United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR
Complainant,
v.
NEWELL RECYCLING COMPANY, INC..
Respondent.

OSHRC DOCKET
NO. 95-0159

NOTICE OF DOCKETING OF ADMINISTRATIVE LAW JUDGE'S DECISION

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on October 13, 1995. The decision of the Judge will become a final order of the Commission on November 13, 1995 unless a Commission member directs review of the decision on or before that date. ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW. Any such petition should be received by the Executive Secretary on or before November 2, 1995 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

All further pleadings or communications regarding this case shall be addressed to:

Executive Secretary
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Petitioning parties shall also mail a copy to:

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If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 606-5400.

FOR THE COMMISSION

Ray H. Darling, Jr.

Date: October 13, 1995

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 95-0159

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SECRETARY OF LABOR,

Complainant,

v.

NEWELL RECYCLING COMPANY, INC.,

Respondent.

OSHRC DOCKET NO. 95-0159

DECISION AND ORDER

This is a proceeding brought before the Occupational Safety and Health Review Commission ("the Commission") pursuant to section 10 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* ("the Act").

The Occupational Safety and Health Administration ("OSHA") conducted an inspection of Respondent's facility, located in Eagle Pass, Texas, on June 30, 1994. As a result, Respondent was issued a nine-item citation alleging serious violations of 29 C.F.R. § 1910.1025, the standard addressing occupational exposure to lead; specifically, the items allege violations of 1910.1025(c)(1), (d)(2), (e)(3)(i), (f)(2)(iii), (g)(1) and (g)(2)(ii), (i)(2)(i), (j)(1)(i), (l)(1)(ii), and (m)(2)(i), respectively. Respondent contested the citation, and a hearing was held on June 15, 1995. Both parties have submitted post-hearing briefs.

Background

The subject facility processes scrap metal for resale. On the day of the inspection, two employees were torch-cutting refinery piping. The employees wore dust masks while performing this work. The OSHA industrial hygienist ("IH") who conducted the inspection monitored the two employees for exposure to lead by placing air sampling devices on them. Upon completing his inspection the IH took the monitoring samples back to his area office,

and on July 6, 1994, he mailed them to the OSHA lab which conducts analyses of OSHA testing. On December 7, 1994, the results of the analyses were faxed to the area office of the IH. They showed the two employees' exposure to lead to have been a time-weighted average over an eight-hour day of 65.7 and 51.5 micrograms per cubic meter, respectively. On December 12, 1994, OSHA issued its citation. Respondent had not conducted any tests of its own with respect to the piping, which was sold within a few days of being cut; however, after receiving the citation the company did send the two employees to a physician for blood tests. The tests reported the blood lead levels of both to be within normal range.[1]

The Contentions of the Parties

While the Secretary believes that all of the citation items in this case should be affirmed based on the monitoring results, it is clear from his post-hearing brief that his primary concern is item 2, the item requiring the employer to perform an initial monitoring to determine if employees may be exposed to lead in amounts at or above the action level of the standard. Prior to the actual commencement of the hearing the undersigned expended a significant amount of time in an attempt to have the parties settle this case. It was apparent that the major impediment to settlement was the Secretary's insistence on initial monitoring and Respondent's position it was not required to do so. (Tr. 25-72). Needless to say, the attempt to arrive at a settlement was unsuccessful. The evidence relevant to the resolution of this case follows.

The Evidence

The IH testified that it normally takes four to six weeks to obtain analysis results from the lab and that he told the company's safety coordinator this during his inspection; he also told her he would let her know what the results were. He further testified that after noting he had not received the results he spoke with his supervisor, who called the lab and requested the results; the IH believed the results were faxed from the lab the same day, on December 7, 1994. The IH identified G-3 as the reports of both analyses. He discussed the

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[1]According to the physician's reports accompanying the tests, one of the workers had been with the company a year and a half and the other had worked there fifteen years. *See* R-4.

analysis results and said he had made the handwritten notations on the reports. (Tr. 81-82; 100-10).

On cross-examination, the IH testified he had not asked anyone to contact the lab until December and that to his knowledge his office had not received the analyses before December 7. He said he had not seen R-1 until the day before the hearing and that he had not been aware the Secretary's counsel had provided R-1 to the company's counsel during discovery. The IH noted R-1 appeared to be the same reports but that one of the dates under column 27, the chain of custody section, was different from the date reflected on G-3; specifically, item f, captioned "Supr OK," showed a date of December 2, 1994, on G-3, while the same item on R-1 showed a date of August 18, 1994. The IH said he did not know why there was a discrepancy between G-3 and R-1 and that he had not called the lab in this regard. (Tr. 146-53).

The analyst who analyzed the subject samples has worked at the OSHA lab since 1977. He testified about the lab's procedures for processing samples, noting in particular the chain of custody and how samples are logged in the lab's computerized management system. He explained the initials and dates under column 27 of the reports were first entered onto work sheets by the persons performing the actions and then entered into the computer. He further explained R-1 was generated after he completed his analysis of the samples on August 3; that information appears at item d. He anticipated a checker would check his calculations on August 17, and provided that date for item e; he also provided his supervisor's initials for item f. After R-1 was generated he initialed item d and changed the date on item e to August 18, the date his calculations were actually checked, and the individual who did so initialed item e. The analyst checked the form and gave it to his supervisor, who initialed item f and wrote in the August 18 date. The handwritten information was entered into the system and the reports were then released to the computer, which should have automatically faxed them to the area office within a day.[2] (Tr. 188-208).

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[2]The analyst did not know if the August 18, 1994 cover letter in R-1 was faxed with the reports; he said such letters were part of the lab's old system when reports were mailed and that they are no longer generated. (Tr. 227-29).

The analyst said the lab did not follow up to ensure reports were received and that it was possible the area office had not gotten them due to a computer or fax problem; he had heard of reports not being received but this was the first time he was aware of it occurring with his reports. He also said he did not generate or fax G-3 and did not know why it contained the December 2 date. He noted the reports could have been faxed by hand, in which case file copies would have been sent, or automatically, in which case the August 18 supervisory approval date would had to have been reentered into the computer; the area office could have asked someone to change the supervisory approval date but he had no knowledge this had occurred. (Tr. 206-32).

Discussion

In view of the foregoing, it is my conclusion that this case cannot be decided on any legal basis but rather must be decided on what is right. The above evidence indicates that at the very minimum there was a problem with OSHA's inspection procedure in regard to this particular site. This problem goes to the very core of the need for the public, *i.e.*, employers and unions, to have complete faith that an OSHA inspection is being conducted in an appropriate manner from beginning to end.

In this case, there was apparently no system in the OSHA area office to ensure the timely receipt of monitoring results. The IH consequently did not follow up with respect to his samples until five months after he sent them to the lab. The results faxed to the area office had a supervisory approval date of December 2, while it is clear from the record that the date the reports were actually approved was August 18. This may have been a mistake on the part of the lab and there is no clear evidence of any wrongdoing by OSHA in this regard. However, these circumstances are very unusual and it is understandable Respondent would question them.

The most important consideration is what remedy is appropriate in this case. It seems to me that vacating all the citation items, including the one requiring initial monitoring, will produce the best result. It will reestablish Respondent's faith in the system and allow OSHA to start over in this case. By that I mean that OSHA should return unannounced to the site, make an inspection of the activities being done and conduct

sampling, send the samples to its lab and ensure the results are obtained promptly, and contact the company. That way, if there are any problems they can be addressed immediately by the employer, as intended by the standard.

Respondent raises a number of arguments and issues in its post-hearing brief which are highly critical of OSHA, its procedures and its conduct. It is understandable that Respondent, from its perspective in this case, would raise such issues. However, the citation items are not being vacated on any of these issues but for the reasons noted above. Let me state categorically that the Commission is an independent agency set up to resolve disputes arising on a case-by-case basis and that we serve no interested parties, including employers, unions and the Department of Labor. Let me state further that my decision in this case is not an endorsement of a blanket attack on OSHA and its compliance officers and that it should not be construed as such. Rather, it is an unusual case in my experience. In this regard, I note that even the Secretary's counsel agreed that a better system of checks and balance should be implemented to prevent what happened here. (Tr. 222-25).

I have been an administrative law judge handling OSHA cases for many years. It is my opinion that OSHA has attempted to carry out its functions properly over the years and in fact has done so. In this regard, it must be remembered that the purpose of the Act is to assure to the extent possible safe and healthful working conditions in this country and that OSHA's mission is to enforce the Act with the tools available to it. In addition, employers have utilized the Act and the Commission to present their defenses and objections to OSHA's actions. At times OSHA prevails; at other times, the employer prevails. In some cases the union prevails. The handling of these cases gives me a basis for concluding that all parties that have appeared before me have had essentially a difference of opinion or a dispute requiring resolution by adjudication. Nowhere have I found, even where I made credibility determinations, that the sorts of criticisms of OSHA noted above were justified.

The undersigned is aware that one could conclude that these statements are unusual in a decision. However, each case is confined to its own facts, and the foregoing has been noted so that no one will be able to take this case out of context and argue that there is something wrong with the system. A system can always be improved, including the

adjudicatory process; however, the system is not in need of emergency CPR.[3] Accordingly, for the reasons set out above and limited thereto, all of the citation items in this case are vacated, with the suggestion that OSHA go back to the site and conduct further monitoring. At the same time, Respondent may want to check its administrative procedures with respect to not processing scrap metals with lead. Respondent may also want to consider performing monitoring itself prior to OSHA's return. Either way, the results will dictate what further actions, if any, need to be taken at Respondent's workplace.

Conclusions of Law

1. Respondent, Newell Recycling Company, Inc., is engaged in a business affecting commerce and has employees within the meaning of section 3(5) of the Act. The Commission has jurisdiction of the parties and of the subject matter of the proceeding.

2. Respondent was not in violation of 29 C.F.R. §§ 1910.1025(c)(1), 1910.1025(d)(2), 1910.1025(e)(3)(i), 1910.1025(f)(2)(iii), 1910.1025(g)(1), 1910.1025(g)(2)(ii), 1910.1025(i)(2)(i), 1910.1025(j)(1)(i), 1910.1025(l)(1)(ii) and 1910.1025(m)(2)(i).

Order

On the basis of the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Items 1-9 of serious citation 2 are VACATED.

Stanley M. Schwartz
Administrative Law Judge

Date: OCT 6 1995

[3]This conclusion, of course, is based on my own experience with respect to the Act as it is presently constituted. It goes without saying that the undersigned judge has no comment one way or the other with respect to any pending legislation concerning the reform of the Act. These areas are left to the policy-making branches.