SECRETARY OF LABOR, Complainant, v. LUNDA CONSTRUCTION COMPANY, Respondent.	OSHRC DOCKET NO. 02-0010

APPEARANCES:

For the Complainant:
Lisa R. Williams, Esq., Susanne Dunn, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois

For the Respondent:
Timothy G. Costello, Krukowski & Costello, Milwaukee, Wisconsin

Before: Administrative Law Judge: Robert A. Yetman

DECISION AND ORDER

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C. Section 651-678; hereafter called the "Act").

Respondent, Lunda Construction Company (Lunda), at all times relevant to this action maintained a place of business at the 6th Street Viaduct Project, Milwaukee, Wisconsin, where it was engaged in the demolition of said viaduct. Respondent admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

On June 11, 2001, the Occupational Safety and Health Administration (OSHA) initiated an inspection of Lunda's 6th Street work site. As a result of that inspection, Lunda was issued citations alleging violations of OSHA's lead standards at 29 CFR §1926.62. By filing a timely notice of contest Lunda brought this proceeding before the Occupational Safety and Health Review Commission (Commission).

On October 1-2, 2002, a hearing was held in Milwaukee, Wisconsin. At the hearing, Complainant moved to amend the citation to reflect the parties' September 19, 2002 partial stipulation and settlement agreement (Tr. 4). The parties agreed to settle a number of other citations during the course of the hearing (Tr. 399-400). Pursuant to the parties' agreements, "serious" citation 1, items 5(b) 6(a), 6(b), 7(b) and 10(b), 11, and "other than serious" citation 3, item 1 were withdrawn (Tr. 5, 399-400). Citation 1, items 4 and 10(a) were reclassified as "other than serious" citations, and the penalty for each item reduced to $1,000.00 (Tr. 399). Citation 1, item 12, was reclassified as "other than serious," without penalty (Tr.

400). Lunda withdrew its notice of contest to the reclassified items (Tr. 399-400). Lunda also withdrew its notice of contest to "other than serious" citation 3, item 2 (Lunda Post-Hearing Brief, p. 6). In addition, the Complainant moved to group items 2 and 3 of "willful" citation 2, and to renumber them as items 2(a), 2(b) and 2(c), with a combined proposed penalty of $55,000.00 (Tr. 5). Finally, Complainant moved to delete the language in "willful" citation 2, item 2(a) that stated "with exposures above the permissible exposure limit." (Tr. 5). Those motions were granted (Tr. 5-6). The parties have submitted briefs on the issues, as amended, and this matter is ready for disposition.

Facts

During the relevant period, Zenith Tech was part of a joint venture organized to demolish an old viaduct, or truss bridge, and erect a new cable suspension viaduct with two lift bridges (Tr. 20-21). Christopher Urech, the safety coordinator for Zenith Tech testified that Zenith was told that the bridge originally was painted with lead-based paint (Tr. 25; Exh. C-9). It was Urech's understanding that the bridge had been sandblasted twice, and repainted with an epoxy paint system (Tr. 25, 37-38; Exh. C-9, p. 2). Nonetheless, on February 7, 2001, prior to taking down the old viaduct, Urech met with Carol Chojnacki from Industrial Hygiene Solutions, and had Chojnacki conduct radiation sampling (Tr. 31). Chojnacki also collected paint chips from upright pillars for analysis (Tr. 31). Chojnacki reported her findings to Zenith on March 3, 2001 (Tr. 34; Exh. C-14). Three of the samples showed undetectable levels of lead; two showed lead levels indicating the presence of lead-based paint (Exh. C-14, p. 7). Based on the report and on his past experience, Urech realized there would be pockets of lead-based paint remaining on portions of the bridge (Tr. 36, 39-40). Urech testified, however, that he did not anticipate lead in concentrations requiring full compliance with the OSHA lead standard (Tr. 41).

Tom Braun is vice president in charge of the Wisconsin bridge operation for Lunda, another partner in the aforementioned joint venture (Tr. 517, 520). Braun testified that Lunda typically relies on the owner, in this case, the state, to provide him with information regarding the hazards to which his employees will be exposed during a demolition job (Tr. 539). According to Braun, Lunda received the same information regarding sandblasting as did Zenith Tech (Tr. 520-21). Braun also learned that the paint chip analysis performed by Zenith showed little or no lead (Tr. 532). Based on the available information, Braun assumed that his employees would encounter minimal lead exposure (Tr. 544). Vice President Braun stated, during a board meeting on or about June 5, 2001, he first learned that Miller Compressing, the salvage company with which the joint venture was working, had reported high lead levels in the scrap it was receiving from the 6th Street bridge (Tr. 535-36).

Gary Kaas, Lunda's safety director at the 6th Street Bridge project, testified that he made an initial assessment as to the possible exposure of Lunda employees to lead-based paint on historical monitoring results. Specifically, Kaas stated that he relied on two sampling results from a similar project Lunda performed on a 90-year old bridge in Baraboo, Wisconsin, in May and November 2000 (Tr. 124-28, 162, 165). According to Kaas, two May samples were obtained from employees who were cutting structural steel with both oxy-acetylene torches and oxy-lances; the sample measured 417 minutes of exposure. The May samples collected at the Baraboo bridge showed exposures of 0.43 mg/m^3 and 0.67 mg/m^3 respectively (Tr. 195, 199-200; Exh. R-3, R-4). The second historical sample, taken in November, was less than an hour in duration (Tr. 127, 191-92; Exh. R-3, R-4, #002086), and not representative of a full shift exposure. Kaas did not know precisely what kind of paint was used on the Baraboo bridge, but believed it was undisturbed lead based paint (Tr. 128, 196, 268). Kaas stated that he presumed that the 6th Street Bridge, which had been sandblasted twice, would contain less lead paint and that less airborne lead would be released during demolition than on the Baraboo project (Tr. 196, 521-23). In making his assumptions, Kaas relied on information provided to him by the owners of the 6th Street Bridge, and conversations he had with Chris Urech regarding the paint chip analysis (Tr. 129). Kaas further relied on information provided to him by his insurance carrier documenting studies done in the petrochemical industry where vessels containing lead paint were cut and burned (Tr.166, 170-71).

Kaas testified that because he originally believed that there would be low concentrations of lead on the project, he did not, in drafting a lead protection plan, presume employee exposures would be in excess of 2500 micrograms per cubic meter (Tr. 129, 161). He did presume that certain work would generate lead exposures greater than the PEL and instituted mandatory protective measures calculated to provide protection for airborne lead levels less than 10 times the OSHA permissible exposure limit (PEL) of 500 micrograms per cubic liter (Tr. 131, 165). Training in Lunda's lead program was conducted; a lead shack was erected; half face respirators (effective for exposures up to 500 micrograms) and protective clothing were provided (Tr. 163-64, 192-94, 204; Exh. C-11). Kaas testified that engineering controls were instituted to minimize employee exposure to lead fumes. Employees were instructed to cut the steel in the largest pieces possible (Tr. 237, 240), to avoid cutting in areas where it was possible that lead would be trapped, *i.e.*, behind "cheek plates" or lattice work (Tr. 241), and to avoid cutting downwind (Tr. 245). Employees were to use a longer cutting torch, or "oxy-lance" where possible (Tr. 240, 243).

Demolition of the old viaduct began around May 1, 2001 (Tr. 30, 163). Employees cutting structural steel for Lunda, Ron Rennhack and Tim Hoeppner, wore 6000 3M half mask respirators (Tr.

138-39). The day Lunda began cutting structural steel, a foreman told Urech that a "plume" where Lunda was cutting had a little color to it (Tr. 41, 44; *see also,* testimony of Gary Kaas at Tr. 163 ["lead was first encountered May 1st or thereabouts"]). The foreman recommended that Urech get a hygienist to the site (Tr. 41). Sampling of Zenith and Lunda employees conducted on May 7, 2001, revealed high levels of airborne lead (Tr. 42-45; Exh. C-15). A 248 minute sample in the breathing area of Tim Hoeppner, the only Lunda employee sampled, measured 0.513 mg/m^3, more than 10 times OSHA's permissible exposure limit for lead (PEL), *i.e.*, 0.05 mg/m^3 (Tr. 96-97; Exh. C-15), and slightly over the concentrations of lead for which a half-mask respirator is considered adequate (Exh. C-15, p. 7, referring to table I of §1926.62). Urech testified that Chojnacki called him with the sampling results within 24 hours (Tr. 45). Urech immediately conveyed the results to Gary Kass, foreman Dennis Harnisch, and Ron Rennhack, Lunda's "competent person" (Tr. 46-51, 114-15).

On May 15, 2001, Ms. Chojnacki conducted additional sampling on a number of the demolition crew, *i.e.*, workers cutting steel from elevated aerial lifts, including Lunda employees Ronnie Rennhack, and Tim Hoeppner (Tr. 57-58, 160; Exh. C-16). The results of the May 15 monitoring indicated that Rennhack and Hoeppner had exposures of 0.367 and 0.178 mg/m^3, respectively (Exh. C-16, p. 6). Industrial Hygiene Solutions stated in its recommendations that the half-mask air purifying cartridge respirators were adequate for the torch cutters with exposures in this range (Exh. C-16, p. 5).

Kaas testified that after the May 15, 2001 resampling confirmed Carol Chojnaki's May 7 findings, he no longer assumed that Lunda employees would be exposed to only minimal airborne lead (Tr. 131-34). However, he did not feel it was necessary to make any immediate changes in Lunda's lead program. Instead, on May 24, 2001 Lunda conducted its own sampling for Tim Hoeppner, who, on that day, was cutting floor beams from an aerial lift (Tr. 207-08). The results were analyzed by Clayton Laboratories, and showed an exposure of only 30 micrograms, or 0.19 mg/m^3 (Tr. 207-09; Exh. R-5). Based on the May 24 sampling, Kaas determined that the half-mask respirators were adequate (Tr. 208-09).

In June 2001, Miller Compressing, the sub-contractor charged with hauling the cut steel away from the 6th Street Viaduct, informed Lunda that the salvage yard would no longer accept steel plate of the size Lunda had been supplying (Tr. 236-37, 529-30). As a result, on June 14, 2001, Lunda began cutting steel on the ground with an acetylene torch (Tr. 236, 392). Prior to that date, minimal cutting on the ground was conducted. However, before June 14, 2001 employees cutting on the ground were required to used an oxy-lance and a full-hood respirator (Tr. 236-37, 241-242). The oxy-lance burns significantly hotter, and has a much longer rod than a standard cutting torch, allowing the employer using the oxy-lance to shorten his cutting time and to stand further away from the steel (Tr. 192). Kaas testified that using an oxy-lance

rather than a standard torch was an engineering control used by Lunda to reduce its employees exposure to lead (Tr. 240-43). Standard torches were used to cut components from the bridge because the longer oxy-lance is difficult to ignite and dangerous to use from an elevated basket (Tr. 242).

On June 14, 2001, OSHA initiated its inspection of the 6th Street bridge site (Tr. 65). Zenith arranged for Industrial Hygiene Solutions to conduct side-by-side sampling with OSHA Compliance Officer (CO) Robertson (Tr. 67). Eight-hour sampling was conducted on two Lunda employees, Joseph Romo and Tim Hoeppner (Tr. 68-69, Exh. C-17). Mr. Romo was sizing steel on the ground using a standard acetylene torch, and wearing a half face-piece respirator (Tr. 373). Hoeppner was cutting from an aerial lift (Tr. 372). OSHA Compliance Officer (CO) Kevin Robertson testified that his sampling showed that Mr. Romo was exposed to 3.5272 mg/m^3 airborne lead, slightly more than 70 times the time weighted PEL (Tr. 385; Exh. C-7). Tim Hoeppner was exposed to 0.4601 mg/m^3, or 9.2 times the PEL for lead (Tr. 385; Exh. C-7). Sampling performed by Industrial Hygiene produced similar results; Joseph Romo's time weighted sample exceeded the PEL of 0.05 at 2.950 mg/m^3, as did Hoeppner's at .456 (Exh. C-17, p. 8).

Kaas stated that he did not know his employees were exposed to lead in excess of 2500 micrograms per cubic meter until after the June 14 sampling (Tr. 164). As Kaas noted, Hoeppner, working in the air, was wearing appropriate respiratory protection for his exposure level, *i.e.*, 0.46 mg/m^3 (Tr. 238). After the June 14 inspection, however, Kaas instituted new administrative controls for employees cutting on the ground. Employees sizing plate on the ground were rotated approximately every two hours and were required to wear positive pressure full-hood respirators (Tr. 245-46). By the time the results of the monitoring came back, Mr. Romo had already been provided with a full-hood respirator (Tr. 238).

Equal Protection

As a threshold matter, Lunda argues that OSHA's failure to zealously prosecute Zenith Tech for violations of the lead standard, while issuing Lunda multiple citations and proposed penalties exceeding $250,500.00 amounts to selective prosecution. It is well settled that the conscious exercise of some selectivity in enforcement is not in itself a constitutional violation. Relief is available only if the decision to prosecute is shown to have been deliberately based on an unjustifiable standard such as race or religion or other arbitrary classification. *Cuyahoga Valley Ry. V. United Transportation Union*, 474 U.S. 3, 106 S.Ct. 286 (1985), or was unreasonably initiated with the intent to punish the employer for his exercise of a legally protected right. *Futernick v. Sumpter Township*, 78 F.3d 1051 (6th Cir.), *cert denied*, 117 S. Ct. 296 (1996). Thus, Lunda has failed to carry its burden to establish that Complainant's actions in this case

satisfy any of the requirements necessary to establish selective prosecution. Lunda has stated no cognizable claim based on its right to equal protection under the law.

Alleged Violations of §1926.62(d) / Employee Exposure Assessments

Relevant portions of 29 CFR §1926.62 include: Paragraph (d)(1)(i), which provides:

> Each employer who has a workplace or operation covered by this standard shall initially determine if any employee may be exposed to lead at or above the action level [defined as: employee exposure, without regard to the use of respirators, to an airborne concentration of lead of 30 ug/m^3; *see,* §1926.62(b)].

Paragraph (d)(3)(i), which states that:

> Except as provided under paragraphs (d)(3)(iii) and (d)(3)(iv) of this section the employer shall monitor employees exposures and shall base initial determinations on the employee exposure monitoring results. . . .

Paragraph (d)(3)(iii) provides:

> Where the employer has previously monitored for lead exposures, and the data were obtained within the past 12 months during work operations conducted under workplace conditions closely resembling the processes, type of material, control methods, work practices, and environmental conditions used and prevailing in the employer's current operations, the employer may rely on such earlier monitoring results to satisfy the requirements of paragraphs (d)(3)(i) and (d)(6) of this section if the sampling and analytical methods meet the accuracy and confidence levels of paragraph (d)(10) of this section.

Paragraph (d)(3)(iv) states:

> Where the employer has objective data, demonstrating that a particular product or material containing lead, or a specific process, operation of activity involving lead cannot result in employee exposure to lead at or above the action level during processing, use or handling the employer may rely upon such data instead of implementing initial monitoring.

* * *

> (B) Objective data, as described in paragraph (d)(3)(iv) of this section, is not permitted to be used for exposure assessment in connection with paragraph (d)(2) of this section.

Paragraph (d)(2)(iv) provides:

> With respect to the tasks listed. . ., where lead is present, until the employer performs an employee exposure assessment as required in paragraph (d) of this section and documents that the employee performing any of the listed tasks is not exposed to lead in excess of 2,500 ug/m^3 (50xPEL), the employer shall treat the employee as if the employee were exposed to lead in excess of 2,500 ug/m^3 and shall implement employee protective measures as prescribed in paragraph (d)(2)(v) of this section.. . . Interim protection as

described in this paragraph is required where lead containing coatings or paint are present on structures when performing
(A) Abrasive blasting,
(B) Welding,
(C) Cutting, and
(D) Torch burning.

Discussion

In order to prove a violation of section 5(a)(2) of the Act, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies, (2) there was a failure to comply with the cited standard, (3) employees had access to the violative condition and (4) the cited employer either knew or could have known of the condition with the exercise of reasonable diligence. *See, e.g., Walker Towing Corp.*, 14 BNA OSHC 2072, 2074, 1991-93 CCH OSHD ¶29239, p. 39,157 (No. 87-1359, 1991).

The evidence establishes that Lunda knew the 6th Street Bridge had originally been painted with lead paint, and that its employees could encounter residual lead while dismantling the bridge. Lunda admits that its employees were actually exposed to concentrations of lead above the action level, and that the lead standard was generally applicable to the cited work site. Lunda maintains, however, that those portions of the standard that require individual monitoring were inapplicable, because Lunda relied on valid historical air monitoring data from its Baraboo project (Lunda's Post-Hearing Brief, p. 23).

Applicability. Paragraph (d)(1)(i) and the other relevant paragraphs reproduced above require employers to make an initial exposure determination for employees who may be exposed to airborne lead. Employees engaged in cutting and torch burning where lead paint is present are presumed to be exposed to lead above the action level. Moreover, until the required monitoring is performed, employers must presume that all employees engaged in cutting and torch burning are exposed to lead in excess of 2,500 ug/m^3. Employers with employees engaged in those activities must implement the protective measures set forth in paragraph (d)(2)(v). Employers who have employees engaged in cutting and torching may not rely on objective data, such as generic insurance company documents, in making an initial determination, but may rely on actual monitoring performed within the previous 12 months, provided such monitoring involved conditions essentially similar to those which will be encountered by employees on the current job and is representative of the employer's current employees' full-shift exposures.

Whether Lunda relied on appropriate data in making its initial determination is the issue cited in item 3, subparagraphs a) and b). Therefore, item 3 will be discussed first.

Serious citation 1 item 3a alleges:

29 CFR 1926.62(d)(3)(iii): The employer relied on previous monitoring results that were not obtained within the past 12 months during work operations closely resembling the processes, type of material, control methods, work practices, and environmental conditions used and prevailing in the employer's current operations to satisfy the requirements of paragraphs (d)(3)(i) and (d)(6) of 29 CFR 1926.62:

a) Historical data used for the initial exposure assessment did not accurately represent the employees' exposures to lead while torch cutting steel coated with lead paint at the "6th Street viaduct project".

The sole issue here is whether the work conducted on Lunda's Baraboo project was so similar to the work done on the 6th Street project as to justify Lunda's reliance on monitoring conducted on the Baraboo job to reflect its employees' full-shift exposures to lead on the 6th Street job. Lunda's safety director, Kaas, testified that both projects involved dismantling old bridges by removing structural steel with oxy-lances and oxy-acetylene torches. Lunda maintains that it was justified in relying on the single day's monitoring conducted during the Baraboo job, because cutting steel is a single task, and the only task in which Lunda employees are involved.

The evidence supports a contrary conclusion. Clearly, employees sizing steel plate on the ground may be exposed to higher levels of airborne lead than those cutting from an aerial lift, where lead fumes generated by cutting and burning fall downward and are swept away by the high winds in the Lake Michigan area (Tr. 239). That safety director Kaas was aware of the potential for higher exposures is established by his initiation of more stringent administrative controls for employees cutting on the ground, *i.e.*, use of an oxy-lance and full-hood respirator. According to Kaas, those controls were in place for employees performing minimal cutting on the ground *before* Lunda employees began sizing plate on a regular basis. Where a job involves different equipment and administrative controls because of the physical environment, it is recognizable as a separate task for which an additional exposure assessment is required.

Moreover, it is clear from Kaas' testimony that he did *not* believe that the conditions at the two sites were essentially similar, as required by the cited standard. Kaas repeatedly testified that the conditions encountered on the bridge sites were different. For instance, the Baraboo bridge had never been sand blasted, while the 6th Street Bridge had been sandblasted twice; the 6th Street job involved stop and start cutting, whereas the Baraboo project involved continuous cutting (Tr. 196, 243-44, 267). Based on his understanding of the 6th Street job and his recollection of conditions on the Baraboo project, Kaas presumed that lead levels *would be different* on the 6th Street job. (*See also*, testimony of Lunda foreman Ron Rennhack, Tr. 275; Q: "On the bridge that you worked on in 2000, was that a similar type of situation

as far as the condition of the paint? A: No, ma'm. . . ."). Finally, if Lunda had, in fact, based its lead abatement on the historical data collected at Baraboo, it would have provided its employees with a higher level of protection than was actually supplied. As noted by Lunda in its Post-Hearing brief, of the two sampling results collected at Baraboo, one, at 0.67 mg/m^3, exceeds the exposure level for which half mask respirators are considered adequate (Lunda's Post-Hearing Brief, p. 20). Lunda employees wore full hoods on the Baraboo job (Tr. 268). Lunda admits that, instead of relying on monitoring results for an essentially similar job, its safety director, Kaas, *extrapolated* from the Baraboo data, and assumed that Lunda employees would encounter different, *i.e.,* lower levels of airborne lead on the 6th Street job. Because Lunda guessed that its employees would be exposed to minimal levels of airborne lead, it supplied only half-mask respirators at the 6th Street project.

The evidence establishes that Lunda did not rely on the monitoring performed at the Baraboo site to make a 1926.62(d) exposure assessment. Instead, it used the Baraboo monitoring as a basis for *assuming* that the exposures at the 6th Street site would be minimal. The standard does not contemplate using historical monitoring in this manner. Lunda's use of the historical monitoring results does not satisfy the requirements of §1926.62 (d)(iii). The violation is established, and the regulations requiring Lunda to perform exposure assessments are applicable.

Serious citation 1 item 3b alleges:

29 CFR 1926.62(d)(3)(iv)(B): The employer used objective data described in paragraph (d)(3)(iv) of the 29 CFR 1926.62 not permitted for exposure assessment:

a) Objective data not permitted by 1926.62(d)(3)(iv) was used in the initial exposure assessment to determine employees' exposure to lead while torch cutting steel coated with lead paint.

Lunda contends that because it properly relied on historical monitoring, it is irrelevant that its safety director, Kaas, also considered objective data in making an initial exposure assessment.

Lunda's safety director admitted that he relied on information provided by Lunda's insurance carrier to bolster his conclusion that employees cutting steel at the 6th Street Bridge would be exposed to only minimal levels of lead. As noted above, Lunda's use of the historical monitoring to make assumptions about the 6th Street job was improper, as was its reliance on objective data to support those assumptions. This violation is established.

Penalty

As noted by Lunda, the violations alleged at item 3 and the violations alleged at items 1 and 2 are duplicative, in that each would be cured by the same abatement conduct, *i.e.,* the use of actual monitoring

to make an initial exposure assessment. *J.A. Jones Construction Co.*, 16 BNA OSHC 1497, 1991-93 CCH OSHD ¶29,964 (No. 87-2059, 1993). The decision to group similar or duplicative items for purposes of assessing a penalty is discretionary. The administrative law judge may properly choose to assess one or more penalties for distinct but potentially overlapping violations. H.H. Hall Constr. Co. (Hall), 10 BNA OSHC 1042, 1981 CCH OSHD ¶25,712, (No. 76-4765, 1981); *see also, Pentecost Contracting Corp.*, 17 BNA OSHC 2133, 1997 CCH OSHD ¶31,382 (Nos. & 92-3790, 1997). In this case, items 3a and 3b are so closely related to the violations cited at items 1 and 2, that an appropriate penalty cannot be determined without first discussing all the violations. The three items, therefore, will be grouped for purposes of assessing a penalty.

Serious citation 1 item 1 alleges:

29 CFR 1926.62(d)(1)(i): Each employer who has a workplace or operation covered by this 29 CFR 1926.62 did not initially determine if an employee would be exposed to lead at or above the action level.

a) The employer did not perform personal monitoring that represented each type of employee exposure that could have resulted from the bridge demolition.

Section 1926.62(d)(1)(i) requires that the employer who has an operation covered by the lead standard initially determine if any employee may be exposed to lead at or above the action level, *i.e.*, an airborne concentration of 30 ug/m^3. Complainant alleges that Lunda did not perform personal monitoring representing each type of employee exposure that could have resulted from the bridge demolition. The evidence establishes that not only were Lunda's initial determinations generally deficient, Respondent did not conduct initial monitoring of cutting operations performed on the ground (Tr. 392-93).

Joe Romo. Gary Kaas admitted that no initial assessment was made for Joe Romo, who was assigned the task of sizing steel plate on the ground after the scrap yard refused to take larger pieces (Tr. 267, 392). Lunda's failure to conduct an exposure assessment for Joe Romo after assigning him a new task is sufficient to establish the violation.

Jerimie Waterstraat. In addition, Complainant charges that no initial assessment was made for Lunda employee Jerimie Waterstraat, who was videotaped on June 11, 2001, cutting a painted handrail in a short sleeved shirt (Tr. 376, 428; Exh. C-2, #13). Mr. Waterstraat was wearing a respirator, but was not wearing protective coveralls (Tr. 362, 376-77). Lunda maintains that it was not required to perform an initial assessment for Mr. Waterstraat because, as stated at §1926.62(d)(3)(ii):

> Monitoring for the initial determination where performed may be limited to a representative sample of the exposed employees who the employer reasonably believes are exposed to the greatest airborne concentrations of lead in the workplace.

According to Lunda, it was likely that the handrails had been more completely sandblasted than the structural steel. The employee cutting them, therefore, would likely be exposed to lower levels of lead than employees cutting structural steel (Lunda's Post-Hearing Brief, p. 24).

Paragraph (d)(3)(ii) does allow employers to rely on a representative sampling from an employee believed to be exposed to the greatest concentration of lead; however, where an employer relies on valid representative sampling, the employer must provide protection for the level of airborne lead to which the sampled employee is exposed. The employer may not *infer* lesser exposures for employees performing other tasks, or provide those employees with a lower level of protection merely because the employer believes that those tasks will produce lower levels of airborne lead. The violation is established.

Serious citation 1 item 2 alleges:

29 CFR 1926.62(d)(2)(iv): The employer did not treat employees as if employee exposures to lead were in excess of 2500 ug/m(3) and did not implement the protective measures described in 29 CFR 1926.62(d)(2)(v) when the employer had not performed an employee exposure assessment and documented exposures to lead were not in excess of 2500 ug/m3:

a) The employer did not implement mandatory employee protective measures for tasks presumed to generate lead exposures greater than the PEL.

Section 1926.62(d)(2)(iv) requires the employer to treat employees engaged in cutting and torch burning where lead paint is present as if they were exposed to lead in excess of 2,500 ug/m^3, until the employer completes an employee exposure assessment for those employees. Lunda did not implement employee protective measures as prescribed in paragraph (d)(2)(v) after employees began cutting on the ground, even though the physical conditions they were working under had changed and no employee exposure assessment for the new tasks had been completed. Employees on the ground were observed using half-mask respirators (Tr. 268, 394), which are approved only for concentrations of lead not in excess of 500 ug/m^3. Jerimie Waterstraat did not wear appropriate personal protective clothing, *i.e.*, coveralls. Coveralls are required under 1926.62(d)(2)(v). The violation has been established.

Penalty

Separate penalties of $7,000.00 are proposed for items 1 through 3. In determining an appropriate penalty, the Commission is required to give due consideration to the size of the employer, the gravity of the violation and the employer's good faith and history of previous violations. The gravity of the offense is the principle factor to be considered. *Nacirema Operating Co.*, 1 BNA OSHC 1001, 1972 CCH OSHD ¶15,032 (No. 4, 1972). When assessing the gravity of a violation, the factors to be considered include: (1) the number of employees exposed to the risk of injury; (2) the duration of exposure; (3) the precautions

taken against injury, if any; and (4) the degree of probability of occurrence of injury. *Kus-Tum Builders, Inc.* 10 BNA OSHC 1049, 1981 CCH OSHD ¶25,738 (No. 76-2644, 1981).

The Secretary introduced no evidence establishing Lunda's size. Lunda has been cited for repeated violations of the lead standard between 1995 and 1998 (Tr. 258; Exh. C-25). Kaas testified that two separate citations were issued in 1995; one was settled quickly for $1,275.00, the other was settled in 1997 for $2,350.00. A 1996 citation resulted in penalties totaling $1,540.00. A three-item citation at a separate job site was settled without penalty in that same year (Tr. 259). In 1998, Lunda was cited for 24 items, most of which involved alleged violations of the lead standard (Tr. 260; Exh. C-25). Safety director Kaas testified that he was hired in 1998 to rewrite Lunda's lead program (Tr. 261). In addition, Kaas stated that he had three new lead shacks built and purchased several thousand dollars worth of respiratory equipment (Tr. 262). CO Robertson testified that, on paper, Lunda's new lead program was exemplary (Tr. 419).

The gravity of the combined violations is high, because Lunda's failure to provide the level of protection required under §1926.62 (d)(2)(iv) prior to conducting the requisite initial exposure assessments caused Joseph Romo's exposure to excessive levels of lead. Jamie Waterstraat was potentially exposed to lead while cutting railing without wearing any protective clothing. Employees exposed to lead may suffer serious lead-related illnesses such as CNS impairment and kidney disease. The cited employees were exposed to the potential hazard for at least one day. Lunda provided partial protection against over-exposures to lead by providing half-mask respirators. Most employees wore protective coveralls. Lunda had erected a lead shack, and posted a lead abatement plan.

Despite the improvement in Lunda's lead program, in light of Lunda's past history of violations and the high gravity of the cited violation, it is appropriate to assess a combined penalty which is the maximum penalty for a serious violation. Accordingly $7,000.00 is assessed for serious citation items 1, 2 , 3(a) and 3(b).

Alleged Violation of §1926.62(e)/ The Written Plan

Serious citation 1 item 5a alleges:

29 CFR 1926.62(e)(2)(ii)(A): The written lead plan for compliance did not include a description of each activity in which lead is emitted including equipment used, material involved, controls in place, crew size, employee job responsibilities, operating procedures and maintenance practices:

a) The Lunda lead compliance plan for the "6th Street viaduct project" did not describe each activity where lead is emitted, taking into consideration lead coated areas of steel so that the employee exposures could be properly characterized.

The cited standard requires:

> *Compliance program*. (I) Prior to commencement of the job each employer shall establish and implement a written compliance program to achieve compliance with paragraph (c) of this section [*i.e.*, assure that no employee is exposed to lead at concentrations exceeding 50 ug/m^3 TWA].
>
> (ii) Written plans for these compliance programs shall include at least the following: (A) A description of each activity in which lead is emitted; e.g. equipment used, material involved, controls in place, crew size, employee job responsibilities, operating procedures and maintenance practices;

Facts

Lunda's 6th Street Lead Abatement Plan consists of a single page generally describing, or, in some cases, merely referring to engineering controls and personal protective equipment to be employed at the site and setting forth the basis for its respirator selection. The plan bans contractors and employees not trained in lead safety from areas where they may be exposed to fumes, and provides for regular inspections by a competent person. The plan refers interested employees to Gary Kaas for more information regarding Lunda's lead program (Exh. C-11).[1] CO Robertson testified that the plan failed to include crew size, employee job responsibilities, or the actual controls that were required for everyone to use on this job (Tr. 402). Specifically, the plan did not separately describe activities where lead coated steel would be cut on the ground (Tr. 402). Robertson indicated that Lunda could not quantify differing employee exposures where separate tasks were not identified (Tr. 402-03). Lunda argues that the only task its employees perform, "cutting/burning during [steel] removal," is referred to in its plan (Exh. C-11).

Discussion

The record establishes that cutting steel on the ground *was* a separate task, in that it required different engineering controls, *i.e.*, limits on the length of time employees could spend cutting on the ground, the use of an oxy-lance rather than a torch, and different respiratory protection, *i.e.*, a full hood respirator. (Tr. 245). However, the record establishes that in February 2001, when Lunda composed its site specific lead abatement plan, it did not anticipate that it would be sizing steel plate on the ground. Lunda's salvage contractor did not begin rejecting steel plate until June. The witnesses agreed that June 14, 2001 was the first day Lunda began sizing steel. Under §1926.62(e)(2)(v) "Written programs [need

[1] Lunda argues that because its Lead Abatement Plan was published in May, and the citation was not issued until December 2001, item 5a is barred under the statute of limitations set forth in §9(c) of the Act (Lunda's Post-Hearing Brief, p. 26). The statute of limitations does not begin to run until OSHA discovers or reasonably should have discovered a violation. *Kaspar Electroplating Corp*. 16 BNA OSHC 1518, 1991-93 CCH OSHD ¶30,303 (No. 90-2866, 1993). Item 5a is not, therefore, time barred.

only] be revised and updated at least every 6 months to reflect the current status of the program." Because six months had not elapsed since Lunda's safety program was written, and because there is no requirement that written programs be updated every time a new task or engineering control is added, Lunda was under no obligation to amend its site plan to reflect the new task of sizing steel on the ground until six months had passed. This violation is, therefore, dismissed.

Alleged Violations of 1926.62(i)/Hygiene

Serious citation 1 item 7a alleges:

29 CFR 1926.62(i)(1): The employer did not assure that in areas where employees are exposed to lead above the PEL, without regard to the use of respirators, food or beverage is not present or consumed, tobacco products or used and cosmetics not applied:

a) Employees were eating lunch sitting on pylons to the bridge structure in a contaminated area at the "6th Street viaduct project" Milwaukee, WI.

The cited standard provides:

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

Facts

Kaas stated that Lunda had a designated lunch room and designated eating areas (Tr. 173). To Kaas' knowledge, employees never ate in any other areas (Tr. 173, 212). CO Robertson, however, testified that he observed Joe Romo and Tim Hoeppner exit the dirty side of the lead shack, seat themselves on pylons 50 to 75 feet from their work area, and eat their lunch (Tr. 403-06). Robertson testified that Lunda foreman Ron Renhaack told him that employees normally ate their lunches in or near their vehicles, which were parked near the pylons (Tr. 403). CO Robertson testified that the soil in the area where Romo and Hoeppner were eating was "potentially" contaminated, as lead paint from earlier sandblasting on the bridge could have contaminated the ground (Tr. 473). Robertson admitted that the bridge was still intact in the area where Romo and Hoeppner was eating, with no steel cutting performed overhead (Tr. 473-74).

Discussion

Complainant introduced no evidence that airborne lead above the PEL was present in the area of the pylons. In the absence of any evidence of exposure to lead in the pylon area, the Secretary has failed to prove the violation cited at item 7a. Accordingly, that item is vacated.

Serious citation 1 item 8 alleges:

29 CFR 1926.62(i)(3)(i): The employer did not provide shower facilities where feasible, for use by employees whose airborne exposure to lead is above the permissible exposure limit (PEL):

a) Shower facilities were not provided for Lunda employees exposed to lead above the permissible exposure limit (PEL) at the "6th Street viaduct project" Milwaukee, WI.

The cited standard provides:

Showers. (i) The employer shall provide shower facilities, where feasible, for use by employees whose airborne exposure to lead is above the PEL.

Facts

It is undisputed that shower facilities were not provided at Lunda's work site (Tr. 154). Lunda maintains that provision of shower facilities was infeasible because there was no independent source of clean water available (Tr. 220-21). CO Robertson testified that trailer units are available with self-contained water tanks, generators for heat and power, and wastewater storage capacity (Tr. 404-05). Both Kaas and Robertson testified that Lunda has now purchased a shower trailer (Tr. 269, 405).

Discussion

The Secretary has established the feasibility of providing a shower on the 6th Street work site. Item 8 is affirmed.

Penalty

A penalty of $7,000.00 was proposed for this item. All of Lunda's demolition crew were exposed to the danger of lead contamination. As noted above, lead contamination can cause illnesses including CNS impairment and Kidney disease (Exh. C-3, p. 24). There was no evidence, however, that any Lunda employees were actually contaminated due to the absence of shower facilities. Safety Director Kaas testified that no Lunda employees have suffered lead related injuries, and none have had to be removed for excessive blood lead levels since he was hired in 1998 (Tr. 258). Taking into account Lunda's history of violations, its good faith, as demonstrated by the improvement in its lead program since 1998, and the absence of any lead-related injuries, a penalty of $1,000.00 is deemed appropriate and is assessed.

Serious citation 1 item 9 alleges:

29 CFR 1926.62(i)(4)(iv): The employer did not assure that employees would not enter lunchroom facilities or eating areas with protective work clothing or equipment:

a) The employer did not ensure that employees exposed to lead above the PEL removed their contaminated coveralls before they ate.

The cited standard provides:

> The employer shall assure that employees do not enter lunchroom facilities or eating areas with protective work clothing or equipment unless surface lead dust has been removed by vacuuming, downdraft booth, or other cleaning method that limits dispersion of lead dust.

Facts

Kaas testified that Lunda's lead program prohibited wearing dirty coveralls on break or during lunch (Tr. 174, 222). Nonetheless, Kaas testified, he knew of one instance where the job foreman reprimanded an employee for failing to remove his coverall before taking his break (Tr. 222). Ron Rennhack confirmed that he verbally reprimanded one employee after seeing him take a break while still wearing dirty coveralls (Tr. 305-06). Rennhack testified that he was unaware of any other instances of misconduct (Tr. 305-06). As noted above, CO Robertson testified that on June 14, 2001 he watched Romo and Hoeppner exit the dirty side of the lead shack in their work coveralls and eat lunch in those coveralls (Tr. 405-06). At the hearing, Tim Hoeppner denied wearing his coveralls to lunch (Tr. 507). According to Hoeppner, he had been reprimanded for eating lunch with his coveralls half-way up and tied around his waist the week before (Tr. 508).

Discussion

The cited standard allows employees to wear protective work clothing in eating areas provided they remove any lead dust by vacuuming or other cleaning method. Robertson observed the employees exiting the lead shack before going to lunch. However, Lunda provided a HEPA vacuum in its lead shack with which employees could vacuum their clothing (Tr. 182, 249). The Secretary failed to introduce any evidence that the employees did not clean their clothing while in the shack. Complainant failed to carry its burden of proof on this item, and it is, therefore, vacated.

Willful Items

Willful citation 2 item 1a alleges:

29 CFR 1926.62(c)(1): The employer did not ensure that employees were not exposed to lead at concentrations greater than fifty micrograms per cubic meter of air averaged over an 8-hour period.

The cited standard provides:

> The employer shall assure that no employee is exposed to lead at concentrations greater than fifty micrograms per cubic meter of air (50 ug/m^3) averaged over an 8-hour period.
>
> **Subparagraph (a)** The oxyacetylene cutter performing cutting on the ground at the "6th Street viaduct project" Milwaukee, WI was exposed to lead at an 8-hour time weighted average of 3.5272 milligrams per cubic meter (mg/m3), approximately 70.544 times the limit of 0.050 mg/m3; this limit is established to prevent injury and illness such as CNS impairment and kidney failure. The

sample was collected on June 14, 2001 during a 453 minute sampling period. Exposure calculations include a zero increment for the 27 minutes not sampled.

Discussion

Lunda admits that on June 14, 2001 Joseph Romo was exposed to lead in concentrations in excess of the OSHA PEL, and was not provided with adequate respiratory protection. Lunda argues that it was not on notice of the cited violation, and asks that the violation be dismissed. Lunda further contends that any violation was not willful.

Knowledge. In order to show employer knowledge of a violation the Secretary must show that the employer knew, or with the exercise of reasonable diligence, could have known of a hazardous condition. *Dun Par Engd. Form Co.*, 12 BNA OSHC 1962, 1986-87 CCH OSHD ¶27,651 (No. 82-928, 1986). The Secretary need not prove the employer had knowledge of a specific hazard, or that an accident/ overexposure, was foreseeable. It is well settled that the employer's lack of knowledge is a defense to an established violation only when the employer was unaware of the conditions in its workplace; *Ormet*,14 BNA OSHC 2134, 1991-93 CCH OSHD ¶29,254 (85-531, 1991). It is clear that Lunda was aware that Mr. Romo would be cutting on the ground. Lunda knew what kind of engineering controls were in place, and what respiratory protection Romo was using. That Lunda was unaware of the concentrations of lead to which Romo was exposed is due solely to its own failure to conduct an initial exposure assessment as required by §1926.62(d)(1)(i). The cited violation is established.

Willful. The Commission has defined a willful violation as one "committed with intentional, knowing or voluntary disregard for the requirements of the Act or with plain indifference to employee safety." *Valdak Corp.*, 17 BNA OSHC 1135, 1136, 1993-95 CCH OSHD ¶30,759, p. 42,740 (No. 93-239, 1995), *aff'd*, 73 F.3d 1466 (8th Cir. 1996). Under Commission precedent, it is not enough for the Secretary to show that an employer was aware of the conduct or conditions that constitute the alleged violation; such evidence is already necessary to establish any violation. The Secretary must differentiate a willful violation by showing that the employer had a heightened awareness of the illegality of the violative conduct or conditions, and by demonstrating that the employer consciously disregarded OSHA regulations, or was plainly indifferent to the safety of its employees. *Propellex Corporation (Propellex)*, 18 BNA OSHD 1677, 1999 CCH OSHD ¶31,792 (No. 96-0265, 1999), *citing*, *Hern Iron Works*, 16 BNA OSHC 1206, 1214, 1993-95 CCH OSHD ¶30,046, p. 41,256-57 (No. 89-433, 1993). In *Propellex*, the Commission noted that the Secretary must show that the employer was actually aware, at the time of the violative act, that the violative conduct or condition was unlawful, or that it possessed a state of mind such that if it were

informed of the unlawful nature of the conduct, it would not care. *Johnson Controls*, 16 BNA OSHC 1048,1051, 1993-95 CCH OSHD ¶30,018, p. 41,142 (No. 90-2179, 1993).

Complainant argues that Lunda's competent person, Ron Rennhack, lead foreman, Dennis Harnisch, and safety director, Gary Kaas, were all aware that burning structural steel creates lead exposure. Complainant maintains that, despite their knowledge of the hazard, Lunda personnel failed to take the precautions a "reasonably prudent" employer would have taken to protect its employees. (Complainant's Post Trial Brief, p. 31). As discussed above, the cited evidence establishes only that Lunda should have been aware of the need to monitor each task to determine actual exposure levels. Such proof is sufficient to establish Lunda's constructive knowledge of the cited conditions, but fails to show willfulness. The record establishes that Lunda should have been, but was not actually aware that Mr. Romo was exposed to levels of airborne lead that were exponentially higher than the levels to which its cutters were exposed when working from lifts. The evidence does not establish that Lunda did not care, *i.e.,* would not have corrected the violative condition had it been aware of Mr. Romo's exposure levels. Rather, Gary Kaas testified that even before the sampling results came back, Romo was provided with a full-hood respirator, after complaining of tasting metal during his June 14 shift (Tr. 317-18). CO Robertson acknowledged that Lunda had an "exemplary" written lead program, that half-mask respirators were provided for and used by all Lunda cutters, and that cutters, except for the single instance cited at Citation 2, item 2a, wore coveralls (Tr. 393, 414, 419). Other cutters were using the longer oxy-lances as both OSHA and Lunda recommended (Tr. 413). Finally, Tom Braun, Lunda's vice president in charge of Wisconsin bridge operations, testified that prior to beginning the 6th Street bridge project, he contacted the OSHA area office and asked that OSHA work with the joint venture to insure compliance with the lead standard (Tr. 524). OSHA's Voluntary Protection Program (VPP) is not available to joint partnerships without employees, and so was not instituted on the 6th Street work site. Nonetheless, Lunda's request is inconsistent with the state of mind associated with a willful disregard for OSHA standards.

The record does not support Complainant's claim that Lunda was indifferent to either OSHA regulations or to employee safety. The violation is affirmed as a "serious" violation (Tr. 409-10).

> **Subparagraph (b)** The oxyacetylene cutter performing cutting on the bridge steel from the basket lift at the "6th Street viaduct project" Milwaukee, WI was exposed to lead at an 8-hour time weighted average of 0.4601 milligrams per cubic meter (mg/m3), approximately 9.202 times the limit of 0.050 mg/m3; this limit is established to prevent injury and illness such as CNS impairment and kidney failure. The sample was collected on June 14, 2001 during a 450 minute sampling period. Exposure calculations include a zero increment for the 30 minutes not sampled.

CO Robertson testified that Mr. Hoeppner, the employee referred to in this sub-paragraph, wore a half mask respirator which was adequate for his lead exposure, as measured on June 14, 2001 (Tr. 408, 413-14). Because the half mask respirator was sufficient to reduce Mr. Hoeppner's exposure below the 0.050 mg/m^3, the facts stated in sub-paragraph (B) cannot support a violation. Accordingly, this violation is vacated.

Penalty

Complainant has grouped items 1a, 1b, 1c and 1d for purposes of assessing a penalty because they involve related hazards that may increase the potential for illness.

Willful citation 2 item lb alleges:

29 CFR 1926.62(e)(1): The employer did not implement engineering and work practice controls, including administrative controls to reduce and maintain employee exposure to lead at or below the permissible exposure limit to the extent feasible:

a) The employer did not enforce the use of engineering and work practice controls for employees performing oxyacetylene cutting of bridge steel with potential exposure to lead at the "6th Street viaduct project" Milwaukee, WI. Control measures among others not utilized which may be effective are the use of longer cutting torches, portable local exhaust or fan, proper respiratory protection for exposure, proper use of protective clothing and "lead shack"[2] and cutting upwind away from the plume generated during cutting. Administrative controls such as reducing time employees perform cutting on lead painted steel would also be effective to reduce employee exposure when implemented.

The cited standard provides:

> *Methods of compliance.* (1) *Engineering and work practice controls.* The employer shall implement engineering and work practice controls, including administrative controls, to reduce and maintain employee exposure to lead to or below the permissible exposure limit to the extent that such controls are feasible. Wherever all feasible engineering and work practices controls . . . are not sufficient to reduce employee exposure to or below the permissible exposure limit. . . . [the employer] shall supplement them by the use of respiratory protection that complies with the requirements of paragraph (f) of this section).

Facts

CO Robertson testified that, although Lunda had outlined engineering controls to reduce its employees' exposure to lead, those controls were not implemented. Specifically, Robertson testified that Joseph Romo used a short cutting torch rather than an oxy-lance while cutting steel on the ground, and stood downwind while cutting. Complainant also maintains that Lunda could have used a portable exhaust

[2] Improper use of respiratory protection, protective clothing, and hygiene are not properly cited here. The applicable regulations under subparagraphs (f), (g) and (i) were also cited at Willful citation 2, items 1(c), 1(d), 2(a), 2(b) and 2(c). Alleged violations of those regulations will be discussed in turn.

fan to disperse fumes (Tr. 417-18). CO Robertson, however, also testified that Tim Hoeppner and Jerimie Waterstraat used oxy-lances, and that he observed Romo using a longer, four foot torch earlier in the day on June 14, 2001 (Tr. 413, 462-63). In addition, CO Robertson testified that he did see Romo standing upwind in the afternoon on June 14 (Tr. 418).

Ron Rennhack testified that Romo started out using the longer lance, and only switched to the shorter torch because he could not control the longer rod, despite Renhaack's attempts to instruct him (Tr. 313-17). Lunda introduced evidence that the wind speeds in Milwaukee, Wisconsin on June 14, 2001 averaged around 11.05 mph, with gusts up to 19.45 (Exh. R-21). According to Lunda, fans would not have served any meaningful purpose. After the June 14 inspection, however, Kaas instituted a new administrative control for employees cutting on the ground. Employees sizing plate on the ground were rotated approximately every two hours (Tr. 245-46).

Discussion

It is clear from the record that although Lunda instituted engineering controls, not all of them were consistently adhered to. Mr. Romo's use of a shorter cutting torch was actually sanctioned by supervisory personnel working with him. Romo's inability to use the oxy-lance does not make the use of the longer torches infeasible. Lunda need only have assigned the task to a more experienced or more proficient cutter. In addition, Lunda could have instituted the practice of rotating its employees working on aerial lifts with those working on the ground to minimize each employee's exposure to airborne lead. Because Lunda failed to conduct initial monitoring for its employees sizing steel plate on the ground, it was unaware of either the disparity in exposures, or the advantage of rotating its employees. By exercising due diligence, Lunda could have known of the higher lead levels on the ground, therefore, constructive knowledge of the need for additional engineering controls has been established. The feasibility of those controls is also established.

As discussed above, the cited violations all arose from Lunda's failure to determine actual exposure levels for employees engaged in distinct tasks. That failure was not shown to be willful. Lunda's reliance on inadequate exposure data was merely negligent, and does not demonstrate either a deliberate disregard for OSHA regulations, or an indifference to employee safety. This item is affirmed as a serious violation.

Willful citation 2 item 1c alleges:

29 CFR 1926.62(f)(2)(i): The employer did not implement a respirator protection program in accordance with 29 CFR 1910.134 (b) through (d) except (d)(1)(iii) and (f) through (m):

a) The employer did not implement an effective respiratory program at the "6th Street viaduct project" Milwaukee, WI. Deficiencies in the program include improper storage of respirators being used, lack of documentation of fit testing for the various types of

respirators available or being used and improper selection of respirator to protect against the level of exposure to lead anticipated or monitored.

The cited standard states:

The employer must implement a respirator protection program in accordance with 29 CFR 1910.134(b) through (d) except (d)(1)(iii) and (t) through (m):

Section 1910.134(c) *Respiratory protection program*. This paragraph requires the employer to develop and implement a written respiratory protection program [including]. . .(1)(v) Procedures and schedules for cleaning, disinfecting, storing, inspecting, repairing, discarding, and otherwise maintaining respirators. . . .

* * *

(d) *Selection of respirators. . . .* (1) *General requirements* (i) The employer shall select and provide an appropriate respirator based on the respiratory hazard(s) to which the work es exposed . . . .

Facts

As discussed fully above, Joe Romo was using a half mask respirator, which was inadequate to protect against exposures of airborne lead above 500 ug/m^3, and he was exposed to approximately seven times that amount. In addition, CO Robertson testified that on June 14, he observed and videotaped a respirator lying face up on a bench in Lunda's lead shack (Tr. 369, 371; Exh. C-2, #4, #6). According to Robertson, the half-mask should have been in a zip-lock bag to prevent it from being contaminated (Tr. 369). Robertson testified that he photographed a second respirator in the same area that was defective, and which should have been discarded (Tr. 370; Exh. C-2, #5). At the hearing, Gary Kaas testified that the defective respirator was immediately disposed of and replaced (Tr. 246-47).

Discussion

The facts are not disputed. Lunda argues that it was unaware that its employees were not properly storing their respirators, and that it did not know that Joe Romo's airborne lead exposures were so high as to require that he be provided with a full-hood respirator. Lunda's arguments are unpersuasive. The violations were easily discoverable, and with adequate monitoring and training, easily corrected. Complainant failed to carry its burden of proving that Respondent possessed a heightened awareness of the illegality of the violative conditions or was plainly indifferent to the safety of its employees. Moreover, there is no evidence that Respondent possessed a state of mind such that if informed of the violative conditions, its representatives would not care. Accordingly, this item is affirmed as a serious violation.

Willful citation 2 item 1d alleges:

29 CFR 1926.62(f)(3)(i): The employer did not select the appropriate respirator or combination of respirators using table 1 of 29 CFR 1926.62:

a) The employee performing oxyacetylene cutting of bridge steel on the ground at the "6th Street viaduct project" was not using a respirator sufficient to protect for the level of lead exposure monitored.

The cited standard requires:

The employer must select the appropriate respirator or combination of respirators from Table I of this section.

Discussion

This item has been discussed repeatedly in the preceding paragraphs. Lunda clearly was in violation of this section. Lunda has been found in violation of 1926.62(f)(2)(i) based on its failure to select the proper respiratory protection for Mr. Romo when creating its respiratory program. Because item 1(d) is explicitly included within item 1(c), and because the abatement required under both items is identical, the violation has been established.

Penalty

Lunda's failure to ensure that employees properly cleaned and stored their respiratory equipment could have resulted in contamination of the equipment. The deficiencies in Lunda's respirator program led to the selection of an inadequate respirator, and to Mr. Romo's overexposure to lead fumes on June 14. Romo was exposed to the violation cited at citation 2 item 1(a) subparagraph (A) for a single shift. In addition, employees cutting steel plate were exposed to the conditions cited at citation 2, item 1(b) from June 14, 2001 until Lunda instituted additional administrative controls after receiving the results of the June 14, 2001 sampling. Though Lunda introduced evidence that Mr. Romo did not suffer any injury related to increased blood lead (Tr. 238; Exh. C-8), the gravity of the violations is high because of the severe nature of possible lead related injuries. The gravity of the violation, the number of violations grouped under this item and Lunda's history of prior violations justify assessing the maximum penalty available for a serious violation. Accordingly, $7,000.00 is assessed for the violations cited at items 1a, 1b, 1c and 1d.

Willful citation 2 item 2a alleges:

29 CFR 1926.62(g)(1)(i): The employer did not provide and assure that employees use appropriate personal protective work clothing and equipment such as coveralls or similar full-body work clothing was

used where employees were exposed to lead above the PEL without regard to the use of respirators, and as interim protection for employees performing tasks as specified in paragraph (d)(2) of 29 CFR 1926.62:

a) Employees performing oxyacetylene cutting of bridge steel on the "6th Street viaduct project" Milwaukee, Wisconsin were not using protective work clothing such as coveralls or other full-body work clothing.

The cited standard provides:

> Where an employee is exposed to lead above the PEL without regard to the use of respirators . . . . and as interim protection for employees performing tasks as specified in paragraph (d)(2) of this section, the employer shall provide at no cost to the employee and assure that the employee uses appropriate protective work clothing and equipment that prevents contamination of the employee and the employee's garments such as, but not limited to i) coveralls or similar full-body work clothing; (ii) Gloves hats and shoes or disposable shoe coverlets;. . . .

Facts

CO Roberton testified that foreman Renhaack told him that employees were not provided with coveralls for the first two weeks Lunda was on the 6th Street Bridge site (Tr. 427). In his testimony, however, Renhaack stated that coveralls were provided as soon as Lunda began cutting structural steel (Tr. 284). Tim Hoeppner testified that he did not wear coveralls while cutting rebar during removal of the concrete deck, but began wearing coveralls once he started cutting structural steel (Tr. 509-10). According to Robertson, Jerimie Waterstraat did not wear coveralls while cutting steel handrails.

Discussion

The Secretary has the burden of proving that the removal of the concrete deck structure and the demolition of the hand railing fall under paragraph (d)(2), which applies to "lead related tasks. . . where lead is present. . . ." Complainant has provided no evidence suggesting that lead containing coatings or paint was present in the concrete deck. The record establishes, however, that the cited handrails were originally painted with lead paint, and that Mr. Waterstraat was cutting those handrails on June 11, 2001 without benefit of protective clothing. Mr. Waterstraat was working in plain view. Lunda supervisory personnel were either aware of the violative condition, or could, with the exercise of reasonable diligence, have known of the condition. The violation is established.

Penalty

The evidence establishes that Lunda's supervisory personnel were actually aware of and approved of Waterstraat's failure to wear protective coveralls. However, the Secretary has not proved, by a preponderance of the evidence, that the violation was willful, see willful discussion above. The violation is affirmed as a serious violation of the Act. One employee was exposed to the cited violation for a single

shift. The gravity of the violation is, nonetheless, high because of the serious nature of lead related illnesses. Taking into account the relevant factors, in particular the gravity of this violation, a penalty of $3,500.00 is assessed.

Willful citation 2 item 2b alleges:

29 CFR 1926(g)(1)(ii): The employer did not provide and assure that employees use gloves, hats, and shoes or disposable shoe coverlets where employees were exposed to lead above the PEL without regard to the use of respirators and as interim protection for employees performing tasks as specified in paragraph (d)(2) of 29 CFR 1926.62:

a) Employees performing oxyacetylene cutting on the bridge steel at the "6th Street viaduct project" were monitored above the permissible exposure limit for lead without the use of disposable shoe coverlets or changing shoes at the end of the workshift.

Facts

Lunda employees wore home the shoes they worked in (Tr. 155). Lunda did not provide disposable shoe coverlets for employees, but provided a HEPA vacuum with which employees were to vacuum their shoes (Tr. 182, 249). CO Robertson testified that providing a vacuum for employees did not comply with the requirements of the standard, because residual dust could be left in the lacing and eyelets, as well as on the soles of the shoes (Tr. 429-31). Robertson admitted that vacuuming would reduce the amount of lead dust carried off the site (Tr. 430-31). Lunda was previously cited for failing to provide changing shoes or coverlets (Tr. 132).

Discussion

Lunda argues only that it believed in good faith that vacuuming was an acceptable alternative to providing protective shoe covers. Respondent, however provides no justification for its decision. The record establishes that Lunda was previously cited for violation of this standard. The standard is clear in requiring that:

> Where an employee is exposed to lead above the PEL without regard to the use of respirators. . . . the employer shall provide at no cost to the employee and assure that the employee uses appropriate protective work clothing and equipment that prevents contamination of the employee and the employee's garments such as, but not limited to i) coveralls or similar full-body work clothing; (ii) Gloves hats and shoes or disposable shoe coverlets;. . . .

While a HEPA vacuum may reduce the amount of lead contaminants an employee carries off a contaminated work site, it clearly does not prevent contamination. Shoe coverlets, on the other hand, prevent lead from settling in the eyelets and laces of the employee's shoes, preventing lead contaminants from being carried off the site. It is true that a violation is not willful if the employer had a good faith

opinion that the violative conditions conformed to the requirements of the cited standard. However, the test of good faith for these purposes is an objective one -- whether the employer's belief concerning a factual matter, or concerning the interpretation of a standard, was reasonable under the circumstances. *Calang Corp.*, 14 BNA OSHC 1789, 1987-90 CCH OSHD ¶29,080 (No. 85-319, 1990). It is clear that vacuuming does not provide the same level of protection as shoe coverlets, just as vacuuming their street clothes would not provide employees with the same level of protection as coveralls. Lunda's claim to have made a good faith effort to comply with the standard is not credible.

Even if Lunda's claims were credible, the Commission has held that an employer who knows the requirements of the standard but decides not to comply, even if it has a good faith belief that its own approach provides protection equivalent to OSHA's requirements, is still in willful violation. *Reich v. Trinity Industries, Inc.*, 16 F.3d 1149, 1152 (11th Cir. 1994). Lunda was cited for violation of the identical regulation before, yet it made a deliberate decision to substitute HEPA vacuuming for shoe coverlets. Lunda's decision not to provide shoe coverlets is found to be willful.

Penalty

In order to distinguish this subparagraph from items 2a, which was not found to be willful, and item 2c, which is vacated below, this item is designated new item number 3. All of Lunda's employees who cut steel plate were exposed to the conditions cited at citation 2, item 2(b) until Lunda's abatement of this item. Because employees could have carried lead off the site, contaminating their cars and their homes, the gravity of the violation is high. Nonetheless, as noted above, there is no evidence that any employees actually suffered any lead related illnesses or elevated blood lead levels. Taking into account the gravity of the violation, Lunda's history of violations, and its efforts to improve its lead program, the proposed penalty of $55,000.00 is deemed excessive. A penalty of $15,000 is assessed for citation 2, new item 3.

Willful citation 2 item 2c alleges:

29 CFR 1926.62(i)(2)(iii): The employer did not ensure that employees left the workplace wearing any protective clothing or equipment that is required to be worn during the work shift:

a) Lunda employees who were monitored for lead at the "6th Street viaduct project" were above the permissible exposure limit (PEL) and were permitted to wear street clothing under their coveralls that were contaminated with lead and allowed to wear them home at the end of the shift.

The cited standard provides:

> The employer shall assure that employees do not leave the workplace wearing any protective clothing or equipment that is required to be worn during the shift.

Facts

Gary Kaas testified that employees working in areas where they would be exposed to lead were provided with a "lead shack" (Tr. 116). Lunda's lead program anticipates the use of separate work clothes, which are to be stored in the clean room of the lead shack. The program requires employees to change out of their street clothes into work clothes before passing from the clean side of the lead shack to the dirty side. Employees are to change out of and store their work clothes after their shifts, changing into street clothes before leaving the site (Tr. 156-57; Exh. C-10, p. 9). In practice, the employees enter the clean side of the lead shack when reporting to work. They pick up a respirator and protective coveralls supplied by Lunda, and go over to the dirty side (Tr. 117-18, 248-49). On the dirty side, employees put on their coveralls over their street clothes (Tr. 118-20). At the end of the day, employees return their contaminated coveralls and leave (Tr. 117-19, 157). Lunda did not enforce the provision of the lead program that required employees to leave their street clothes in the clean room (Tr. 158-59, 181). Kaas knew that employees wore their coveralls over their street clothes in violation of company policy (Tr. 181). Kaas admitted that if the coveralls were torn, burned or not properly buttoned or zipped, there was a possibility that the street clothing could become contaminated during the employee's shift (Tr. 120-21).

Discussion

Nothing in the cited standard explicitly prohibits the wearing of street clothes under properly worn protective clothing. No evidence was introduced suggesting that Lunda employees wore protective clothing home from the 6th Street work site. Item 2c is vacated.

ORDER

1. Serious citation 1, items 1, 2, 3a and 3b, alleging violation of 29 CFR §1926.62(d)(1)(i), (d)(2)(iv), (d)(3)(iii) and (d)(3)(iv)(B) are AFFIRMED, and a single penalty of $7,000.00 is ASSESSED.

2. Serious citation 1, item 5a, alleging violation of 29 CFR §1926.62(e)(2)(ii)(A) is VACATED.

3. Serious citation 1, item 7a, alleging violation of 29 CFR §1926.62(i)(1) is VACATED.

4. Serious citation 1, item 8, alleging violation of 29 CFR §1926.62(i)(3)(i) is AFFIRMED, and a penalty of $1,000.00 is ASSESSED.

5. Serious citation 1, item 9, alleging violation of 29 CFR §1926.62(i)(4)(iv) is VACATED.

6. Citation 2, item 1a, 1b, 1c, and 1d alleging violations of 29 CFR §1926.62(c)(1), (e)(1), (f)(2)(i), and (f)(3)(i), respectively, are AFFIRMED as a "serious" violation, and a combined penalty of $7,000.00 is ASSESSED.

7. Citation 2, item 2a, alleging violation of 29 CFR §1926.62(g)(1)(i) is AFFIRMED as a "serious" violation, and a penalty of $3,500.00 is ASSESSED.

8. Citation 2, new item 3, alleging violation of 29 CFR §1926.62(g)(1)(ii) is AFFIRMED as a "willful violation of the Act, and a penalty of $15,000.00 is assessed.

9. Citation 2, item 2c, alleging violation of 29 CFR §1926.62(i)(2)(iii) is VACATED.

10. The total penalty is $33,500.00

/s/
Robert A. Yetman
Judge, OSHRC

Dated: January 21, 2003