Secretary of Labor,	:	
Complainant,	:	
	:	
v.	:	OSHRC Docket No. **98-0587**
	:	
Eslich Wrecking Company,	:	
Respondent.	:	

Appearances:

Anthony Stevenson, Esquire
Office of the Solicitor
U. S. Department of Labor
Cleveland, Ohio
For Complainant

Keith Pryatel, Esquire
Millisor & Nobil
Cleveland, Ohio
For Respondent

Before: Administrative Law Judge Stephen J. Simko, Jr.

DECISION AND ORDER

Eslich Wrecking Company is a construction contractor with offices in Louisville, Ohio. The Occupational Safety and Health Administration (OSHA) conducted an inspection of respondent's jobsite at the Cleveland Public Library in Cleveland, Ohio, from January 23, 1998, through February 25, 1998. As a result of this inspection, respondent was issued two citations. Respondent filed a timely notice contesting the citations and proposed penalties. A hearing was held in Cleveland, Ohio, on January 12 and 13, 1999.

At the hearing, the Secretary withdrew Citation No. 2, items 1 and 2. After the hearing, the Secretary withdrew item 3 of Citation No. 1. The violations alleged in Citation No. 1, items 1a and 1b, 2 and 4, and the penalties proposed for those items remain at issue.

For the reasons that follow, Citation No. 1, items 1a and 1b are affirmed and a penalty of $1,125 is assessed; Citation No. 1, item 2, is vacated, and no penalty is assessed; Citation No. 1, item 4, is vacated and no penalty is assessed.

Background

During the period of the OSHA inspection, Eslich performed labor and light demolition work for renovation of the Cleveland Public Library, originally built in 1923. Its work included saw cutting through floors in preparation for mechanical, electrical and plumbing lines (MEP). It also exposed perimeter chases to allow certified asbestos removal contractors to remove thermal insulated piping. The chases are vertical spaces between the inner and outer walls of the library. These chases carried thermal-insulated piping through the perimeter of the building from the basement through the fourth floor. Prior to demolition, URS Consultants prepared blueprints of those areas of the building where asbestos existed. Eslich was provided these blueprints by URS.

Stipulations

At the hearing, the parties stipulated as follows:

1. Respondent did no lead monitoring prior to and during its undertaking of work while on site at the project.

2. Respondent did not treat its employees as if they were exposed to the lead level in the standard of 500 micrograms per cubic meter of air.

3. There was no initial asbestos exposure assessment conducted by the respondent.

4. Jurisdiction is proper and appropriate for the Commission.

5. Respondent's corporate safety manual is a business record maintained in the normal course and scope of its business affairs for purposes of the hearing.

Discussion

The Secretary has the burden of proving the violation:

> In order to establish a violation of an occupational safety or health standard, the Secretary has the burden of proving: (1) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, (c) employee access to the violative conditions, and (d) the employer's actual or constructive knowledge of the violation (*i.e.*, the employer knew or, with the exercise of reasonable diligence could have known, of the violative conditions).

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

Citation No. 1, Item 1a
Alleged Serious Violation of 29 C.F.R. § 1926.62(d)(1)(i)

In Citation No. 1, item 1a, the Secretary alleges that:

> The employer did not initially determine if any employee may be exposed to lead at or above the action level:
>
> On site at the Cleveland Public Library: Employees performed manual demolition of structures (walls and ceilings) where lead-containing coatings or paints were present, but were not monitored at any time during the demolition project to determine their exposures to lead.
>
> Note 1: Monitoring shall be done during those activities which the employer reasonably believes would cause the greatest airborne concentrations of lead in the workplace. Because of the variability of demolition on this worksite, monitoring may need to be done more than one time. In lieu of repeated monitoring, the employer may presume that the employee is exposed above the permissible limit, and provide the correct respiratory protection and protective measures.
>
> Note 2: Variable conditions to be considered include, but are not limited to, the following: size of the demolition job, location of the job at the facility, number of employees performing the demolition activity, equipment being used for the demolition activity (bobcat, jackhammer, hammer), and concentration of lead in the paint).
>
> Section 1926.62(d)(1)(i) provides:
>
> (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.

Pursuant to 29 C.F.R. § 1926.62(d)(3), the employer is required to monitor employees and base initial determinations on employee exposure monitoring results and other listed relevant factors. It is undisputed that the standard applies to these working conditions. Respondent, through counsel, admitted at the hearing that the interior walls being demolished by Eslich had lead

paint on them. This condition was determined prior to commencing work at this location. Respondent stipulated that it "did no lead monitoring prior to or during its undertaking of work while on site at the project" (Stipulation #1). Furthermore, at hearing, respondent's attorney admitted that Eslich did no assessment relating to lead on this job. Respondent relies on the opinion of its safety director that employees would not be overexposed to lead while working at the library site. This reliance is based on the safety director's twenty-eight years of safety experience, but is insufficient to satisfy the requirements of the standard. There are limited exceptions to the requirement that an initial determination be based on monitoring. Respondent made no showing that it met any such narrow exception.

The OSHA compliance officer tested for lead when no demolition work other than sweeping was being done. Those tests show a level of 6.5 ug/m^3 for the employee sweeping, well below the permissible exposure limit (PEL) and the action level. Respondent argues that these low results conducted when no demolition work was being performed relieve Eslich of its responsibility to initially monitor lead levels. The OSHA sampling does not reflect exposure levels for employees while performing actual demolition work. This test was taken long after demolition work had commenced, and at a time when no demolition work was being done. Eslich cannot rely on after-the-fact sampling by OSHA to relieve it of its responsibility at a previous point in time to initially determine levels for employees exposed to lead during demolition. It is undisputed that respondent's employees demolished walls covered with lead paint, that respondent knew its employees were performing this work, and that it knew, through its site specific inorganic lead program, the interior walls contained lead paint (Exh. C-1, §§ 3.3 and 3.4). Respondent violated 29 C.F.R. § 1926.62(d)(1)(i) by failing to make an initial determination as to whether any employee may be exposed to lead at or above the action level.

Citation No. 1, Item 1b
Alleged Serious Violation of 29 C.F.R. § 1926.62(d)(2)(i)

In Citation No. 1, item 1b, the Secretary alleges that:

> The employer did not treat the employees as if they were exposed to lead in excess of 500 micrograms per cubic meter when performing manual demolition of

structures (walls, ceilings) until the employer performs an employee exposure assessment and documents that the employees are not exposed to lead in excess of 500 micrograms per cubic meter.

On site at the Cleveland Public Library: Employees performed manual demolition (using jackhammers and sledge hammers) of the library walls and ceilings where walls and ceilings were coated with lead-containing paint. Employees also performed dry-sweeping clean-up after the demolition activities (a task where exposure to lead may be above the PEL). Employees were not monitored for lead exposure during either of these activities; nor were they assumed to be exposed to 10 times the permissible limit (or 500 micrograms per cubic meter of air) during these activities and protected by the use of a half-mask respirator with HEPA filters; nor were interim protective measures as prescribed in paragraph (d)(2)(v) of the section implemented during the exposure assessment. Interim protective measures include the following:

1) Appropriate respiratory protection (as described above);

2) Appropriate personal protective clothing (as described in paragraph (g));

3) Clean change areas (as described in paragraph (i)(2)); and

4) Hand-washing facilities that include hot and cold running water, soap and towels (as described in paragraph (i)(5)).

Note that the respirators provided were nuisance dust respirators; no personal protective clothing was provided; no clean change areas were provided; and hand-washing facilities contained only cold water, and no towels or soap on different days.

29 C.F.R. § 1926.62(d)(2)(i) provides:

(2) *Protection of employees during assessment of exposure.* (i) With respect to the lead related tasks listed in paragraph (d)(2)(i) of this section, where lead is present, until the employer performs an employee exposure assessment as required in paragraph (d) of this section and documents that the employee performing any of the listed tasks is not exposed above the PEL, the employer shall treat the employees as if the employee were exposed above the PEL, and not in excess of ten (10) times the PEL, and shall implement employee protective measures prescribed in paragraph (d)(2)(v) of this section. The tasks covered by this requirement are:

(A) Where lead containing coatings or paint are present: Manual demolition of structures (e.g., dry wall), manual scraping, manual sanding, heat gun applications, and power tool cleaning with dust collection systems;

(B) Spray painting with lead paint.

As discussed above, Eslich did not perform an employee exposure assessment prior to or during work by its employees on the jobsite of the Cleveland Public Library. The respondent did not treat its employees as if they were exposed above the PEL and not in excess of ten times the PEL. Furthermore, it did not implement the protective measures prescribed in 29 C.F.R. § 1926.62(d)(2)(v). Specifically, it provided only nuisance dust respirators which do not meet the requirements of 29 C.F.R. § 1926.62(f). While the Secretary alleged that other safety measures were not implemented by Eslich, no evidence was presented at hearing to support these allegations.

Respondent violated 29 C.F.R. § 1926.62(d)(2)(i) by failing to treat its employees as if they were exposed to lead in excess of 500 micrograms per cubic meter prior to and during initial assessment of exposure.

Classification of Violations - Items 1a and 1b

The Secretary alleges that the violations alleged in Citation No. 1, items 1a and 1b, constitute one serious violation. In support, complainant relies on the testimony of its compliance officer that the adverse effects of exposure to lead include kidney damage, damage to the reproductive system, damage to the central nervous system, and an exposure to a substantial amount of lead could result in cardiorespiratory arrest because lead is a systemic toxin. There was no testimony regarding the physical effects of exposure to specific levels of lead. In general, it is accepted that exposure to lead at some level may result in health problems described by the compliance officer at the hearing. That testimony is consistent with the medical data and findings relied upon by the Secretary in promulgating the general industry and construction lead standards. *See* 43 Fed. Reg. 52,592 (November 14, 1978) and 58 Fed. Reg. 26,590 (May 4, 1993).

In promulgating 29 C.F.R. § 1926.62(d)(2)(i), the Secretary stated the following:

> Paragraph (d)(2)(i) includes a listing of the following tasks which are presumed to frequently entail lead exposure levels above the PEL: Where lead containing coatings or paint are present; manual demolition of structures (e.g. dry wall) . . . .

58 Fed. Reg. 26,601 (May 4, 1993)

This presumption of tasks that often result in overexposure includes demolition work performed by respondent on this site. As discussed above, OSHA's sampling was done after demolition of the lead-covered walls was completed. The low levels found in those samples do not reflect the lead levels which should have been anticipated by Eslich and which are presumed by the standard. Without initial determination of lead levels, employers cannot identify sources of lead emission or determine the extent of employee exposure. Failure to conduct these determinations or, alternatively, fully protect employees from the adverse health effects of lead could result in serious physical harm or death due to lead poisoning. The grouped violation is serious.

Citation No. 1, Item 2
Alleged Serious Violation of 29 C.F.R. § 1926.102(a)(1)

In Citation No. 1, item 2, the Secretary alleges that:

> Eye and face protective equipment was not used when machines or operations presented potential eye or face injury:
>
> On site at the Cleveland Public Library (third floor, North wall) on 02-11-98: A carpenter was drilling into tile (in order to install lathe) without the use of safety glasses.

29 C.F.R. § 1926.102(a) provides:

> Employees shall be provided with eye and face protection equipment when machines or operations present potential eye or face injury from physical, chemical, or radiation agents.

During the OSHA inspection, Compliance Officer Donovan observed two Eslich employees on a lift drilling into tile. One employee was not wearing safety glasses. In response to a discovery request, respondent admitted that one of its supervisors or forepersons was standing within 8 feet and in plain view of this employee when she drilled into the tile without using safety glasses. The other employee on the lift was identified by Tony Stefanick, respondent's job supervisor, as a carpenter steward on the job, not a supervisor or foreperson. Respondent's representative and a supervisor accompanied the compliance officer during her inspection. They were in the area approximately 10 feet from the lift when Ms. Donovan observed the employee drilling without wearing safety glasses. This is consistent with respondent's admission that a supervisor or foreperson was within 8 feet of this employee while she was drilling. Mr. Stefanick further testified that the tile drilling job took between five and ten minutes to complete.

The standard clearly applies to the working conditions at issue. Respondent's employee was not wearing safety glasses, and tile chips or particles could strike her eyes during the drilling operation. This was the employee's first day on the job. Mr. Stefanick issued mandatory safety gear to her. This included a hard hat, safety glasses, and earplugs. He also instructed her on respondent's requirements for use of this equipment on the job. Respondent's supervisors were in the area at the time of the observed violation, but they were in the process of accompanying the OSHA compliance officer in her walkaround inspection. The evidence does not establish exposure for more than five to ten minutes. Given the short duration of exposure, and the fact that respondent's supervisors were involved with the OSHA inspection at the moment of the violation, I conclude that respondent did not know and could not, with the exercise of reasonable diligence, know of the presence of the violation.

Citation No. 1, Item 4
Alleged Serious Violation of 29 C.F.R. § 1926.1101(f)(2)(ii)

In Citation No. 1, item 4, the Secretary alleges that:

The initial exposure assessment was not based on monitoring results, and all observations, information or calculations which would indicate employee exposure to asbestos:

On site at the Cleveland Public Library: Employees performing demolition activities on a structure built in 1923 were not adequately assessed (monitored) to determine their exposure to asbestos as they performed demolition. On at least 10 occasions, concealed asbestos (thermal system insulation) was uncovered during demolition.

Note: Monitoring for the assessment shall include 8-hour time-weighted averages and 30 minute excursion limits during those activities most likely to result in exposure to asbestos. Because of the variability of the demolition on this project (variability including, but not limited to, the size of the job, location on the site, number of employees performing the activity, training of the employees performing the demolition, equipment used for the demolition ie., bobcat, jackhammer), an assessment may need to be done more that one time.

29 C.F.R. § 1926.1101(f)(2)(ii) provides:

(ii) Basis of Initial Exposure Assessment: Unless a negative exposure assessment has been made pursuant to paragraph (f)(2)(iii) of this section, the initial exposure assessment shall, if feasible, be based on monitoring conducted pursuant to paragraph (f)(1)(iii) of this section. The assessment shall take into consideration both the monitoring results and all observations, information or calculations which indicate employee exposure to asbestos, including any previous monitoring conducted in the workplace, or of the operations of the employer which indicate the levels of airborne asbestos likely to be encountered on the job. For Class I asbestos work, until the employer conducts exposure monitoring and documents that employees on that job will not be exposed in excess of the PELs, or otherwise makes a negative exposure assessment pursuant to paragraph (f)(2)(iii) of this section, the employer shall presume that employees are exposed in excess of the TWA and excursion limit.

At hearing, the parties stipulated that there was no initial asbestos exposure assessment conducted by the respondent (Stipulation 3). A threshold determination must be made whether 29 C.F.R. § 1926.1101(f)(2)(ii) is applicable to the work performed by respondent at the Cleveland Public Library.

The violation alleged by the Secretary presupposes that an initial exposure assessment was performed by the respondent. The parties, however, stipulated at hearing that respondent

conducted no such assessment. To determine applicability of the cited standard, it is necessary to first decide whether 29 C.F.R. § 1926.1101 requires respondent to conduct an initial determination for the work performed by its employees at this jobsite.

The Secretary in OSHA Instruction CPL 2-2.63 dated November 3, 1995, established policies and clarifications to ensure uniform enforcement of the asbestos standards, including 29 C.F.R. § 1926.1101, which applies to construction. The CPL discusses, in part, the classification scheme in the standard for construction work which ties mandatory work practices to work classification. The CPL addressed the need for initial exposure assessments as follows:

> **Q. Do all employers need to conduct an "initial exposure assessment" under the Construction standard?**
>
> A. In general, all employers who have a workplace covered by this standard are to conduct an "initial exposure assessment" at the beginning of each asbestos job [paragraph (f)(2)]. Exceptions to this requirement exist only for most Class IV work . . . . OSHA CPL 2-2.63
>
> 29 C.F.R. § 1926.1101(b) defines the four classes of asbestos work:
>
> *Class I asbestos work* means activities involving the removal of TSI and surfacing ACM and PACM.
>
> *Class II asbestos work* means activities involving the removal of ACM which is not thermal system insulation or surfacing material. This includes, but is not limited to, the removal of asbestos-containing wallboard, floor tile and sheeting, roofing and siding shingles, and construction mastics.
>
> *Class III asbestos work* means repair and maintenance operations, where "ACM", including TSI and surfacing ACM and PACM, is likely to be disturbed.
>
> *Class IV asbestos work* means maintenance and custodial activities during which employees contact but do not disturb ACM or PACM and activities to clean up dust, waste and debris resulting from Class I, II, and III activities.

The CPL addressed the question whether all asbestos activity is designated by "class" as follows:

> All asbestos work under the Construction and Shipyard standards is not in the "class system." The installation of new asbestos-containing products does not carry a class designation, and thus the class-specific requirements do not apply to that

activity. For work that does not readily fall into one of the four classes, the employer must comply with PEL. OSHA CPL 2-2.63

It is clear from the asbestos standard and the OSHA Instruction interpreting the standard that employers performing Class I, II and III asbestos construction work are required to conduct an initial exposure assessment in accordance with 29 C.F.R. § 1926.1101(f)(2). Employers performing most Class IV work or unclassified work are not required to conduct this assessment.

The labor and light demolition work performed by respondent's employees was not Class I or Class II work since that work did not involve removal of thermal system insulation (TSI), asbestos-containing material (ACM), or presumed asbestos-containing material (PACM) in any form.

The Secretary presented no direct evidence that respondent's activities disturbed asbestos. She argues, however, that Mr. Stefanick, respondent's job supervisor, admitted at the hearing that Eslich employees disturbed asbestos during exploratory demolition. This assertion relies primarily on the following testimony by Mr. Stefanick during cross-examination:

Q. Apparently, there was a channel on the fourth floor. Do you recall that channel on the fourth floor when you were working with Hirsch Electric when you made a contact and stopped?

A. They weren't chases. They were trenches I would call them that were put in the floor that they ran their new bus duct and whatever through those areas.

Q. Was there asbestos found this those areas?

A. There was some random asbestos that was found in those areas, yes. No prints on it.

Q. No prints?

A. None.

Q. What does that mean?

A. No blueprints.

Q. Was any contact made at that point?

A. Contact?

Q. With the asbestos.

A. Well, yes. There would have to be contact made in order to see it. Nobody knows it's there.

Q. Okay, was it disturbed at all?

A. It was exposed.

Q. But is that a "yes" or "no", sir; disturbed?

A. It was exposed. We uncovered it. We didn't know it was there. We uncovered it.

Q. But, what I'm asking for is a simple "yes" or "no" answer.

A. Yes.

Q. Was there something similar on the first floor?

A. Possibly. It might have happened a half dozen times throughout the floor. There was no way of knowing where this was going to turn up at.

Q. Okay.

A. In those situations where it did turn up, I would advise the abatement contractor. I would pull my workers back and go to a different area and call Safe Air. That was their job.

Q. On the first floor, was that asbestos disturbed?

A. It would be the same as with the fourth floor.

Q. So the answer is, "yes"?

A. Yes. There was no way of knowing it was there. (Tr. 254-256)

After hearing that testimony and observing the exchange between the witness and Secretary's counsel, I conclude that, while Mr. Stefanick responded affirmatively to the term "disturbed," he was referring to contact rather than actual disturbance as defined in the standard. In 29 C.F.R. § 1926.1101(b), the term "disturbance" is defined as follows:

> *Disturbance* means activities that disrupt the matrix of ACM or PACM, crumble or pulverize ACM or PACM, or generate visible debris from ACM or PACM. In no event shall the amount of ACM or PACM so disturbed exceed that which can be contained in one glove bag or waste bag which shall not exceed 60 inches in length and width.

No evidence indicated that respondent's activities disrupted the matrix, crumbled, pulverized, or generated visible debris from ACM or PACM.

During the testimony relied on by the Secretary as an admission of disturbance, Mr. Stefanick further testified on cross-examination, in part, as follows:

> Q. Okay, now, was any of the debris that resulted from your demolition removed as containing asbestos or contaminated with asbestos?
>
> A. Was any of our debris?
>
> Q. Yes, as a result of the demolition?
>
> A. Negative.
>
> Q. No?
>
> A. No. (Tr. 257)

No evidence established that respondent's activities were likely to disturb TSI, ACM, or PACM. While the OSHA compliance officer testified that she observed asbestos being disturbed at the site, she admitted that she could not determine whether the persons disturbing the asbestos worked for Eslich or another contractor.

The record is silent regarding whether respondent's work activities constituted Class III "repair and maintenance operations." Assuming that those terms include respondent's labor and

demolition, "ACM, including TSI and surfacing ACM and PACM" were not likely to be disturbed by such work. Since these materials were not disturbed or likely to be disturbed as defined in 29 C.F.R. § 1926.1101(b), respondent's activities were not Class III asbestos work.

The work performed by Eslich employees was not Class I, II, or III asbestos construction work. Since that work is not included in any of those three classes, respondent was not required to conduct an initial exposure assessment in accordance with 29 C.F.R. § 1926.1101(f)(2). That standard, therefore, is not applicable to the work at issue.

Having determined the inapplicability of 29 C.F.R. § 1926.1101(f)(2)(ii), it is unnecessary to discuss the other elements of the Secretary's burden of proving an alleged violation of this standard. The alleged violation is vacated.

Motion to Amend

At the hearing, the Secretary moved to amend item 3 of Citation No. 1 to allege a violation of 29 C.F.R. § 1926.405(a)(2)(ii)(E). This relates to protecting lamps from accidental contact or breakage. The standard originally cited at 29 C.F.R. § 1926.405(j)(1)(iii)(A) relates to the use of paper lined lamps. This motion raises a new issue which was not tried by consent. The motion was denied at hearing. In her posthearing brief, the Secretary withdrew item 3 of Citation No. 1.

Penalties

Under § 17(j) of the Act, in determining the appropriate penalty, the Commission must give due consideration to the size of the employer's business, the gravity of the violation, the good faith of the employer, and the history of previous violations.

No evidence was presented at the hearing to indicate the exact number of respondent's employees working at the jobsite. Eslich, however, is a small employer. It received a citation for serious violations within the past three years. Upon due consideration of these factors, a grouped penalty of $1,125 is appropriate for Citation No. 1, items 1a and 1b.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

ORDER

Based upon the foregoing decision, it is ORDERED:

1. Citation No. 1, item 1, is affirmed as a serious violation and a penalty of $1,125 is assessed.
2. Citation No. 1, item 2, is vacated.
3. Citation No. 1, item 3, was withdrawn by the Secretary.
4. Citation No. 1, item 4, is vacated.
5. Citation No. 2, item 1, was withdrawn by the Secretary.
6. Citation No. 2, item 2, was withdrawn by the Secretary.

STEPHEN J. SIMKO, JR.
Judge

Date: April 26, 1999