UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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| SECRETARY OF LABOR,<br>Complainant, | : | |
| v. | : | OSHRC DOCKET NO. 01-0764 |
| ICARUS INDUSTRIAL PAINTING &<br>CONTRACTING CO., INC.,<br>Respondent. | : | |

Appearances: Mary Anne Garvey, Esquire
Linda A. Hastings, Esquire
U.S. Department of Labor
Cleveland, Ohio
For Complainant.

Corey V. Crognale, Esquire
Schottenstein, Zox & Dunn
Columbus, Ohio
For Respondent.

BEFORE: MICHAEL H. SCHOENFELD
Administrative Law Judge

# DECISION AND ORDER

## *Background and Procedural History*

This case arises under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (1970) ("the Act"). In October 2000, the Occupational Safety and Health Administration ("OSHA") began conducting an inspection of Respondent's work site in Lucasville, Ohio. As a result of the inspection, OSHA issued three multiple-item citations to Respondent, Icarus Industrial Painting & Contracting Co., Inc. ("Icarus"), on March 8, 2001, alleging serious, willful and repeated violations of various construction safety standards in Title 29 of the Code of Federal Regulations ("C.F.R.").[1]

[1]At the hearing, the Secretary withdrew Items 2(a) and (b) of Willful Citation 2. The Secretary also amended Items 2, 3, 4 and 7 of Repeated Citation 3 by reclassifying these alleged violations from repeated to serious. (Tr. 5.) No amendments were made to Serious Citation 1.

Respondent timely contested the citations. Following the filing of a complaint and answer, and pursuant to a notice of hearing, the case came on to be heard in Columbus, Ohio. No affected employees sought to assert party status. Both parties have filed post-hearing briefs.

***Jurisdiction***

It is undisputed that at all relevant times, Icarus has been an employer engaged in the removal of materials containing lead and in industrial and residential painting operations. In addition, Icarus admits that it utilizes tools, equipment, machinery, materials, goods and supplies that have moved in interstate commerce. I therefore find that Icarus was engaged in a business affecting interstate commerce. I further conclude that Icarus is an employer within the meaning of section 3(5) of the Act and that the Occupational Safety and Health Review Commission ("the Commission") has jurisdiction over the parties and the subject matter of this proceeding.

***The Work Site***

Icarus was under contract with the Ohio Department of Transportation to perform paint removal and repainting operations on ten different bridges in southern Ohio. On October 11, 2000, James Sweeney, an OSHA Industrial Hygienist ("IH"), began inspecting one of these operations located at State Route 348 in Lucasville, Ohio, where employees were engaged in abrasive blasting and painting of a bridge. The Lucasville bridge was approximately 450 feet in length, 40 feet wide and 50 feet high over the Scioto River. Icarus installed a containment over part of the bridge to contain dust and other airborne particles from escaping into the environment. At the time of the inspection, the containment covered half the bridge and was approximately 230 feet long, 50 feet wide and 40 to 45 feet high. The floor of the containment consisted of tarpaulin-covered sheets of styrofoam which was spread across the river. Icarus hung tarps from the top of the bridge down to the floor of the containment. An air collection hose which was attached to a dust collector was placed inside the containment to remove contaminants from the air. (Tr. 50-54, 235-46, 368-70.)

***The Secretary's Burden of Proof***

To prove a violation of a specific standard, the Secretary must establish by a preponderance of the evidence (1) that the cited standard applies, (2) noncompliance with the terms of the standard, (3) employee exposure or access to the hazard created by the noncompliance, and (4) that the employer knew, or with the exercise of reasonable diligence could have known, of the condition. *Astra Pharmaceutical Prod., Inc.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981); *Dun-Par Eng'd*

*Form Co.*, 12 BNA OSHC 1949 (No. 79-2553), *rev'd & remanded on other grounds*, 843 F.2d 1135 (8th Cir. 1988), *decision on remand*, 13 BNA OSHC 2147 (1989). Once the Secretary has established a prima facie violation, the burden then shifts to the employer to rebut the prima facie showing. *Trinity Indus. Inc.*, 15 BNA OSHC 1579, 1590 (No. 88-1545 and 88-1547, 1992), *rev'd and remanded on other grounds*, 16 F.3d 1149 (11th Cir. 1994). In order to successfully rebut the Secretary's prima facie showing, the employer need not demonstrate overwhelming evidence, but rather, sufficient evidence to prevent the Secretary from establishing her burden by a preponderance of evidence. *See, e.g., Hamilton Fixture*, 16 BNA OSHC 1073, 1098 (No. 88-1720, 1993), *aff'd without op.*, 28 F.3d 1213 (6th Cir. 1994) (employer's evidence "not overwhelming" but sufficient rebuttal when weighed against the Secretary's "thin" evidence). Preponderance of evidence is "that quantum of evidence which is sufficient to convince the trier of fact that the facts asserted by a proponent are more probably true than false." *Ultimate Distribution Sys., Inc.*, 10 BNA OSHC 1568, 1570 (No. 79-1269, 1982). In several instances the Secretary urges findings of fact to be reached despite the absence of sufficent evidentiary focillation. As discussed in detail below, the Secretary failed in many instances to present the quantum of reliable evidence sufficient to establish a prima facie violation or to refute Icarus' rebuttal by a preponderance of evidence.

***The Alleged Serious Violations***

Citation 1, Items 1a and 1b allege serious violations of 29 C.F.R. §§ 1926.55(a) and (b), for employee Dave Skaggs' overexposure to airborne manganese and for failure to implement adequate engineering controls to prevent overexposure to manganese, respectively. For several reasons, I question the reliability of IH Sweeney's air sampling results. According to the IH's testimony, he did not follow the testing protocol for conducting air sampling as outlined in OSHA's Technical Manual ("the Manual").[2] (Tr.139-45.) Instead, as the IH testified, he explained to the employees how to attach and turn on the testing equipment. (Tr. 21-22.) Of the five individuals sampled, two employees' sampling equipment became disconnected during the testing period. (Tr. 23.) While IH

[2]It is undisputed that the IH did not personally place the test equipment on four of the five employees sampled, that he did not turn on the pump and record the starting time, that he did not observe the pump operating for a short time after starting it, and that he did not check the pump every two hours. (Tr. 21-23, 139-45.) While I do not find that the failure to follow the testing protocol, standing alone, invalidates the results, I do find that it at least raises questions about the results.

Sweeney stated that this was a "common problem," I find it significant that the only employee whose test results showed overexposure to manganese was one of those whose equipment became disconnected. (Tr. 40.) Most importantly, the IH's failure to properly calibrate the testing equipment before using it when combined with the failure to follow other aspects of the established protocol, is fatal to the Secretary's case. The IH testified that he pre-calibrated the sampling equipment in August 24, 2000 and that he used the equipment on October 19, 2000. (Tr. 57-58.) While the Manual does not specify exactly when pre-calibration should be done, it does instruct the IH to perform the calibration at the pressure and temperature where the sampling is to be done. (Tr. 142-46.) The Manual further instructs the IH to notify the Salt Lake City Technical Center ("the Technical Center") if calibrating conditions are significantly different from site conditions, such as significant temperature and pressure differences. (Tr. 143.) It is reasonable to infer from these instructions that temperature and pressure changes could affect the reliability of sampling. It is also reasonable to infer that there would be temperature and pressure changes between August and October of 2000. However, IH Sweeney failed to comply with these instructions, and I find that such failure casts doubt on the reliability of the test results. Based on this finding, I conclude that the Secretary has not met her burden of proving the alleged violations. Items 1a and 1b are accordingly vacated.

Item 2 of Citation 1 alleges a serious violation of 29 C.F.R. § 1926.62(f)(3)(ii), which states that "[t]he employer must provide a powered air-purifying respirator when an employee chooses to use such a respirator and it will provide adequate protection to the employee."[3] It is undisputed that Icarus did not provide a powered air-purifying respirator ("PAPR") to its employees. Respondent in essence argues that even if they were used, PAPRs would have provided insufficient protection. (R. Brief at p. 10-11.) According to James Workman, Respondent's supervisor in charge of the Lucasville bridge project, PAPRs do not provide adequate protection under certain conditions. For example, if an employee were in a situation in which he did not have easy access to an exit in the containment, that employee might not be adequately protected if the hose providing the purified air became disconnected. (Tr. 230-31.) The Secretary merely showed that PAPRs were not provided.

[3]Respondent does not dispute the applicability of 29 C.F.R. § 1926.62, the lead standard, to the subject site, but it does dispute that it violated the provisions of the lead standard cited in this case.

She did not address whether PAPR's would provide adequate protection under these or similar circumstances. Item 2 is therefore vacated.

Citation 1, Item 3 alleges a serious violation of 29 C.F.R. § 1926.62(g)(1)(i), for failure to ensure that employees wore coveralls or similar employer-owned outer protective clothing when they took down, moved and set up containment tarps. IH Sweeney recommended this item based on his interviews with employees. However, some of the IH's testimony about what employees told him was inconsistent and unclear. While there may be several explanations for this, it is most reasonable to infer from the record that some of the inconsistencies were a result of miscommunication between the IH and employee Joseph Moise, who was not a native English speaker. (Tr. 125.) IH Sweeney testified that he did not feel as though he had difficulty communicating with Mr. Moise, but he admitted that he did not know if Mr. Moise could read the statement that he (the IH) prepared. (Tr. 124-26.) According to the IH, Mr. Moise told him he did not wear coveralls when taking down, moving or setting up containment tarps. (Tr. 52.) Employee Dave Skaggs, however, told the IH that he wore Tyvek disposable coveralls when handling containment tarps. (Tr. 182.) Based on what Mr. Skaggs said, and the fact that Icarus provided two different kinds of coveralls (cloth and Tyvek), I find that Mr. Moise may well have misunderstood what the IH meant when he asked him about wearing coveralls. I further find that, given these circumstances, the IH should not have relied solely on Mr. Moise's statement as the basis for this citation item.[4] The record as a whole does not meet the level of preponderance that is the Secretary's burden. This item is consequently vacated.

Item 4 of Citation 1 alleges a serious violation of 29 C.F.R. § 1926.62(g)(2)(ii), for failure to "provide for the cleaning, laundering, and disposal of protective clothing and equipment required by paragraph (g)(1) of this section." As in the previous item, the IH relied solely on Mr. Moise's statements as the basis for this item. (Tr. 65-66.) Because of the likelihood of miscommunication between the IH and Mr. Moise, as set out above, I find that the IH's reliance solely on Mr. Moise's statement as proof of the alleged violation was insufficient. Item 4 is therefore vacated.

Citation 1, Item 5 alleges a serious violation of 29 C.F.R. § 1926.62(i)(1), for failure to "assure that in areas where employees are exposed to lead above the PEL without regard to the use

[4]The IH's testimony about how often employees changed coveralls also demonstrates the apparent miscommunication between the IH and some employees. *See* Item 3 of Citation 3, *infra*.

of respirators, food or beverage is not present or consumed, tobacco products are not present or used, and cosmetics are not applied." The IH once more relied on his interview with Mr. Moise as the basis for this alleged violation. (Tr. 66-67.) For the same reasons discussed *supra*, Item 5 is vacated.

Citation 1, Item 6 alleges a serious violation of 29 C.F.R. § 1926.62(j)(2)(ii), for failure to provide "a second (follow-up) blood sampling test within two weeks after the employer receives the results of the first blood sampling test." According to IH Sweeney, three employees, Jason Willis, Michael Russell and Douglas Robinson, had blood lead levels above the medical removal trigger concentration, but Icarus failed to provide them follow-up blood tests within two weeks. (Tr. 68.) Respondent argues the cited standard does not apply because these three individuals were not employees of Icarus when the results of the blood lead level tests were received. (Tr. 346-54; R. Brief at p. 17-22.) Under these circumstances, I agree with Respondent that the standard does not apply. The preamble to the standard states that "this follow-up is intended to assure that no unnecessary removals occur. If the second test exceeds the removal criteria then the employee must be removed." 58 FR 26590, 26603 (May 4, 1993). In this case, all three individuals were no longer employees of Icarus and could not have been "removed," had such action been required.[5] Item 6 is thus vacated.

Citation 1, Items 7a and 7b allege serious violations of 29 C.F.R. §§ 1926.1118(c) and (g)(1)(i), for employee Dave Skaggs' overexposure to inorganic arsenic and for failure to implement adequate engineering controls to prevent such overexposure, respectively. The basis of Item 7 was the results of IH Sweeney's air sampling at the site. However, as discussed in Item 1, *supra*, the manner in which the IH performed the sampling was flawed and the results were unreliable. For the same reasons set out in Item 1 of Citation 1, Items 7a and 7b are vacated.

Item 8 of Citation 1 alleges a serious violation of 29 C.F.R. § 1926.1118(j)(2)(vii), for failure to "assure that the containers of [inorganic arsenic] contaminated protective clothing and equipment in the workplace or which are to be removed from the workplace are labeled" as required by the

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[5]Assuming *arguendo* that the standard did apply, the record shows that Icarus mailed a letter to each of these individuals informing them that they had to have a follow-up blood test within two weeks. (R-4.) Although the Secretary implies Icarus did not mail these letters, I find that Respondent did in fact mail the letters and that the three individuals made no attempt to have or inquire about a follow-up test. (Tr. 346-65.) *See also* Citation 2, Item 1, *infra*. In any case, and as a practical matter, Icarus was no longer in a position to ensure former employees had follow-up tests.

standard. Based on my findings in Items 1 and 7, *supra*, and the Secretary's failure to present any other evidence that Icarus was required to comply with the cited standard, this item is vacated.

Item 9 of Citation 1 alleges a serious violation of 29 C.F.R. § 1926.1118(m)(3)(i) which states that "[t]he employer shall provide for employees working in regulated areas, lunchroom facilities which have a temperature controlled, positive pressure, filtered air supply, and which are readily accessible to employees working in regulated areas." As discussed above, the Secretary has failed to present any evidence to establish that Icarus was required to comply with provisions of the cited standard. Item 9 of Citation 1 is accordingly vacated.

Citation 1, Item 10 alleges a serious violation of 29 C.F.R. § 1926.1118(n)(2), for failure to provide each affected employee an opportunity for a medical examination where the employee is likely to be exposed to inorganic arsenic over the action level at least 30 days per year. In view of my conclusion in Item 7, set out above, the Secretary has not established that Icarus employees were exposed to inorganic arsenic over the action level. Item 10 of Citation 1 is therefore vacated.

Citation 1, Item 11 alleges a serious violation of 29 C.F.R. § 1926.1118(o)(1)(i), which provides that "[t]he employer shall institute a training program for all employees who are subject to exposure to inorganic arsenic above the action level without regard to respirator use, or for whom there is a possibility of skin or eye irritation from inorganic arsenic. The employer shall assure that those employees participate in the training program." As noted above, the Secretary has not shown that Icarus employees were exposed to inorganic arsenic over the action level. Item 11 is vacated.

Item 12 of Citation 1 alleges a serious violation of 29 C.F.R. § 1910.134(f)(2), which requires the employer to "ensure that an employee using a tight-fitting facepiece respirator is fit tested prior to initial use of the respirator, whenever a different respirator facepiece (size, style, model or make) is used, and at least annually thereafter." I find that the standard applies and that Icarus violated its terms. According to the testimony of IH Sweeney, operator Jude James told him that while he was fit tested for his half-face air-purifying respirator, he was not fit tested for a full-face air-purifying respirator. (Tr. 104.) The IH also testified that Icarus provided records for numerous fit tests for the half-face air-purifying respirators but none for the full-face air-purifying respirators. (Tr. 105.) Respondent has failed to rebut this evidence. The evidence also supports a finding that Mr. James was exposed to the cited hazard when he used the full-face air-purifying respirator for recycling. (Tr. 104.) I further find that Respondent had knowledge of the violation, as Mr. James wore the full-face

air-purifying respirator provided by Icarus in plain view of his supervisor. I agree with the serious classification of this violation because the cited condition could have resulted in serious physical harm. Based on the foregoing, this citation item is affirmed as a serious violation. The Secretary's proposed penalty of $1,000.00 is appropriate and is accordingly assessed.[6]

Citation 3, Item 2 alleges a serious violation of 29 C.F.R. § 1926.62(g)(1)(ii), for failure to "provide at no cost to the employee and assure that the employee uses appropriate protective work clothing and equipment that prevents contamination of the employee and the employee's garments such as...gloves, hats, and shoes or disposable shoe coverlets." I find that the standard applies and that Respondent violated the terms of the standard. According to IH Sweeney, four of the five employees he interviewed stated that they provided their own shoes for work.[7] (Tr. 86-90.) Icarus asserts that providing work shoes to employees was cost prohibitive. (R. Brief at p. 29.) The standard, however, does not require shoes to be provided, but, rather, the provision of appropriate protection to prevent contamination. In this case, Icarus at the very least should have provided disposable shoe coverlets to protect employees' shoes from contamination, and the company's requirement that employees leave their shoes in the shower trailer at work did not meet the standard's terms. I further find that employees were exposed to the cited hazard, and Respondent does not deny that it knew that employees were providing their own shoes. This item is affirmed as a serious violation. The proposed penalty of $2,000.00 is appropriate and is therefore assessed.

Citation 3, Item 3 alleges a serious violation of 29 C.F.R. § 1926.62(g)(2)(i), which states that "[t]he employer shall provide the protective clothing required in paragraph (g)(1) of this section in a clean and dry condition at least weekly, and daily to employees whose exposure levels without regard to a respirator are over 200 μg/m3 of lead as an 8-hour TWA." Specifically, the Secretary alleges that "fresh and clean coveralls were donned only 1 time per week by some employees, and only once every 2 or 3 days by other employees." As indicated *supra*, there are inconsistencies in

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[6]In assessing this penalty and the others in this case, set out *infra*, due consideration has been given to the employer's size, history and good faith, and to the gravity of the violation.

[7]The IH also said that employees told him that they provided their own gloves and head and neck coverings. (Tr. 86-90.) However, there is insufficient evidence in the record to establish this assertion, and my decision will thus address only whether shoes or disposable coverlets were provided.

the IH's testimony as to employees' statements about wearing "fresh and clean coveralls." For example, IH Sweeney first stated only one employee wore disposable Tyvek coveralls, but he then admitted that both Mr. Skaggs and Mr. James said they wore disposable Tyvek coveralls. (Tr. 157-60, 180.) The inconsistencies in the IH's testimony relate not only to which "coverall" employees wore or did not wear but also to how often employees changed coveralls. According to the IH, at least one employee, presumably Mr. Skaggs, told him he changed his coveralls once every 2 or 3 days. (Tr. 91, 182.) However, even if Mr. Skaggs changed his *launderable* coveralls once every 2 or 3 days, the IH also said that Mr. Skaggs told him he placed his used disposable coveralls in a blue rubber trash can at the end of every shift. Therefore, it is reasonable to infer that Mr. Skaggs changed into fresh and clean disposable coveralls every day. (Tr. 183.) Similarly, the IH testified that Mr. Moise told him that he changed coveralls once a week. (Tr. 90.) The IH then admitted that Mr. Moise only mentioned launderable coveralls. (Tr. 172.) This admission makes it unclear whether Mr. Moise was referring to launderable coveralls, and Mr. Moise could very well have been wearing disposable Tyvek coveralls over launderable coveralls, just as, as found above, Mr. Skaggs did. In considering the IH's testimony as a whole, I am simply not persuaded that he was able to communicate clearly and effectively with the employees when interviewing them. In view of the record, employees may well have misunderstood what the IH meant when he asked them about the coveralls Icarus provided. I find that the IH's reliance on inconsistent employee statements was misplaced, and I am not convinced by the IH's testimony standing alone that the facts asserted by the Secretary are more probably true than false. The Secretary failed to present any other reliable and probative evidence to establish her burden of proof by a preponderance of evidence, and, I accordingly vacate Item 3 of Citation 3.[8]

Citation 3, Item 4 alleges a serious violation of 29 C.F.R. § 1926.62(g)(2)(vii), for failure to assure that containers of lead-contaminated protective clothing and equipment were labeled as required by the standard. IH Sweeney testified that while there was a label on a blue rubber container at the site, the label did not meet the requirements of the standard. (Tr. 92-93.) The IH and Mr. Workman, Respondent's supervisor, both testified the label read as follows: "Place contaminated

[8]I also note that the IH testified only about what employees said about wearing coveralls. He took no photos and did not describe what he saw employees wearing during the inspection.

clothing inside and replace the lid." (Tr. 274-75.) The standard, however, requires the label to state as follows: "Caution: Clothing contaminated with lead. Do not remove dust by blowing or shaking. Dispose of lead contaminated wash water in accordance with applicable local, state, or federal regulations." The label clearly did not comply with the requirements of the standard, and I find that Icarus violated the terms of the cited standard. I further find that employees were exposed to the cited hazard and that Icarus had actual knowledge of the condition, especially since the company was previously cited for violating this same standard. *See* C-5. This item is properly classified as serious because of the serious physical harm that could result from the violation. Item 4 of Citation 3 is accordingly affirmed as a serious violation, and a penalty of $1,000.00 is assessed.

Citation 3, Item 7, alleges a serious violation of 29 C.F.R. § 1910.134(g)(1)(iii), for not ensuring that "employees perform a user seal check each time they put on the respirator." I find that the cited standard applies and that Respondent did not comply with the terms of the standard. IH Sweeney testified that at least two employees told him that they did not perform a user seal check each time they put on the half-face air-purifying respirator.[9] (Tr. 105-07.) Based on these statements, I also find that employees were exposed to the violative condition. I further find that with the exercise of reasonable diligence, Respondent could have discovered the cited condition because the violations were in plain view of the foreman and supervisor. This item is properly classified as serious, in light of the serious injuries that could have resulted from the violation. This item is therefore affirmed as a serious violation, and the proposed penalty of $2,000.00 is assessed.

***The Alleged Willful Violation***

Item 1 of Citation 2 alleges a willful violation of 29 C.F.R. § 1926.62(j)(2)(iv)(A), which provides that "[w]ithin five working days after the receipt of biological monitoring results, the employer shall notify each employee in writing of his or her blood lead level." IH Sweeney in essence testified that this item was based on the statements of two former employees, Jason Willis and Michael Russell, who told him that "they never saw, heard or received" the results of their blood

[9]One employee said he performed the user seal check once a week, while the other said he performed the user seal check every fourth or fifth time he wore the respirator. (Tr. 105-07.)

samples drawn in June 2000 and July 2000.[10] (Tr. 70-71, 97.) Respondent asserts that its practice is to include the results of blood lead level tests with an employee's weekly paycheck, by hand if the employee is still working for Icarus and by mail if not. (Tr. 326, 343-60; R-4.) In addition, the IH admitted that two employees of Icarus who were working at the site when he was conducting his inspection told him they had received their blood test results. (Tr. 99.) I decline to accord greater probative weight to the reported statements of two former employees admitted for a limited purpose than opposite factual statements of two present employees. I further find, in the absence of any other evidence in support of this item, the Secretary has net met her burden of proving the alleged violation. This item is accordingly vacated.

***The Alleged Repeated Violations***

Citation 3, Item 1 alleges a repeated violation of 29 C.F. R. § 1926.62(d)(8)(i), for failure to notify each employee in writing of the results of that employee's exposure within five working days after the completion of the exposure assessment. I find that the standard applies and that Respondent violated the terms of the standard. IH Sweeney testified that four of the five employees at the site, including the foreman, told him that they had neither seen nor heard about the results of air sampling conducted by Icarus. (Tr. 74-82.) In addition, the IH testified without refutation that he did not see air sampling results posted anywhere on the job site. (Tr. 84.) It is clear that employees were exposed to the violative condition and that Respondent had knowledge of the violation. Therefore, the Secretary has satisfied her burden of proving the alleged violation.

The Secretary classified this violation as repeated. "A violation is repeated under section 17(a) of the Act if, at the time of the alleged repeated violation, there was a Commission final order against the same employer for a substantially similar violation." *Potlatch Corp.*, 7 BNA OSHC 1061 (No. 16183, 1979). The Commission further held that "the Secretary, in order to prove any violation to be repeated, must demonstrate that the earlier citation upon which he relies became a final order of the Commission prior to the date of the alleged repeated violation." *Id.* at 1064; *see also, Dic-Underhill, A Joint Venture*, 8 BNA OSHC 2223 (No. 10798, 1980), and *Amerisig Southeast Inc.*,

[10]Mr. Willis and Mr. Russell were not employees of Icarus when the IH interviewed them. The IH's testimony about their statements was admitted solely for the purpose of demonstrating the IH's basis for the issuance of this item and not for the truth of the matter asserted. (Tr. 70-71.)

17 BNA OSHC 1659 (No.93-1429), *aff'd per curiam*, 117 F.3d 1433 (11th Cir. 1997). As a basis for the repeated classification of the cited standard, the Secretary relies on a previous citation issued on March 13, 2000. *See* C-5. The record demonstrates, however, that the antecedent violations of this citation could not have become a final order before the start of OSHA's investigation in the subject case.[11] OSHA began its investigation of the Lucasville Bridge project on October 11, 2000, and alleges in its citation that "at least through October 18, 2000, employees had neither seen nor heard the results of the air sampling fo Lead...." While OSHA may have issued the citations in this case on March 8, 2001, the Secretary has failed to present any evidence that the date of the alleged repeated violation occurred prior to the date of the final order upon which the Secretary relies. Therefore, I conclude that the cited violation was not repeated within the meaning of section 17(a) of the Act, but serious because of the serious injuries that could result from the violative condition. Based on the foregoing, I affirm Citation 3, Item 1 as a serious violation, and assess a penalty of $2,000.00.

Item 5 of Citation 3 alleges a repeated violation of 29 C.F.R. § 1926.62(i)(3)(ii), for failure to "assure, where shower facilities are available, that employees shower at the end of the work shift and shall provide an adequate supply of cleansing agents and towels for use by affected employees." It is undisputed that Icarus provided an adequate supply of cleaning agents and towels for employees to use in the shower facilities. (Tr. 175, 187.) The IH testified that two employees, Mr. Moise and Andrew DuPre, another worker whose native language was not English, told him they did not shower after handling tarps at the site. (Tr. 94-95.) There were inconsistencies, however, in what Mr. DuPre told the IH. The IH first stated that Mr. DuPre said that he did not shower after handling tarps inside the containment, but the IH later admitted that Mr. DuPre said he showered after he worked inside the containment. (Tr. 94, 187.) In addition, two other employees told the IH they showered inside the red trailer. (Tr. 178, 183.) The sum of this evidence does not reach the level of a

[11]The only evidence the Secretary offered into evidence to demonstrate that there was a final order against Icarus for the previous violations was the "Stipulation and Settlement Agreement" signed by the parties on November 6, 2000. (C-5.) OSHRC records indicate that the violations became a final order of the Commission on January 17, 2001.

preponderance. It is thus, by itself, insufficient to satisfy the Secretary's burden of proving the alleged violation. Item 5 of Citation 3 is accordingly vacated.

Citation 3, Item 6 alleges a repeated violation of 29 C.F.R. § 1926.1118(e)(2), which provides that "[e]ach employer who has a workplace or work operation covered by this standard shall monitor each such workplace and work operation to accurately determine the airborne concentration of inorganic arsenic to which employees may be exposed." I find that the standard applies and that Respondent violated the terms of the standard. It is undisputed that Icarus did not monitor the work site for arsenic. Moreover, the air sampling that IH Sweeney performed, while not establishing employee overexposure to inorganic arsenic, did detect the presence of inorganic arsenic such that Icarus was required to monitor the site pursuant to the cited standard.[12] *See* C-2-4. I further find that employees were exposed to the cited condition and that Icarus had knowledge of the violation. Even though the violation from the previous inspection was not a final order, Respondent should have been aware that this hazard might be present on its work site because the previous violation was based on the same type of work, abrasive blasting and painting of a bridge. Finally, for the same reasons set out in Citation 3, Item 1, I conclude that this item was not properly classified as repeated, and affirm this item as a serious violation with an assessed penalty of $1,000.00.

Citation 3, Item 8 alleges a repeated violation of 29 C.F.R. § 1910.1020(g)(1), for failure to inform employees of the existence, location and availability of records covered by this section, the person responsible for maintaining and providing access to such records, and each employee's rights of access to these records. I find that the cited standard applies and that Respondent violated its terms. According to the IH, four of the five employees he interviewed said they were not told of the existence, location and availability of records kept by Icarus related to monitoring and exposure levels to contaminants. (Tr. 107-08.) They also said they were not advised of who was responsible for the records or their rights of access to the records. *Id.* The record clearly shows employee exposure to the cited hazard and that Respondent had knowledge of the violation. As in the previous

[12]The IH's air sampling is discussed in Item 1 of Citation 1, *supra*. The results, C-2-4, show that the sampling detected the presence of inorganic arsenic, manganese and lead.

item, this violation was not properly classified as repeated. This item is affirmed as a serious violation, and a penalty of $1,000.00 is assessed.

Item 9 of Citation 3 alleges a repeated violation of 29 C.F.R. § 1910.1200(h)(3)(ii), for failure to ensure employees were trained about the physical and health hazards of chemicals, such as diesel fuel and fumes, manganese, carbon monoxide, and paint solvents and vapors, in the workplace. I find that the cited standard applies and that Respondent did not comply with its terms. It is undisputed that these chemicals were on the work site, and, according to the IH, employees said they had not been trained about the physical and health hazards of the chemicals at the site. (Tr. 109-13.) Although Icarus asserts there was no risk of injury from the chemicals, I find this argument to be without merit. (R. Brief at p. 33-35.) Further, employees clearly had access to and worked near the chemicals, and they were thus exposed to the cited condition. (Tr. 109-13.) Finally, Icarus had knowledge of the violation because the hazardous condition was in plain view of the supervisor. In view of my conclusion, *supra*, this item was not properly classified as repeated. I, thus, affirm this item as a serious violation and assess a penalty of $1,000.00.

## ***Findings of Fact***

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

## *Conclusions of Law*

1. Respondent was, at all times pertinent hereto, an employer within the meaning of section 3(5) of the Act.

2. The Commission has jurisdiction over the parties and the subject matter.

3. Respondent was not in violation of 29 C.F.R. §§ 1926.55(a) and (b), 1926.62(f)(3)(ii), 1926.62(g)(1)(i), 1926.62(g)(2)(ii), 1926.62(i)(1), 1926.62(j)(2)(ii), 1926.1118(c) and (g)(1)(i), 1926.1118(j)(2)(vii), 1926.1118(m)(3)(i), 1926.1118(n)(2), and 1926.1118(o)(1)(i), as alleged in Citation 1, Items 1 through 11, respectively.

4. Respondent was in serious violation of 29 C.F.R. § 1910.134(f)(2), as alleged in Citation 1, Item 12, and a civil penalty of $1,000.00 is appropriate for this violation.

5. Respondent was not in violation of 29 C.F.R. §§ 1926.62(j)(2)(iv)(A), 1926.62(j)(2)(iv)(B) and 1926.62(k)(2)(vi), as alleged in Citation 2, Items 1, 2(a) and 2(b), respectively.

6. Respondent was in serious violation of 29 C.F.R. § 1926.62(d)(8)(i), as alleged in Citation 3, Item 1, and a civil penalty of $2,000.00 is appropriate for this violation.

7. Respondent was in serious violation of 29 C.F.R. § 1926.62(g)(1)(ii), as alleged in Citation 3, Item 2, and a civil penalty of $2,000.00 is appropriate for this violation.

8. Respondent was not in violation of 29 C.F.R. § 1926.62(g)(2)(i), as alleged in Citation 3, Item 3.

9. Respondent was in serious violation of 29 C.F.R. § 1926.62(g)(2)(vii), as alleged in Citation 3, Item 4, and a civil penalty of $1,000.00 is appropriate for this violation.

10. Respondent was not in violation of 29 C.F.R. § 1926.62(i)(3)(ii), as alleged in Citation 3, Item 5.

11. Respondent was in serious violation of 29 C.F.R. § 1926.1118(e)(2), as alleged in Citation 3, Item 6, and a civil penalty of $1,000.00 is appropriate for this violation.

12. Respondent was in serious violation of 29 C.F.R. § 1926.134(g)(1)(iii), as alleged in Citation 3, Item 7, and a civil penalty of $2,000.00 is appropriate for this violation.

13. Respondent was in serious violation of 29 C.F.R. §§ 1910.1020(g)(1) and 1910.1200(h)(3)(ii), as alleged in Citation 3, Items 8 and 9, respectively, and a civil penalty of $1,000.00 is appropriate for each of these violations.

## ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Citation 1, Items 1 through 11 are VACATED.
2. Citation 1, Item 12 is AFFIRMED as a serious violation.
3. Citation 2, Items 1 and 2 are VACATED.
4. Citation 3, Items 1 and 2 are AFFIRMED as serious violations.
5. Citation 3, Item 3 is VACATED.
6. Citation 3, Item 4 is AFFIRMED as a serious violation.
7. Citation 3, Item 5 is VACATED.
8. Citation 3, Items 6 through 9 are AFFIRMED as serious violations.
9. A total civil penalty of $11,000.00 is assessed.

/s/

Michael H. Schoenfeld
Judge, OSHRC

Dated: September 6, 2002
Washington, D.C.