we have set forth previously, *see supra* Background, Section C, we conclude that the issue before us is not whether the requirements of the 1987 Settlement Agreement (including its attached compliance program) were violated, but rather whether the requirements of the cited standard were violated. The distinction is important here because the cited standard does not expressly require that lead waste disposal containers be covered. We therefore further conclude that the judge erred in basing his decision on Atlantic's noncompliance with the compliance program.

noncompliance. Indeed, we conclude that the Secretary, as well as Atlantic, has implicitly acknowledged that other factors in addition to the lack of a cover and the accessibility of the container (*e.g.*, the depth of the container) may be relevant in determining whether a particular waste lead disposal container meets the standard's requirements. In determining whether the Secretary has established a violation of analogous, broadly-worded performance standards, the Commission has applied a "totality" of all the relevant "circumstances" test. *See infra* Part XIII.

Applying that test here, we conclude that the Secretary has clearly established Atlantic's noncompliance with the cited standard at the time of the first incident on December 5, 1989. The first container that Turner observed was in relatively close proximity to two work areas, and the available evidence suggests that there were no partitions separating that container from those work areas. Insofar as employee access is concerned, Turner saw at least one employee (Augustine) going in and out of the storage area where the container was located, and president Migell essentially admitted that employees would have to go near the container when they engaged in spray painting operations. In addition, it appears that the painting contractor could have inadvertently tipped the shallow, uncovered metal container over in the process of obtaining access to his house paints and equipment, which were stored right next to the container.⁵⁶ Based on all of

(..continued)

⁵⁵ We reject the Secretary's argument on review that Atlantic has admitted its noncompliance with the cited standard. Atlantic has not disputed the Secretary's evidence that the two waste containers at issue were both uncovered at the time IH Turner observed them. It has also stipulated that the waste emptied into the two containers included lead dust that had been vacuumed from the floors and other surfaces of its workplace. Nevertheless, we conclude that Atlantic has challenged and that it continues to challenge the Secretary's allegation that it failed to comply with its obligation under the cited standard to empty its vacuum "in a manner which minimizes the reentry of lead into the workplace."

⁵⁶ We find, based on president Migell's testimony, that the paints shown in the three photographic exhibits were in fact "house paints" used by the painting contractor rather than the spray enamels used by Atlantic in painting batteries, as Turner apparently assumed. In the context of the instant violation, however, we conclude that Atlantic's reliance on this fact is misplaced. From the viewpoint of the standard's performance objective, *i.e.*, minimizing the risk of vacuumed lead waste re-entering the workplace, it is irrelevant whether it is an Atlantic employee or an independent contractor who causes the improperly stored lead waste to be re-introduced into the work areas.

We also reject Atlantic's other defenses to the alleged violation on December 5, 1989. As the Secretary points out, there is no "unpreventable misconduct defense" that is recognized in the case law when the conduct at issue is the conduct of an independent contractor working on the cited employer's premises. That defense is restricted to *employee* misconduct. We also agree with the

these "circumstances," we find that, on December 5, 1989, Atlantic did not store its emptied vacuum lead waste "in a manner which minimizes the reentry of lead into the workplace."

Having affirmed the instant citation item with respect to the first incident described in the citation's allegation, we decline to rule on the dispute over whether Atlantic also violated the cited standard at the time of the second incident. Thus, we conclude that the classification of the violation as serious and the judge's assessment of the proposed \$300 penalty are both fully supported by the record evidence, regardless of whether we consider only the first incident or both incidents. We emphasize the potentially grave consequences of employee exposure to airborne or surface lead dust. We also conclude that the evidence set forth above establishes that there was a relatively high risk that Atlantic's improper storage of the waste lead on December 5, 1989, could have resulted in the re-entry of that waste lead into the work areas. In view of the gravity of this first instance of violation, a \$300 penalty is by no means too high for that instance alone.⁵⁷

XIII. CITATION NO. 1, ITEM 1

Item 1 of citation no. 1 alleged a serious violation of 29 C.F.R. § 1910.151(c)⁵⁸ and proposed a penalty of \$360. The citation alleged that Atlantic violated the cited standard in the following manner:

(..continued)

Secretary that Atlantic's defense to this citation item is more closely analogous to a "multi-employer worksite defense." Under the case law relating to that defense, we would have to reject Atlantic's argument here because Atlantic clearly had "control" over the cited conditions, *e.g.*, the authority and the ability to place a cover over the metal container or to move the container back to the patio/storage area where it was supposed to be kept. We also summarily dismiss Atlantic's lack-of-knowledge defense. Since the cited conditions were in a relatively conspicuous location and readily observable by anyone passing by, we find that Atlantic could have known of those conditions with the exercise of reasonable diligence. Finally, we are not persuaded by Atlantic's claim that this citation should be vacated because it normally covered its lead waste disposal containers. As indicated, when Turner returned to the workplace on February 15, 1990, she again found the lead waste being stored in an uncovered container.

⁵⁷ Because the Secretary's proposal of a \$300 penalty was based on two distinct and independent violations of the cited standard and yet the Commission has sustained the alleged violation only with respect to the first of the two cited incidents, Commissioner Montoya would find that the gravity of this violation was less than the Secretary believed it to be. She concludes that a penalty of \$150 would be appropriate.

⁵⁸ The cited standard provides, as follows:

§ 1910.151 Medical services and first aid.

....

- (a) Charging Area/Acid Filling Area: Employer did not provide suitable facilities for flushing of the eyes. Employees use such chemicals as sulfuric acid, ammonium hydroxide, lead, paints, paint thinners and lacquers.

IH Turner testified that this citation item was based on her observation of "a makeshift eyewash" in the battery filling area. More specifically, she described the eyewash facility as a "hose which has some type of spray nozzle with a handle attached to it," and she identified Exhs. C-19 and C-20 as photographs of the apparatus in question.⁵⁹ The parties stipulated the following:

At the time of the 1989-90 OSHA inspection, Atlantic Battery employees worked several hours a week in the acid mixing/charging area of the plant. The quick drenching or flushing mechanisms for the eyes and body provided by Atlantic Battery at that time consisted of an [aerated] hose on the wall in the acid mixing room.⁶⁰

(..continued)

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

⁵⁹ In both its post-hearing brief and its arguments before the Commission, Atlantic has challenged Turner's description of the eyewash facility in question as a "makeshift eyewash." At the hearing, however, Atlantic failed to introduce any evidence to rebut Turner's description.

⁶⁰ Although the instant citation item implicitly alleges that "sulfuric acid, ammonium hydroxide, lead, paints, paint thinners and lacquers" were all "injurious corrosive materials" that posed a risk to the eyes of Atlantic's employees, within the meaning of the cited standard, *see supra* note 58, Turner's testimony concerning this item focused almost exclusively on the hazard of exposure to sulfuric acid. The Secretary's theory of the case therefore appears to be that any eyewash facility that would be adequate ("suitable") in view of the risk of contacting sulfuric acid would also be an adequate response to the hazard posed by the other listed substances. We have no alternative but to also proceed on that basis since the record is not sufficiently developed to allow us to independently evaluate the hazard posed by the other listed substances.

Insofar as the sulfuric acid hazard is concerned, we note initially that only one employee (John Gallman) has been identified on this record with the three operations that most directly involved work with sulfuric acid--acid mixing, battery filling, and battery charging. In Part VII, *supra*, we evaluated the evidence concerning Gallman's alleged exposure to sulfuric acid during battery charging operations, and we concluded that the risk of contact with the sulfuric acid solution that was contained in the batteries (a mixture of acid and water) was not great enough to mandate the wearing of protective eyewear. We also credited president Migell's testimony concerning the battery filling operations at Atlantic's workplace. As described by Migell, battery filling is a mechanized and automated process that virtually eliminates the possibility of contact with the sulfuric acid solution while the batteries are being filled. Given our discussion in Part VII, we assume that the most hazardous of the three operations was the acid mixing operation, which

Based on her observations, IH Turner testified that the facility was unsuitable for quick flushing of the eyes because an employee would have to "reach across a conveyor type apparatus to get to [the eyewash]," which was hung "up on the wall" directly above the conveyor. Turner further claimed that the apparatus was also unsuitable for use as an eyewash because an employee would have to hold the device with one hand while opening only one eye with the other. It therefore "would be impossible for him to flush both eyes at the same time with this type of apparatus." When asked "[w]hat type of apparatus would be suitable in this situation," Turner replied, as follows: "An apparatus . . . that was made specifically for the flushing of the eyes, which would allow the employee to flush both eyes at the same time and provide a continuous flow of water to the eyes." We construe this testimony as a claim that only an eyewash fountain would have satisfied Atlantic's legal duty under the cited standard.⁶¹

President Migell disputed Turner's claim that the hose was not suitable. He testified that the apparatus was "right in the area [where it was] needed" and "within six feet of where it was used."⁶² He testified that the facility was "accessible," meaning that "we were able to reach that and perform the necessary flushing." Migell stated that Atlantic had installed the aerated hose apparatus after a different OSHA compliance officer had recommended the device to the company "[a]pproximately ten years ago." He conceded that this advice was not in writing and that no citation had been issued in conjunction with the incident. Migell also claimed that, during the several OSHA inspections that had been conducted over the course of the 10-year interval, no

(.continued)

(unlike the other two operations) presumably involved a risk of exposure to *undiluted* sulfuric acid. There is, however, no description in the record of the acid mixing operation at Atlantic's workplace.

⁶¹ We note that Atlantic construed Turner's position in this same manner. According to president Migell, Atlantic installed "the type of wash station that was suggested" by Turner within ninety days after receiving the citation now under discussion ("We didn't agree with [her suggestion] 100 percent, but it does sound like a better system, so we incorporated it"). Atlantic also introduced into evidence (as Exh. R-2) a diagram of the new "wash station." The diagram clearly establishes that the eyewash facility "suggested" by Turner was an eyewash fountain.

⁶² We construe this testimony as referring to the proximity of the eyewash facility to the acid mixing area. While the facility was also close to the battery filling operation, the evidence concerning that mechanized, automated operation strongly suggests that it was the acid mixing area and not the battery filling area where the eyewash was "needed" and "used." *See supra* note 60 (likelihood that acid mixing was the most hazardous of the three operations involving sulfuric acid).

In its review brief, Atlantic expanded on Migell's testimony by asserting that "the [cited] eyewash functioned properly and was used successfully many times since it was first installed ten years ago."

comment had ever been made about the aerated hose apparatus being inadequate and no citations had been issued.

The judge affirmed the alleged violation based on the compliance officer's opinion testimony to the effect that only an eyewash fountain would have satisfied the employer's obligation under the cited standard. We conclude that the judge erred. Under Commission precedent, whether an employer has complied with its obligation to provide "suitable facilities" within the meaning of section 1910.151(c) depends on the "totality" of the relevant "circumstances," including the nature, strength, and amounts of the corrosive material or materials that its employees are exposed to; the configuration of the work area; and the distance between the area where the corrosive chemicals are used and the washing facilities. *See, e.g., Con Agra Flour*, 16 BNA OSHC at 1142, 1993 CCH OSHD at p. 41,235; *Bridgeport Brass Co.*, 11 BNA OSHC 2255, 2256, 1984-85 CCH OSHD ¶ 27,054, p. 34,860 (No. 82-899, 1984); *Gibson Discount Center, Store No. 15*, 6 BNA OSHC 1526, 1527, 1978 CCH OSHD ¶ 22,669, p. 27,357 (No. 14657, 1978). The Secretary bears the burden of proving that the facilities provided by the employer are not "suitable" within the meaning of the standard, a burden that he cannot meet merely by showing that the flushing apparatus provided was not an eyewash fountain. *E.g., E.I. duPont de Nemours & Co.*, 10 BNA OSHC 1320, 1324-25, 1982 CCH OSHD ¶ 25,883, pp. 32,381-82 (No. 76-2400, 1982).

Here, we conclude that the totality of the circumstances does not establish that Atlantic's flushing apparatus was unsuitable for its intended purpose. First, the record evidence does not establish that the strength and amount of the sulfuric acid used by Atlantic were such that only an eyewash fountain could adequately protect the exposed employee(s). Second, we have found that two of the operations in question do not present a hazard that even requires personal protective equipment. The employees involved in battery charging operations were not required to wear protective eyewear, and battery filling presents virtually no exposure to sulfuric acid. The acid-mixing operation is not even described in the record. In addition, Migell testified that the hose was located "right in the area" where it was most needed. Finally, we have no basis on which we can independently evaluate the claim that the conveyor impeded employee access to the eyewash. (We note, however, that the claim was contradicted by Migell's testimony that the aerated hose had been successfully used on a number of occasions.) Turner's testimony does not indicate whether the conveyor in question was functional or merely a stationary object. Nor do we know its dimensions or the distances between the conveyor and the floor and the conveyor and the eyewash facility.

We also note that, in another case where employees were potentially exposed to sulfuric acid, the Commission held that eye-drenching facilities were "suitable" within the meaning of the cited standard even though access to them was obstructed by "an outdoor storage tank[.]. . . [a] delivery truck and lines, and the door into the building containing the eyewash and shower."

Bridgeport Brass, 11 BNA OSHC at 2256, 1984-85 CCH OSHD at p. 34,860. The conveyor at issue here certainly created no greater obstruction to access than the obstacles described in *Bridgeport Brass*. We therefore vacate this citation item on the ground that the Secretary has failed to prove noncompliance with the cited standard.

XIV. CITATION NO. 2, ITEM 6

Item 6 of citation no. 2 alleged a willful violation of 29 C.F.R. § 1910.1200(g)(8)⁶³ and proposed a penalty of \$3600. The citation alleged that Atlantic violated the cited standard in the following manner:

- (a) Employees are exposed to, but not limited to: toluene, sulfuric acid, ammonium hydroxide, ammonia, and spray enamel. MSDS for these chemicals are not readily accessible, in that they are maintained by a bookkeeper that only works one day a week.

We conclude, however, that the Secretary implicitly amended this citation item in his post hearing brief so as to delete the citation's references to toluene, ammonia, and ammonium hydroxide.⁶⁴

IH Turner testified that she based this citation item on her discussions with the five production employees--Augustine, Gallman, Vasiliades, Simon, and Gregory--and with company president Migell. Referring to the production employees as a group, she stated that they were

⁶³ The cited standard provides, as follows:

§ 1910.1200 Hazard communication.

....

(g) *Material safety data sheets.*

....

- (8) The employer shall maintain copies of the required material safety data sheets for each hazardous chemical in the workplace, and shall ensure that they are readily accessible during each work shift to employees when they are in their work area(s).

⁶⁴ As the judge pointed out at the hearing below, the allegations of the instant citation item and of citation no. 1, item 9, *see infra* Part XVI, were internally inconsistent. Thus, this citation item implied that Atlantic *had* "MSDS's" (material safety data sheets) for certain hazardous chemicals, but failed to make those MSDS's readily accessible to its employees, while citation no. 1, item 9, alleged that Atlantic *did not have* MSDS's for some of the same chemicals that are listed in this citation item. The judge asked the Secretary to address this inconsistency in his post hearing brief, and the Secretary responded by abandoning his charge under the instant citation item with respect to three of the listed chemicals ("toluene, ammonia and ammonium hydroxide. . . do not pertain to this item"). We construe the Secretary's response as an implicit amendment of citation no. 2, item 6, as quoted *supra*.

unaware of what material safety data sheets are, of where the MSDS's were located at Atlantic's workplace, and of what procedures they were supposed to follow in order to obtain access to the MSDS's. Specifically, they were not aware that Atlantic expected them to go to the office and ask the bookkeeper for access.

Turner further testified, as follows:

Q: . . . Did you talk to Mr. Migell . . . about this topic?

A: Yes. . . . [H]e informed me that these material safety data sheets were maintained by the office secretary/bookkeeper, which was Alice Sederis at the time.

And I was able to see some material safety data sheets, but they were not accessible to the employees. She only worked once a week, so she wasn't there pretty much. So . . . it was difficult to get to them.

. . . .

Q: Did you ask Mr. Migell to try to retrieve these material safety data sheets for you?

A: Yes, I did and he . . . referred me to the bookkeeper, Alice Sederis.

Q: Did he know where they were?

A: No.

Q: How do you know that?

A: He was not able to supply them to me. He consistently referred me to her.

Turner concluded that the MSDS's were not "readily accessible," as required under the cited standard, because "[t]he bookkeeper, Alice Sederis, only worked once a week" and, "[w]hen she was not there, they were not able to find the material safety data sheets that were requested." On cross-examination, Turner added that president Migell was the source of her information about the bookkeeper's work schedule, that she had made arrangements to come back in her subsequent visit(s) on the day that the bookkeeper worked, and that she had eventually obtained access to Atlantic's MSDS's.

Migell testified in effect that, at the time of the alleged violation, Atlantic met the test of accessibility under the cited standard, noting that the standard refers to access during an employee's work shift and that "[i]t doesn't say within 10 minutes or 15 minutes." Migell acknowledged that, at the time of the OSHA inspection, the bookkeeper worked only one day a week. However, the witness implicitly disputed the compliance officer's assertion that employees could only obtain MSDS's through the bookkeeper: "In a small company, many people do many jobs and it's not necessarily one person delegated just for that. When you have limited people and you only have one full-time person in the office."

IH Turner explained that the instant citation item had been classified as willful because of Atlantic's past history of violations of the hazard communication standard ("the HCS") and the inclusion of a section on hazard communication in the 1987 Compliance Program. Turner also asserted that the instant violation created a danger that "[e]m-ployees[,] not being aware of the contents or hazards of the materials that they're working with[,] may not take the appropriate protective measures to prevent exposure or know what to do when exposure occurs." As Turner testified, Atlantic had been cited previously, on October 30, 1986, for three other than serious violations of the HCS (Exh. C-3, citation no. 1). Item 1b of that citation alleged a violation of 29 C.F.R. § 1910.1200(e)(1) based on Atlantic's failure to develop and implement a formal, written hazard communication program for its Watertown, Massachusetts workplace. As indicated, Atlantic settled its contest of the October 30, 1986 citation in the 1987 Settlement Agreement (see Background, Section A). We therefore assume that paragraph 10 of the 1987 Compliance Program (an attachment to the settlement agreement) was designed to abate the contested violation of section 1910.1200(e)(1) by setting forth what is in essence a written hazard communication program.

The provisions of paragraph 10 that related specifically to MSDS's were the following:
 (C) MSD Sheets from suppliers will be kept on file by the office manager⁶⁵. Copies of MSD sheets will be kept in an accessible place for employee inspection. Copies will be provided on request. Employees will sign saying they received a copy.

.....
 (E) We rely on information supplied to us by the manufacturers via MSD sheets to determine the hazards of materials used in our company. This list will be amended as necessary.

(F) New employees will review copies of MSD sheets and receive instructions for handling hazardous materials. Regular employees will receive refresher instruction once annually.

Based on this record, Chairman Weisberg and Commissioner Foulke conclude that the Secretary has sustained his burden of proving noncompliance with the cited standard. In her testimony set forth in detail above, IH Turner stated that as a result of her discussions with president Migell and other information she had gathered at Atlantic's workplace, she had determined that (a) Migell did not know where the MSDS's were located, (b) Migell was "not able" to supply the MSDS's to her, and (c) when the bookkeeper was not in the office, Atlantic was "not able to find the material safety data sheets that were requested." At the hearing, Atlantic introduced no

⁶⁵ The record does not reveal whether Atlantic still had an "office manager" at the time of the 1989-90 inspection. It is clear from the record, however, that the responsibilities created under the 1987 Compliance Program with regard to MSDS's had subsequently been assigned to Alice Sederis. As indicated, Turner identified Sederis as the "office secretary/ bookkeeper," and Atlantic appears to accept that description of her position.

evidence that even casts doubt on the validity of any of these conclusions. Nor did it introduce any evidence as proof of the allegations that it has since made in its written submissions. Accordingly, Turner's uncontradicted investigative findings fully support the allegations of the instant citation item.

Chairman Weisberg and Commissioner Foulke join in classifying Atlantic's violation of section 1910.1200(g)(8) as other than serious rather than willful. Chairman Weisberg finds that in accord with the 1987 Settlement Agreement, MSDS's are being kept on file in a central location by Atlantic's office manager and copies apparently will be provided to employees on request. He notes that there is no evidence that any employee had ever experienced any difficulty in obtaining access to an MSDS as a result of the bookkeeper's schedule. Further, the record suggests that this violation may have been primarily the result of inadequate communication about the procedures for obtaining access to MSDS's rather than intentional disregard or plain indifference on Atlantic's part.

Commissioner Foulke concludes that the instant violation was not willful because Atlantic had made a good faith effort to comply with the requirements of the cited standard. *See supra* Part I.D (relevant case law). Given its past history under the HCS, Atlantic apparently believed (with considerable justification) that it would meet its obligation under the cited standard if it implemented the terms of paragraph 10 of the 1987 Compliance Program, as quoted *supra*. On this record, Commissioner Foulke would find that, at the time of the 1989-90 inspection, Atlantic had fully met its obligations under paragraph 10(C) of the compliance program. Thus, Atlantic kept its MSDS's in a single centralized location, where they were tended by a single employee. It also posted a notice to its employees that the MSDS's were available for their inspection (Exh. C-13). While these good faith efforts to make MSDS's accessible to employees may not have been sufficient to satisfy Atlantic's obligations under the cited standard, Commissioner Foulke concludes that they were certainly sufficient to negate the Secretary's allegation of willfulness.

Finally, Chairman Weisberg and Commissioner Foulke join in assessing a \$300 penalty for Atlantic's other than serious violation of section 1910.1200(g)(8). As the compliance officer testified, the gravity of this violation is relatively high since the inability to easily obtain access to an MSDS could deprive an employee of needed information that could prevent exposure to a hazardous chemical or guide the employee's response in the event exposure occurs. In addition, Atlantic had a past history of violations under the HCS, although not the particular provision at issue here. On the other hand, Atlantic's small size and its good faith in attempting to make the MSDS's accessible to employees weigh in its favor. Balancing all of these factors, the Chairman and Commissioner Foulke conclude that a penalty of \$300 would be "appropriate" within the meaning of 29 U.S.C. § 666(j).

XV. CITATION NO. 2, ITEM 7

A. Background

Item 7 of citation no. 2 alleged a willful violation of 29 C.F.R. § 1910.1200(h)⁶⁶ and proposed a penalty of \$3600. The citation alleged that Atlantic violated the cited standard in the following manner:

Employees were not provided information and training as specified in 29 CFR 1910.1200(h)(1) and (2) 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:

(a) In the establishment where materials such as:

Paints, sulfuric acids, toluene, ammonium hydroxide, paint and varnish remover, and spray enamels

are used, employees shall be informed of:

1. The requirements of this section;
2. Any operations where hazardous chemicals are present;

AND

3. The location and availability of the written Hazard Communication Program, list(s) of hazardous chemicals and Material Safety Data Sheets.

Employee training shall include at least:

⁶⁶ The cited standard provides, as follows:

§ 1910.1200 Hazard communication.

.....
 (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.

(1) *Information.* Employees shall be informed of:
 [Those matters that are listed in citation no. 2, item 7, as quoted *infra*]

(2) *Training.* Employee training shall include at least:
 [Those matters that are listed in citation no. 2, item 7, as quoted *infra*].

There are some minor differences between the language of the cited standard and the language of the citation item. However, the only significant difference is the identification of six hazardous chemicals found at Atlantic's workplace in the citation item, as quoted *infra*. Otherwise, the citation item basically tracks the language of the cited standard.

1. Methods and observations that may be used to detect the presence or release of a hazardous chemical in work area.
2. The physical and health hazards of the chemicals in the work area.
3. The measures employees can take to protect themselves such as specific procedures, appropriate work practices, emergency procedures and personal protective equipment to be used.
4. The details of the employer's Hazard Communication Program, including an explanation of labeling systems[,] Material Safety Data Sheets[,] and how employees can obtain and use the appropriate hazard information.

We construe this as an allegation that Atlantic failed to comply with all of the information and training requirements set forth in section 1910.1200(h) as they relate to the six specific hazardous chemicals that are listed in the citation item and that Atlantic also failed to comply with each of the generalized requirements of the cited standard, such as informing employees of the requirements of the HCS and the location and availability of MSDS's. We note, however, that throughout her entire testimony concerning this citation item, IH Turner did not refer to the six hazardous chemicals that are identified in the citation's description of the alleged violation. We therefore can only speculate as to which particular products are at issue here.

The compliance officer testified that this citation item was based on her determination "that the employees had not been trained on hazard communication." She further stated that she had reached this conclusion by talking to "all of the employees," meaning the five production employees. *See supra* Part XIV (Turner's identification of Augustine, Gallman, Vasiliades, Simon, and Gregory as the employees she had talked to about MSDS's). When asked what the employees had "indicate[d]" to her, she responded as follows: "They indicated that they had not been trained on hazard communication." She did not elaborate. Nor did the Secretary introduce into evidence the "signed employee statements" that assertedly "documented" Turner's findings, even though the witness claimed that she had obtained such statements from Gallman and Augustine.

Turner did acknowledge that Atlantic had made its written hazard communication program available to her during the inspection. The following exchange then occurred:

Q: [D]id any employees indicate that they had been made familiar with this written program?

A: No, they did not.⁶⁷

⁶⁷ We consider this testimony too ambiguous to sustain the Secretary's implied contention that Atlantic had failed to inform its employees of the existence of its written hazard communication program.

Also, as indicated previously, *see supra* Part XIV, Turner claimed that, in questioning the employees, she had learned that they did not know (a) what MSDS's were, (b) where they were located at Atlantic's workplace, or (c) that they could obtain access to the MSDS's through the bookkeeper.

The witness was also asked whether she had made any "observations of the employee work habits that indicated such a lack of training." Her initial response was "[n]ot that I can recall." After prompting from the Secretary's counsel, however, she did recall observing employee Augustine engaged in a spray painting operation under conditions where the MSDS "would have given him the information on the appropriate personal protective equipment to wear." On this record, we are unable to determine what incident Turner was referring to and whether, at the time, Augustine was working (a) without respiratory protection or (b) while wearing the wrong kind of respirator.⁶⁸

Turner further testified that the instant violation was classified as willful because "it was addressed in the 10/86 citations" and "[i]t's also addressed in the settlement agreement." Atlantic was cited on October 30, 1986, for three other than serious violations of the HCS. *See supra* Part XIV. Item 1c of that citation alleged a violation of the employee training requirement at 29 C.F.R. § 1910.1200(h)(2)(iv) in that "employees were not aware of the [employer's] hazard communication program, [its] labeling system, and how to obtain hazard information on chemicals at Atlantic Battery." We have already inferred from the record that part 10 of the 1987 Compliance Program was developed as a means of abating these previously-cited HCS violations. The provisions of part 10 relating to MSDS's have been set forth previously, *supra* Part XIV. The provisions that specifically related to employee information and training were the following:

(A) This program is available for employee review in the office.

....
(G) Employees will be informed of the requirements of 29 CFR 1910.1200 [*i.e.*, the HCS].

(H) Employees will be informed of any operations in their work area where hazardous chemicals are present.

⁶⁸ Based on Turner's own testimony, we find that the only painting operation she observed during the course of her 1989-90 inspection was the special maintenance project on December 5, 1989, involving the spray painting of metal shelves. *See supra* Part II and note 38. The record does not reveal whether employee Augustine was wearing respiratory protection at that time. Although citation no. 4, item 2, included an allegation that Augustine was wearing the wrong kind of respirator while spray painting, the description of that alleged violation specifies that Turner made her determination of noncompliance "[o]n 11/7/89 and 2/15/90." *See supra* Part VIII. Turner did not observe any spray painting operations on either of those dates.

- (I) Employees will be trained on methods and observations to detect the presence or release of hazardous chemicals.
- (J) Employees will be trained on the protective measures regarding exposure to hazardous chemicals. As part of this training, employees will be instructed in the Respirator Program and the Housekeeping Program, which are both parts of this Compliance Program.
- (L) Employees will be trained and informed as itemized above regarding any hazardous chemicals they may encounter in the performance of new or non-routine tasks.

In his testimony, president Migell defended primarily on the ground that Atlantic had met its obligation under the cited standard by providing the required information and training. For example, he asserted that the allegation of the instant citation item "just isn't so." However, he also contended (primarily in the context of other citation items) that hazard communication was neither needed nor required for most of the hazardous chemicals that are at issue under the instant citation item. Keying in on the standard's specification that training about hazardous chemicals be provided "whenever a new hazard is introduced into [an employee's] work area," *see supra* note 66, Migell testified that some of the chemicals listed in the instant citation item, *e.g.*, the spray enamels, were not "new hazard[s]," while others, *e.g.*, the paint and varnish remover, were not hazards "introduced into [the production employees'] work area."

Concerning the chemicals that were not "new hazard[s]," president Migell claimed that Atlantic's employees had "used" and "worked with" these chemicals "for a number of years," that the employees "were familiar with them," and that the employees "are constantly [warned] about the hazards of them." He specified that he personally was the one "doing the warning" and that he did this "daily in various aspects, because in a small company, you warn when someone is going to use [the hazardous chemical]." Later, he added that "it's a constant education process. And we're talking just about a few employees and it is done." As examples of training and instructions that he provided on a "constant" or repeated basis, he listed warnings about the health hazards of lead, instructions to employee Gregory to wear his respirator, instructions to "all employees about protective equipment and cleaning and putting things back and so on," and training given to employee Augustine, who "is mostly involved in shipping," about labeling.

B. Applicability of the Cited Standard

An employer is only required to communicate information about the hazard to those employees who "may be exposed" to the chemical. *Durez Div. of Occidental Chemical Corp. v. OSHA*, 906 F.2d 1, 2, 3-4 (D.C. Cir. 1990) (quoting 29 C.F.R. § 1910.1200(b)(2)). The Secretary makes this point clearly in the standard's preamble:

The standard . . . limits hazard communication duties to those chemicals to which employees are exposed under normal conditions of use or in foreseeable emergencies. Furthermore, employers must train their employees regarding the risks involved in the particular exposure situation in their work areas.

48 Fed. Reg. 53,280, 53,295 (1983). *See also id.* at 53,299, 53,310-11; *General Carbon Co. v. OSHRC*, 860 F.2d 479, 481 & n.3 (D.C. Cir. 1988) ("it is expected that downstream employers, in training their own workers, will more fully explain *the hazards to which they may be subjected*") (emphasis added).⁶⁹

Applying these guidelines to the record in this case, we conclude that the Secretary has failed to prove that any of the five production employees at Atlantic's workplace was actually or potentially "exposed," within the meaning of the HCS, to the "paints," "ammonium hydroxide," and "paint and varnish remover" listed in the citation. He therefore failed to prove that any information or training concerning those chemicals was required under the terms of the cited standard.⁷⁰ The record reveals the following concerning the six products at issue under this citation item.

⁶⁹ Based on the *General Carbon* case, we reject Atlantic's contentions that the HCS does not apply (a) to some of the chemicals at issue (*e.g.*, ammonium hydroxide/ammonia) because they are used in a diluted form that is not hazardous to employees and (b) to other chemicals at issue (*e.g.*, Kutzit paint and varnish remover, Servistar spray enamel, Sunnyside paint thinner, toluene, and ammonium hydroxide) because they are used in such small amounts that they are not hazardous to employees. Under *General Carbon*, the fact that the chemical may be present in such small amounts or low concentrations as to effectively eliminate any risk (hazard) to the exposed employee does not negate the employer's obligation to inform that employee of that fact, *i.e.*, that the chemical poses no risk to the employee and that no protective measures on his or her part are called for. *See* 860 F.2d at 484.

⁷⁰ The legal issue, of course, is whether the Secretary has met his burden of proving the applicability of the cited standard *to the cited conditions*. Here, as IH Turner's testimony clearly reveals, the Secretary has limited the charge under item 7 of citation no. 2 to an allegation that Atlantic failed to provide adequate instruction and training *to its five production employees*. In particular, there is no indication that the Secretary is even alleging that Atlantic failed to adequately instruct and train president Migell concerning the hazards of the six chemicals that are at issue here. We are therefore unable to base a finding that the cited standard is applicable to ammonium hydroxide and to paint and varnish remover on Migell's admission that he had personally used and therefore been exposed to those two products. Because Migell was not one of the employees whose instructions and training are at issue in this case, we conclude that his admissions are not sufficient to meet the Secretary's burden of proof on the applicability of the cited standard.

Paints. IH Turner did not identify which "paints" are at issue here.⁷¹ We therefore assume that the item's reference is to the paints that are shown in photographic exhibits C-31 through C-33.⁷² See *supra* Part XII.A. We have previously resolved the parties' dispute over the ownership of these paints by finding that they were in fact "house paints" used by the independent painting contractor in renovating Atlantic's facility. See *supra* note 56. It is undisputed that these paints were in storage at the time Turner observed and photographed them and that she did not see anyone using the paints during her inspection. Turner testified that the paints were contained in "numerous" 1-gallon cans.

As the preamble to the expanded standard makes clear, the fact that another employer brought this hazardous chemical into the workplace for its own use did not necessarily absolve Atlantic of a duty to instruct and train its employees. See 52 Fed. Reg. 31,852, 31,865 (1987). However, Atlantic had such a duty only if the storage of the paints and/or the painting contractor's use of the paints resulted in the actual or potential "exposure" of Atlantic's employees, as that term is defined in the HCS. *Id.* The Secretary has made no such showing in this case. Rather, the record is silent as to which, if any, of Atlantic's employees may have been exposed to the hazards associated with these paints. We therefore conclude that the Secretary has failed to establish the applicability of section 1910.1200(h) to the "paints."

Sulfuric acid. The evidence concerning the presence of sulfuric acid in the workplace and the potential for employee exposure to sulfuric acid has been set forth, *supra* Parts VII.A and XIII. That evidence establishes that there were three distinct operations in which employees worked directly with either concentrated sulfuric acid (*i.e.*, the acid mixing operation) or a diluted sulfuric acid solution consisting of acid mixed with water (*i.e.*, the battery filling and battery charging operations). The record also establishes that at least one Atlantic employee (John Gallman) was "exposed" to this chemical within the meaning of the HCS. Gallman apparently performed all three of the operations listed above, thereby working with sulfuric acid on a daily basis. In any event, Atlantic does not dispute the applicability of the HCS to sulfuric acid. Migell testified without contradiction that Atlantic had an MSDS for sulfuric acid, and Atlantic listed sulfuric acid as a hazardous chemical in both the 1987 Compliance Program and the posted notice to employees

⁷¹ Indeed, as we noted previously, the witness did not describe or otherwise identify any of the hazardous chemicals that are at issue with respect to the instant citation item. All of the chemicals listed under this item are referred to in the record, but only in the context of other citation items.

⁷² The only other "paints" that are referred to in this record would presumably be covered, if they are covered at all, under the separately-listed category of "spray enamels." See discussion of spray enamels *infra*.

concerning hazard communication (Exh. C-13). Migell also indicated that Atlantic's batteries were labeled under the HCS to warn downstream employees of the batteries' sulfuric acid hazard.

Toluene. The dispute between the parties over the presence of toluene at Atlantic's workplace has been described, *supra* Part XII.A. However, with specific reference to the citation item now under discussion, *both* parties stipulated, as follows:

The following chemicals were used in some fashion by Atlantic Battery employees at the time of the 1989-90 OSHA inspection: sulphuric acid, *toluene*, ammonium hydroxide, and spray enamel paints.

(Emphasis added). In addition, Turner testified that she had observed a 55-gallon drum of toluene stored in the outdoors patio/storage area of the plant and determined that it was not empty by unsuccessfully attempting to move it. She apparently did not see anyone using toluene at the workplace and provided no information as to its use by Atlantic.

Considering the record as a whole, and emphasizing in particular the stipulation, we reject Atlantic's claims concerning this product and find that the toluene drum observed by Turner was not empty at the time and that the company had not ceased using toluene prior to the 1989-90 inspection. The evidence that Atlantic also used Sunnyside paint thinner, a less hazardous brand, at the time of the inspection does not affect our finding. Accordingly, we conclude that the Secretary has made a *prima facie* showing that the cited standard was applicable to toluene.

Ammonium hydroxide. The dispute over the presence of ammonium hydroxide at the workplace, which essentially parallels the dispute over toluene, has also been described, *supra* Part XII.A. Again, however, the parties have stipulated that ammonium hydroxide was "used in some fashion by Atlantic Battery employees at the time of the 1989-90 inspection." As with toluene, Turner testified that she had observed a 55-gallon drum of ammonium hydroxide stored in the patio/storage area, that she had determined its contents by looking at the label, and that she had determined that it was not empty by unsuccessfully attempting to move it. She conceded that she had not seen anyone using ammonium hydroxide at the workplace, but she described an incident in which employee Augustine had used a small container ("about a gallon") of ammonia to neutralize an acid spill. This testimony provides the only clue in the record as to the manner in which Atlantic may have used ammonium hydroxide at its workplace.

In his testimony, Migell squarely contradicted parts of Turner's testimony. He testified that, at the time in question, Atlantic had only two *empty* drums of ammonium hydroxide at its workplace, as well as "dilute household ammonia," which was available for use. Migell also testified that he was "[t]he only one who handles" the "concentrated ammonia" that Atlantic used to buy and that he was "very familiar with that particular item." We construe this testimony as a claim that Migell was the only one at Atlantic's workplace who worked with *ammonium hydroxide* and that he was "very familiar with" that product. (In context, it is clear that this witness used the

terms "concentrated ammonia" and "ammonium hydroxide" interchangeably and that he used both terms to refer to the same product).

The parties' pre-hearing stipulation again contradicts Atlantic's arguments before us. Accordingly, based on the record as a whole, we find that the ammonium hydroxide drum was not empty when Turner observed it and that the company had not ceased using ammonium hydroxide prior to the 1989-90 inspection.⁷³ However, we do not find any clear evidence in this record that any of Atlantic's five production employees used the ammonium hydroxide. On the contrary, Migell's testimony that he was the "only one" at the workplace who used the product was not rebutted. Nor is there any evidence that either the storage of the chemical in the outdoor/patio area or Migell's use of the product for unspecified purposes at unspecified times resulted in the actual or potential "exposure" of any production employee to that chemical. We therefore conclude that the Secretary has failed to establish the applicability of section 1910.1200(h) to ammonium hydroxide.

Paint and varnish remover. The only paint and varnish remover that is identified on this record is the "Kutzit Paint and Varnish Remover" that is referred to in citation no. 1, item 9. *See infra* Part XVI. The record contains very little evidence concerning this product, and the parties did *not* include it in the stipulation they entered into concerning the instant citation item. *See* toluene discussion *supra*. IH Turner gave no indication in her testimony that she had observed any employee using paint and varnish remover or that she had attempted to determine when, how, and by whom the chemical was used. Indeed, throughout the entire proceeding, the only testimony given by this witness concerning the paint and varnish remover was a statement that she had observed this product somewhere in the workplace.

In conjunction with the instant citation item, president Migell testified that the paint and varnish remover was not a "new hazard . . . introduced into" the employees' "work area," within the meaning of the cited standard, because it was "not used." He later testified, in response to item 9 of citation no. 1, that the Kutzit paint and varnish remover was present in the workplace because he was using it personally in connection with refinishing a piano. He claimed that the remover was "not used in the workplace." The Secretary introduced no evidence to rebut this testimony.

The fact that the remover was used only by Migell for personal reasons does not in itself establish that the cited standard was inapplicable. Since the standard contains a *limited* exemption for *some* hazardous chemicals that are brought into the workplace for personal use, *see*

⁷³ On the other hand, we conclude that Migell's testimony about the phasing out of ammonium hydroxide and the substitution of plain household ammonia in its place is credible. In particular, Turner's discovery of Augustine using household ammonia to clean up an acid spill tends to corroborate Migell's assertion. Although the record is far from clear on the matter, it suggests that Atlantic's use of ammonium hydroxide at the time of the alleged violation was infrequent.

section 1910.1200(b)(6)(vi) ("foods, drugs, or cosmetics intended for personal consumption"), we assume that other hazardous chemicals brought into the workplace for personal use or consumption may fall within the coverage of the HCS. However, the Secretary still has the burden of proving actual or potential employee "exposure" to the chemical within the meaning of the HCS. Here, the Secretary has made no showing that either the storage of the paint and varnish remover in the workplace or Migell's use of the product in the refinishing of a piano resulted in the actual or potential exposure of any production employee to this chemical. We therefore conclude that the Secretary has failed to establish the applicability of section 1910.1200(h) to the paint and varnish remover.

Spray enamels. The parties stipulated that "spray enamel paints" were "used in some fashion by Atlantic Battery employees at the time of the 1989-90 OSHA inspection." They did not, however, identify any particular brand of enamel they were referring to or the manner in which spray enamel paints were used. The only spray enamel that is specifically identified in the evidentiary record is "Servistar Spray Enamel," which is one of the hazardous chemicals listed in citation no. 1, item 9.⁷⁴ See *infra* Part XVI. In connection with that citation item, Turner testified that she had observed the Servistar spray enamel, which was contained in "your average spray can," in the storage space at the far end of the battery charging area, where the house paints, the paint thinner, and the waste lead disposal container were also stored on December 5, 1989. See *supra* Part XII.A. Although the Secretary introduced no evidence to tie this particular product into Atlantic's production operations, it appears more likely than not on this record that Servistar spray enamel was the product used by Atlantic when it spray painted batteries, and we so find.⁷⁵ Since at

⁷⁴ In its written submissions to the Commission, Atlantic identifies the product used by employee Augustine on December 5, 1989, in the spray painting of some metal shelves, as "Kyanize `OSHA Safety Yellow,'" a "lead-based enamel." See *supra* Part II. However, neither Turner nor Migell ever referred to this product by name during their testimony. We therefore assume, as Atlantic has also assumed in defending against this citation item, that the product that is at issue here is the enamel paint Atlantic used in the spray painting of its batteries on an infrequent but recurring basis.

⁷⁵ In defending against citation no. 1, item 9, Migell testified that Atlantic did not have to obtain an MSDS for Servistar spray enamel because this product was "a consumer item, bought at the hardware store over the counter." However, in response to questioning by the judge, he acknowledged that the product was used in Atlantic's business operations, although he asserted that the company's total usage of the product was "limited to two spray cans a week." We conclude that this testimony closely parallels Migell's testimony about Atlantic's spray painting operations. Thus, Migell testified that, on average, the spraying of batteries occurred at the workplace less than

least one of Atlantic's production employees (Franklin Augustine) was regularly "exposed," within the meaning of the HCS, to this spray enamel while spray painting batteries, we conclude that the Secretary has made a prima facie showing that section 1910.1200(h) was applicable to the Servistar spray enamel.

C. The Consumer Product Exemption

With respect to two of the three products that remain at issue under this citation item (the toluene and the Servistar spray enamel), we must next address Atlantic's contention that these products were excluded from the cited standard's coverage under the consumer product exemption.⁷⁶ (As indicated, Atlantic does not dispute the applicability of the HCS to sulfuric acid). The provision cited by Atlantic, 29 C.F.R. § 1910.1200(b)(6)(vii), establishes an exemption from the coverage of the entire HCS, as follows:

(b) *Scope and application.* . . .

. . . .

(6) This section does not apply to:

. . . .

(vii) Any consumer product or hazardous substance . . . where the employer can demonstrate it is used in the workplace in the same manner as normal consumer use, and which use results in a duration and frequency of exposure which is not greater than exposures experienced by consumers

In order to qualify for the exception, an employer need only show that its employees' use and exposure is comparable to that of a consumer. *Safeway Store No. 914*, 16 BNA OSHC 1504, 1511, 1994 CCH OSHD ¶ 30,300, pp. 41,743-44 (No. 91-373, 1993). Applying these criteria to the hazardous chemicals at issue under the instant citation item, we conclude that the toluene at Atlantic's workplace did *not* fall within the consumer product exemption. Migell testified that, while toluene can be purchased at a hardware store, Atlantic had not done so "because more of it is used." Accordingly, we agree with IH Shum that the exemption does not apply here because an ordinary consumer would not have a 55-gallon drum of this chemical in his or her garage.

(.continued)

30 minutes a week. He stated that only one customer had its batteries painted and that that customer purchased only 10 to 15 batteries at a time.

⁷⁶ At various points in this proceeding, Atlantic has raised the claim that the consumer product exemption applies to each of the following "hazardous chemicals" that Turner observed at Atlantic's workplace: toluene, ammonium hydroxide, Kutzit paint and varnish remover, Servistar spray enamel, Sunnyside paint thinner, lacquer thinner, and ammonia. A review of Atlantic's evidence and arguments reveals that Atlantic has based its exemption claims primarily on (a) the purchase of the product at issue in a hardware store or supermarket and/or (b) use of the product in roughly the same quantities that an ordinary, nonbusiness consumer would use it.

We also reject Atlantic's exemption claim with respect to the Servistar spray enamel. While Atlantic presents some plausible arguments in support of its position, we conclude that the exemption does not apply here because, as Shum pointed out, an ordinary consumer would not have a spray booth for the purpose of spray painting batteries nor would it have "routine frequent operations using a 15-ounce can of spray enamel or a one-gallon container of paint."

D. Noncompliance with the Cited Standard--

Training and Instructions Concerning Specific Hazardous Chemicals

For the reasons stated *supra* Parts XV.B & C, we have concluded that section 1910.1200(h) applies to three of the six hazardous chemicals listed in the instant citation item--sulfuric acid, toluene, and "spray enamels" (specifically, Servistar spray enamel). We find, however, that the Secretary failed to establish that Atlantic did not give its production employees the instruction and training concerning those products that was required by the standard. Migell testified that the chemicals at issue were not "new hazards" that Atlantic had recently "introduced into [its employees'] work area," within the meaning of the cited standard, but rather chemicals that the employees had used and worked with "for a number of years." The employees accordingly were "familiar with" these chemicals. The witness further testified that Atlantic's employees were "constantly [warned] about the hazards" resulting from exposure to these chemicals, that he had personally given these warnings at times when the employees were using the chemicals, and that, at the workplace in question, "it's a constant education process" involving a small number of employees and "it is done." We credit this testimony of Migell over any contradictory evidence in the Secretary's case. Indeed, strictly speaking there is no contradictory evidence.

IH Turner based her determination that Atlantic's five production employees "had not been trained on hazard communication" on her interviews with those employees, but she did not state what questions she had asked or what answers she had received. Thus, the record does not even establish that she specifically asked the employees about the training and instructions they had received concerning sulfuric acid, toluene, and spray enamel paints. In view of this lack of evidence, we cannot determine whether that training was inadequate under the standard. *See Trinity Indus., Inc.*, 15 BNA OSHC 1788, 1991-93 CCH OSHD ¶ 29,773 (No. 89-1791, 1992). We therefore vacate the citation's allegation that "[e]mployees were not provided information and training . . . on hazardous chemicals in their work area." The Secretary has failed to prove that charge.

E. Noncompliance with the Cited Standard--

General Hazard Communication

The judge did not base his affirmance of the instant citation item on IH Turner's conclusory testimony about the results of her investigation, but rather on his finding that: "I agree with the Secretary that the actions of employees demonstrate that Respondent did not provide to its

employees adequate information and training on hazardous chemicals." While his decision is not clear on the point, it suggests that the specific actions the judge had in mind were those he had referred to earlier in his discussion when he noted the Secretary's assertions, "in connection with previous items," that "employees did not know where MSD sheets were, an employee who used spray paints did not use the appropriate respirators, and protective equipment was observed not being worn by an employee while using sulfuric acid."

We conclude, however, that none of the examples given by the judge support his finding that the actions of Atlantic employees revealed their lack of hazard communication training. As indicated previously, IH Turner concluded, on the basis of her discussions with the five production employees, that these employees did not know (a) what MSDS's are, (b) where they were located at Atlantic's workplace, or (c) that they could obtain access to the MSDS's through the bookkeeper. Yet, as we discuss more fully below, the record establishes that Atlantic had communicated to its employees the basic information about its hazard communication program, including information about MSDS's, in at least three ways, including a notice posted on the employee bulletin board that Turner herself discovered during the inspection and that the Secretary subsequently introduced into evidence (Exh. C-13). That notice expressly informed employees that "MSD Sheets from supplie[r]s will be kept on file by the office manager" and that these documents were available "for employee inspection." We therefore find that, notwithstanding any statements Atlantic's employees may have made to the compliance officer, Atlantic had in fact informed them that the MSDS's were available for inspection in its office.

The other examples cited by the judge involve the use of personal protective equipment at Atlantic's workplace. We note that there are five instances in this case where the Secretary has alleged a violation of OSHA standards based on improper usage of or failure to use PPE:

- (a) Gregory's failure to wear a respirator while group burning (citation no. 1, item 5);
- (b) Gallman's failure to wear protective eyewear while "filling batteries with sulfuric acid" [citation no. 2, item 1(a)];
- (c) Augustine' failure to wear protective eyewear while hand casting small parts [citation no. 2, item 1(b)];
- (d) Augustine's use of an improper respirator while hand casting small parts (citation no. 4, item 2); and
- (e) Augustine's use of an improper respirator while engaged in spray painting (citation no. 4, item 2).

(This list apparently includes the two situations cited in the judge's decision, *see supra* p. 87, as support for the instant citation item). However, in all five of these instances, we have vacated the citations on the ground that the Secretary failed to prove any need (as defined by the OSHA

standards) for the employee to be wearing the personal protective equipment at issue. *See supra* Parts VI-VIII. It therefore follows that these instances do not establish that the employees in question were inadequately instructed and trained concerning the hazards they were working with or the appropriate means of protecting themselves against the hazards. We therefore set aside the judge's finding on the ground that it is not supported by the record.

Indeed, we conclude that the record affirmatively establishes that Atlantic did provide its employees with both general hazard communication instructions and training and specific training on the proper use of personal protective equipment. Specifically, the information set forth in part 10 of the 1987 Compliance Program, which included provisions covering each of the program elements that OSHA requires in a formal, written hazard communication program, was disseminated to Atlantic employees in at least three ways. First, virtually all of that information was repeated or paraphrased in the notice to employees that Turner found posted on the employee bulletin board during the course of her inspection. Second, copies of the compliance program were available for employee review in the office and in the lunchroom (as Atlantic reported in its quarterly progress reports). Finally, since part 10 is contained within the 1987 Compliance Program, we infer from the record that training on the basic elements of Atlantic's hazard communication program was included in its annual review of the entire compliance program.⁷⁷

We therefore vacate item 7 of citation no. 2. More specifically, we vacate the citation's allegations concerning paints, ammonium hydroxide, and paint and varnish remover on the ground that the Secretary has failed to prove the applicability of the cited standard to the cited conditions.

⁷⁷ Paragraph 2(D) of the 1987 Compliance Program stated that "[a]n annual review of the entire written Health and Safety Compliance Program will be done with all factory employees by the Foreman." In accordance with that provision, page 5 of the quarterly progress report contained the representation that "[o]ur Health and Safety Compliance Program is reviewed in total, on an annual basis, with all existing factory employees" Atlantic certified compliance with this requirement by reporting to OSHA that program reviews were conducted in July and August 1987; on October 27, 1988; and on January 4 & 5, 1989. This last two-day training session was described in a hand-written note, as follows:

In addition to reviewing general aspects of other safety program items, the slide show program on "Lead and Your Health and Safety" was shown to all employees and a question and answer period & discussion concerning all aspects of the film & the program was held between D. Wellen & the employees.

We vacate the citation's remaining allegations on the ground that the Secretary has failed to prove Atlantic's noncompliance with the cited standard.⁷⁸

⁷⁸ In agreeing with his colleagues to vacate this item, Chairman Weisberg relies solely on Migell's general assertion that training was done on an ongoing basis in the workplace and the documentary evidence that Atlantic provided hazard communication training in conjunction with the 1987 Compliance Program. In his view, the evidence is sufficient to rebut the Secretary's allegation and the evidence proffered by the Secretary pertaining to that allegation, both of which lack specificity.

XVI. CITATION NO. 1, ITEM 9

Item 9 of citation no. 1 alleged a serious violation of 29 C.F.R. § 1910.1200(g)(1)⁷⁹ and proposed a penalty of \$360. The citation alleged that Atlantic failed to comply with the provision of the cited standard that is directed to "[e]mployers." Specifically, it alleged that Atlantic violated that requirement in the following manner:

At the establishment MSDS's were not available for employee use for:

1. Kutzit Paint and Varnish Remover;
2. Toluene;
3. Ammonium Hydroxide;
4. Servistar Spray Enamel;
5. Sunnyside Paint Thinner.

IH Turner testified that this citation item was based on her determination that MSDS's for the five "products" listed in the item "were not maintained in the workplace." Thus, she asserted, MSDS's "were requested" during the 1989-90 inspection for each of these hazardous chemicals, but "they were not available." The witness further noted that she had asked for the MSDS's for these specific products because she had "observed" each of them "in the workplace." The spray enamel, in "your average spray can," and the paint thinner, "in, I believe, a gallon . . . plastic container," were in the storage space at the far end of the battery charging area on December 5, 1989, along with the "[n]umerous one-gallon containers" of house paints and the metal waste lead container that is at issue in citation no. 1, item 7. Turner observed the toluene and ammonium hydroxide on February 15, 1990, in two 55-gallon drums that were located near the plastic waste lead container that is also at issue in citation no. 1, item 7. *See generally supra* Part XII.A. The witness did not identify the location or the amount of the paint and varnish remover that she had observed. Insofar as this record reveals, she did not see any of these products in use at the workplace.

In his testimony, president Migell asserted that "[w]e did have MSDS sheets for the *required* chemicals" (emphasis added). However, he also argued that MSDS's were not "required" for any of the five products that are at issue under this citation item. *See supra* Part XV (consumer

⁷⁹ The cited standard provides, as follows:

§ 1910.1200 Hazard communication.

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- (g) *Material safety data sheets.* (1) Chemical manufacturers and importers shall obtain or develop a material safety data sheet for each hazardous chemical they produce or import. Employers shall have a material safety data sheet for each hazardous chemical which they use.

The term "use" is defined, in section 1910.1200(c), as meaning "to package, handle, react, or transfer."

product exemption invoked with respect to all five of these chemicals; additional claims relating to toluene, ammonium hydroxide, and paint and varnish remover). Migell later clarified his testimony about which chemicals Atlantic had MSDS's for. He specifically claimed (and subsequently repeated his claim) that Atlantic did have MSDS's for toluene and ammonium hydroxide at the time of the alleged violation because it "used to use" those products. However, he acknowledged that Atlantic did not have MSDS's for the other three products at issue here "because we didn't need to have one." The witness offered no explanation for Atlantic's failure to show Turner the MSDS's that it assertedly maintained at the workplace for toluene and ammonium hydroxide. He implied, however, that the compliance officer might have overlooked the MSDS for toluene because that chemical was listed under a different name ("It's also listed under toluol, which is another generic name for it").

Atlantic's claim that MSDS's were not "required" for any of the five products listed in this citation item raises the issue of whether the cited standard applied to the cited conditions. The Secretary's burden, in proving the applicability of section 1910.1200(g)(1) to the five listed products, was to demonstrate that two tests were met with respect to each of those products: (a) the hazardous chemical was "present" in Atlantic's "workplace" in such a manner that some employee was actually or potentially "exposed" to the chemical within the meaning of the HCS, and (b) the chemical was "use[d]" by Atlantic in conjunction with its commercial operations.⁸⁰

For the reasons that follow, we conclude that the cited standard applied to all of the products at issue except the Kutzit paint and varnish remover. As indicated previously, *see supra* Part XV.B, the record contains un rebutted testimony by president Migell to the effect that he was the only person in the workplace to use the paint and varnish remover and that his use was restricted to a nonbusiness-related, personal venture--the refinishing of a piano. It therefore cannot be said that the Kutzit paint and varnish remover was "use[d]" by the "[e]mployer[]" within the meaning of the cited standard. Accordingly, under the express terms of section 1910.1200(g)(1), Atlantic was not required to maintain an MSDS at the workplace for that product.

⁸⁰ The first test is derived from 29 C.F.R. § 1910.1200(b)(2), which limits the coverage of the entire HCS to chemicals that are "known to be present in the workplace in such a manner that employees may be exposed under normal conditions of use or in a foreseeable emergency." We broadly construe this section as meaning that a chemical is covered under the HCS if any employee, including a corporate management employee like Migell, is "exposed" to the chemical within the meaning of the HCS. The second test is derived from the language of the cited provision, section 1910.1200(g)(1), which expressly states that "employers" are only required to obtain MSDS's "for each hazardous chemical which they [*i.e.*, the employers] use."

In contrast, the record clearly establishes that Atlantic was required to have an MSDS for toluene. Indeed, as indicated, Migell claimed that Atlantic did have an MSDS for toluene, which was present at the workplace in a 55-gallon drum. Migell testified that toluene was a "type of paint thinner" that Atlantic could have purchased in a hardware store, but did not "because more of it is used." We have also noted, *see supra* Part XV.B, that Atlantic entered into a stipulation that toluene was "used in some fashion by Atlantic Battery employees at the time of the 1989-90 OSHA inspection." Atlantic revealed in its review brief that it used the toluene to thin the enamel paint that it sprayed onto the batteries ordered by one of its customers. We therefore conclude that both tests for determining the applicability of section 1910.1200(g)(1) have been met with respect to toluene. As for Atlantic's specific reasons for claiming that it did not need an MSDS for toluene, we have already considered and rejected them, *supra* Part XV.

We also conclude that there is sufficient evidence to sustain the Secretary's allegation that the cited standard applied to ammonium hydroxide. President Migell implicitly acknowledged this when he testified that Atlantic had an MSDS for ammonium hydroxide because it "used to use" that product at its workplace. In addition, the parties stipulated, *see supra* Part XV, that ammonium hydroxide was "used in some fashion by Atlantic Battery employees at the time of the 1989-90 OSHA inspection."⁸¹ Although this evidence does not disclose how the ammonium hydroxide was used at Atlantic's workplace, we conclude that the reasonable inference to be drawn from the evidence set forth above (particularly when it is combined with the evidence that Atlantic had purchased the product in a 55-gallon drum) is that Atlantic did use the ammonium hydroxide in conjunction with its business. Once again, Atlantic confirms this conclusion in its review brief, when it states that the household ammonia used during one of Turner's visits to the workplace was a "[s]ubstitut[e]" for the ammonium hydroxide that Atlantic had previously used. We therefore infer from Atlantic's statement that it used the ammonium hydroxide to neutralize acid spills. Based on that inference, we conclude both (a) that section 1910.1200(g)(1) applied to the ammonium hydroxide and (b) that the consumer product exemption did not apply.⁸²

⁸¹ As indicated, *supra* Part XV, president Migell gave un rebutted testimony to the effect that he was the only one at Atlantic's workplace who worked with the ammonium hydroxide. We conclude that this fact did not absolve Atlantic of its duty to provide an MSDS for ammonium hydroxide. Specifically, we conclude that the admitted exposure of this management employee satisfied the Secretary's burden, under section 1910.1200(b)(2), of proving that the ammonium hydroxide was "present in the workplace in such a manner that *employees* may be exposed under normal conditions of use or in a foreseeable emergency" (emphasis added). *See supra* note 80.

⁸² Atlantic's use of the product clearly differed from ordinary consumer use in that it had 55-gallon drums of the substance and used it to neutralize a big spill of sulfuric acid. The other reasons given

We further conclude that the Secretary properly applied section 1910.1200(g)(1) to the Servistar spray enamel. Migell expressly admitted, under questioning from the judge, that this spray enamel was "use[d] . . . in the business." The spray enamel therefore clearly met one of the two tests for coverage because it was a product used by the employer. As for the second test, we have already found, *see supra* Part XV.B, that the Servistar spray enamel was the product used by Atlantic in its battery spray painting operations. Since at least one Atlantic employee (Augustine) spray painted batteries on a recurring (albeit irregular) basis, the second coverage test, *i.e.*, use of the product in a manner that resulted in the "expos[ure]" of at least one employee, has also been met. Again, we have already considered and rejected the specific reasons Atlantic gives in support of its claim that an MSDS was not required for the spray enamel. *See supra* Part XV.

We also conclude that the standard applied to the Sunnyside paint thinner. The record evidence relating to this product consists of Turner's testimony that she observed a 1-gallon plastic container of Sunnyside paint thinner in the storage space at the far end of the battery charging area and Migell's testimony that this paint thinner "was bought in quantity and packing similar to what the consumer would buy at the hardware store and is, in fact, available at any hardware store." Although this evidence in itself does not establish that the paint thinner was a product (a) used by Atlantic (b) in a manner that resulted in the "expos[ure]" of one or more of its employees, we hold that the cited standard did apply to it. As indicated previously, *see supra* Part XV.B, Atlantic has defended against the HCS charges involving toluene on the ground that it had substituted a less hazardous "supermarket brand" of paint thinner for the toluene that it used to use in its battery painting operations (to thin the spray enamel paint that it applied to the batteries). Accordingly, it has admitted that it used a paint thinner other than toluene in a recurring, albeit irregular, production operation. On this record, we infer that the Sunnyside paint thinner identified in the testimony described above was the same "supermarket brand" of paint thinner that Atlantic referred to in its review brief.

The second part of the test has also been met since at least one employee (Augustine) was regularly involved in Atlantic's spray painting operations and therefore "exposed" to the paint thinner within the meaning of the HCS. Atlantic's reliance on the consumer product exemption is misplaced. The mere fact that the paint was purchased "in quantity and packing similar to what the consumer would buy at the hardware store," as Migell testified, does not establish that the product's use and exposure was comparable to that of a consumer. *See Safeway*. We also reject Atlantic's claim that the Sunnyside paint thinner was not covered under the HCS because it was "not hazardous in the quantity . . . used." *See supra* note 69.

(.continued)

by Atlantic in support of its contention that an MSDS was not required for ammonium hydroxide have already been considered and rejected. *See supra* Part XV.

We further find that Atlantic failed to comply with the cited standard. President Migell admitted in his testimony that Atlantic did not have MSDS's for either Servistar spray enamel or Sunnyside paint thinner, and Atlantic repeated these admissions in its review brief. Therefore, based on our conclusion, *supra*, that the cited standard applied to these two products, we affirm the allegation of the instant citation item that Atlantic violated section 1910.1200(g)(1) by failing to obtain MSDS's for them.

We also affirm violations of section 1910.1200(g)(1) as to toluene and ammonium hydroxide. Migell testified that Atlantic had the required MSDS's, while Turner testified that it did not. The judge did not resolve the conflict by crediting one witness over the other. Nevertheless, we are able to conclude for the reasons set forth below that, on this particular factual issue, Turner's testimony was clearly more credible than Migell's. We therefore credit Turner's testimony and, on the basis of that testimony, we sustain the Secretary's allegation that Atlantic failed to maintain MSDS's for toluene and ammonium hydroxide at its Watertown workplace.

Atlantic has not disputed or contradicted the compliance officer's testimony that Atlantic was not able to supply her with MSDS's for toluene and ammonium hydroxide even after she requested access to those specific documents. On the contrary, Migell testified only that Atlantic had possession of the two MSDS's and not that it had provided the documents to Turner upon request. We consider Turner's testimony on this issue to be highly trustworthy. Indeed, the evidence introduced in conjunction with citation no. 2, item 6, *see supra* Part XIV, suggests that bookkeeper Sederis kept all of the company's MSDS's in a centralized location in the Watertown office and that she had eventually complied with Turner's request for access to those documents. Therefore, since Turner did not find MSDS's for toluene and ammonium hydroxide among the MSDS's that were presented to her for review and since Sederis was apparently unable to comply with an explicit request for access to those two specific documents, a strong presumption has been created that Atlantic was unable to produce the documents because it did not have them in its possession.

This presumption has not been overcome by Migell, who offered no explanation during his testimony for Atlantic's failure to turn over to OSHA the two documents, which it had assertedly had in its possession, despite Turner's specific request for access to them. Most significantly, however, we conclude that Atlantic, in its review brief, has seriously undermined Migell's unqualified testimony that Atlantic had the two documents at the time in question by asserting that "MSD sheet(s) were, *or should have been*, available for toluene and ammonium hydroxide" (emphasis added). Therefore, considering the record as a whole, we resolve the conflict in the evidence by finding that Atlantic did not have those MSDS's in its possession at the time of the inspection. We therefore affirm the instant citation item's allegation with respect to toluene and ammonium hydroxide.

We also affirm the judge's classification of this violation as serious and his assessment of a \$360 penalty. As the compliance officer testified, the "dangers" created by this violation were that "[t]he employees would not necessarily know what they were exposed to, [the] hazards of exposure, [or] the proper measures to take to protect themselves against the exposure." She also noted that "[t]he employer, to my knowledge, was aware that these products were in the workplace," and she pointed out that the subject of MSDS's had been addressed previously in the October 1986 citations and the 1987 Settlement Agreement. In conjunction with citation no. 1, item 1, *see supra* Part XIII, Turner also testified about the potential consequences of employee contact with ammonium hydroxide, a hazardous chemical that is at issue under both citation items. The witness compared the hazard posed by ammonium hydroxide to the hazard created by sulfuric acid. Either chemical, she asserted, could cause burns or severe irritation to an employee's eyes.

Based on the testimony set forth above, we find that Atlantic's failure to maintain an MSDS for ammonium hydroxide created a serious violation within the meaning of section 17(k) of the Act. *See supra* note 23. Based on the gravity of the violation and the number of instances--Atlantic was missing four required MSDS's despite its awareness of its obligation to obtain these documents--we further conclude that the judge's assessment of a \$360 penalty is also fully supported by the record.

XVII. CITATION NO. 4, ITEM 4

Item 4 of citation no. 4 alleged an other than serious violation of 29 C.F.R. § 1910.1200(e)(1)(i)⁸³ and proposed that no penalty be assessed. The citation alleged that Atlantic violated the cited standard in the following manner:

The written hazard communication program did not include a complete list of the hazardous chemicals known to be present using an identity that is referenced on the appropriate material safety data sheet . . . :

⁸³ The cited standard provides, as follows:

§ 1910.1200 Hazard communication.

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- (e) *Written hazard communication program.* (1) Employers shall develop, implement, and maintain at the workplace, a written hazard communication program for their workplaces 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) . . .

- (a) The following chemicals/products were not included on the list of hazardous chemicals:
 Lacquer thinner, toluene, ammonium hydroxide, spray enamel, paint thinner, and ammonia.

We conclude that the Secretary has implicitly abandoned the charge with respect to one of the six listed products, *i.e.*, lacquer thinner. IH Turner made no express reference to this product at any point in her testimony. Similarly, the judge in his decision and both parties in their briefs to the Commission have essentially ignored this citation's reference to lacquer thinner. Accordingly, based on the Secretary's abandonment of the charge, we vacate the citation's allegation with respect to lacquer thinner.

The central allegation of the instant citation item is undisputed. Paragraph 10(D) of the 1987 Compliance Program provided, as follows:

(D) The following is a list of hazardous materials in use at our plant:

- (1) Lead oxide
- (2) Expander
- (3) Sulfuric Acid
- (4) Kyanize Paint
- (5) Pioneer sealing compound
- (6) Atlas Epoxy

The notice to employees that Turner observed posted on the bulletin board outside the office and that the Secretary later introduced into evidence as Exh. C-13 restated this same list of six hazardous chemicals, as quoted *supra*. Turner identified this list in Exh. C-13 as the list of hazardous chemicals that was required under the cited standard and the only list that she had been given during the inspection. It is, however, clear on the face of the document that the products and chemicals listed in the instant citation item were not included on Atlantic's list of hazardous chemicals.

Atlantic defends against this citation item on the ground that it was not required to include the specific products identified in the citation's description of the alleged violation on its hazardous chemicals list:

... [O]nly *hazardous* chemicals were on that list. Ammonia, paint thinner, and spray enamel were not hazardous because their manner [of] use was the same as a normal consumer would use them. Toluene and ammonium hydroxide were not used (e.g. empty 55 gallon drums) and were replaced with paint thinner and ammonia, respectively.

We construe this defense as an argument that the cited standard was not applicable to the products listed in the instant citation item. Accordingly, if we conclude that the standard applied to the

“hazardous chemicals” at issue, we must reject Atlantic’s argument that it was not required to include them on its list of hazardous chemicals.⁸⁴

For the reasons that follow, we conclude that the cited standard, section 1910.1200(e)(1)(i), has the same scope as the standard we have just discussed, *supra* Part XVI, *i.e.*, section 1910.1200(g)(1). Therefore, here, as in the context of citation no. 1, item 9, the Secretary had the burden of proving that (a) the hazardous chemical was “present” in Atlantic’s “workplace” in such a manner that some employee was actually or potentially “exposed” to the chemical within the meaning of the HCS, and (b) the chemical was “use[d]” by Atlantic in conjunction with its commercial operations. *See supra* note 80. We affirm the modified allegation of citation no. 4, item 4, after deleting the citation’s reference to “lacquer thinner.”

Based on our analysis of the HCS and its legislative history, we conclude that the Secretary intended to require listing of a chemical on the employer’s hazardous chemical list only if the employer is also required, under the terms of section 1910.1200(g)(1), to obtain an MSDS for that same chemical. In support of our determination, we point first to the language of the cited standard, section 1910.1200(e)(1)(i). *See supra* note 83. This standard requires employers who include a hazardous chemical on their hazardous chemical list to “us[e] an identity that is referenced on the appropriate material safety data sheet.” The inference that we draw from this language is that the standard applies only to those chemicals for which the employer is required to obtain an MSDS. We further conclude that the preamble to the final version of the original HCS was even clearer on this point when it described the mandated hazardous chemical list as “in essence an index or inventory of hazardous chemicals in the workplace for which material safety data sheets should be available.” 48 Fed. Reg. 53,280, 53,300 (1983).

Based on our conclusion that the scope of the cited standard, section 1910.1200(e)(1)(i), is co-extensive with the scope of section 1910.1200(g)(1), and our finding that Atlantic’s hazardous

⁸⁴ We note that Atlantic has never disputed, at any point in this proceeding, the Secretary’s characterization of the products at issue in this case as “hazardous chemicals” within the meaning of the HCS. Instead, it has presented more limited claims. Specifically, Atlantic has argued that the products at its workplace were not hazardous because of the small amounts and/or the diluted concentrations of the products that it used or that were on hand. In addition, it has contended that the products were not hazardous because it used them in the same manner that an ordinary consumer would have used them. We have already considered and rejected most of Atlantic’s claims concerning specific hazardous chemicals in the context of other alleged violations of the HCS. *See supra* Parts XV and XVI and note 69. The only claims that we have not yet considered are those relating to “ammonia” (as distinguished from those relating to the “ammonium hydroxide”).

chemical list did not include the products listed in the instant citation item, we affirm the citation's allegation that Atlantic violated section 1910.1200(e)(1)(i) by failing to include toluene, ammonium hydroxide, spray enamel, and paint thinner on its list. We have already found, *see supra* Part XVI, that Atlantic was required under the HCS to obtain and maintain MSDS's for toluene, ammonium hydroxide, Servistar spray enamel, and Sunnyside paint thinner. It therefore necessarily follows, from what we have said above, that Atlantic was also required to include these same four products on its list of hazardous chemicals.

The only remaining question is whether Atlantic was also required to include plain or "household" ammonia on its hazardous chemical list. The record evidence concerning this product focuses on an incident that Turner became aware of sometime during the course of her 1989-90 inspection. As described by Turner, her attention was drawn to the matter when she became "disturbed" by the "very strong" smell of ammonia. Upon investigating, she learned from employee Augustine that Atlantic used ammonia to neutralize acid spills and that he (Augustine) had just poured some ammonia onto sulfuric acid that had leaked from some batteries. The only ammonia that the compliance officer saw in the workplace was the small container ("about a gallon size") that Augustine had used for this purpose. Turner also examined the product's label to confirm that it was ammonia.

The testimony set forth above not being rebutted, we find that the Secretary has sustained his burden of proving the applicability of the cited standard to the ammonia Turner observed at Atlantic's workplace. The ammonia was present in the workplace in a manner that resulted in the exposure of at least employee Augustine and it was used by Augustine in conjunction with Atlantic's business operations. For the reasons stated *supra* note 69, we reject Atlantic's contention that the cited standard did not apply because neither the amount nor the concentration of the ammonia involved in the Augustine incident was hazardous. We also find no basis for Atlantic's reliance on the consumer use exemption. The mere fact that this product may have been purchased and used in quantities that are comparable to ordinary consumer use, as president Migell suggested in his testimony, is not enough in itself to establish that the ammonia met the consumer product exemption, particularly when it was used to neutralize a big spill of sulfuric acid. *See supra* Part XV.C.

Neither the classification of this violation (as other than serious) nor the penalty (none was proposed or assessed) has been disputed. Therefore, they are also affirmed.

XVIII. CITATION NO. 1, ITEM 2a

Item 2a of citation no. 1 alleged a serious violation of 29 C.F.R. § 1910.157(c)(4).⁸⁵ The Secretary proposed, and the judge assessed, a single consolidated penalty for the "grouped"

⁸⁵ The cited standard provides, as follows:

violations alleged in this subitem and in item 2b, even though these two subitems alleged violations of two different OSHA standards and involved two different portable fire extinguishers. The merits of item 2b are not before us on review, *see supra* note 1. In fact, Atlantic has admitted that violation in its review brief, ascribing it to "an honest mistake." The subitem still at issue alleged that Atlantic violated the cited standard in the following manner:

Establishment (Between the assembly area and acid mixing/filling area): Employer did not ensure that a portable fire extinguisher was kept in its designated place when not being used.

The key factual allegation of this citation subitem is not disputed. During her inspection, IH Turner observed a door frame where there was a sign designating the presence of a fire extinguisher. Yet, as photographic Exh. C-21 confirms, there was no fire extinguisher hanging from the hook below the sign, where an extinguisher should have been located. Turner further testified that she had not seen a fire extinguisher anywhere "in that general area."

In his testimony, president Migell confirmed that, at the time of the alleged violation, the extinguisher in question was not in its designated location, but rather "directly behind the person on the assembly line where he was using it or could have used it, if necessary." Because the object in question was "quite a large extinguisher," Migell continued, the employee "kept it on the floor rather than lifting it up on the hook." The witness also indicated that he approved of this practice because, "while [the employee] was working on the assembly line, it made sense to have [the extinguisher] very close at hand."

The judge construed Atlantic's defense as an argument that the violation should be reclassified as other than serious "because the extinguisher was kept in an unspecified location behind an unnamed employee working on the assembly line." He rejected this defense on the ground that "this hazard is serious," reasoning that "[t]here are other employees who may need to use the fire extinguisher if a fire breaks out and an extinguisher not in its designated place will not be readily accessible to them." On review, Atlantic challenges the judge's reasoning, arguing in effect that, contrary to his statement, the other employees in its plant had no "need to use the fire extinguisher" in question. In Atlantic's view, the fire extinguisher that had been moved was not needed because there were ten other extinguishers "strategically located throughout the plant" and

(..continued)

§ 1910.157 Portable fire extinguishers.

....
(c) *General requirements.* . . .

-
(4) The employer shall assure that portable fire extinguishers are maintained in a fully charged and operable condition and kept in their designated places at all times except during use.

those extinguishers provided more than adequate protection for "a small factory of about 15,000 square feet" containing "only five employees." Atlantic also suggests that we should vacate this citation item because the Secretary's application of the standard to the facts of this case is "ridiculous[]" and contrary to "common sense."

The simple response to Atlantic's arguments is the one urged by the Secretary in his review brief, *i.e.*, that the defense must be rejected because it is not supported by the record. In fact, Atlantic presented no evidence whatsoever that would allow us to enter a finding that its production employees, other than the one who had moved the disputed fire extinguisher to a location near him, were adequately protected even though that fire extinguisher was not in its designated place. We also conclude that this case is closely analogous to *Austin Engg. Co.*, 12 BNA OSHC 1187, 1188, 1984-85 CCH OSHD ¶ 27,189, pp. 35,098-99 (No. 81-168, 1985), a case in which the Commission held that it lacked the power to question the Secretary's decision to require fire extinguishers at certain locations. (Citing *Van Raalte Co.*, 4 BNA OSHC 1151, 1152, 1975-76 CCH OSHD ¶ 20,633, p. 24,698 (No. 5007, 1976)(the Commission lacks the power to question the wisdom of a standard)). As in *Austin*, the Secretary's intention to require fire extinguishers at a particular location, *i.e.*, their "designated places" unless the extinguishers are actually in use, is clear from the language of the cited standard. The standard serves to protect those employees in the workplace who are *not* aware that a fire extinguisher has been moved from its designated place. Given this purpose, Atlantic's claim that the assembly line employee who moved the fire extinguisher closer to him was receiving greater protection misses the point.

We therefore affirm item 2a of citation no. 1, including the Secretary's allegation that this violation was serious. In addition, we affirm the judge's assessment of a \$240 penalty for the "grouped" violations described in items 2a and 2b. A penalty of \$240 for two separate serious violations of the fire extinguisher standards, involving two separate fire extinguishers, is neither unreasonable nor excessive.

XIX. CITATION NO. 1, ITEM 3

Item 3 of citation no. 1 alleged a serious violation of 29 C.F.R. § 1910.157(g)(1)⁸⁶ and proposed a penalty of \$240. The citation alleged that Atlantic violated the cited standard in the following manner:

⁸⁶ The cited standard and its companion provision establish the following requirements:

§ 1910.157 Portable fire extinguishers.

-
- (g) *Training and education.* (1) Where the employer has provided portable fire extinguishers for employee use in the workplace, the employer shall also provide an

Establishment: Employer did not provide an educational program for all employees to familiarize them with general principles and hazards involved with fire fighting in the workplace. Employees use the following flammable products: toluene, Kyanize paint, lacquer thinner, and spray paint.

In contrast to all of the other citation items in this case, the instant citation item is based primarily on the testimony of IH Shum and only secondarily on the testimony of IH Turner. Shum testified that she had conducted interviews with four of Atlantic's production employees, during which she asked them "about what type of training they had received about use of the fire extinguisher." According to the witness, the employees had responded, as follows. One employee, Jean Simon, said that he had received training about the use of fire extinguishers from president Migell. A second employee, Mike Vasiliades, stated that he had not received any training about the fire extinguishers for several years, although he had received training at that time from a foreman who apparently no longer worked for Atlantic. *Compare supra* note 86, quoting section 1910.157(g)(2). The two other employees Shum interviewed, Weston Gregory and Franklin Augustine, both told her that they had never received training from Atlantic about the use of its fire extinguishers.

When she took the stand following Shum's testimony, IH Turner indicated that the instant citation item was based primarily on Shum's interviews and secondarily on her own interview with Migell. She added that she had also talked to the employees about fire extinguishers and that, to the best of her recollection, there were no inconsistencies between Shum's testimony on the matter and what the employees had told her. Concerning her interview with Migell, Turner testified that she had asked the company president if the employees were "expected" to use fire extinguishers if the need arose and he had responded that they were "required" to do so.⁸⁷

President Migell testified that "[t]he employees had at some time been told about fire extinguishers." When asked by the judge if he could be more specific, the witness answered that "over the years, they've been shown several times" how to use the extinguishers. Migell suggested that any contrary information the employees may have given the compliance officers was simply
(..continued)

educational program to familiarize employees with the general principles of fire extinguisher use and the hazards involved with incipient stage fire fighting.

(2) The employer shall provide the education required in paragraph (g)(1) of this section upon initial employment and at least annually thereafter.

⁸⁷ We conclude that this undisputed testimony establishes that the cited standard was applicable to the cited conditions. Under the terms of the standard, *see supra* note 86, the specified employee training is required "[w]here the employer has provided portable fire extinguishers *for employee use* in the workplace" (emphasis added).

the result of faulty memories. Migell further testified that Atlantic maintained only one type of fire extinguisher, a carbon dioxide extinguisher, at its Watertown workplace. He asserted that "it's almost common knowledge for most people how to use that type of fire extinguisher" and also that "there's very little chance of injury with that," in contrast to some other types of extinguishers. He added that at least one employee had demonstrated his knowledge about how to use the extinguisher by in fact using it "many times." (We infer from other related statements that this testimony refers to Weston Gregory).

Based on the record evidence set forth above, we conclude that the Secretary has sustained his burden of proving the alleged violation. We find IH Shum's testimony concerning her interviews with the four production employees to be credible and reliable evidence, and we fully credit that testimony. In particular, we conclude that Migell was unsuccessful in his attempt, during his cross-examination of Shum, to establish that there had been some misunderstanding during the interviews because some or all of the employees were French-speaking immigrants from Haiti. In addition, we reject Atlantic's challenge to the *admissibility* of Shum's testimony. Statements by employees to OSHA compliance officers concerning their workplace activities are not "hearsay" but rather "admissions," which are admissible in the Commission's proceedings under Fed. R. Evid. 801(d)(2)(D) and 29 C.F.R. § 2200.71. *E.g., Regina Constr. Co.*, 15 BNA OSHC 1044, 1047, 1991-93 CCH OSHD ¶ 29,354, p. 39,467 (No. 87-1309, 1991). Here, the disputed testimony set forth the admissible "admissions" of four employees concerning matters that were within the scope of their employment. *See supra* note 87.

We further conclude that IH Shum's testimony provides strong support for the Secretary's allegation of noncompliance with section 1910.157(g)(1). Her testimony was quite specific in setting forth the basic question that she had asked the employees and the differing answers that each of them had given. In response to this evidence, Atlantic introduced only the vague, generalized testimony of president Migell that, "over the years," the employees had been shown "several times" how to use Atlantic's fire extinguishers.

We conclude that Migell's testimony is insufficient to rebut Shum's testimony. Migell testified only that the employees had been taught how to use the fire extinguishers that Atlantic provided. He said nothing about training them in how to safely fight fires. Yet, the cited standard expressly requires training "to familiarize employees with the general principles of fire extinguisher use and the hazards involved with incipient stage fire fighting." In addition, the standard's requirement for "an educational program" to be provided on "at least" an annual basis suggests to us something more than "[l]earn as you go one-on-one informal instruction or explanation" (Atlantic's own description of its training). We therefore find that, whatever training Atlantic may have provided its employees relating to the use of fire extinguishers, it was not sufficient to satisfy the requirements of the cited standard.

We also conclude that the Secretary has sustained his burden of proving that the instant violation was a serious violation warranting a \$240 penalty. During her testimony, IH Turner expressed her opinions that training is "important for the ultimate proper use of fire extinguishers by employees" and that an employee required to use an extinguisher without adequate training might injure himself or herself through improper use of the extinguisher, *e.g.*, by pointing it in the wrong direction. We are not persuaded by Migell's arguments that there was no hazard because employees knew how to operate the extinguishers and there was little chance of injury from the extinguishers provided. We credit Turner's testimony as to the hazard created by the instant violation over Migell's contrary claims and, on the basis of that testimony, we sustain the Secretary's classification of the violation and assess his proposed penalty.⁸⁸

⁸⁸ Commissioner Montoya joins in affirming the alleged violation of 29 C.F.R. § 1910.157(g)(1) that was set forth in item 3 of citation no. 1. However, she dissents from the Commission's classification of this violation as serious and its assessment of the proposed penalty of \$240. In her view, it does not follow, as IH Turner suggested, that any deficiency in an employer's fire extinguisher training program automatically creates "a substantial probability that death or serious physical harm could result." *See supra* note 23 (statutory definition of "serious" violation). On this record, Commissioner Montoya would find that the Secretary has established only a hypothetical possibility that death or serious physical harm might have resulted from Atlantic's noncompliance with the cited standard. President Migell testified to the effect that all of the production employees had "at some time been told" how to use the carbon dioxide fire extinguishers that Atlantic provided for the workplace. The Secretary also failed to rebut Migell's testimony to the effect that Gregory, one of the two employees who stated he had never received fire extinguisher training, had nevertheless demonstrated, by his actual use of the extinguisher on several occasions, that he in fact knew how to use it. Based on the evidence set forth above, Commissioner Montoya would classify this violation as other than serious, rather than serious. Having considered each of the section 17(j) factors, she would assess a penalty of \$100 for this violation.

XX. CITATION NO. 4, ITEM 1

Item 1 of citation no. 4 alleged an other than serious violation of 29 C.F.R. § 1903.2(a)(1)⁸⁹ and proposed a penalty of \$100. The citation alleged that Atlantic violated the cited regulation in the following manner:

Plant: On 11/7/89 it was determined that the poster informing employees of the existence of OSHA and their rights and duties set forth by the OSHAct was not posted.

On the evidentiary record, Atlantic's failure to comply with the requirements of section 1903.2(a)(1) is undisputed. IH Turner testified that, on the first day of her inspection, November 7, 1989, she had determined that Atlantic did not have an "OSHA poster," *i.e.*, the poster described in the cited regulation, posted at its Watertown, Massachusetts workplace. She had therefore provided the company with additional copies of the poster and informed its representative(s) that those copies should be posted. Nevertheless, on each of the days that she returned to the workplace--December 5, 1989; February 15, 1990; and March 9, 1990--she determined that Atlantic still did not have any copies of the OSHA poster posted.

President Migell did not dispute any of these assertions in his own testimony. Instead, he suggested that the OSHA poster had not been posted during the 1989-90 inspection because of the plant-wide cleaning and renovation project that was underway at the same time as the inspection. However, Turner testified that Atlantic could have posted a poster on the employee bulletin board outside of the office, where she had observed the posted hazard communication notice (Exh. C-13). *See supra* Part XV.E. Yet, there was no poster on the bulletin board. In fact, she stated, she had covered "the entire facility" on each of the last three days she was in the plant and had not observed the poster posted anywhere. This testimony remained undisputed in this proceeding until Atlantic filed a response to the Secretary's review brief with the Commission, eighteen months after the

⁸⁹ The cited regulation provides, as follows:

§ 1903.2 Posting of notice; availability of the Act, regulations and applicable standards.

(a)(1) Each employer shall post and keep posted a notice or notices, to be furnished by the Occupational Safety and Health Administration, U.S. Department of Labor, informing employees of the protections and obligations provided for in the Act, and that for assistance and information, including copies of the Act and of specific safety and health standards, employees should contact the employer or the nearest office of the Department of Labor. Such notice or notices shall be posted by the employer in each establishment in a conspicuous place or places where notices to employees are customarily posted. Each employer shall take steps to insure that such notices are not altered, defaced, or covered by other material.

hearing in this case. In that response, it belatedly challenged the Secretary's claim that a poster could have been posted on the employee bulletin board, as follows:

[T]he bulletin board did have an OSHA poster attached to it at the time of the relevant inspection. The poster was entitled Safety and Health Protection on the Job, contained 10 paragraphs referring to the Act of 1970, and was printed by or for the United States Department of Labor. The poster was approximately 20 years old and was not recognized by Turner.

Atlantic also claims in its response that, even though this poster "was faded and somewhat water stained," it was "legible nonetheless." Atlantic asserts that the poster "was discovered attached to the glass enclosed bulletin board near the office in the place where Turner claims not to have seen it, *after* Respondents filed their brief." We assume this refers to Atlantic's filing of its review brief with the Commission, at least 26 months after the last day of the 1989-90 inspection.

Neither of Atlantic's defenses to the Secretary's charge are persuasive. At the hearing, Migell implied that the OSHA posters had been "temporarily removed to accomplish the painting."

On this record, however, it is clear that there was nothing at all "temporar[y]" about the violative conditions that are at issue here. It is also clear that the posters remained unposted for far longer than was necessary to accommodate the needs of the painting contractor and that Atlantic had more than enough time to put the posters back up after the contractor removed them, assuming that this was indeed what happened.

Atlantic's remaining defense is its claim that the poster was in fact posted. Even if we were to consider this factual claim that was not even raised in the case until several months after the close of the evidentiary hearing, we would conclude that it is without merit. A poster so hidden, faded or damaged that Atlantic did not even recognize it for what it was until two years after the contested citation was issued (even though Turner expressly claimed at the hearing that she had examined the bulletin board and found no poster to be there) can hardly be considered as being in compliance with the cited regulation. We therefore affirm citation no. 4, item 1, as an other than serious violation of the Act. We also affirm the judge's assessment of the proposed \$100 penalty.

ORDER

For the reasons stated above, we dispose of the citation items and assess penalties totaling \$7240, as follows:

Citation No. 1, Item 1, vacated	_____
Citation No. 1, Item 2, affirmed, serious as alleged	\$240
Citation No. 1, Item 3, affirmed, serious as alleged	\$240
Citation No. 1, Item 4, vacated	_____
Citation No. 1, Item 5, vacated	_____
Citation No. 1, Item 6, affirmed, changed to unclassified	\$300
Citation No. 1, Item 7, affirmed as modified, serious as alleged	\$300
Citation No. 1, Item 8, affirmed, changed to other than serious	\$100

Citation No. 1, Item 9, affirmed as modified, serious as alleged	\$360
Citation No. 2, Item 1, vacated	
Citation No. 2, Item 2, affirmed, changed to nonwillful	\$300
Citation No. 2, Item 3, vacated	
Citation No. 2, Item 4, affirmed, willful as alleged	\$800
Citation No. 2, Item 5, affirmed, willful as alleged	\$4200
Citation No. 2, Item 6, affirmed, changed to other than serious	\$300
Citation No. 2, Item 7, vacated	
Citation No. 3, vacated	
Citation No. 4, Item 1, affirmed, other than serious as alleged	\$100
Citation No. 4, Item 2, vacated	
Citation No. 4, Item 4, affirmed as modified, other than serious as alleged	\$ 0

It is so ordered.

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

Dated: December 5, 1994

MONTOYA, Commissioner, concurring and dissenting:

I join in Parts I through X, XIII, XV, XVIII, and XX of the lead opinion. I also join in Parts XI and XII, with respect to all issues except the penalty assessments, and in Part XIX, with respect to all issues except the classification of the violation and the penalty assessment. My separate views on each of those matters are set forth in the lead opinion.

XIV. Citation No. 2, Item 6

I dissent from the majority's decision to affirm item 6 of citation no. 2. *See supra*, lead opinion, Part XIV. The sole support for the Secretary's charge is the ambiguous and conclusory testimony of IH Turner that is summarized in the lead opinion. I would find, however, that that testimony establishes only the following: (1) Turner spoke to president Migell about MSDS's; (2) Migell informed Turner that Atlantic's MSDS's were maintained by Alice Sederis, the company's office secretary and bookkeeper; (3) Migell further informed Turner that Sederis worked only one day a week; (4) Turner thereafter arranged to return to the workplace on a day or days when Sederis was working; and (5) Sederis granted Turner access to the MSDS's when the compliance officer returned to the workplace. While these facts are undisputed, they do not provide an adequate foundation for the Secretary's allegation that Atlantic failed to make its MSDS's "readily accessible [to its production employees] during each work shift," as required under the cited standard.

Unlike the compliance officer, I would not conclude, from the mere fact that president Migell referred her to the bookkeeper, that Alice Sederis was the *only* employee who could have provided her access to the MSDS's and therefore that *an Atlantic employee* requesting access to an MSDS would similarly have had to wait until Sederis was in the office before he could examine an MSDS. As president Migell suggested during his testimony, the compliance officer's reasoning ignores the reality of working "[i]n a small workplace, [where] many people do many jobs and it's not necessarily [just] one person" who is able to do a particular job.

In its post hearing and review briefs, Atlantic asserts that: (a) Migell could and would have obtained quick access to the MSDS's if an employee had requested access, (b) Migell was unaware of any problem Turner may have had in obtaining access to the MSDS's at the time of the inspection, and (c) anyone in the office could have "presented" the MSDS's to Turner "on the spot" if she had only gone to the office and asked for access. On this record, I find these assertions to be credible. I particularly note that Turner never even claimed during her testimony that, at the time of her initial request(s) for access to the MSDS's, either Migell or anyone else had made an unsuccessful attempt to search for the documents. In addition, the record establishes that Alice Sederis was not the only employee who worked in Atlantic's office. In defending against the instant citation item, Migell testified that Atlantic had "one full-time person in the office" at the time of the alleged violation. In context, it is clear that Migell was not referring to Sederis, and it is unlikely that he was referring to himself. Also, both IH Shum and Migell referred in their

testimony to an office employee named Henry Trabolvsi, identified by Shum as "the bookkeeper there," who had assisted Shum during the inspection by acting as a translator. On this record, I am not persuaded that a production employee seeking access to an MSDS could *not* have obtained that access during any work shift simply by going to the office and asking Trabolvsi or some other office worker if he could see the document.

In arguing that Atlantic failed to make its MSDS's "readily accessible during each work shift," within the meaning of the cited standard, 29 C.F.R. § 1910.1200(g)(8), the Secretary cites two cases in which the Commission affirmed alleged violations of the construction industry counterpart to that standard, 29 C.F.R. § 1926.59(g)(8). *Thomas Lindstrom Co.*, 15 BNA OSHC 1353, 1991-93 CCH OSHD ¶ 29,526 (No. 90-1084, 1991); *Super Excavators, Inc.*, 15 BNA OSHC 1313, 1991-93 CCH OSHD ¶ 29,498 (No. 89-2253, 1991). However, those two cases are easily distinguished. In the *Lindstrom* case, the MSDS's were maintained at the employer's central office, which was variously estimated to be between ten and forty-five minutes away by car from the construction site where the exposed employees were working. In *Super Excavators*, the MSDS's were again at the employer's office, approximately 22 miles away from the construction site where the employees were working.

Here, in sharp contrast, all five of Atlantic's production employees were working in the same workplace establishment where the MSDS's were maintained. Moreover, that establishment apparently consisted of a single, relatively small and compact, one-story building. Although the size of Atlantic's total workforce is not specified in the record, it seems highly likely that no more than ten people worked in the building on either a full-time or part-time basis. In addition, all five of the production employees at issue here had been working at this same establishment for several years prior to the 1989-90 inspection. I further note that this employer maintained all of its MSDS's in a centralized location (the company office) and that there is no evidence that the MSDS's were kept in either a locked file cabinet or a hidden compartment within the office.

Prior to this case, the Commission has never sustained an alleged violation of the cited standard or its construction industry counterpart under circumstances that even remotely resemble those that existed here, *i.e.*, where the MSDS's were maintained in the office of the same building where the employees at issue worked and where the workforce was small, stable, and experienced. Under these circumstances, I find it difficult to believe that Atlantic's MSDS's would *not* have been "readily accessible" upon request of a production employee "during [any] work shift," as required under the cited standard. I would therefore vacate the Secretary's charge of noncompliance with section 1910.1200(g)(8) on the basis of the flimsy evidence that he has presented.

XVI. Citation No. 1, Item 9

I concur in part and dissent in part from the Commission's disposition of citation no. 1, item 9. For the reasons stated *supra*, lead opinion, Part XVI, I join in affirming the citation's allegations

concerning toluene, ammonium hydroxide, and Servistar spray enamel. I also join in vacating the citation's allegation concerning Kutzit paint and varnish remover, again for the reasons stated in Part XVI. However, unlike my colleagues, I would additionally vacate the citation's allegation that Atlantic violated 29 C.F.R. § 1910.1200(g)(1) by failing to maintain an MSDS for Sunnyside paint thinner.

The standard cited by the Secretary applies by its terms only to hazardous chemicals that are "use[d]" by the "[e]mployer[]": "Employers shall have a material safety data sheet for each hazardous chemical which *they use*" (emphasis added). Yet, the Secretary made no effort to establish that Sunnyside paint thinner was a product used by Atlantic. On the contrary, OSHA apparently included this product in the instant citation item simply because IH Turner had observed a small amount of it (a 1-gallon plastic container) stored in Atlantic's workplace. Assuming for the sake of argument that it would ever be proper for us to infer from the mere presence of a chemical in the workplace that that product was used by the employer, such an inference has been negated here. The storage area where Turner observed the paint thinner contained *both* household paints brought into the workplace by the painting contractor and spray enamels used by Atlantic in its production operations. Under these circumstances, there can be no presumption that the paint thinner was used by one employer rather than the other since either of the employers could have used the paint thinner in its operations.

The majority attempts to compensate for the Secretary's failure to introduce evidence that he should have gathered before issuing the citation by relying on statements made in Atlantic's review brief that it had substituted an unidentified "supermarket brand" of "paint thinner (mineral spirit)" for the more hazardous toluene in its battery spraying operations. However, there is no basis in the record for finding that those statements even refer to the Sunnyside paint thinner that is at issue here, let alone for concluding that those statements establish the applicability of the cited standard to the cited product.

I further dissent from the majority's classification of citation no. 1, item 9, as a serious violation of the Act and from their assessment of the proposed penalty of \$360. Under Commission precedent, the determination of whether a violation based on inadequate employee access to MSDS's has properly been classified as serious depends primarily on "[t]he nature of the hazardous material" involved, since "the absence of an MSDS, alone, would not cause physical harm." *Ford Development Corp.*, 15 BNA OSHC 2003, 2006, 1991-93 CCH OSHD ¶ 29,900, p. 40,798 (No. 90-1510, 1992), *aff'd without published opinion*, 16 F.3d 1219 (6th Cir. 1994); *Super Excavators*, 15 BNA OSHC at 1317, 1991-93 CCH OSHD at p. 39,804. However, while the Commission has looked primarily to the type of harm that could result if an employee contacted the chemical(s) in question, it has also examined whether the exposed employees have been "trained . . . in the recognition and avoidance of the hazards posed by [the] substances . . . [and] in the

proper treatment in case of exposure." *Id.*, 15 BNA OSHC at 1317, 1991-93 CCH OSHD at p. 39,805. In other words, the Commission has considered whether the information contained in the missing or inaccessible MSDS's has been conveyed to the employees through some other means.

Applying these principles to the record before us, I would hold that the Secretary has failed to prove that the absence of MSDS's for toluene, ammonium hydroxide, and Servistar spray enamel (the three products that I conclude are covered under the cited standard) created "a substantial probability that death or serious physical harm could result" within the meaning of section 17(k) of the Act, 29 U.S.C. § 666(k) (statutory definition of a "serious" violation). Indeed, since the record is virtually silent concerning the potential consequences of employee exposure to toluene and Servistar spray enamel, the only product for which the absence of an MSDS is even arguably serious is the ammonium hydroxide. Nevertheless, I would not classify even that violation as serious, because president Migell gave unrebutted testimony to the effect that he was the only employee at Atlantic's workplace who was exposed to ammonium hydroxide and that he was "very familiar with" that product. Moreover, president Migell gave unrebutted and credible testimony to the effect that toluene, spray enamels, and ammonia in the generic sense were all chemicals that the production employees had worked with or around for a number of years and that he (Migell) had given repeated warnings to the employees about the hazards of these chemicals and the appropriate use of personal protective equipment. I would therefore find that Atlantic's violation of section 1910.1200(g)(1) was other than serious, rather than serious. Based on my evaluation of the section 17(j) penalty factors, I would assess a penalty of \$100 for this citation item.

XVII. Citation No. 4, Item 4

In addition, I would vacate the allegation concerning "paint thinner" in citation no. 4, item 4. *See supra*, lead opinion, Part XVII. I agree with my colleagues that the coverage of the standard cited in item 4 of citation no. 4, *i.e.*, section 1910.1200(e)(1)(i), is co-extensive with the coverage of the standard cited in item 9 of citation no. 1, *i.e.*, section 1910.1200(g)(1). *See* immediately-preceding discussion of citation no. 1, item 9, *supra*. Therefore, since I have already concluded that Atlantic was *not* required to maintain an MSDS for the Sunnyside paint thinner observed at Atlantic's workplace, it necessarily follows that Atlantic was also not required to include that product on its list of hazardous chemicals. With the exception just noted, I join in Part XVII of the lead opinion.

/s/ _____
Velma Montoya
Commissioner

Dated: December 5, 1994

WEISBERG, Chairman, concurring in part and dissenting in part,

Like the bunny associated with another battery company, *Atlantic Battery* is a case that keeps going and going and going. To those readers who managed to wade through the voluminous decision preceding, congratulations on your perseverance.

Initially, it is important to put this case in proper perspective. In my view this is not a particularly difficult case nor does it raise novel legal issues. It does not involve reviewing a lengthy hearing record. The hearing before the administrative law judge lasted 4 days, and the hearing transcript is only 551 pages.

Moreover, it is significant to note that on May 22, 1991, the Secretary of Labor petitioned the First Circuit Court of Appeals to hold Atlantic Battery and its president, Bruce Migell, in contempt of the previous enforcement order. In October 1991, the Court of Appeals deferred acting on the contempt petition pending the Commission's findings in this proceeding. Thus, the contempt proceeding involving this employer before the First Circuit has been held in abeyance while this case has moved so ponderously through the Commission.

I agree with my colleagues that in general the Secretary's collection and presentation of evidence in this case had numerous shortcomings and should have been more careful and detailed. Similarly, I share my colleagues' view that the administrative law judge's decision is cursory, at best, and lacks critical analysis.

Atlantic Battery, however, is an employer who has been cited many times in the past for violations of OSHA's standard governing exposure to lead. While it appears that Atlantic has made significant improvements regarding lead exposure since the onset of these citations, some, though not all of the abatement has occurred through elimination of certain operations and employees. Indeed, at the time of the 1989-90 inspection, there were only 5 remaining production employees at the workplace. Two of these five employees were still on medical removal. One of these employees, Gregory, who should have been on medical removal since 1987, was the subject of several of the alleged violations and was found to have been overexposed to airborne lead on the day he was monitored. The other employee, Gallman, was found eating his lunch in the lunchroom in which surface lead was found. In this overall context, I find it difficult to give much credence to Migell's claims that the violations found, particularly those pertaining to lead, were unrepresentative of normal working conditions or beyond his knowledge or control.

As to the merits, I concur in the decision to affirm Parts III and XVIII through XX, and to affirm but modify Parts XI, XII, XIV, XVI and XVII. I also join in vacating the citation items at issue in Parts II, VI through VIII, X and XV. I disagree with my colleagues' disposition of the following citation items.

I. Citation No. 2, Item 2

I agree with my colleagues that the Secretary met his burden of proving Atlantic's violation of 29 C.F.R. § 1910.1025(c)(1). However, I disagree with their decision to classify this violation as nonwillful.

As a repeated violator of the cited standard, Atlantic was fully aware of its obligation to keep employee exposures to airborne lead within the standard's PEL.⁹⁰ It was also aware of the potential for overexposure during group burning. Indeed, Gregory, the employee found to have been overexposed to lead in the instant case, had been engaged in group burning on September 17, 1987, when Atlantic itself measured his overexposure to airborne lead levels of 73.99 $\mu\text{g}/\text{m}^3$. Yet, despite its "heightened awareness" of the need for precautionary measures, on February 15, 1990, Atlantic again allowed employee Gregory to be exposed to excessive airborne lead levels. There were only five production employees in its entire workplace. Gregory was performing his work in plain view of anyone who might pass by, and Atlantic by its own reckoning classified Gregory (since 1987) as a medically-removed employee whose exposure should have been constantly maintained below 30 $\mu\text{g}/\text{m}^3$.

My colleagues emphasize that the measures Atlantic had taken prior to the 1989-90 inspection to reduce airborne lead levels throughout its workplace were generally successful. As I view it, however, the fact that levels were generally low merely illustrates how little effort it would have taken for Atlantic to maintain Gregory's exposure within the PEL. Yet, there is no evidence that Atlantic took any measures that were specifically designed to reduce exposures in its group burning operations. It had not even retested in this area after its September 1987 test revealed the potential for overexposure. On this record, the Secretary correctly characterized the instant violation as willful.

IV. Citation No. 1, Item 8

Again, I concur in my colleagues' decision to affirm the alleged violation, but dissent from their decision to reclassify it. I would classify Atlantic's violation of 29 C.F.R. § 1910.1025(j)(2)(i)(C) as serious, as alleged by the Secretary, and assess the proposed penalty of \$420.

The majority's rationale for reclassifying this violation is based on speculation rather than the record evidence. My colleagues assume that Atlantic knew enough about Gregory's blood lead level and about the airborne lead levels in its workplace to make informed decisions about his work assignments. They also assume that the additional information gained by complying with the cited standard would not have had any significant impact on Atlantic's actions and, through those actions,

⁹⁰ Atlantic had been cited three times previously (in November 1972, August 1979, and January 1986) for violating this same standard or its predecessor, and it had been issued a failure to abate notification in October 1986.

on the employee's health. However, the majority fails to consider that additional biological monitoring might have provided Atlantic with additional information that might have caused it to take more stringent measures to protect Gregory's health, resulting in a shortening of the period (in excess of three years) that Gregory remained on medical removal status (at least on paper). Since Atlantic failed to comply with the prescribed schedule for sampling Gregory's blood lead level, we can never know what information those additional tests would have provided and what actions Atlantic might have taken in response. Nevertheless, given the length of time Gregory's blood lead level remained above 40 µg/100 g and the lengths of the recurring gaps in his biological monitoring (as long as 5 ½ months), I am in complete agreement with the Secretary's classification of this violation as serious.

V. Citation No. 2, Item 3

I dissent from my colleagues' decision to vacate this citation item. As noted in the lead opinion, an OSHA standard should be interpreted in a manner that is consistent with the standard's purpose. Here, the cited standard's purpose is to require a continuation of employee exposure monitoring when the initial results reveal exposure to excessive levels of airborne lead. Monitoring is to be repeated until the employee exposures have been reduced below the lead standard's action level. Exposure monitoring conducted by Atlantic on September 17, 1987, showed employee exposure to excessive levels of airborne lead during group burning operations. Yet, Atlantic never again conducted monitoring to determine whether exposures during group burning had been reduced. The Secretary correctly determined that these undisputed facts established noncompliance with the cited standard.

I find no merit in the majority's assertion that Atlantic would have had to assign Gregory to group burning on a regular quarterly basis so that follow-up monitoring could have been conducted while he was engaged in that activity. My colleagues apparently credit the claim in Atlantic's review brief that Gregory did not burn groups between September 1987 and February 1990 because he was on medical removal. However, Migell made no such claim during his testimony, and the claim is contradicted by Gregory's admission to Turner that group burning was "part of his job title." In any event, Atlantic repeatedly asserted in that same review brief that Gregory performed no group burning on February 15, 1990, because he was on medical removal. However, contrary to Atlantic's assertion, we have expressly found, *see supra*, lead opinion, Part I.B, that this latter claim is false. I would reject the other claim as well. On this record, I simply do not believe that Gregory engaged in group burning only on the two occasions when exposure monitoring established his overexposure to airborne lead, while faithfully refraining from that activity throughout the entire 2 ½-year interval between those samples because of his medical removal status.

IX. Citation No. 2, Item 4

While I join in affirming item 4 of citation no. 2, I dissent from the majority's decision to assess a substantially reduced penalty of \$800 for this willful violation. The majority justifies its reduction based on a lack of evidence concerning the most critical penalty factor, gravity. However, I would find that the high gravity of the violation is apparent from the fact that it resulted in the presence of surface lead dust in a lunchroom. Indeed, we have found that the record establishes the actual exposure of an employee to a lead ingestion hazard on November 7, 1989. An employee was sitting at a lunchroom table reading a newspaper and drinking milk on that date when Turner took two wipe samples from the table's surface. Analysis of those samples later revealed that the surface of that table had been contaminated with lead dust at the same time that the employee was seated there.

While I agree with my colleagues that we cannot determine from this record how much lead dust Atlantic's employees brought into the lunchroom with them on their work clothes, we do know that the compliance officer saw all five employees enter into the lunchroom without removing the surface lead dust from their clothing. Turner discovered lead dust in the lunchroom on all three of the days that she conducted wipe sampling in that room, and, "at one point or another," she discovered lead dust contamination on every surface in the lunchroom. Given the gravity of this willful violation, I find no basis for reducing the Secretary's proposed penalty of \$4200. In particular, I would not "give Atlantic credit for taking significant steps to provide and maintain a lead-free lunchroom," as my colleagues have done. Atlantic failed to take basic steps to keep employees from bringing lead dust into the work room with them, such as enforcing its own work rules. The "significant steps" that it did take vis-a-vis its housekeeping program to remove lead dust that was accumulating in the lunchroom have been properly considered in the context of the alleged violation discussed in Part X of the lead opinion.

XIII. Citation No. 1, Item 1

Finally, I dissent from my colleagues' decision to vacate item 1 of citation no. 1, which alleges that Atlantic failed to provide "suitable facilities . . . for flushing of the eyes," within the meaning of 29 C.F.R. § 1910.151(c). Considering the "totality" of the relevant "circumstances," as required under the case law cited in Part XIII of the lead opinion, I conclude that the disputed facilities provided by Atlantic were not "suitable" within the meaning of the cited standard and that the Secretary therefore sustained his burden of proving Atlantic's noncompliance with that standard.

Specifically, I credit IH Turner's testimony that the aerated hose provided by Atlantic was *not* suitable for flushing the eyes because an employee would first have to reach across a "conveyor type apparatus" to remove the hose from its storage place on the wall above the conveyor and then hold the device with one hand while flushing only one eye at a time, *i.e.*, the eye held open by the unoccupied hand. Since the Secretary proved that the combination of these defects rendered the aerated hose unsuitable for its intended purpose, I find it unnecessary to decide whether only an

eyewash fountain would have satisfied the employer's duty under the cited standard. I also disagree with my colleagues' reliance on *Bridgeport Brass* as support for their conclusion that Atlantic complied with the cited standard. In *Bridgeport Brass*, which my colleagues cite with respect to obstruction to access, the flushing facilities that the Commission found suitable were an eyewash fountain and a safety shower, not an aerated hose. 11 BNA OSHC at 2256, 1984-85 CCH OSHD at p. 34,860.

/s/

Stuart E. Weisberg
Chairman

Dated: December 5, 1994