SECRETARY OF LABOR,	:	
Complainant,	:	
v.	:	OSHRC Docket 00-0096
UNION TANK CAR COMPANY,	:	
Respondent.	:	

ORDER

This case is before the Commission based on a Direction for Review by Commissioner Ross Eisenbrey on March 19, 2001. The Direction specified the sole issues for review as the administrative law judge's affirmance of Citation 4, Item 1, alleging an other-than-serious violation of 29 C.F.R. § 1904.2(a), and Citation 4, Item 2, alleging an other-than-serious violation of 29 C.F.R. § 1904.4.

The Secretary has now filed a Notice of Withdrawal of Citation Items, in which she withdraws Citation 4, Items 1 and 2. We construe this as a motion to withdraw these two items, and we grant it. The judge's decision is hereby modified to the extent it is inconsistent with the Secretary's Notice of Withdrawal.

We conclude that no further review of this case is warranted.[1] As modified by the Secretary's Notice of Withdrawal and by this Order, the judge's decision is the final order of the Commission.

It is so ordered.

/s/
Thomasina V. Rogers
Chairman

/s/
Ross Eisenbrey
Commissioner

Dated: July 17, 2001

[1]The administrative law judge's decision also includes an affirmance of Citation 3, Item 1, alleging a willful violation of 29 C.F.R. § 1910.1020(e)(2)(i)(A). Respondent took issue with this disposition in its petition for discretionary review, but this item was not included in the direction for review or briefing notice. *See* Rule 92(a) of the Commission's Rules of Procedure, 29 C.F.R. § 2200.92(a).

Secretary of Labor,

Complainant,

v.

OSHRC Docket No. **00-0096**

APPEARANCES

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For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

Union Tank Car Company (UTC) repairs and cleans railroad tank cars at a plant in Marion, Ohio. After receiving an employee complaint, the Occupational Safety and Health Administration (OSHA) inspected the Marion plant on October 25, 1999. As a result of the inspection, UTC received four citations on January 26, 2000, which it timely contested.

Among the citation items received[2] which remain in issue, it is alleged that UTC willfully violated 29 C.F.R. § 1910.1020(e)(2)(i)(A) (citation no 3, item 1) by failing to provide each employee or the designated representative access to the employee's exposure records. A penalty of $55,000 is proposed. Also, it is alleged that UTC violated 29 C.F.R. § 1904.2(a) (citation no. 4, item 1) and 29 C.F.R. § 1904.4 (citation no. 4, item 2) by failing to record on its 1998 OSHA 200 log and the supplementary record (OSHA Form No. 101) employees who developed skin rashes/burns and inhalation illnesses from exposure to electrode binder. The failure to record

[2]The remaining items in citation nos. 1, 2, 3 and 4 were settled by the parties prior to the hearing (Tr. 5). The parties' partial stipulation and settlement agreement dated July 27, 2000, is approved.

violations are classified as "other" than serious and propose penalties of $1,000 (item 1) and $7,000 (item 2).

A hearing was held in Columbus, Ohio, on August 2 and 3, 2000. The parties stipulated jurisdiction and coverage and filed post-hearing briefs (Tr. 4-5).

UTC denies the alleged violations. It argues that the allegation involving employees' access to exposure records (citation no. 3, item 1) is barred by the six-month statute of limitations. Also, UTC asserts that employees did not request the exposure records after the results were available. With regard to the alleged failure to record entries on its OSHA 200 log and supplemental Form 101 in 1998, UTC submits that the skin rashes and burns were not recordable illnesses because of the lack of diagnosis.

For the reasons discussed, UTC's time bar and lack of diagnosis arguments are rejected and the violations are affirmed.

Background

UTC repairs and cleans railroad tank cars at a plant in Marion, Ohio. The Marion plant employs approximately 125 employees (Tr. 104-105, 227). In addition to the Marion plant, UTC has 10 other repair facilities, 3 manufacturing facilities and mobile units. UTC's corporate headquarters is in Chicago, Illinois. UTC employs 2,000 employees (Tr. 80, 141, 270).

At the Marion plant, railcars are cleaned by two or three man crews in an area referred to as the "cleaning rack." The railcars to be cleaned have carried a variety of products including asphalt, propane, sulfur and electrode binder.[3] To avoid potential problems in cleaning, UTC places a tag on the front end of each railcar which informs employees of the car's former contents and the level of personal protective equipment and measures needed. One man then enters the railcar and cleans out the old products, sometimes using a jackhammer, while the other crew members remain outside the railcar. The man inside the railcar places the old product in buckets which are lifted out and disposed of by the other crew members (Exh. R-5; Tr. 13, 24-25, 37-38, 60).

[3]Electrode binder is within the family of polynuclear aromatic hydrocarbons and includes coal tar pitch volatile and benzene soluble fractions (Exhs. J-1, exhibit B at p. 23, C-2; Tr. 102, 131, 136).

After not processing railcars containing electrode binder for several years,[4] UTC again started cleaning them in April 1998. Employees described electrode binder as a hard black asphalt-like product that broke into a powdery substance. Between April 14 and July 15, 1998, the record shows that UTC cleaned 18 electrode binder railcars (Exh. R-5; Tr. 38, 61).

When cleaning the railcars, the employees inside the railcars initially wore Tyvek suits and air-supplied respirators as protective equipment. However, employees began experiencing skin problems and lung irritation (Tr. 27-28, 31, 118-120, 189, 214-215). Three employees testified as to their experiences.

Bill Dolloway, a former coil and valve repairman, testified that after cleaning inside the railcar, he experienced what he described as chemical burns on his exposed neck and wrist areas. He compared the burns to a sunburn but "a lot more intense." He was given a skin cream to put on. The burn lasted approximately 48 hours. Dolloway did not seek medical treatment because he "didn't think it was that bad" and he "didn't want to seem like [he] was just whining." Dolloway testified that he observed similar burns of co-workers Mark Wilson and Michael Chontos (Tr. 13, 16-19, 28-29).

Daniel Wireman, a current coil and valve repairman, testified that his burns on the back of his neck and nose were like "the worst sunburn you ever had with like fiberglass insulation over top of that . . . [o]nce you get burned by it, the sun, the heat reacted like . . . a chemical reaction with the sun." It lasted one or two weeks before it cleared up. He did not seek medical treatment. Wireman testified that he observed co-workers Dolloway, Wilson, Chontos, Bob Fields and Corey Watts with similar burns (Tr. 36, 41, 43, 48).

Michael Chontos, a current coil and valve repairman, described his burns on his neck and arms as a "chemical burn." "[I]t looked like a deep red rash " and felt like "shoe leather." He experienced "great discomfort." Chontos stated that although it took several months for the condition to clear up, he did not seek medical treatment. He used a cream given to him by UTC. Also, he avoided direct sunlight because sunlight seemed to enhance the burning sensation. Chontos

[4]The record indicates that in the past employees had not experienced any problems cleaning the electrode binder railcars (Tr. 189-190).

testified that he observed similar burns on Dolloway, Wilson, Wireman, Fields and Watts (Tr. 44, 59, 63-65, 73-74, 214).

In addition to the three testifying employees, George Auxier, Forrest Palmer, Marvin Sieter and Robert Fields reported experiencing similar burns to OSHA Industrial Hygienist (IH) Laura Ulczynski when cleaning the electrode binder railcars. Also, welding supervisor Jim Cavinee and hourly employee Ralph Dunsen experienced respiratory irritation as a result of welding inside railcars containing electrode binder. Their symptoms were described as flu-like. Cavinee sought medical attention[5] and missed a day or two of work (Tr. 145-146).

Dolloway, Wireman and Chontos testified that they told their cleaning rack supervisor Karl Blankenship and environmental engineer David Lawrence of their burns. Blankenship saw reddish rashes like sunburn on the necks of two employees, Dolloway and Chontos. Also, Blankenship testified that he told plant environmental engineer Lawrence of the employees' skin irritation. Lawrence testified that he initially believed the conditions were caused by heat chaffing. Lawrence provided the employees with a skin cream (Tr. 16-17, 42-43, 64, 107-109, 212-214).

In May, 1998, Lawrence notified UTC's corporate safety department of the employees' burns and rashes. IH Mary Kut went to the Marion plant and conducted air monitoring on two employees (Fields and Watts) cleaning a railcar containing electrode binder on May 21-22. Although she did not see the skin rashes, Kut interviewed six employees about their symptoms. Based on the air monitoring, Kut found that employees working on top and inside the railcars were exposed to coal tar pitch volatile at exposure levels exceeding OSHA's permissible exposure limit (PEL) of 0.2 mg/m³.[6] Kut concluded that the employees contacted the electrode binder on exposed areas of the skin or during removal of personal protective equipment. A copy of Kut's report, issued July 8, 1998, was received by Lawrence and Marion plant manager Bill Rasile (Exh. J-1 exhibit A; Tr. 80-83, 85, 269).

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[5]Although Cavinee received a diagnosis that his symptoms were due to exposure to electrode binder fumes, the parties stipulate that UTC was not aware of this diagnosis and knew only of the flu-like symptoms (Tr. 159-160).

[6]29 C.F.R. § 1910.1000(a), Table Z-1. OSHA's permissible exposure limit (PEL) for airborne coal tar pitch, benzene soluble fractions is .2 mg/m³ (milligrams of substance per cubic meter of air) for an 8-hour time weighted average (TWA). Although expressed in TWA, it is the PEL.

On July 13-15, 1998, UTC hired National Control Loss (NATLSCO), an outside consultant firm, to further investigate. NATLSCO's industrial hygienist, accompanied by Kut, monitored five employees (Chontos, Palmer, Marley, Wireman, Auxier) while cleaning electrode binder railcars. NATLSCO' air monitoring results also revealed that employees were exposed to benzene soluble particulate in excess of OSHA's PEL of 0.2 mg/m^3. The NATLSCO report is dated October 21, 1998. Plant manager Rasile received the NATLSCO results on November 5, 1998 (Exh. J-1, exhibit B; Tr. 85-86, 134-135, 237, 240).

On July 15, 1998, following NATLSCO's air monitoring, UTC discontinued servicing electrode binder railcars at the Marion plant (Tr. 31, 228).

On November 4, 1998, plant manager Rasile asked eight employees whether they wished to see a doctor. Supervisor George Auxier, who had complained of skin irritation, did request a doctor. Auxier was examined by Dr. Robert Brownlee on February 8, 1999 (Exhs. R-6, R-8, Tr.228-229, 231-232, 253-254). Dr. Brownlee notified Auxier by letter on February 16, 1999, that he thought it was "possible that this exposure to the coal tar at work has resulted in the appearance of a persistent Photo-reaction." However, he considered it a "fairly complicated diagnosis to make and treat." Dr. Brownlee recommended that Auxier see a more specialized doctor (Exh. R-2). A copy of Dr. Brownlee's February 16th letter was provided to UTC on April 9, 1999. In his transmittal to UTC, Dr. Brownlee stated that "historically" Auxier has a problem related to electrode binder and "historically" he is sensitive to it. He advised UTC that Auxier needed further testing (Exh. R-10). Dr. Brownlee did not see the skin rash on Auxier and did not conduct any tests (Exhs. R-12, R-13). Auxier did not follow Dr. Brownlee's recommendation to see a specialist (Tr. 259).

Following the air monitoring, Wireman testified that he requested his monitoring results from supervisor Blankenship "at least 5 times." He also asked plant manager Rasile. Wireman was told that the results were not available. Later, he was told by plant manager Rasile that UTC corporate would not allow him to give the results (Tr. 45-46, 50-51, 53).

Chontos testified that he also asked Rasile and Blankenship for the results on several occasions and was told that he would not be given the results (Tr. 67-69). Blankenship testified that Corey Watts had asked for the results (Tr. 211).

A 1996 poster on the plant bulletin board instructed employees who wanted to review their exposure records to contact plant environmental engineer Lawrence or his administrative assistant. On September 11, 1998, Lawrence was temporarily assigned to a plant in Texas until February, 1999. After the transfer, Lawrence testified that he did not receive any further requests for the results (Exh. J-1, exhibit D; Tr. 111-112, 115-116, 190-191).

Rasile, who was not plant manager when IH Kut conducted her air monitoring, testified that he was not aware of Kut's report until he was organizing files from the former manager during the fall of 1998. Rasile could not recall "anyone asking for the results" (Tr. 227-228, 241). He did state that Auxier and other employees at a November 4, 1998, meeting had requested the NATLSCO report. He did not receive the NATLSCO report until the next day, November 5, 1998 (Tr. 233, 237, 241-242).

After receiving the NATLSCO report, Rasile telephoned the corporate safety department and was told not to distribute the results. IH Kut testified that she spoke to her director of safety William Finkler who indicated that if not required by the standard then employees would not be provided the results. Finkler and Kut do not recall being told that an employee had requested the results. IH Kut agrees that she told plant manager Rasile not to give the employees the exposure results (Resp. Brief, p. 10; Tr. 238-239, 243, 262-265, 277).

The parties agree that the employees received the NATLSCO exposure results from the 1998 air monitoring on January 7, 2000. IH Kut's monitoring results have apparently never been provided (Tr. 237-238, 243, 247-248).

With regard to the OSHA logs, UTC admits that it did not record the employees' skin irritations or the flu symptoms on the OSHA 200 logs or supplemental Form 101 (Resp. Brief, p. 11). Environmental engineer Lawrence, who was in charge of recording injuries and illnesses at the Marion plant, stated that he did not record the skin irritations because there was no diagnosis. The employees lost no work time and no one filed a workers compensation claim. He considered the symptoms reported as "minimal." With regard to Cavinee and Dunsen, Lawrence was told only that they had flu-like symptoms (Tr. 191-193, 208-209).

In October, 1999, OSHA received an employee complaint alleging that he was not given monitoring results and his symptoms were not recorded as an illness. On October 20, 1999, after

obtaining an inspection warrant, IH Ulczynski initiated a limited inspection of the Marion plant (Tr. 127-129, 174-175). OSHA's citations were issued to UTC on January 26, 2000.

Discussion

Six-Month Statute of Limitations

UTC argues that the alleged violation of § 1910.1020(e)(2)(i)(A) is barred by the six-month statute of limitations because, if requested, the employees made such requests and were not provided access to the exposure records in 1998. The OSHA citation was issued more than one year later, January 26, 2000. In order to avoid the statute of limitations, UTC argues that the employees' requests and UTC's refusal had to occur after July 26, 1999. UTC asserts that there was no overt act by UTC that triggered liability within the statutory period (Resp. Brief, p. 12).

UTC's time bar argument is rejected. Section 9(c) of the Occupational Safety and Health Act (Act) provides that "[n]o citation may be issued . . . after the expiration of six months following the occurrence of any violation."

The record shows that IH Ulczynski during her inspection found no employees who had requested monitoring results after November, 1998 (Tr. 165). Plant manager Rasile stated that the last time George Auxier or other employees requested results was during a November, 1998, meeting when the NATLSCO exposure records were not available (Tr. 231-232).

In considering the six-month limitations, the instance of noncompliance and employee access to the unsafe condition must occur within six months of the issuance of the citation. However, the instance of a noncompliance may have existed more than six months and continued into the statutory period. *Central of Georgia Railroad Company*, 5 BNA OSHC 1209, 1211 (No. 11742, 1977) (although in existence more than six months, a housekeeping condition was not time barred because it also existed during OSHA's inspection). The Review Commission has noted that a failure to:

> comply with a standard issued under the Act violates the Act until it is abated. We conclude that the obligation to correct any error or omission in an employer's OSHA-required injury records runs until the error or omission is either corrected by the employer, or discovered or reasonably should have been discovered by the Secretary.

General Dynamics Corp., *Electric Boat Div.,* 15 BNA OSHC 2122, 2128 (No. 87-1195, 1993) (a record keeping violation affirmed where the initial failure to record occurred more than six months prior to the issuance of the citation), *Johnson Controls, Inc.*, 15 BNA OSHC 2132, 2135 (No. 89-2614, 1993) (inaccurate entry on OSHA Form 200 violates Act until it is corrected).

Similarly, a violation for failing to provide employees access to monitoring results upon request is not time barred; it is, if requested, a continuing obligation until the employee is provided access. In this case, the employees' exposure records were not provided until January 7, 2000, after OSHA's inspection had concluded (Tr. 237-238, 247). OSHA was not aware, nor reasonably should have been aware, of UTC's failure to provide access until its inspection in October, 1999.[7] Although employees were no longer exposed to electrode binder, the employees' rights to their exposure records did not expire. If the record shows that employees requested their exposure records in 1998 and they were not provided, the statute is tolled.

Alleged Violations

The Secretary has the burden of proving a 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).

Atlantic Battery Co., 16 BNA OSHC 2131, 2138 (No. 90-1747, 1994).

[7] Although not argued by Union, the record shows that on June 3, 1998, OSHA received a telephone complaint regarding employees getting ill from exposure to electrode binder. Instead of initiating an inspection, by letter dated June 3, 1998, OSHA requested that UTC investigate the complaint and provide OSHA the results. On June 8, 1998, UTC informed OSHA that the employees had not correctly worn their personal protective equipment (Exh. C-1, exhibit C, attachments 5 and 6). This correspondence does not constitute notice to OSHA that UTC's exposure records were requested by employees or access was denied by UTC. The six-month statute of limitations did not begin to run until OSHA initiated its inspection in October, 1999.

UTC does not dispute the application of § 1910.1020 and the record keeping standards or that its employees were exposed to electrode binder. Also, UTC knew that the employees were cleaning railcars containing electrode binder.

The issue in dispute is whether UTC failed to comply with the terms of the cited standards.

Citation No. 3, Item 1 - Alleged Violation of § 1910.1020(e)(2)(i)(A)

The citation alleges that UTC failed to provide employees air monitoring records upon request. Section 1910.1020(e)(2)(i)(A) provides in part:

> [E]ach employer shall, upon request, assure the access to each employee and designated representative to employee exposure records relevant to the employee.

The purpose of the standard is to allow employees access to information about their exposure to potentially harmful substances in the workplace so that they are better able to evaluate long term health risks and to encourage the use of proper precautions, including personal protective equipment and hygiene. Also, employees will have the information so that if medical attention is necessary, proper treatment is rendered.

An employee exposure record includes "environmental (workplace) monitoring or measuring of a toxic substance or harmful physical agent" to which the employee is or has been exposed. *See* § 1910.1020(c)(5) and § 1910.1020(e)(2)(i). The material safety data sheet (MSDS) identifies electrode binder as "very toxic." Electrode binder is not only a contact irritant but also a potential carcinogen (Exh. C-2). The NATLSCO report specifically referenced § 1910.1020 and advised UTC that the records were accessible by employees (Exh. J-1, exhibit B).

UTC does not dispute that the air monitoring results of IH Kut and NATLSCO showing employee exposure to electrode binder were exposure records required to be provided to employees, if requested, under § 1910.1020(e)(1)(i)(Exh. J-1; Tr. 264). UTC acknowledges that employees were not provided access to NATLSCO's monitoring results until January 7, 2000. IH Kut's monitoring results have never been provided (Exh. C-1; Tr. 247-248).

UTC argues that the air monitoring results were not requested by employees after the Marion plant had received the results. UTC acknowledges that several employees had requested the results prior to receipt.

The record shows that employees requested the air monitoring results from UTC supervisory employees on numerous occasions from 1998 through 1999 (Tr. 20-21, 30, 45-46, 53-54, 211-212, 217). The reports reflecting the air monitoring results were available to UTC on July 8, 1998 (IH Kut's report) and on October 21, 1998 (NATLSCO's report) (Exh. J-1, exhibits A and B). Even if the results were not available when first requested, UTC knew that employees wanted access. UTC was not relieved from providing employees access to the exposure records when available. Section 1910.1020(e)(2)(i) contemplates that if the exposure record cannot be provided within 15 working days, the employer will notify the employee of the reason and the earliest date it will be available. Also, the record shows that even when employees requested the exposure records after they were available, UTC still refused to provide the NATLSCO report until after OSHA had completed its inspection. Plant manager Rasile acknowledged that Auxier had requested his monitoring results after he had the NATLSCO report in November 1998, but he still did not provide him access (Tr. 237). Also, without explanation, IH Kut's monitoring results have never been provided (Tr. 247-248). The violation is affirmed.

Willful Classification

The violation of § 1910.1020(e)(2)(i)(A) is classified as willful.[8] A willful violation is "one committed with intentional knowing or voluntary disregard for the requirements of the Act, or with plain indifference to employee safety." *Cone Construction, Inc.*, 16 BNA OSHC 1870, 1872 (No. 92-264, 1994). A willful violation differs from other classifications because of an employer's heightened awareness of the noncompliant conduct or conditions and by a state of mind showing conscious disregard or plain indifference. *Morrison-Knudsen Co./Yonkers Contracting Co.,* 16 BNA OSHC 1105, 1123 (No. 88-572, 1993).

However, a violation is not willful if the employer has a good faith belief that it was not in violation. The test of good faith is objective--whether the employer's belief concerning a factual matter, or the interpretation of a rule, was reasonable under the circumstances. *General Motors Corp.*, *Electro-Motive Div.*, 14 BNA OSHC 2064, 2068 (Nos. 82-630, 84-731, 84-816, 1991).

[8]In the alternative, the Secretary has classified the violation as serious (Tr. 140).

The record in this case establishes that UTC's violation of § 1910.1020(e)(2)(i)(A) was willful. UTC was aware that § 1910.1020(e)(2)(i)(A)[9] permitted employee access to air monitoring records. A poster at the Marion plant advised employees of their right to request and receive exposure records (Exh. J-1, exhibit D; Tr. 138-139). This notice had been posted since 1996.

Furthermore, NATLSCO, in its report issued October 21, 1998, specifically advised UTC that the monitoring results were exposure records to which employees must be given access (Exh. J-1, exhibit B at p. 25). The report states:

> This report is an employee exposure record according to the OSHA Standard *Access to Employee Exposure and Medical Records*. The Standard's requirements include employee access to exposure records, informing employees of their right to access these records, and record retention (30 years for exposure records). The specific requirements of the Standard may be found in 1910.1020. As a matter of good industrial hygiene practice, it is recommended that employees be informed of the results of this study that represent their exposure.

UTC made a conscious decision not to provide employees access to the monitoring results. The company policy is not to post industrial hygiene studies (Tr. 293). Plant manager Rasile testified that he received the NATLSCO report on November 5, 1998, and that he did not give the results to employees until January 7, 2000. Rasile knew that employees wanted the monitoring results at his meeting on November 4, 1998 (Tr. 241-242). Auxier also had requested the report after the meeting (Tr. 237). Instead of following up on the employees' requests, Rasile contacted his corporate office (Tr. 139). Rasile was "advised [by corporate safety department] not to make distribution of it [the report]" (Tr. 237-238).

UTC's argument that if there was a violation, it was *de minimis* or "other" than serious is rejected (Resp. Brief, pp. 14, 15). UTC assertions that only a small number of employees (seven employees) were monitored, that the employees' requests may have been made in a low key, off hand manner, and that employees were wearing full personal protective equipment to prevent actual exposure are immaterial or speculative in determining the violation classification. The standard is

[9]UTC was previously cited for a violation of § 1910.1020 (Tr. 141-142). The specific standard cited or the circumstances of the prior citation are unknown.

violated if only one employee is denied access. The use of personal protective equipment is required by other standards. Also, although one employee may have made his request while the plant manager rode through the plant, the other requests were made to all levels of management (immediate supervisor, environmental engineer and plant manager) and in various contexts, including a meeting. There is no doubt that UTC knew employees were requesting the monitoring results. UTC chose not to provide them with access.

Also, immaterial to a willful determination are UTC's claims that the records would have been provided to a physician if requested or that employees failed to comply with the poster directing them to request the records from Lawrence or his assistant. The standard requires access be provided to the employee or his designated representative. It is not restricted to a physician. With regard to UTC's poster, Lawrence was temporarily assigned to another plant in Texas from September 11, 1998, to February, 1999 (Tr. 112). Prior to his temporary assignment, the requests received by Lawrence were not fulfilled. Also, there is no showing that the immediate supervisor or the plant manager referred employees to Lawrence. It was Lawrence's supervisor in the corporate safety department who directed Rasile not to provide employee access to the records.

UTC's deliberate refusal to provide employees access to the air monitoring results was willful.

Other Than Serious Citation No 4, Items 1 and 2 -
Alleged Violations of § 1904.2(a) and § 1904.4

The citation alleges that UTC failed to record the redness/rashes as recordable illnesses on the OSHA Log 200 or equivalent and on the supplementary record OSHA Form 101. Section 1904.2(a) provides in part:

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

Section 1904.4 provides in part:

> In addition to the log of occupational injuries and illnesses provided for under 1904.2, each employer shall have available for inspection at each establishment within 6 working days after receiving information that a recordable case has occurred, a supplementary record for each occupational injury or illness for that establishment.

There is no dispute that UTC's 1998 OSHA Log 200 and the supplementary record for occupational illnesses did not contain the incidents of burns, rashes or lung irritation experienced by employees who worked on railcars containing electrode binder (Exh. C-1; Tr. 110-111, 191-192). Nor is there any dispute that supervisory employees were aware that employees had complained of burns and lung irritation (Tr. 94, 107-108, 213-215).

For the most part, the burns/rashes lasted from three days to a couple of weeks. It appears that the condition cleared up without any further problem. Employees did not lose work time, file workers' compensation claims or receive medical treatment, except for a skin cream provided by UTC. However, there were two exceptions.

One employee, George Auxier, requested and was referred by UTC to a medical doctor. Although recommending testing by another doctor, Auxier's doctor opined that the photo-reaction was possibly the result of exposure to coal tar at work (Exh. R-2).

Another employee, welding supervisor Cavinee, saw a doctor for flu-like symptoms and missed two days of work. UTC, however, was not aware of the doctor's treatment or diagnosis (Tr. 145-146, 159-160).

Section 1904.12(c) directs that "*recordable occupational injuries or illnesses*" include those injuries or illnesses that result in a fatality, lost workdays and all:

> [n]onfatal cases without lost workdays which result in transfer to another job or termination of employment, or require medical treatment (other than first aid) or involve: loss of consciousness or restriction of work or motion. This category also includes any diagnosed occupational illnesses which are reported to the employer but are not classified as fatalities or lost workday cases.

Also, § 1904.2(a) provides that the log should be completed according to the instructions on OSHA Form 200. On the back of the 200 log, an "occupational illness" is defined as:

> any abnormal condition or disorder, other than one resulting from an occupational injury, caused by exposure to environmental factors associated with employment. It includes acute and chronic illnesses or diseases which may be caused by inhalation, absorption, ingestion, or direct contact. (Exhs. C-4 and C-5, pp. 63-64).

Among the categories of recordable occupational illnesses listed are occupational skin diseases or disorders, which include "contact dermatitis, eczema or rash caused by primary irritants and sensitizers or poisonous plants, oil acne, chrome ulcers, chemical burns or inflammations, etc." and respiratory condition due to toxic agents such as "acute congestion due to chemicals, dusts, gasses or fumes" (Exh. C-5, p. 64).

An occupational illness encompasses more than a sickness or disease, "it can encompass abnormal physiological conditions." *Johnson Controls, Inc*., 15 BNA OSHC 2132, 2139 (No. 89-2614, 1993) (elevated blood lead levels are considered an illness). The purpose of the record keeping requirements is to develop "information regarding the causes and prevention of occupational accidents and illnesses: 29 U.S.C. 657(c)(1)." 15 BNA OSHC at 2140.

To be recordable in this case, the issue is whether the burns, rashes and lung irritation were diagnosed occupational illnesses. UTC agrees that it is liable only if an illness was diagnosed. An occupational illness which is not classified as a fatality or a lost workday must be diagnosed to be recordable.

According to *Record keeping Guidelines for Occupational Injuries and Illnesses,* prepared by OSHA's Office of Statistics, Division of Record keeping Requirements, such recordable illnesses do not have to be diagnosed by a physician or other medical personnel. The guidelines provide that a "diagnosis may be by a physician, registered nurse, or a person who by training or experience is capable to make such a determination." The guidelines recognize that "employers, employees and others may be able to detect some illnesses, such as skin diseases or disorders, without the benefit of specialized medical training. However, a case more difficult to diagnose, such as silicosis, would require evaluation by properly trained medical personnel." (Exh. C-5, p. 39).

The Review Commission has recognized the reasonableness of the guidelines. In *Johnson Controls, Inc.*, the Review Commission noted that:

> [N]ot all diagnoses made for the purposes of the 1986 BLS Guidelines will be so complex as to require a physician's judgment; some diagnoses will be relatively simple and straight-forward, capable of being made after a brief examination. After all, as we have determined "illnesses" can include "any abnormal condition." Moreover, a "diagnosis" is "the art or act of identifying a disease from its signs and symptoms." Webster's at 622. This certainly includes the act of discerning an employee's blood lead level by taking a blood sample and performing the appropriate analysis. A physician is not needed to perform these functions. 15 BNA OSHC at 2143.

None of the employees except Auxier went to a physician. UTC argues that Auxier's doctor did not render a diagnosis. UTC notes that Dr. Brownlee stated that it was "possible that this exposure to coal tar at work has resulted in the appearance of a persistent Photo-reaction" but "this would be a fairly complicated diagnosis to make and treat." He recommended that Auxier make an appointment with a specialist for testing in order "to work out this type of a problem, diagnostically" (Exh. R-2). Auxier did not see the specialist (Tr. 259).

Dr. Brownlee did not see Auxier until February, 1999, more than six months after his exposure to electrode binder. By that time, he did not observe the burns or rash on Auxier. Also, Dr. Brownlee did not have Auxier's exposure records showing the air monitoring results of NATLSCO. Dr. Brownlee's opinion was not a diagnosis.

A diagnosis is the act of identifying a disease or illness from its signs and symptoms. It is the investigation or analysis of the cause or nature of a condition, situation, or problem resulting in a statement or conclusion concerning the nature or cause.

For record keeping purposes, the employees' conditions were diagnosed by UTC's industrial hygienist Kut. In her report, Kut related the rashes and burns to working on railcars containing electrode binder. Her air monitoring results of two employees established overexposure to electrode binder (Exh. J-1, exhibit A). Based on her interviews with employees, the symptoms experienced by employees were consistent with those listed in the MSDS for electrode binder (Exh. C-2; Tr. 94). Kut's report concluded that if her recommendations were implemented by management, it would "prevent a recurrence of *contact dermatitis,*" a recordable illness identified on the back of the OSHA 200 log. "Contact dermatitis" is "an acute or chronic inflammation produced by substances which

come in contact with the skin." *The Merck Manual* (Eleventh Edition). Kut's education and experience as an industrial hygienist allowed her to render a diagnosis which should have been recorded on the OSHA 200 log.

The burns/rashes experienced by Auxier, Chontos, Palmer, Wireman, Wilson, Watt, Sieter, Dolloway and Fields, as well as the lung irritation experienced by Cavinee and Dunsen, were recordable illnesses. The record keeping violations are affirmed.

Penalty Consideration

The Review Commission is the final arbiter of penalties in all contested cases. In determining an appropriate penalty, the Commission is required to consider the size of the employer's business, history of previous violations, the employer's good faith, and the gravity of the violation. Gravity is the principal factor to be considered.

UTC is a large employer with 2,000 employees company wide. Approximately 125 employees work at the Marion plant. Seven employees were monitored for exposure to electrode binder.

UTC is not credited for history. The record shows that UTC has received a serious citation within the previous three years. Also, it has previously been cited for violation of § 1910.1020 (Tr. 104-105, 141-142).

UTC is entitled to good faith. UTC was cooperative during the inspection. It acted swiftly when it received reports of potential problems by conducting air monitoring and halting the cleaning of electrode binder cars. UTC has extensive safety programs, including regular safety training of employees and auditing of plant safety on a twice per month basis. In a previous case, Judge Spies found that UTC had a good safety program. *Union Tank Car Company*, 18 OSHC 1378 (No. 96-0770, 1998).

A penalty of $14,000 is reasonable for violation of § 1910.1020(e)(2)(i)(A). The exposure to electrode binder by employees was less than two months and the physical symptoms cleared within a couple of days. UTC processed no more railcars with electrode binder at the Marion plant after July, 1998. However, electrode binder is considered a carcinogen. At least four employees who had requested the air monitoring results showed significant levels of overexposure. There is

no showing that employees inhaled any electrode binder because they were wearing air-supplied respirators and adequate protective clothing (Tr. 166). The exposure was to the skin resulting in burns and rashes.

A grouped penalty of $2,000 is reasonable for the record keeping violations of § 1904.2(a) and § 1904.4. The purpose of recording is to provide OSHA with information on occupational illnesses (Tr. 155). UTC failed to maintain the information for 11 instances of occupational illness.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

ORDER

Based upon the foregoing decision, it is ORDERED that:

The parties' partial stipulation and settlement agreement dated July 27, 2000, is approved. The items settled are affirmed, reclassified or vacated in accordance with the terms of the settlement agreement.

With regard to the items remaining in dispute, it is further ORDERED that:

Citation no. 3, item 1, alleged willful violation of § 1910.1020(e)(2)(i)(A), is affirmed and a penalty of $14,000 is assessed.

Citation no. 4, items 1 and 2, alleged "other" than serious violations of § 1904.2(a) and § 1904.4, are affirmed and a grouped penalty of $2,000 is assessed.

/s/
KEN S. WELSCH
Judge

Date: February 8, 2001