United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR, Complainant, v. L & L PAINTING COMPANY, INC., Respondent.	OSHRC Docket No. 05-0055

ON BRIEFS:

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For the Complainant

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For the Respondent

DECISION AND ORDER

Before: ROGERS, Chairman; ATTWOOD, Commissioner.

BY THE COMMISSION:

This case, which is on review before the Commission for a second time, involves a twenty-item serious citation issued to L & L Painting Company, Inc. ("L&L") following an inspection of its worksite on the New York side of the George Washington Bridge ("the Bridge") by the Occupational Safety and Health Administration ("OSHA"). OSHA initiated the inspection after being notified by the New Jersey Department of Health and Senior Services that L&L employees working at the Bridge had elevated blood lead levels ("BLLs"). In the citation, OSHA alleged violations of the Occupational Safety and Health Act of 1970 ("the Act"), 29 U.S.C. §§ 651-678, primarily under the lead in construction standard, 29 C.F.R. § 1926.62.

The late Chief Administrative Law Judge Irving Sommer issued his initial decision in this matter in 2006, following a hearing at which L&L was represented by a non-attorney safety

consultant. After the hearing, but prior to issuance of the decision, L&L obtained counsel who filed L&L's post-hearing brief and two motions with the judge. In the first motion, L&L sought reconsideration of the judge's earlier ruling denying the admission of monitoring results for airborne lead that L&L had obtained from its worksite on the New Jersey side of the Bridge.[1] In the second motion, L&L sought to reopen the record to introduce additional evidence, including the New Jersey air monitoring results. In his decision, the judge rejected both motions, affirmed all of the citation items, and assessed the $33,500 proposed penalty.[2]

The judge's decision was directed for review, and the Commission remanded the case to him to determine whether L&L complied with its obligation to conduct initial monitoring for lead exposure on the New York side of the Bridge under 29 C.F.R. § 1926.62(d)(1). In this regard, the Commission noted that the judge should determine whether L&L met the requirements of the "historical monitoring exception" set forth at 29 C.F.R. § 1926.62(d)(3)(iii) based on L&L's previous air monitoring on the New Jersey side of the Bridge. *L & L Painting Co.*, 22 BNA OSHC 1353, 1355 (No. 05-0055, 2008). The Commission instructed the judge "to admit the results of the [New Jersey] air monitoring . . . and allow the parties to introduce any additional evidence regarding the [historical monitoring] exception . . . ." *Id.* The Commission also directed the judge to "allow the parties to make any further arguments regarding those citation items . . . that are specifically affected by the results of the New Jersey air monitoring in terms of L&L's knowledge of the cited conditions" and "reconsider his decision as to the affected citation items."[3] *Id.*

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[1] OSHA conducted an inspection of the New Jersey worksite that resulted in the issuance of a separate citation to L&L, which the company also contested. The Commission issued a decision in that case on September 29, 2008. *L & L Painting Co.*, 22 BNA OSHC 1346, 2004-09 CCH OSHD ¶ 32,978 (No. 05-0050, 2008).

[2] Prior to the hearing, the judge granted the Secretary's motion to amend her complaint. Items 1 through 4, 6, 7, and 10 through 15 were amended to change the date the alleged violations were observed from July 7, 2004, to September 21, 2004. Item 5 was amended to comprise two instances, a and b, for conditions observed on July 7, 2004, and September 21, 2004, respectively.

[3] In its remand order, the Commission declined to address "any of the other arguments raised by the parties[,]" which included six particular citation items encompassed by the Commission's direction for review. *L & L Painting Co.*, 22 BNA OSHC at 1355 n.4. These six items remain at issue and are addressed below.

In his decision on remand, the judge found that L&L failed to establish the historical monitoring exception and affirmed the serious violation alleged under Item 2 for L&L's failure to conduct initial monitoring for exposure to lead.[4] The judge also affirmed the serious violations alleged under Items 3, 8, 10, and 11, all of which relate to various hygiene and personal protective equipment provisions of the lead in construction standard.

On review now before the Commission are the following issues from the judge's decision on remand: L&L's challenges to the judge's credibility determinations, his finding that L&L failed to establish the historical monitoring exception, and his affirmance of Items 2, 3, 8, 10, and 11. Also at issue is the judge's affirmance in his initial decision of Items 1a, 1b, 1c, 4, 5, instances a and b, and 15b, the items that were not addressed in the Commission's remand order.[5] For the following reasons, we vacate Items 3, 8, 10, and 5, instance b, affirm Items 1a, 1b, 1c, 4, 5, instance a, 11, and 15b as serious, and assess the total proposed penalty of $14,000 for the seven affirmed items. With regard to Item 2, we affirm the portion of the judge's decision with respect to that item but accord it the precedential value of an unreviewed decision.

FACTUAL BACKGROUND

In 2001, under a contract with the Port Authority of New York and New Jersey, L&L began to remove lead-based paint from the Bridge by abrasive blasting inside containment enclosures. The Bridge has four large towers—one north tower and one south tower located on the New York side of the Bridge, and two identical towers located on the New Jersey side.

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[4] Along with its brief to the judge on remand, L&L submitted: (1) the New Jersey air monitoring results; (2) the cover page of L&L's contract for the Bridge lead-removal project; and (3) the affidavits of William LePage, a consultant with C&E Ventures and L&L's safety supervisor, and Declan Farrington, L&L's site supervisor. The Secretary submitted a letter, which outlined the judge's prior credibility determinations, and the November 16, 2007 brief she filed with the Commission following the direction for review of the judge's first decision.

[5] Because L&L does not address Item 12 in any of the briefs it has filed before the Commission, we treat this item as abandoned. *See Midwest Masonry Inc.*, 19 BNA OSHC 1540, 1543 n.5, 2001 CCH OSHD ¶ 32,428, p. 49,994 n.5 (No. 00-0322, 2001) (arguments not raised in briefs before Commission are generally deemed abandoned); *S&S Diving Co.*, 8 BNA OSHC 2041, 2042, 1980 CCH OSHD ¶ 24,742, p. 30,464 (No. 77-4234, 1980) (same).

In addition, as the Secretary conceded in her 2006 briefs to the Commission that Items 1d and 15a are duplicative of other citation items, we vacate both of these items without discussion. Finally, we do not disturb the judge's affirmance of Items 6, 7, 9, 13, 14, and 15c, which L&L has not challenged at any point on review.

L&L's work included removing the lead-based paint from the New Jersey and New York towers, and then repainting them. In mid-2004, while finishing up its work on the New Jersey side, L&L started working on the New York side of the Bridge.

On July 7, 2004, Regan Branch, an OSHA Industrial Hygienist ("the IH"), initiated an inspection of the New York side of the Bridge. She was accompanied during the inspection by C&E Ventures' consultant and L&L's safety supervisor William LePage, L&L's site supervisor Declan Farrington, and L&L's site foreman John Lawson. L&L's worksite consisted of a containment area surrounding each tower where employees used abrasive blasting equipment to remove lead-based paint from the bridge. The worksite also contained a decontamination unit, an equipment trailer, and a machine that supplied compressed air to workers on the bridge. During the inspection the IH took wipe samples from various surfaces at the worksite, and she also requested the results of any area sampling and personal air monitoring for employee lead exposure that L&L had conducted. L&L told her that it had conducted no sampling at its New York worksite, but gave her the results of the sampling it conducted at the New Jersey worksite.

The IH testified that upon her September 21, 2004 return to the New York worksite to conduct air sampling, L&L had completed its work on the south tower and had begun work on the north tower. At this time, she saw five L&L employees breaking down the containment and vacuuming up debris in the south tower and another L&L employee, identified here as "J.G.," vacuuming up debris outside the active north tower containment and in the area between the north and south towers. The IH attached a sampling device to J.G. while he vacuumed debris for almost four and a half hours. The IH testified that she also sampled two of L&L's blasters and one of its vacuumers, all of whom were working inside the active north tower containment, and took more wipe samples in the decontamination area.

DISCUSSION

A. Credibility Determinations

As a threshold matter, we first address L&L's challenges to the judge's credibility determinations and their effect on his disposition of most of the citation items before him. At the hearing, the IH and L&L's management employees testified regarding the inspection. In discussing that testimony in his initial decision, the judge stated that he "observed the demeanor[] of [safety supervisor] LePage and IH Branch as they testified" and found LePage "to

be a less than reliable witness." He also found L&L's site foreman Lawson to be unreliable based on his demeanor.

In his decision on remand, the judge reiterated his credibility findings regarding Lawson and stated that he had thoroughly considered the affidavits of safety supervisor LePage and site supervisor Farrington, submitted by L&L on remand, in light of the "adequate and well supported" credibility findings he had made in his initial decision. In so doing, the judge focused on the two affiants' assertions that they were with the IH during her second visit to the worksite and recalled that she had entered the active containment area despite their warnings not to do so. Although the IH did not testify as to whether she entered the active containment without protective equipment, the judge did not believe LePage and Farrington because he found it "incredible" that the IH would enter an active containment where abrasive blasting was taking place without protective equipment. He also noted that contrary to the affiants' claims, the IH testified that only foreman Lawson was present on the day of her second visit to the worksite. For these reasons, the judge "credit[ed] the testimony of IH Branch over the statements of Mr. Farrington and Mr. LePage in their affidavits, to the extent there are conflicts between her testimony and their statements."

The Commission generally accepts a judge's credibility finding where it is based on "the judge's observation of a witness' demeanor." *Hern Iron Works, Inc.*, 16 BNA OSHC 1206, 1214, 1993 CCH OSHD ¶ 30,046, p. 41,257 (No. 89-433, 1993) (citation omitted). Such a finding normally will not be disturbed "because it is the judge 'who has lived with the case, heard the witnesses, and observed their demeanor.' " *Hackney, Inc.*, 15 BNA OSHC 1520, 1522, 1992 CCH OSHD ¶ 29,618, p. 40,106 (No. 88-0391, 1992) (citation omitted). Nonetheless, the judge must explain his findings and "identify the oral testimony that is conflicting." *P&Z Co.*, 6 BNA OSHC 1189, 1192, 1977-78 CCH OSHD ¶ 22,413, p. 22,024 (No. 76-431, 1977) (citations omitted). The judge may not support his finding simply "by applying a 'credible' or 'not credible' rubber stamp to witnesses' testimony without explanation." *Id.* Thus, a "wholesale rejection of unnamed witnesses' testimony under the color of a credibility evaluation *without any explanation* for its rejection is unacceptable." *Id.* (emphasis added).

Here, we find that the judge provided a sufficient basis for his rejection of LePage's testimony and affidavit, and Farrington's affidavit, where they conflict with the IH's statements. The judge made clear that he was convinced both affiants were not believable because of their

"incredible" assertions. The judge's credibility findings are also entitled to deference because he analyzed the demeanors of the IH, LePage, and Lawson, "including their facial expressions and body language," and found the IH "to be a sincere and credible witness." *E.g.*, *Waste Mgmt. of Palm Beach*, 17 BNA OSHC 1308, 1309-10, 1995-97 CCH OSHD ¶ 30,841, p. 42,892 (No. 93-128, 1995) (noting Commission generally defers to judges' demeanor-based credibility determinations). Accordingly, we find no basis to disturb the judge's credibility determinations.

B. Citation 1, Item 2 (initial determination)

Section 29 C.F.R. § 1926.62(d)(1), the standard cited under this item, provides that "[e]ach 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." Two methods of making this determination permitted by the standard are relevant here: (1) an employer can monitor employee exposure, or (2) it can establish the historical monitoring exception by relying on monitoring results from a previous worksite if conditions were sufficiently similar to the employer's current worksite. 29 C.F.R. § 1926.62(d)(3)(i),(iii). Here, the Secretary alleges that L&L violated the cited provision because it did not conduct initial monitoring to determine employee J.G.'s lead exposure while he was vacuuming dust and debris.

L&L does not dispute that it did not conduct any air monitoring for lead exposure on the New York side of the Bridge. It argued before the judge that it nonetheless complied with the initial determination requirement at the New York worksite because employee air monitoring it had conducted on the New Jersey side of the Bridge met the standard's historical monitoring exception. The judge affirmed the citation item. He found that L&L's previous monitoring did not include the work J.G. was performing and, therefore, did not satisfy the historical monitoring exception.

We turn first to whether L&L has demonstrated that its New Jersey monitoring satisfies the historical monitoring exception to the standard's initial determination requirement.[6]

Historical Monitoring Exception

To establish the exception, L&L must prove that the workplace conditions at its New

[6] There is no dispute on review that each side of the Bridge was a separate worksite such that the requirement to perform an initial determination was triggered anew when L&L shifted its work operations to the New York side of the Bridge.

Jersey worksite "closely resembl[e] the processes, type of material, control methods, work practices, and environmental conditions used and prevailing" at its New York worksite.[7] 29 C.F.R. § 1926.62(d)(3)(iii); Lead Exposure in Construction, 58 Fed. Reg. 26,590, 26,599 (May 4, 1993) (interim final rule); *see Bianchi Trison Corp. v. Chao*, 409 F.3d 196, 203 (3d Cir. 2005) (holding that the judge correctly placed the burden on the employer to establish it appropriately relied on exception); *Kaspar Electroplating Corp.*, 16 BNA OSHC 1517, 1522, 1991-93 CCH OSHD ¶ 30,303, p. 41,759 (No. 90-2866, 1993) ("[T]he party claiming the benefit of an exception to the requirements of a standard has the burden of proof of its claim."). We find that L&L has failed to make such a showing.

Contrary to L&L's assertions, the record establishes that L&L had different job tasks at the two separate Bridge worksites. Site supervisor Farrington stated in his affidavit that the work assigned to L&L's containment cleanup crew at the New Jersey worksite was not performed near the active containment and involved only "small amounts" of airborne lead. He also indicated that L&L's monitoring results for this job classification on the New Jersey side of the Bridge showed exposure levels below the PEL. The IH testified that on September 21, 2004, she observed a cloud of dust around J.G.—who was assigned to the containment cleanup crew—as he vacuumed debris outside the active north tower containment and in the area between the north and south towers, and that his measured lead exposure was above the PEL. According to the IH, "the New Jersey sampling results did not have sampling conducted for an employee performing this kind of work." The judge expressly credited the IH's testimony over Farrington's statements to the contrary in his affidavits, a determination we have already declined to disturb. Therefore, we find that the IH's observations of J.G., coupled with J.G.'s established overexposure,

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[7] Section 1926.62(d)(3)(iii) states:

> 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)([9]) of this section.

29 C.F.R. § 1926.62(d)(3)(iii).

demonstrate that the job tasks J.G. performed on September 21, 2004, at the New York worksite were not the same as those performed by the cleanup crew at the New Jersey worksite.

L&L has also not shown that the monitoring data from the New Jersey side of the Bridge was obtained under workplace conditions involving the same type of material or the same environment as that on the New York side of the Bridge. In his affidavit, Farrington claimed that L&L was removing the same original paint on both sides of the Bridge. He based his conclusion on the presence of "Mill Scale," a substance that forms on steel while it is being fabricated and must be blasted off before *non-lead* paint is applied. Farrington stated that the presence of Mill Scale confirmed for him "that the [entire] Bridge had not been blasted to the metal and the original paint coatings had not been removed prior to L&L's work." He did not consider, however, that the Bridge could have been repainted at different times and in different places with any number of coats of *lead* paint before L&L began its work on the Bridge in 2004, because using such paint would not have required the removal of Mill Scale. Indeed, L&L has provided no evidence showing either that the Bridge: (1) was never repainted before 2004 or (2) was repainted the same number of times on each side using the same lead paint. As for the environmental conditions on both sides of the Bridge, the sole basis for L&L's contention that they were the same is simply the proximity of one worksite to the other; the New York worksite was located approximately two-thirds of a mile from the New Jersey worksite. But we find no basis in this record for concluding that environmental similarity is established by proximity alone. Consequently, we find that L&L has not shown that the two worksites were sufficiently similar to meet the criteria necessary to establish the historical monitoring exception. L&L cannot, therefore, rely on the New Jersey results to satisfy its obligation to conduct an initial determination on the New York side of the Bridge.

While we agree that L&L has not established the historical monitoring exception, we are divided as to whether the Secretary has otherwise established that L&L violated the initial determination requirement under § 1926.62(d)(1). To resolve this impasse and permit a more speedy resolution of this case, we agree to affirm the judge's decision with respect to Item 2, but to accord that portion of the judge's decision "the precedential value of an unreviewed judge's decision." 29 U.S.C. § 661(e) (official action by the Commission requires the affirmative vote of at least two members); *Westar Mech. Inc.*, 19 BNA OSHC 1568, 1584, 2001 CCH OSHD ¶ 32,483, p. 50,297 (Nos. 97-0226 & 97-0227, 2001); *see Life Science Products Co.*, 6 BNA

OSHC 1053, 1977-78 CCH OSHD ¶ 22,313, pp. 26,870-71 (No. 14910, 1977). The Commissioners' separate views follow.

Chairman Rogers' View

I would find that the Secretary did not show that L&L violated § 1926.62(d)(1)'s initial determination requirement based on its specific failure to monitor J.G.'s exposure to lead. To begin with, § 1926.62(d)(3)(ii) required L&L only to monitor the employees it reasonably believed to be the greatest exposed—a group that the Secretary has not shown would have included J.G. and a failure for which she did not cite L&L. Thus, § 1926.62(d)(3)(ii) imposes no obligation on an employer to monitor *each* job classification for lead exposure to comply with the initial determination requirement. Instead, as OSHA explained in the preamble to the lead in construction standard, the initial determination provision "*only requires* monitoring of a representative sample of the employees believed to have the highest exposure levels." Lead Exposure in Construction, 58 Fed. Reg. at 26,599 (emphasis added). Only if the initial determination shows any employee exposure at or above the action level is an employer required to conduct monitoring that is representative of the exposure *for all* exposed employees as set forth under 29 C.F.R. § 1926.62(d)(4). *Id.* (emphasis added).

Here, OSHA's monitoring results for the four L&L employees sampled by the IH on the New York side of the Bridge show that it was the abrasive blasters who had the greatest lead exposure. These results are consistent with L&L's New Jersey monitoring results, which also showed that the abrasive blasters had the greatest lead exposure. Indeed, under the lead in construction standard, OSHA has identified abrasive blasting as a task that poses a high risk of exposure to employees. *See A.G. Mazzocchi Inc.*, 22 BNA OSHC 1377, 1380, 2004-09 CCH OSHD ¶ 32,988, p. 54,133 (No. 98-1696, 2008) (citing Lead Exposure in Construction, 58 Fed. Reg. at 26,594-96) (stating that § 1926.62(d)(2)(iv) "is based on the Secretary's finding that certain tasks related to lead normally expose employees to very high concentrations of airborne lead").

But the Secretary limited her allegation under this citation item to L&L's failure to initially monitor J.G. and only J.G. At the hearing, the Secretary's counsel reiterated that this was the sole basis for the citation: "Citation 1, Item 2 deals with [L&L] not doing initial exposure assessment tests *of a particular employee and, this employee was [J.G.]*." (Emphasis added). However, L&L would only have been required to choose J.G. as the employee to

initially monitor if he was representative of employees believed to have the highest exposure levels. I find nothing in the record evidence to show that L&L had any reason to believe the job tasks assigned to J.G. exposed him to greater levels of airborne lead than the levels experienced by its abrasive blasters such that it was required by the cited provision to specifically identify and monitor J.G. in order to comply with the cited initial determination requirement. Absent such evidence, the Secretary cannot prove that L&L's failure to monitor J.G. alone was a violation of § 1926.62(d)(3)(ii). Accordingly, I would vacate Citation 1, Item 2.

Commissioner Attwood's View

I would affirm Citation 1, Item 2. The Secretary alleges in the citation that L&L violated the lead standard's requirement that "[e]ach 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." 29 C.F.R. § 1926.62(d)(1)(i) (emphasis added). The initial-determination provision of the standard is designed to inform an employer whether any of the standard's other requirements are applicable to its worksite, and employee monitoring for the initial determination "*may* be limited to a representative sample of the employees who the employer reasonably believes are exposed to the greatest airborne concentrations of lead." 29 C.F.R. § 1926.62(d)(3)(ii) (emphasis added).

In describing this allegation here, the Secretary states in the citation that L&L did not perform initial monitoring to determine the exposure of an employee who was vacuuming lead-containing debris. L&L concedes that it did not monitor this employee and does not contend that it monitored a different employee at the New York worksite to satisfy its initial monitoring obligation. Indeed, L&L admits that it did not monitor any employee at the New York worksite. L&L's only defense to this citation item is that it complied with the cited standard by relying on its New Jersey worksite exposure monitoring under the historical monitoring exception to the standard's initial monitoring requirement. *See* 29 C.F.R. § 1926.62(d)(3)(iii). For the reasons described above, the Commission has determined that L&L failed to establish the elements of this defense. As L&L admits that it performed no initial-determination monitoring of any employee at the New York worksite, its non-compliance with the cited provision of the lead standard is established.

My colleague would find that the Secretary did not prove her case with respect to this citation item because the citation narrows the allegation to a particular employee whose exposure

L&L could not have believed was representative of the most-exposed employees. But L&L monitored no one. It failed to determine the exposure of the identified employee who was performing "potentially-high-exposure" work and failed to determine the exposure of *any* other employee at this worksite. *See* 58 Fed. Reg. at 26,595. Accordingly, I would find the Secretary proved this violation as alleged.

C. Citation 1, Items 3, 8, 10, and 11 (coveralls, lunchroom, showers, face/hand washing)

The requirements of the standards cited under these four citation items are triggered by employee exposure to lead above the PEL. Thus, before considering whether L&L complied with these provisions, we first address whether the Secretary has shown that employees assigned to the job tasks identified in these items were, in fact, overexposed and whether L&L knew or could have known with the exercise of reasonable diligence that they were overexposed. *See Contour Erection & Siding Sys., Inc.*, 22 BNA OSHC 1072, 1073, 2004-08 CCH OSHD ¶ 32,943, p. 53,787 (No. 06-0792, 2007) (citation omitted) (stating to establish a violation, Secretary must prove that employer "knew or could have known with the exercise of reasonable diligence of the conditions constituting the violation"). According to the Secretary, the lead exposure levels for employees assigned to perform abrasive blasting (abrasive blasters) and employees assigned to perform vacuuming (members of the containment cleanup crew)—the two job tasks identified under these citation items—were shown by the IH's sampling results to exceed the PEL, and L&L could have known of this overexposure had it met its monitoring obligations under the lead in construction standard. In affirming these four items in his decision on remand, the judge simply concluded that L&L had knowledge that its employees were doing work that had not been previously monitored.

On review, L&L challenges the judge's knowledge determination based primarily on its contention that it made out the historical monitoring exception and, therefore, reasonably relied on its monitoring results from the New Jersey side of the Bridge. Those results show that only the abrasive blasters were exposed to lead levels above the PEL; members of the containment cleanup crew were exposed to lead levels below the PEL. But we have already rejected L&L's claim that it was entitled to rely on the New Jersey monitoring results given its failure to show that the two worksites were sufficiently similar. And as noted above, it is undisputed that L&L performed no monitoring at the New York worksite. Accordingly, we must consider whether L&L, had it complied with its monitoring obligations under the standard on the New York side

of the Bridge, would have known that the employees assigned to these two job tasks were overexposed. For the reasons discussed below, we find that the Secretary has established knowledge with respect to Items 8 (lunchroom) and 11 (face/hand washing), but not Items 3 (coveralls) and 10 (showers).

Knowledge Based on Compliance with Standard

Although L&L did not conduct air monitoring at the New York worksite, it does not dispute that it expected the abrasive blasters working at the active north tower containment would be exposed to lead at levels above the PEL. Indeed, this expectation was confirmed by the IH's monitoring results, which show that the two abrasive blasters she sampled at the New York worksite were overexposed. *See* Lead Exposure in Construction, 58 Fed. Reg. at 26,594-96 (explaining basis for presumption in § 1926.62(d)(2)(iv) that lists abrasive blasting as high-risk task requiring use of interim protections during exposure assessment). Thus, we find that if L&L had conducted monitoring at the New York worksite as required under the lead in construction standard, it would have known that employees assigned to the job classification of abrasive blaster were exposed above the PEL. *See S. Scrap Materials Co.*, 23 BNA OSHC 1596, 1624, 2012 CCH OSHD ¶ 33,177, p. 55,579 (No. 94-3393, 2011) (finding that Respondent would have discovered its employees were potentially exposed to airborne cadmium above the action level and the PEL if it had exercised reasonable diligence).

However, we cannot find that even if L&L had complied with its monitoring obligations, it would have known that any employee assigned to the containment cleanup crew would have been overexposed. The judge found that J.G. vacuumed debris at two different locations on the day he was monitored and shown to be overexposed, but the record contains no evidence regarding whether J.G. had previously performed similar work under similar conditions at the New York worksite. In these circumstances, we cannot find that even if L&L had previously monitored J.G., it necessarily would have known of his overexposure.

Nor can we find that the monitoring results the IH obtained for J.G. are representative of the level of exposure L&L would have obtained had it monitored other employees assigned to the containment cleanup crew at the New York worksite. According to the IH, the five containment cleanup crew employees she observed during the inspection, none of whom she monitored, experienced the same level of overexposure as J.G., their fellow crew member, because all six were performing similar tasks. As the Commission has held, where direct

evidence shows that an unsampled employee worked in the same location and under the same conditions as an overexposed, sampled employee, the Secretary can establish overexposure for the unsampled employee. *E. Smalis Painting Co.* ("*Smalis*"), 22 BNA OSHC 1553, 1559, 2009 CCH OSHD ¶ 33,030, p. 54,353 (No. 94-1979, 2009). The IH testified that the five containment cleanup crew employees she observed were working in the *inactive* south tower containment throughout their eight-hour shift. But she also testified that J.G. was working outside the *active* containment at the north tower and on the platform in between the two towers when she monitored him. Thus, although J.G. and the other employees were assigned to the same job classification, they performed their work in different locations and under different environmental conditions on the day that J.G. was found to be exposed above the PEL. Under these circumstances, the Secretary has failed to show that J.G.'s overexposure was representative of the exposure of his fellow containment cleanup crew members. *Id.* (rejecting "the judge's principal reliance on job classification to establish overexposure"). Accordingly, the record lacks any basis for concluding that L&L's compliance with its monitoring obligations would necessarily have provided the requisite knowledge of overexposure with regard to this job classification.

Based on the foregoing conclusions, we find that the Secretary has shown that L&L had knowledge of overexposure to lead only for the abrasive blasters. Thus, we vacate Items 3 (coveralls)[8] and 10 (showers), as these items are based on the alleged overexposure of the containment cleanup crew employees. We now turn to the remaining issues in dispute under Items 8 and 11.

Citation 1, Item 8 (lunchroom)

Under this item, the Secretary alleges that L&L violated 29 C.F.R. § 1926.62(i)(4)(i) by failing to provide required lunchroom facilities or eating areas for the abrasive blasters. In both of his decisions, the judge found that the Secretary established the alleged violation based on the IH's testimony, which he described as indicating that there was "no set area for employees to have lunch and that they sat on planks or on the platform itself to eat." And he rejected LePage's

[8] Although § 1926.62(d)(2) prescribes that coveralls are required as an interim protection pending an exposure assessment for employees engaged in particular work activities, the Secretary's brief only referenced this provision in very general terms, and she made no effort to apply it to the specific circumstances at issue here. Accordingly, we do not address it.

testimony indicating there was "a make-shift table with planks to sit on for employees to have lunch." Based on our review of the record, we vacate this citation item.

The gravamen of the Secretary's charge is that the surfaces of the planks on which L&L's employees sat while eating lunch were covered with measurable amounts of lead, a condition for which L&L was not cited under this provision.[9] However, the cited standard, § 1926.62(i)(4)(i), requires only that an employer "provide lunchroom facilities or eating areas[.]" Although the IH claimed that L&L had provided "no specified [eating] area" even though its safety program requires one, she also acknowledged observing lunch containers resting on a plank that Farrington indicated employees sat on while eating lunch. Indeed, the IH testified that photographs she took on September 21, 2004, showed employees sitting on these same planks and on the platform eating lunch, which is consistent with LePage's testimony that L&L had set up planks as a make-shift table to function as a lunch area for employees. The standard permits an employer to provide an "eating area" as an alternative to a "lunchroom," but does not describe its characteristics. Nor has the Secretary identified any specific deficiencies with L&L's eating area other than its alleged contamination with lead, which is the subject of a separate citation item addressed below. Under these circumstances, we find that the Secretary failed to establish that the eating area L&L provided its employees did not satisfy the requirements of the cited provision, § 1926.62(i)(4)(i). Accordingly, we vacate Item 8.

Citation 1, Item 11 (face/hand washing)

Under this item, the Secretary alleges that L&L violated 29 C.F.R. § 1926.62(i)(4)(iii) because it failed to assure that employees whose airborne exposure to lead was above the PEL washed their hands and face before eating, drinking, or smoking. Specifically, the IH testified that she observed employees at lunchtime who, upon leaving the north tower's active containment and the south tower, washed only their hands and had visible dust on their faces while eating. She testified that although foreman Lawson observed this conduct, no employees were ever told to wash their faces. And the IH stated that based on the sampling she conducted, all the employees she observed were exposed above the PEL.

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[9] Keeping an eating area free from lead contamination is an obligation that arises under 29 C.F.R. § 1926.62(i)(4)(ii). That standard requires an employer to "assure that lunchroom facilities or eating areas are as free as practicable from lead contamination and are readily accessible to employees."

On remand, the judge credited the IH's testimony and affirmed Item 11. He rejected L&L's claim that "the IH did not identify the employees [she saw] or show they were exposed to lead above the PEL." Instead, the judge found that the record: (1) "clearly shows that [J.G. and] the employees working in the north tower containment were exposed to lead above the PEL"; and (2) "also shows that the five employees working in the south tower area were more than likely exposed to lead above the PEL, as found in Item 10 . . . ."

As noted, L&L does not dispute that the abrasive blasters working inside the active containment on the New York side of the Bridge were exposed to lead levels above the PEL. And the judge credited the IH's testimony that she told Lawson that employees working inside the active containment ate lunch without first washing their visibly dust-covered faces. L&L does not challenge the IH's testimony on this point. Under these circumstances, we find that Lawson had knowledge that the abrasive blasters were eating without first washing their faces, and that his knowledge as foreman can be imputed to L&L. *See Conie Constr. Co.*, 16 BNA OSHC 1870, 1872, 1993-95 CCH OSHD ¶ 30,474, p. 42,090 (No. 92-0264, 1994) (finding that the foreman's knowledge of the violative condition is imputable to the company), *aff'd*, 73 F.3d 382 (D.C. Cir. 1995); *see also Pride Oil Well Serv.*, 15 BNA OSHC 1809, 1814, 1992 CCH OSHD ¶ 29,807, p. 40,584 (No. 87-692, 1992) ("The actual or constructive knowledge of the employer's foreman or supervisor can be imputed to the employer."). Accordingly, we affirm Item 11.

D. Citation 1, Items 1a, 1b, 1c, 4, 5, and 15b

We now turn to Items 1a, 1b, 1c, 4, 5, instances a and b, and 15b. For the following reasons, we affirm each of these citation items except Item 5, instance b, which we vacate.

Citation 1, Item 1a (facial hair/respirators)

Under this item, the Secretary alleges that L&L violated 29 C.F.R. § 1910.134(g)(1)(i)(A), which prohibits employers from "permit[ting] respirators with tight-fitting facepieces to be worn by employees who have: (A) Facial hair that comes between the sealing surface of the facepiece and the face or that interferes with valve function . . . ." The judge affirmed the citation based on the IH's testimony that during the September 2004 inspection, she observed five workers with obvious facial hair wearing tight-fitting half-face respirators and told foreman Lawson about it, but "nothing was done." Having found their testimony unreliable, the judge discounted claims from both Lawson and LePage that the IH did

not mention these five employees to them, as well as LePage's testimony that an L&L policy prohibits an employee who is not clean shaven from working. On review, L&L raises—for the first time—the unpreventable employee misconduct defense with regard to the actions of the five workers at issue. In addition, L&L renews its request to reopen the record, asserting that if these five employees were allowed to testify they would directly contradict the IH's testimony. In response, the Secretary argues that L&L waived the employee misconduct defense by not bringing it up at trial, and, in any event, L&L failed to prove the defense.

We find that the Secretary has established a violation based on the IH's credited testimony about the cited conditions. In addition, we agree with the Secretary that L&L waived the unpreventable employee misconduct affirmative defense because it failed to raise the defense in its answer as required by Commission Rule 34(b)(3), 29 C.F.R. § 2200.34(b)(3).[10] Further, we find no support for L&L's claim that the defense was tried by consent. "Consent will be found only when the parties 'squarely recognized' that they were trying an unpleaded issue." *NORDAM Group Inc.*, 19 BNA OSHC 1413, 1414-15, 2001 CCH OSHD ¶ 32,365, p. 49,684 (No. 99-0954, 2001), *aff'd*, 37 Fed. App'x 959 (10th Cir. 2002) (unpublished). And there is simply no indication in the record that the Secretary consented to try the defense.[11]

We also find that the judge did not err in declining to reopen the record. In making such a determination, the Commission takes "into account the character of the additional evidence, the effect of opening the record, and the time the motion was made," as well as whether reopening would be "in the interest of fairness and substantial justice." *E.g. Article II Gun Shop, Inc.*, 16 BNA OSHC 2035, 2036, 1993-95 CCH OSHD ¶ 30,563, p. 42,299 (No. 91-2146, 1994) (consolidated). L&L had ample opportunity here to introduce any evidence before the judge it

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[10] Commission Rule 34(b)(3) states that "[t]he answer shall include all affirmative defenses being asserted. Such affirmative defenses include, but are not limited to, 'infeasibility,' 'unpreventable employee misconduct,' and 'greater hazard.' " 29 C.F.R. § 2200.34(b)(3).

[11] Although LePage testified that L&L required employees to be clean shaven, kept a shaving kit at the jobsite, and took workers off the job for refusing to shave, the judge specifically discredited this testimony. Thus, even if properly alleged, L&L failed to provide credible evidence establishing any aspect of the defense. *See Star Brite Constr. Co.*, 19 BNA OSHC 1687, 1695, 2001 CCH OSHD ¶ 32,511, p. 50,437 (No. 95-0343, 2001) (requiring an employer to show "that it adequately communicated work rules to prevent the behavior and effectively enforced the rules when violations were discovered" to establish the unpreventable employee misconduct defense).

believed to be relevant to this citation item. Indeed, L&L could have cross-examined the IH at the hearing regarding her testimony that five of its employees were not clean shaven and wore tight-fitting respirators, but did not do so. Accordingly, we reject L&L's request for a second chance to present evidence on this issue and affirm Item 1a.

Citation 1, Item 1b (clean respirators)

Under this item, the Secretary alleges that L&L violated 29 C.F.R. § 1910.134(h)(1) by failing "to provide each respirator user with a respirator that was clean, sanitary, and in good working order." The standard requires the employer to "ensure that respirators are cleaned and disinfected using the procedures in Appendix B-2 of this section, or procedures recommended by the respirator manufacturer, provided that such procedures are of equivalent effectiveness." 29 C.F.R. § 1910.134(h)(1). The judge affirmed the citation based on the IH's testimony that L&L's respirators were visibly dirty and had dirty cartridges, as well as on OSHA's wipe sample results establishing the presence of lead on three separate respirators at levels ranging from 76 to 140 μg.

On review, L&L claims the judge erred in relying on the wipe-sample results because the IH took the samples before employees "would have donned their respirators," and L&L's unwritten policy required employees to clean their respirators immediately before wearing them. However, based on his credibility determinations, the judge rejected LePage's testimony about L&L's unwritten policy and noted that L&L's *written* policy stated respirators "will be cleaned at the end of the workday." Given these findings, which establish that any respirator cleaning would have been accomplished prior to the start of the workday, and the lead residue the IH measured on the respirators, we find that L&L failed to provide respirators that were "clean, sanitary, and in good working order" in violation of 29 C.F.R. § 1910.134(h)(1). Accordingly, we affirm Item 1b.

Citation 1, Item 1c (respirator storage)

Under this item, the Secretary alleges that L&L allowed its employees to improperly store their respirators in violation of 29 C.F.R. § 1910.134(h)(2)(i). This provision requires that "[a]ll respirators shall be stored to protect them from damage, contamination, dust, sunlight, extreme temperatures, excessive moisture, and damaging chemicals, and they shall be packed or stored to prevent deformation of the facepiece and exhalation valve." 29 C.F.R. § 1910.134(h)(2)(i). The judge affirmed the citation, finding that L&L allowed its workers to

hang their respirators from their belts or from scaffolding for up to forty-five minutes, and the IH's unrebutted testimony established that leaving respirators out in the sun for that long could result in contamination or deformation. Finally, he rejected L&L's argument that the cited standard did not require respirators to be stored when unused for brief periods of time.

On review, L&L argues that the judge's interpretation of the standard is unreasonable. We disagree. Although the standard does not specify any threshold time period necessary to invoke the standard's requirements, the IH's undisputed testimony was that the respirators were not properly stored during the 30- to 45-minute lunch break because they were not "protected from the sun" or were "left on a nail in the shanty." Indeed, one of the express purposes of the standard's storage requirement is to provide protection from the sun. In support of its contrary view, L&L cites to a document entitled "OSHA Office of Training and Education, *Respiratory Protection Frequently Asked Questions* (Nov. 2004)." But this document actually supports the judge's conclusion because it states that the proper way to store a regularly-used respirator is to protect it "from damage, contamination, dust, sunlight, [and] extreme temperatures."

Thus, we find that the plain language of the standard and the IH's undisputed testimony support the Secretary's claim that the manner in which L&L employees stored their respirators violated § 1910.134(h)(2)(i). *See Summit Contractors Inc.*, 23 BNA OSHC 1196, 1202, 2010 CCH OSHD ¶ 33,079, p. 54,692 (No. 05-0839, 2010) ("[T]his reading of the Secretary's [standard] is consistent with, and effectuates, the remedial purposes of the Act."), *aff'd*, 442 F. App'x 570 (D.C. Cir. 2011). Accordingly, we affirm Item 1c.

Citation 1, Item 4 (protective work clothing)

Under this item, the Secretary alleges that L&L allowed its employees to use compressed air to remove lead dust from their clothing in violation of one of the "protective work clothing and equipment" provisions of the standard, 29 C.F.R. § 1926.62(g)(2)(viii). This provision "prohibit[s] the removal of lead from protective clothing or equipment by blowing, shaking, or any other means which disperses lead into the air." *Id*. The L&L employees identified in the citation used compressed air to remove the lead dust from their clothing while inside the ventilated containment unit. In affirming the violation, the judge rejected L&L's argument that using compressed air to remove lead dust from clothing was permitted by the housekeeping provision of the standard, 29 C.F.R. § 1926.62(h)(5), which allows the use of compressed air to remove lead from any *surface* when used "in conjunction with a ventilation system designed to

capture the airborne dust created by the compressed air." The judge reasoned that the cleaning and replacement of protective clothing is the activity specifically addressed by the cited provision, and the provision L&L relies on, § 1926.62(h)(5), applies *only* to housekeeping. On review, L&L argues that there was no lead dispersal "into the air" because its employees used compressed air inside the ventilated containment unit. The Secretary responds that "the cited standard absolutely prohibits the use of compressed air to clean clothing and makes no allowance for the presence or absence of ventilation."

We agree with the judge that the provision relied upon by L&L applies only to "housekeeping." In contrast, the cited standard applies to "protective work clothing and equipment." And although the containment in which L&L employees cleaned their clothes with compressed air was ventilated, the cited provision of the standard prohibits, without exception, the use of compressed air for "protective clothing." *Caminetti v. U.S.*, 242 U.S. 470, 485 (1917) (statutory language construed according to its plain meaning); *Reich v. Gen. Motors Corp*., 89 F.3d 313 (6th Cir. 1996) (interpreting OSHA standard based on its "plain language"). Accordingly, we affirm Item 4.

Citation 1, Item 5 (housekeeping/clean surfaces)

Under this item, the Secretary alleges that L&L failed to keep surfaces "as free as practicable of accumulations of lead" in violation of 29 C.F.R. § 1926.62(h)(1). The judge affirmed the violation based on eight wipe sample results showing the presence of lead on the following surfaces: (1) lockers in the clean side of the decontamination unit; (2) an outside water cooler; (3) a plank where employees sat to eat lunch; and (4) a "rag bag" containing rags used by employees after they washed their hands. L&L argued before the judge that the standard is vague, OSHA's sampling procedures were improper, and the wipe samples only established a *presence* of lead and not a *concentration*, as recognized in a 1993 OSHA Instruction which states as follows:

> In determining whether an employer has maintained surfaces of hygiene facilities free from contamination, OSHA recommends the use of HUD's recommended level for acceptable decontamination of 200 $\mu g/ft^2$ for floors in evaluating cleanliness of change areas, storage facilities, and lunchrooms/eating areas. OSHA would not expect that surface levels should be any cleaner than this level.

OSHA Instruction CPL 02-02-058, p. 16 (Dec. 13, 1993). With respect to OSHA's sampling, the judge found that the IH's monitoring procedures were proper. He also found the OSHA

Instruction referenced by L&L inapplicable to the cited conditions because, in his view, it only pertains to the cleanliness of floors.

On review, L&L renews its vagueness argument and its contention that the Secretary did not evaluate the "*concentration* of lead . . . in determining whether [L&L] complied with the [cited] housekeeping provisions . . . ." The Secretary counters that the presence of lead shown by the results of the wipe sampling supports the judge's conclusion that the standard was violated, and contends that the OSHA Instruction pertains only to the standard's hygiene provision, § 1926.62(i), and not the housekeeping provision at issue here, § 1926.62(h). She also argues that the cited standard is not irreparably vague because "L&L knew full well what the standard required, but failed to live up to that requirement."

We agree with the Secretary that the cited standard is not irreparably vague. *See Cont'l Oil Co.*, 11 BNA OSHC 2114, 2117, 1984-85 CCH OSHD ¶ 26,993, p. 33,840 (No. 79-570-E, 1984) ("The Commission will not declare a standard unenforceably vague merely because the wording is not exact or because it requires the employer to exercise some judgment . . . . 'So long as the mandate affords a reasonable warning of the proscribed conduct in light of common understanding and practices, it will pass constitutional muster.' " (citations omitted)). L&L's own written policy required that the worksite be maintained "as free as practical of accumulation of lead," which shows that L&L was aware of the housekeeping requirement and understood its obligation. *See New England Tel. & Tel. Co.*, 11 BNA OSHC 1501, 1506, 1983-84 CCH OSHD ¶ 26,535, p. 33,840 (No. 80-6519, 1983) (stating that employer's "own work rule shows it had no difficulty understanding the Secretary's standard").

But we also agree with L&L that, given the OSHA Instruction,[12] the evidence in this case does not establish a concentration of lead sufficient to support a violation with regard to six of

[12] We find the judge's conclusion that the OSHA Instruction only pertains to the cleanliness of floors, and the Secretary's assertion that the Instruction is not applicable to the cited housekeeping provision, inconsistent with guidance provided in a January 13, 2003 OSHA standard interpretation letter. In that letter, Richard E. Fairfax, Director of OSHA's Directorate of Compliance Programs, specifically applied the HUD-recommended level addressed in the 1993 OSHA Instruction to lead accumulations on floors and other working surfaces under the hygiene and housekeeping provisions of the standard. The letter explains that "[i]n situations where employees are in direct contact with lead-contaminated surfaces, such as working surfaces or floors in change rooms, storage facilities and, of course, lunchroom and eating facilities,

the eight wipe samples taken by the IH.[13] The eight wipe samples proffered in support of Item 5, instances a and b, as amended, were taken by the IH on two different dates—July 7, 2004, and September 21, 2004, respectively. We find that the evidence is sufficient to establish the concentration of lead for two of the wipes samples—one from the locker and one from the plank—both of which are cited under instance a and showed levels of 1400 μg. According to the IH, the wipe sample she took from the plank was from "about an eight by eight square inch area." She explained that sampling "the entire bench" would have resulted in "the piece of sampling wipe that was used . . . be[ing] destroyed[, and] [s]o, only a *small area* was sampled and placed in a vial and sent to the laboratory for analysis." (Emphasis added.) This unrebutted testimony establishes a concentration of lead on the plank that is well beyond the range OSHA has identified in its Instruction as "free from contamination." The IH also described the wipe sample she took from a locker on the same date as having been taken from a "*small surface area*." (Emphasis added.) Although the IH did not specify the size of the locker area, we find that her description of the area as "small" establishes that it, like the sampled area of the plank, was approximately eight-by-eight square inches, which results in a concentration well beyond that identified in the OSHA Instruction. *See Manganas Painting Co.*, 21 BNA OSHC 1964, 1981, 2007 CCH OSHD ¶ 32,908, p. 53,397 (No. 94-0588, 2007) ("reasonable inferences can be drawn from circumstantial evidence").

In contrast, the record lacks similar evidence about the size of areas sampled for the remaining six wipe samples. These comprise three of the five wipe samples from July that are cited under instance a, and all three of the wipe samples from September that are the subject of instance b. Because we cannot determine the concentration of lead for these six sample results, we do not rely on them in affirming instance a, and we vacate instance b in its entirety.

Finally, the evidence shows that it was "practicable" for L&L to have done more to keep surfaces at this worksite free from lead accumulation. At the hearing, safety supervisor LePage

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OSHA has stated that the Agency would not expect surfaces to be any cleaner than the 200 μg/ft^2 HUD level."

[13] These six sample results are: from July 7, 2004, 130 μg on a cooler used for drinking water, 150 μg on a rag bag holding rags employees used to wipe their hands after washing, 1700 μg in a locker; and from September 21, 2004, 24 μg on a locker door handle, 233 μg on a clean-side bench, and 680 μg on the inside of a locker.

acknowledged that housekeeping is always an issue at a worksite of this size. According to LePage, the platform area measured about 180 feet by 120 feet, and the Bridge's tower was "tremendous." But LePage testified that L&L had assigned only one worker "to clean the job site, top to bottom," even though seventy L&L employees were present on this large worksite at the time of OSHA's inspection. Based on this evidence, we find that it was feasible for L&L to have implemented a "more stringent housekeeping program" to keep work surfaces free from lead accumulation. *Atl. Battery Co.*, 16 BNA OSHC 2131, 2162, 1993-95 CCH OSHD ¶ 30,636, p. 42,478 (No. 90-1747, 1994) (assessing whether it was "practicable" for employer to "implement a more stringent housekeeping program"). Indeed, L&L could have reduced the lead accumulation by assigning more than just one of its seventy employees to perform all of its housekeeping duties. *Cf. id.* (vacating citation item alleging violation of general industry lead standard's housekeeping provision based on evidence that employer "devoted a full 20 percent of its production workforce to the task of complying" with cited provision and washed lunchroom surfaces twice a day). L&L also could have provided lockers on the dirty side of its decontamination unit so that employees would not have stored their contaminated work clothing and equipment in a clean-side locker, as shown in a July 7, 2004 photograph. In fact, LePage and other L&L representatives who were present when the July 7, 2004 wipe samples were taken, acknowledged that "there was a housekeeping issue in the locker room, especially because of the debris" and dirty clothes in the lockers. Accordingly, we affirm instance a and vacate instance b.

Citation 1, Item 15b (hazard communication/chemical inventory list)

Under this item, the Secretary alleges that L&L violated 29 C.F.R. § 1910.1200(e)(1)(i) because there was no complete chemical inventory list at the New York side of the bridge. This provision requires that employers "maintain *at each workplace*, a written hazard communication program," which includes "[a] list of the hazardous chemicals known to be present using an identity that is referenced on the appropriate material safety data sheet ["MSDS"] . . . ." 29 C.F.R. § 1910.1200(e)(1)(i) (emphasis added). The judge rejected L&L's post-hearing request to reopen the record and admit into evidence a chemical inventory list the company maintained at its main office which, according to L&L, would establish compliance with the cited provision. On review, L&L renews its request to admit this evidence.

We find that the judge properly denied L&L's request to reopen the record. First, although L&L claims it was precluded from introducing the chemical inventory list at the hearing, the record reflects that L&L's representative tried to introduce the New Jersey air-monitoring results, but not the chemical inventory list. Second, even if L&L proved that it maintained this chemical inventory list at its "main office," doing so would not constitute compliance with the cited standard's requirement that the list be "maintain[ed] at *each workplace*," because the main office was not located at the New York worksite at issue in this citation. 29 C.F.R. § 1910.1200(e)(1) (emphasis added); *see Safeway Store No. 914*, 16 BNA OSHC 1504, 1514-15, 1993-95 CCH OSHD ¶ 30,300, p. 41,746-47 (No. 91-373, 1993) (affirming violation of § 1910.1200(e)(1) for employer's failure to include a hazardous chemical present at its site in its hazard communication program list); *Thomas Lindstrom Co.*, 15 BNA OSHC 1353, 1354, 1991-93 CCH OSHD ¶ 29,526, p. 39,853 (90-1084, 1991) (holding that employer violated standard's requirement that MSDSs be located "at the worksite" because MSDSs were kept at central office ten minutes away and were not, therefore, " 'readily accessible' at the worksite"). L&L has made no other arguments with regard to Item 15b. Accordingly, we affirm this item.

E. Characterization and Penalties

L&L does not challenge the judge's serious characterization of any of the citation items at issue on review, or the penalties he assessed for Citation 1, Items 1a, 1b, 1c, 4, 5, and 15b. Therefore, we affirm the judge on these issues. *See, e.g., KS Energy Servs. Inc.*, 22 BNA OSHC 1261, 1268 n.11, 2008 CCH OSHD ¶ 32,958, p. 53,925 n.11 (No. 06-1416, 2008) (affirming judge's serious characterization and judge's assessed penalty amount where parties did not dispute these findings on review). L&L argues, however, that the $2,000 penalty the judge assessed for Item 11 should be reduced, and the Secretary urges affirmance of this penalty amount.

Section 17(j) of the Act provides that the Commission shall assess an appropriate penalty for each violation, giving due consideration to the size of the employer, the gravity of the violation, the good faith of the employer, and the employer's history of previous violations. 29 U.S.C. § 666(j). After considering these factors and L&L's failure to provide any basis for reducing the penalty amount assessed by the judge, we find that the $2,000 penalty assessed by the judge for Item 11 is appropriate. *See ConAgra Flour Milling Co.*, 15 BNA OSHC 1817,

1826-27, 1992 CCH OSHD ¶ 29,808, p. 40,597 (No. 88-2572, 1992) (finding no reason to amend the judge's assessment after considering the penalty factors and the parties lack of argument on this question).

ORDER

We affirm Citation 1, Items 1a through 1c, 4, 5, instance a, 11, and 15b, and characterize the violations as serious. We vacate Items 1d, 3, 5, instance b, 8, 10, and 15a. We assess a total penalty of $14,000, as follows: Items 1a through 1c - $3,500; Item 4 - $3,500; Item 5, instance a - $3,500; Item 11 - $2,000; and Item 15b - $1,500. As discussed above with respect to Citation 1, Item 2, we affirm the judge's decision as to that item, including his assessment of a $2,000 penalty, but accord these portions of his decision the precedential value of an unreviewed judge's decision.

SO ORDERED.

/s/
Thomasina V. Rogers
Chairman

/s/
Cynthia L. Attwood
Commissioner

Dated: June 28, 2012

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR,
Complainant,

v.

L & L PAINTING CO., INC.,

Respondent

OSHRC DOCKET NO. 05-0055

Before: Chief Judge Irving Sommer

DECISION AND ORDER ON REMAND

This matter is before me as a result of the Commission's remand order dated September 29, 2008. The issue to determine is whether Respondent has proved that it met the historical monitoring exception to OSHA's lead in construction standard, such that it was not required to monitor employee exposure to lead at its work site. I find that Respondent has not met its burden of proof.

Procedural Background

My decision in this case was issued on May 4, 2006. That decision addressed numerous citation items issued to Respondent, L & L Painting Co., Inc. ("L&L"), stemming from its work on a project involving the removal of lead paint from the towers on the New York side of the George Washington Bridge.[14] At the hearing in this matter, L&L attempted to introduce the

[14]OSHA issued a separate citation to L&L for its paint-removal work from the towers on the New Jersey side of the bridge. My decision in that case, Docket No. 05-0050, was issued on May 4, 2006. The Commission also issued a remand order in that case, on September 29, 2008. That case has since settled.

results of air monitoring for employee exposure to lead that it had conducted on the New Jersey side of the bridge. L&L sought to introduce the results as relevant to establishing a defense of several of the violations alleged under OSHA's lead in construction standard, relating to the New York side of the bridge. I declined to admit the results, finding them irrelevant to the cited conditions on the New York side of the bridge. All of the citation items were affirmed. The Commission disagreed with my decision to not admit the monitoring results and remanded this matter to me.

In its remand order, the Commission found the New Jersey results were relevant to L&L's claim that it could have established the "historical monitoring" exception to the initial monitoring requirement of the standard. The Commission stated that if L&L had had the opportunity to present evidence as to why it met the "historical monitoring" exception, it would have had the burden to show that the "processes, type of material, control methods, work practices, and environmental conditions" used on the New Jersey side "closely resemble[d]" those on the New York side. *See Bianchi Trison Corp. v. Chao*, 409 F.3d 196, 207 (3d Cir. 2005). The Commission accordingly remanded this matter to me to admit the air monitoring results and to "allow the parties to introduce any additional evidence regarding the exception to the initial monitoring requirement at issue here." The Commission also remanded this matter to "allow the parties to make any further arguments regarding those citation items alleged under the [standard] that are specifically affected by the results of the New Jersey air monitoring in terms of L&L's knowledge of the cited conditions."

Upon receiving the remand, I issued an order on October 2, 2008, and admitted the New Jersey monitoring results. I advised the parties that they would be allowed to submit further evidence regarding the above-noted exception and to make further arguments as to the citations issued under the standard that were specifically affected by the monitoring results. I also directed the parties to inform me of any evidence and arguments they wished to submit and if they required a hearing to present additional evidence. On February, 10, 2009, after receiving the parties' filings, I issued another order, stating that this matter would proceed upon written submissions without a hearing. On April 30, 2009, L&L submitted its brief on remand, which included, among other things, the New Jersey monitoring results, affidavits of L&L's safety supervisor and site supervisor, and the cover page of L&L's contract in regard to the lead-

removal project. On May 14, 2009, the Secretary submitted her brief in this matter.[15] On June 12, 2009, L&L filed a reply.

[15]The Secretary's brief is the same one filed with the Commission on November 16, 2007.

The OSHA Inspection

As set out in my initial decision, Reagan Branch, the OSHA industrial hygienist ("IH") who inspected the site, went to the site on July 7, 2004. She testified that each side of the bridge had two towers that had to be repainted, that there was scaffolding around the towers on the New York side of the bridge, and that the towers were covered with tarp for the blasting work. She also testified that there was a decontamination unit at the site, as well as an equipment trailer and a machine that supplied compressed air to the workers on the bridge, and that there was more equipment up on the bridge. Upon arriving, IH Branch met with Declan Farrington, L&L's site supervisor, John Lawson, L&L's site foreman, and William LePage, a consultant with C&E Ventures and L&L's safety supervisor at the site. The IH conducted a walk-around inspection on July 7, 2004, with Messrs. Farrington, Lawson and LePage, and she saw conditions that violated the lead standard and L&L's own lead program. In particular, the IH saw that there were no lockers on the dirty side of the decontamination unit and that it appeared employees were putting their contaminated work clothes and equipment in the lockers on the clean side along with their street clothes. She took wipe samples of a locker handle and the inside of a locker, and the analysis results of her samples showed the presence of 1400 and 1700 cgs of lead, respectively. The IH also saw planks up on the bridge platform, and Mr. Farrington indicated employees sat on the planks to eat their lunch; the IH took a wipe sample of one of the planks, where lunch containers were being stored, and the analysis of that sample showed the presence of 1400 cgs of lead. After her initial visit, IH Branch requested employee sampling or monitoring results from L&L, to determine the lead exposures of employees at the site. She was told no sampling had been done at the New York site, but L&L later sent her sampling results from the New Jersey site. (Tr. 16-17, 21-26, 49, 65-74, 83-92, 166-69).

On September 21, 2004, IH Branch returned to the New York site to do her own employee sampling.[16] By that time, work on the south tower at the site was completed and five employees were breaking down the containment and vacuuming up debris in that area. Another

[16]The IH said that only Mr. Lawson was with her on September 21. She also said that she conducted her sampling by attaching sampling pumps to four different employees; she then sent the sampling filters to OSHA's Salt Lake City Technical Center for analysis. (Tr. 28-32, 131).

employee was vacuuming up debris outside the north tower containment and in between the two containment areas. The north tower containment was still active, with abrasive blasting going on. The employees doing the vacuuming and cleanup work were using portable vacuums that were not equipped with HEPA filters.[17] They emptied the vacuum contents into 5-gallon containers, which they then emptied into a larger pile; the larger pile was cleaned up by a containment vacuum, which had greater suction.[18] The IH noted there was no wetting down of surfaces and that the work created clouds of dust. She sampled the employee who was vacuuming outside the active containment, and the analysis results of that sampling revealed his exposure to lead was over three times the PEL.[19] She also sampled three employees who were working inside the north tower containment; two were doing blasting work, one was doing vacuuming, and their exposures were 287, 224 and 170 times the PEL, respectively.[20] The IH testified that the vacuuming being done in the south tower area and outside of the north tower containment was of concern as the New Jersey sampling results did not indicate that L&L had done any sampling or monitoring of such work. (Tr. 18-19, 29-34, 49-59, 75-79, 190-92).

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[17]The IH initially testified that the vacuums in use were not to be used for lead. She later testified that it was possible they could have been used as HEPA vacuums, but she was adamant the filter she saw being used for the vacuuming outside the active containment was not a HEPA filter. She said that that filter and the vacuum were shown in C-12. (Tr. 75-80, 179-90, 194).

[18]C-3, page 2, is the IH's sketch of the platform where she observed the vacuuming and cleanup work. The sketch shows the north and south tower areas as well as the areas where the employees were emptying the vacuum contents into piles; it also shows a hand-washing station, a "shanty," and, in the center, the area where employees stored and ate their lunch. (Tr. 17-20).

[19]The IH noted that this employee was shown in C-12 and that he did vacuuming work for almost 4.5 hours; the sampling results for this employee, shown in C-4, state that he wore a half-face respirator for his work. The IH also noted that the employees doing the same work in the south tower area were of concern due to the nature of the work, the fact that not all of them wore respirators, and the fact that some of them had facial hair, which interferes with the face-to-respirator seal and negates the respirator's protection. The employees working in the south tower area were also of concern as two of them had been medically removed for having elevated blood lead levels; these two employees were supposed to be doing work that would not expose them to additional lead. (Tr. 29, 33-34, 49-59, 75-79, 95, 98, 190-92).

[20]The analysis results for these employees are shown in C-5, C-6 and C-7; these workers wore blasting hoods and other protective equipment for their work. (Tr. 29-33; C-5-7).

The IH saw other conditions on September 21 that violated the lead standard. For example, she saw visibly dirty respirators and respirators being improperly stored. She also saw employees wearing regular clothes instead of protective coveralls, employees leaving the site without going into the decontamination unit, and employees leaving the active containment and not washing up properly before smoking or having lunch. The IH held a closing conference on September 22, 2004, at which time she discussed with L&L the violations she had seen. (Tr. 36-46, 58-60, 81-83, 95-101).

The Initial Decision

My initial decision addressed in detail all of the citation items issued in this case. Items 1 through 12 of the citation alleged violations of the lead in construction standard, while Items 13 through 15 alleged violations of OSHA's fire extinguisher, flexible cord and hazard communication requirements. All 15 items were affirmed, based on the evidence adduced at the hearing and my credibility findings in regard to the witnesses who testified. My credibility findings were based on observing the demeanor of the witnesses as they testified and on certain statements of specific witnesses who were determined to be not credible in light of other evidence in the record. In particular, I found IH Branch to be a sincere and believable witness and Messrs. Lawson and LePage to be less than reliable. I thus credited her testimony over that of Messrs. Lawson and LePage.

The Standard Requiring Exposure Monitoring and the Exception to the Standard

> (d) *Exposure assessment*–(1) *General*. (i) Each employer who has a workplace or operation covered by this standard shall initially determine if any employee may be exposed to lead at or above the action level. (ii) For the purposes of paragraph (d) of this section, employee exposure is that exposure which would occur if the employee were not wearing a respirator. (iii) With the exception of monitoring under paragraph (d)(3), where monitoring is required under this section, the employer shall collect personal samples representative of a full shift including at least one sample for each job classification in each work area either for each shift or for the shift with the highest exposure level. (iv) Full shift personal samples shall be representative of the monitored employee's regular, daily exposure to lead.

(d)(3)(iii) 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.

The Parties' Positions

There is no dispute that L&L did not conduct sampling or monitoring of employee exposure to lead on the New York side of the project. There is likewise no dispute that the citation items affected by the now-admitted sampling results from the New Jersey side of the project are Items 2, 3, 8, 10 and 11. Respondent contends the New Jersey sampling results, together with other evidence it has submitted, such as the affidavits of Mr. Farrington and Mr. LePage, establish that it meets the "historical monitoring" exception to the exposure assessment requirement of the lead standard. The Secretary contends the New Jersey results change nothing, as they did not include monitoring of work or conditions closely resembling those on the New York side of the bridge. The Secretary also indicates that Respondent's reliance on the affidavits it has submitted is misplaced, as the credibility of the affiants, who testified at the hearing, has already been determined.

The Affidavits

As noted above, Mr. Farrington was L&L's supervisor at the site, and Mr. LePage, a consultant with C&E Ventures, was L&L's safety supervisor at the site. The affidavits of Messrs. Farrington and LePage set out their qualifications, training and experience. They also contain much of the same information.[21] In summary, and taken together, the affidavits state that the New Jersey and New York sites were simply two parts of the same project, as indicated on the

[21]The affidavit of Mr. LePage states at various points that he (Mr. LePage) agrees with specific paragraphs of Mr. Farrington's affidavit. *See* LePage Affidavit, pages 7-12.

cover page of the contract with the Port Authority of New York and New Jersey. The sites were two-thirds of a mile apart, and the same lead-removal and painting work was done at both sites and in the same way; the same tools and equipment and many of the same employees were utilized at both sites, and the work site conditions, tasks, practices and training were also the same. The affidavits further state that Messrs. Farrington and LePage worked at both sites throughout the project and were present at one site or the other on most workdays. Mr. LePage oversaw all safety and health aspects of the work, utilizing L&L's safety and health program and his own expertise, and he and Mr. Farrington, who oversaw the entire project and supervised all aspects of the job, worked closely together and consulted with each other often as to safety and health on the job. Mr. LePage also worked closely with Port Authority representatives, who likewise monitored and supervised the job.

As to the actual work on the project, the paint removal and painting was done on the New Jersey side first. That work was completed around mid-2004, after which work began on the New York side. On each side, before any removal work began, a subcontractor constructed containment support systems around the towers and provided platforms for those systems and protective shielding for the roadway. L&L itself put up containment areas around the parts of the towers to be painted. L&L's containment/cleanup crew ("cleanup crew") did this work, using plywood, tarps and fasteners. Once the containment areas were finished, L&L employees performed abrasive blasting inside the containment areas, where mechanical ventilation systems were in place. Once the blasting was finished in a containment, L&L blasters and vacuumers cleaned the area of debris and dust so that paint could be applied. After the area was painted, Mr. LePage and a Port Authority representative inspected the area to ensure it was safe so that the containment could be taken apart and removed. L&L's cleanup crew then took apart the containment and did residual cleaning. As this work occurred, blasting would be going on in another containment but not in the same vicinity.

The affidavits indicate there were two categories of L&L employees, *i.e.*, those that worked in or near an active containment and those that worked in the cleanup crew. Those that worked inside an active containment included blasters, vacuumers and sprayers. Blasters and vacuumers had the highest lead exposures as they worked in close proximity to pulverized lead and were not in the open air. Blasters and vacuumers were required to wear abrasive blasting

hoods, which provide the highest level of respiratory protection. Sprayers also had to wear respiratory protection, but as their work was done after blasting and cleaning was performed, they were not required to wear the blasting hoods. Vacuumers worked almost entirely inside the active containment. They vacuumed up the used abrasive as the paint was blasted off the tower surfaces, and, on this project, they used large long-range 3-inch corrugated hoses that connected through piping to a very large vacuum that sat at the base of the bridge. The abrasive was sucked through the hoses and collected at the bottom of the towers, in sealed lead-waste containers. On rare occasions a vacuumer might step outside of an active containment and use a 3-inch hose to clean the area just outside the containment.

The second category of employees, the cleanup crew, worked only at the site of a dormant containment, after the blasting and painting were completed, and their work was done almost entirely in the open air. The cleanup crew were required to wear half-face negative pressure respirators with protection for up to 500 cg/m³ of lead, due to the residual dust and debris that resulted when the containment was broken down. The cleanup crew used small hand-held HEPA vacuums to clean up this residue. The vacuuming work was a minor aspect of the overall work of the crew and was done on an intermittent basis and for short durations. The crew's work did not involve large piles of lead-containing debris, and L&L had no position dedicated to vacuuming outside of a containment.[22]

Mr. LePage was responsible for ensuring that L&L's lead heath and safety program was implemented at the site. That program covered, among other things, monitoring employee exposure to lead and ensuring the use of proper protective clothing and equipment and proper personal hygiene practices. The monitoring program applied to both sides of the project, and Mr. LePage considered the monitoring results from the New Jersey side representative of the exposures on the New York side since the work and conditions on both sides were virtually

[22]Mr. Farrington's affidavit states that he "would not expect a member of this crew to vacuum in the aggregate for more than one hour." *See* Farrington Affidavit, p. 10, ¶ 49.

identical.[23] Mr. LePage administered the exposure sampling himself and sent all the sampling materials to the same accredited laboratory. When the results were received, he reviewed them and then prepared the reports that went to L&L. The reports included the job and location of the work, engineering controls used, respirator type required with maximum exposure limits, and the duration of the sampling and the exposure results (both actual and as an eight-hour time-weighted average ("TWA")). When IH Branch asked for monitoring results during her inspection, the results from the New Jersey side were provided to her.

[23]The affiants believe the paint removed at the two sites was the original paint due to the presence of "mill scale" on the towers' surfaces; they also believe the original paint on all four towers was most likely the same paint. Farrington Affidavit, pp. 6-7; LePage Affidavit, pp. 8-9.

Mr. LePage was also responsible for identifying the work described in the "job classification" space on the reports; he chose the terms used not to describe all aspects of the work but as descriptive of the major aspect of the work. For example, full-shift sampling done of cleanup crew work was described as "removing contaminated tarps" but included other tasks performed, such as vacuuming. Testing of this work from May to August 2004 at the New Jersey site showed worker exposure to lead to be below the PEL based on an eight-hour TWA. In particular, test results for five employees performing this work ranged from 20.8 to 28 cg/m³ of lead.[24] Sampling of work performed inside the containment areas showed much higher lead exposure levels, as expected. Specifically, test results for four employees doing blasting and vacuuming inside a containment on the New Jersey side from March to May 2004 were all well over the PEL, ranging from 383 to 1,186 cg/m³ of lead based on an eight-hour TWA. Mr. LePage intended this monitoring to be relied upon for employees working in the same job and performing generally the same tasks during the course of the project, including when the work moved from New Jersey to New York.

As an example of a circumstance where testing was done because a task had changed, a member of the cleanup crew performed vacuuming for a full day on May 27, 2004. The reason was a flood situation that had caused lead-containing debris to collect at the base of one of the New Jersey towers; the debris became disturbed, mixed with water and then dried. The cleanup crew member performed the job of vacuuming and removing the accumulated debris, which had become matted down. His exposure results were very low, that is, 1.1 cg/m³ of lead.

[24]All of L&L's test results from the New Jersey side, except one, are contained in Exhibit A to L&L's brief; the additional test result is Exhibit A to Mr. LePage's affidavit.

The affiants state that paint removal work on the south tower on the New York side began in July 2004 and that on September 21, 2004, when the IH returned to the site, work on the south tower was completed and the cleanup crew's work was in progress there. The north tower was active, with abrasive blasting going on at that time. The affiants also state that "J.G.," the employee the IH claimed she saw vacuuming outside the active containment, was performing the ordinary tasks at the south tower that the cleanup crew did whenever they broke down a dormant containment. According to the affiants, there was no plausible reason for J.G. to have been working at the north tower, since cleanup crew members do not work near an active containment. The affiants claim that the IH's description of what J.G. was doing, that is, vacuuming up dust and debris, emptying the contents into a 5-gallon bucket and then emptying the bucket into a pile to be collected with the containment vacuum, do not comport with the tasks of anyone on the job. They also claim that there were no circumstances where J.G. would have worked at or near a "pile" of debris or in "clouds" of dust. The affiants note that Photograph 13 of C-12, which the IH testified depicted the area of J.G.'s work, shows a pile of dust and the 3-inch corrugated hoses. They also note that the photo cannot be of J.G.'s work area as he was working at the dormant south tower that day. The affiants conclude the photo actually depicts the inside of the north tower's active containment since it shows unpainted and rusted surfaces (which would be the condition of an active containment and not the south tower, which was newly painted) and a large pile of debris (which would be in an active containment but not in an inactive one). Farrington Affidavit, pp. 3, 13-15; LePage Affidavit, p. 12.

Both affiants state that they were with the IH on September 21, 2004. They recall that, upon approaching the active containment at the north tower, the IH wanted to enter it. Both affiants advised her not to do so because, without wearing the necessary protection, it was dangerous. The IH, however, disregarded their warnings and entered the active containment. The IH was in the containment for a short time, after which she rejoined the affiants outside. The affiants conclude that the IH's observations more closely resemble the work of a vacuumer than that of a member of the cleanup crew. Farrington Affidavit, p.15; LePage Affidavit, p. 12.

Discussion

It is clear from the affidavits that a significant number of the statements of Mr. Farrington and Mr. LePage conflict with the IH's testimony. In my initial decision, as noted above, I

credited the testimony of the IH over that of Mr. Lawson and Mr. LePage. My credibility findings were based on observing the demeanor of these witnesses, including their facial expressions and body language, and on certain statements of Mr. Lawson and Mr. LePage that were determined to be not credible in light of other evidence in the record. *See, e.g.*, Decision, pp. 5, 7-8, 11, 16-19, 21-22. In its reply, L&L disputes my credibility findings, especially as to Mr. LePage.[25] I have reviewed the credibility findings in my decision and conclude that they are adequate and well supported. I have considered L&L's assertions in this regard, but I do not find them persuasive. The credibility findings set out in the initial decision are, therefore, affirmed.

[25]L&L asserts that no credibility findings were made as to Mr. Farrington. L&L is correct.

Even assuming for the sake of argument that my credibility findings were somehow inadequate or incorrect, there is one overriding reason to find that both of the affiants here are not believable. That reason is the one appearing on the last page of each affidavit, where the affiants both describe being with the IH on September 21, 2004, when she decided to enter the active containment against their advice. Farrington Affidavit, p. 15, ¶ 71; LePage Affidavit, p. 12, ¶ 53. I find it incredible that IH Branch, an OSHA industrial hygienist with extensive education, training and experience, would enter an active containment, where abrasive blasting work was taking place, without any protective equipment.[26] That the affiants would made such a statement convinces me of the unreliability of Mr. Farrington and Mr. LePage. Also, the IH specifically testified that only Mr. Lawson was with her on September 21, 2004, which is further evidence of the unreliability of the affiants. (Tr. 131). For this reason, and because of the credibility findings in my initial decision, I credit the testimony of IH Branch over the statements of Mr. Farrington and Mr. LePage in their affidavits, to the extent there are conflicts between her testimony and their statements.[27]

[26]The IH described her education, training and experience at the hearing. (Tr. 8-13). In addition, Exhibit C-1 documents the IH's training and credentials in industrial hygiene matters.

[27]In this regard, I do not credit the affiants' statements indicating that the IH's photos in C-12 were taken inside the active containment and that the work she saw was more like that of a vacuumer than a cleanup crew member. Farrington Affidavit, p. 15; LePage Affidavit, p. 12.

Based on the foregoing, I credit all of the testimony of IH Branch set out on pages 3 through 5 of this decision. In light of the testimony concerning what the IH observed on September 21, 2004, I find that J.G., the cleanup crew member the IH sampled, was performing work that L&L had not monitored previously. In particular, J.G. was vacuuming up debris outside the north tower containment, where abrasive blasting was going on, and in between the south and north tower containment areas. Five other employees were breaking down the south tower containment and vacuuming up debris in that area. All six employees doing the vacuuming and cleanup work were using portable vacuums that were not equipped with HEPA filters. They emptied the vacuum contents into 5-gallon containers, which they then emptied into a larger pile; the larger pile was cleaned up by a containment vacuum, which had greater suction. There was no wetting down of surfaces, and the work created clouds of dust. The IH sampled J.G., the employee who was vacuuming outside of the active containment, and the analysis results of that sampling revealed his exposure to lead was over three times the PEL. Although the IH did not sample the five employees working in the south tower area, she found them to also be of concern because they were doing the same vacuuming and cleanup work that J.G. was performing.[28] Given that L&L had not previously monitored this work, which exposed an employee to three times the PEL for lead, L&L has not met its burden of proving that it satisfied the "historical monitoring" exception to the standard.

Item 2

This item alleged a violation 29 C.F.R. 1926.62(d)(1), which is set out above. The foregoing discussion establishes that L&L violated this standard by not monitoring J.G., the cleanup crew employee the IH sampled and determined was exposed to lead over three times the PEL. It also establishes that this employee did vacuuming work for nearly 4.5 hours. The other five cleanup crew employees were doing the same vacuuming and cleanup work in the south tower area. Based on the evidence of record, L&L knew or should have known that employees were doing work that had not been previously monitored and that they could have been exposed

[28]Footnote 6, *supra*, sets out the IH's other reasons for finding those employees to be of concern. It also sets out the fact that J.G. did vacuuming work for almost 4.5 hours.

to lead over the action level of the standard.[29] This is true in light of the affiants' statements that they oversaw the project and were on the job most workdays. It is also true since Mr. LePage was responsible for implementing L&L's lead health and safety program at the site. Farrington Affidavit, ¶¶ 4-5; LePage Affidavit, ¶¶ 8-15. The Secretary proves knowledge by showing the employer either knew or could have known with the exercise of reasonable diligence of the cited condition. *Astra Pharmaceutical Prod., Inc.*, 9 BNA OSHC 2126, 2129 (No. 78-6248, 1981). I find the Secretary has met her burden of proving L&L's knowledge of this citation item. For this reason and those set out in my initial decision, this item is affirmed as a serious violation, and the proposed penalty of $2,000.00 is assessed.

Item 3

[29]The action level is 30 cg/m³. The PEL, or permissible exposure limit, is 50 cg/m³.

This item alleged a violation of 29 C.F.R. 1926.62(g)(1)(i), which requires the employer, when an employee is exposed to lead over the PEL, to provide coveralls or similar full-body work clothing. The foregoing discussion shows that J.G. was exposed to lead over the PEL, and my initial decision, on pages 11 and 12, establishes that J.G. and the other employees doing the same work in the south tower area wore regular clothing such as jeans and shirts rather than coveralls. My initial decision and the discussion relating to Item 2, *supra*, demonstrates that L&L knew or could have known with the exercise of reasonable diligence of the violative condition. Item 3 is affirmed as a serious violation, and the proposed penalty of $2,000.00 is assessed.

Item 8

Item 8 alleged a violation of 29 C.F.R. 1926.62(i)(4)(i), which requires the employer to provide lunchroom facilities or eating areas for employees exposed to lead above the PEL. My initial decision, on pages 16 and 17, establishes employees stored their lunch containers and ate lunch on planks located in between the north and south containment areas where work was taking place on September 21, 2004. It also establishes that the IH took a sample from one of the planks and that the sampling results showed the presence of 1400 cgs of lead. L&L asserts that the IH never identified which employees she saw having lunch or showed that they were exposed to lead above the PEL. L&L's Brief, p. 23. I disagree. Footnote 5, *supra*, sets out the IH's testimony about C-3, page 2, her sketch of the platform where the cleanup and vacuuming work was taking place on September 21, 2004; the IH indicated that the area where the employees ate lunch was in between the north and south tower areas. The record, as set out above, shows that J.G. was exposed to lead over the PEL, as were the employees who were working in the active north tower. These employees, and those working in the south tower area, presumably all had lunch in the area the IH saw, even though she did not specifically identify those she saw eating lunch. L&L's assertion is rejected. For the reasons in my initial decision and those set out above, I find that L&L knew or could have known with the exercise of reasonable diligence of the cited condition. This item is affirmed as a serious violation, and the proposed penalty of $2,000.00 is assessed.

Item 10

Item 10 alleged a violation of 29 C.F.R. 1926.62(i)(3)(ii), which requires the employer to assure, where shower facilities are available, that employees shower at the end of the work shift

and to provide an adequate supply of cleansing agents and towels for affected employee use.[30] My initial decision, on pages 18 and 19, shows that the five employees who were working in the south tower area left the site without going into the decontamination unit. L&L asserts that since the IH did not identify the five employees, and did not show they were exposed to lead above the PEL, the alleged violation has not been established. L&L's Brief, p. 23. I disagree. Footnote 24, on page 18 of my initial decision, demonstrates the IH was referring to the five employees who were working in the south tower area, and she named those employees, except one, in the evidence set out on page 7 of my initial decision. Also, even though the IH did not sample those employees, it is clear from her testimony, and I find, that those employees were more than likely exposed to lead above the PEL because they were doing the same vacuuming and cleanup work that J.G. was doing. L&L's assertion is rejected. For the reasons in my initial decision and those set out above as to knowledge, I find that L&L knew or with the exercise of reasonable diligence could have known of the cited condition. Item 10 is affirmed as a serious violation, and the proposed penalty of $2,000.00 is assessed.

Item 11

This item alleged a violation of 29 C.F.R. 1926.62(i)(4)(iii), which requires the employer to assure that employees exposed to lead above the PEL wash their hands and faces before eating, drinking or smoking. My initial decision establishes, on pages 19 and 20, that employees leaving both the south tower and north tower containment areas washed their hands but not their faces before having lunch. The IH testified that there was visible dust on the employees' faces, which exposed them to lead ingestion upon eating. L&L asserts the IH did not identify the employees or show they were exposed to lead above the PEL. L&L's Brief, p. 24. I disagree. The record in this case clearly shows that the employees working in the north tower containment were exposed to lead above the PEL, as was J.G.[31] It also shows that the five employees working in the south tower area were more than likely exposed to lead above the PEL, as found in Item

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[30]Affected employees are those who airborne exposure to lead is above the PEL. *See* 29 C.F.R. 1926.62(i)(3)(i).

[31]The IH identified all four employees she sampled, as set out on pages 6 and 7 of my initial decision, and where they were working; all four were exposed to lead above the PEL.

10, *supra*. L&L's assertion is rejected. For the reasons in my initial decision, and for those relating to knowledge set out above, I find that L&L knew or could have known with the exercise of reasonable diligence of the cited condition. Item 11 is affirmed as a serious violation, and the proposed penalty of $2,000.00 is assessed.

ORDER

Based upon the foregoing findings of fact and conclusions of law, it is ORDERED that:

1. Items 2, 3, 8, 10 and 11 of Serious Citation 1 are AFFIRMED, and a penalty of $2,000.00 is assessed for each of these items.

/s/

Irving Sommer
Chief Judge

Date: November 23, 2009
Washington, D.C.