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SECRETARY OF LABOR
Complainant,
v.
G-UB-MK CONSTRUCTORS
Respondent.

OSHRC DOCKET
NO. 92-3040

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 March 31, 1994. The decision of the Judge will become a final order of the Commission on May 2, 1994 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 April 20, 1994 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:

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Review Commission
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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: March 31, 1994

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 92-3040

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SECRETARY OF LABOR, Complainant, v. G-UB-MK CONSTRUCTORS, Respondent.	OSHRC Docket No. 92-3040

Appearances:

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Office of the Solicitor
U. S. Department of Labor
Nashville, Tennessee
For Complainant

William P. Snyder, Esquire
Kramer, Rayson, Leake, Rodgers & Morgan
Knoxville, Tennessee
For Respondent

Before: Administrative Law Judge Edwin G. Salyers

DECISION AND ORDER

This proceeding arises under the Occupational Safety and Health Act of 1970 (29 U.S.C., § 651, *et. seq*, hereafter referred to as the Act).

Respondent, G-UB-MK Constructors (G-UB-MK), at all times relevant to this action maintained a place of business at the Tennessee Valley Authority's (TVA's) Colbert Fossil Plant in Tuscumbia, Alabama, where it was engaged in modification and maintenance of steam generator units (boilers) (Tr. 541, 600). Respondent admits it is an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

On May 27 and 28, 1992, following receipt of an employee complaint, the Occupational Safety and Health Administration (OSHA) conducted an inspection of G-UB-MK's Colbert worksite (Tr. 11, 14, 20). As a result of the inspection, G-UB-MK was issued citations alleging a number of violations of the Act, together with proposed penalties. G-UB-MK filed a timely notice contesting the alleged violations in their entirety, bringing this matter before the Occupational Safety and Health Review Commission (Commission).

On April 27 and 29, 1993, a hearing was held in Florence, Alabama, on the contested issues. The parties have submitted briefs, and this matter is ready for disposition.

Alleged Violations

Serious Citation No. 1 alleges:

1
29 CFR 1910.1018(e)(5)(i): Each employee was not notified in writing within five (5) working days after receipt of monitoring results, which represented that employee's exposure to inorganic arsenic:

> a) Boiler 5, results of exposure monitoring were not provided to employees in writing within 5 days of receipt.

2a
The alleged violations below have been grouped because they involve similar or related hazards that may increase the potential for illness.

29 CFR 1910.1018(q)(3)(i): All records for inorganic arsenic required to be maintained by paragraph (q) of this section were not made available upon request to the Assistant Secretary and the Director for examination and copying:

> a) Boiler 5, records of all exposure monitoring were not made available for examination and copying.

2b
29 CFR 1910.1018(q)(3)(ii): Records requested, which are required to be maintained by paragraph (q) of this section, were not provided to employees, designated representative and Assistant Secretary:

a) Boiler 5, site labor representative did not receive arsenic exposure monitoring results after a written request was filed with the site manager.

3
29 CFR 1926.58(n)(5)(ii): Upon request, the employer did not make any exposure records required by 29 CFR 1926.58(f) and (n) available for examination and copying to affected employees, former employees, designated representatives, or the Assistant Secretary in accordance with 29 CFR 1910.20(a)-(e) and (g)-(i):

a) Boiler 5, site labor representative did not receive asbestos exposure monitoring results after a written request was filed with the site manager.

4
29 CFR 1926.59(e)(1): Employer had not developed or implemented a written hazard communication program which describes how the criteria in 29 CFR 1926.59(f), (g), and (h) will be met:

a) Boiler 5, a written hazard communication program had not been developed for employees exposed to hazardous chemicals such as asbestos, arsenic, welding fumes and ceramic fiber.

5
29 CFR 1926.59(h): Employees were not provided information and training as specified in 29 CFR 1926.59(h)(1) and (2) on hazardous chemicals in their work area at the time of their initial assignment and whenever a new hazard was introduced into their work area:

a) Boiler 5, information and training were not provided for employees exposed to hazardous chemicals such as asbestos, arsenic, welding fumes and ceramic fiber.

"Other" than serious Citation No. 2 alleges:

1
29 CFR 1910.20(g)(1): The employer did not provide current employees upon their first entering into employment and at least annually thereafter the information required in 29 CFR 1910.20(g)(1)(i) -(iii):

a) Boiler 5, at the time of initial employment employees were not informed of the existence, location, and availability of records covered by 29 CFR 1910.20. They were not informed of the person responsible for maintaining and providing access to records or of their rights of access to the records.

2
29 CFR 1910.134(b)(1): Written standard operating procedures governing the selection and use of respirators were not established:

a) Boiler 5, a written program was not developed for respirators used to provide protection against contaminants, such as arsenic, welding fumes, and ceramic fibers.

3
29 CFR 1910.134(b)(3): The users of respirators were not instructed and trained in the proper use of respirators and their limitations:

a) Boiler 5, training was not provided to employees wearing disposable respirators.

4
29 CFR 1926.59(g)(8): Employer did not maintain copies of the required material safety data sheets for each hazardous chemical in the workplace and ensure that they were readily accessible to the employees in their work area during each work shift:

a) Boiler 5, material safety data sheets were not available for welding rods which contain hazardous chemicals.

Alleged Violations of § 1910.1018

Fossil fuels, including coal, are commonly known to contain arsenic; when coal is burned, arsenic becomes concentrated in the cinders that result from combustion (Tr. 344). In a boiler, freed arsenic lodges in the boiler's pipes and may also be found in the boiler's particulate byproduct, "flyash" (Tr. 24).

Employees cutting pipe in the Colbert No. 5 boiler's economizer and precipitator, a collection device on the boiler's smoke stack which filters the combustion gases produced by the boiler, could be expected to release some form of arsenic into the air (Tr. 27, 345-346). Rolf Amundson, G-UB-MK's site manager (Tr. 625), testified that TVA arsenic

sampling had been reviewed and that G-UB-MK was aware there was a potential for arsenic exposures in the area, although past samplings had been well below PEL levels (Tr. 633). Northwest Envirocon, an industrial hygiene and environmental consulting firm retained by G-UB-MK, first conducted arsenic monitoring in G-UB-MK's work areas in the economizer and precipitator on April 17, 1992 (Exh. C-4; Tr. 492-494, 502). The results of the monitoring were sent to a lab for analysis and the results made available by phone to Don Feezell, G-UB-MK's area safety engineer, on approximately April 21, 1992 (Tr. 496-498). Further monitoring was performed on April 22, May 5 and May 20 (Tr. 24, 495). At Feezell's request, a complete package documenting the monitoring results was not provided to Feezell until all the monitoring was completed in mid-May (Tr. 499).

Eleven employees were monitored on April 17; ten registered exposures over OSHA's permissible exposure limit (PEL) of 10 micrograms per cubic meter averaged over an eight-hour day (Tr. 42). The highest exposure, 149.15 micrograms per cubic meter, was believed to be a false reading (Exh. C-4; Tr. 42, 507-509). Other readings show overexposures from 22.3 to 59.4 micrograms per cubic meter for the same day (Tr. 510-511). No overexposures were registered during later monitoring (Exhs. C-5, C-6, C-7; Tr. 43-44).

Bobby Terrell, the boilermaker's general foreman, testified that Don Feezell told him verbally of the arsenic results twelve to thirteen days after the initial arsenic monitoring (Tr. 721-726). Terrell stated all workers engaged at the economizer were orally notified of the monitoring results at that time (Tr. 722-726). Terry White, a boilermaker monitored for exposure to arsenic on April 17 (Tr. 274-276), testified, however, that he was unaware that he had been exposed to arsenic until a safety meeting on the subject of asbestos was held shortly before May 22 (Tr. 281-283).

Employees who had actually been monitored were eventually notified in writing of the monitoring results in letters drafted May 21, 1992 (Exh. R-22; Tr. 123, 641-42, 698). Compliance Officer Sharon Ratliff testified that on May 28 she was told by Amundson employees had not yet been notified (Tr. 29, 802). Terry White testified he received the monitoring results in a letter postmarked May 27 or 28 (Tr. 278). Other employees working in the area where monitoring was taking place were not notified in writing of the results (Tr. 123-124; *See also* testimony of Randy Pittman, Tr. 569-571). On May 28, Compliance

Officer Ratliff requested Amundson to provide her with G-UB-MK's records of arsenic exposure monitoring at that time (Tr. 35, 770, 799-801). Amundson refused stating that the data he had was not complete (Tr. 35-36, 769, 811).

David Faulkner, a site labor representative for Tennessee Valley Trades and Labor Council, told Ratliff that on approximately May 22, 1992, he had asked G-UB-MK to provide him with arsenic monitoring results, had been refused, and had not yet received any monitoring documents (Tr. 47; *See also* testimony of Faulkner, Tr. 219-220, 223). Faulkner further requested monitoring test results in a letter to Amundson dated May 28, 1992 (Exh. C-9; Tr. 47-49). On August 31, 1992, Faulkner told Ratliff he had not yet received a copy of the arsenic monitoring (Tr. 50). Faulkner testified that he received the arsenic monitoring on October 22, 1992 (Tr. 225).

Compliance Officer Ratliff testified that arsenic has been recognized as a cause of lung and skin cancer, as well as dermatitis and nasal perforations (Tr. 33). Dr. Carl Schultz, a board-certified toxicologist called by the Secretary (Tr. 312-342) agreed, testifying that inorganic arsenic is a carcinogen known to cause respiratory problems and lung and skin cancer in exposed populations (Tr. 343). Higher exposures for longer periods are associated with higher incidents of disease (Tr. 402). Schultz stated that cancer in humans exposed to carcinogens is a progressive disease. Specific symptoms may not appear until fifteen to thirty years after the initial exposure (Tr. 349).

Respondent's expert, Dr. Rupert Burtan, a board-certified specialist in occupational and environmental medicine (Tr. 371), took the view the arsenic exposures suffered by G-UB-MK's employees in the case at bar were unlikely to lead to serious illness or death (Tr. 421-423).[1] However, Dr. Schultz opined, "with a reasonable degree of scientific certainty," that the exposure of G-UB-MK's employees to the levels of arsenic they encountered in boiler No. 5 increased their risk of developing respiratory cancer and

[1] Dr. Burtan admitted, however, that his opinion (to the effect that there is a threshold exposure to carcinogens below which cancer is not a risk), is disputed in the scientific community (Tr. 426-430).

dermatitis[2] (Tr. 348-349, 355). For reasons which will be discussed below (see Classification Section, pg. 8, *infra*), the court concludes it is unnecessary for the Secretary to show an immediate exposure to serious injury to meet the burden of proof under the cited standard.

As Ratliff confirmed in her testimony, unless monitoring records are maintained and provided, employees do not know whether to request protective equipment or seek medical treatment (Tr. 54), nor can OSHA ascertain an employer's compliance with the arsenic standard or ensure employees' protection (Tr. 53).

Applicability

G-UB-MK argues that the inorganic arsenic regulations were never intended to apply to the intermittent arsenic exposure encountered by workers at coal-fired power plants. Section 1910.1018(a) unambiguously states:

> This section applies to *all* occupational exposures to inorganic arsenic except that this section does not apply to employee exposures in agriculture or resulting from pesticide application, the treatment of wood with preservatives or the utilization of arsenically preserved wood. (Emphasis added)

Section § 1910.1018, *et seq.*, is, on its face, applicable to G-UB-MK's operation. Because the scope of the regulation is clear, it is neither necessary nor proper to look to secondary sources to discover the drafter's intent. *Alaska Trawl Fisheries, Inc. & Golden Age Fisheries*, 15 BNA OSHC 1699, 1992 CCH OSHD ¶ 29,758 (Nos. 89-1017 & 89-1192, 1992).

Serious Citation No. 1, Item 1

Section 1910.1018(e)(5)(i) provides that:

> Within five (5) working days after the receipt of monitoring results, the employer shall notify each employee in writing of the results which represent that employee's exposures.

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[2] Dr. Burtan admitted that the literature in the field points to inorganic arsenic as a cause of lung cancer, although he stated his own research failed to show such a correlation (Tr. 375). Skin damage, however, was found in the study group Burtan discussed (Tr. 386).

It is undisputed that each employee working in boiler No. 5 was not notified in writing of monitoring results which represented that employee's exposure to inorganic arsenic. Moreover, G-UB-MK admits that the notifications that were sent out were not provided within five working days after G-UB-MK's receipt of the monitoring results (Tr. 32). A violation of § 1910.1018(e)(5)(i) is, therefore, established.

Classification

G-UB-MK disputes the classification of the violation as "serious," arguing that employee overexposures were insufficient and the delays in notification too brief to actually result in serious bodily harm.

According to § 17(k) of the Act, a violation is considered serious if the violative condition or practice gives rise to a "substantial probability" of death or serious physical harm. The test for determining the serious nature of violations of monitoring and reporting standards is not, therefore, whether actual overexposures to toxic materials were proven by the Secretary. The substantial probability of death or serious physical harm required by the Act refers not to any actual injury but to the probability that the hazard sought to be prevented by a given standard could result in death or serious physical harm. *Dec-Tam Corp.*, 15 BNA OSHC 2072, 1993 CCH OSHD ¶ 29,942 (No. 88-0523, 1993); *Phelps Dodge v. O.S.H.R.C*, 725 F.2d 1237 (9th Cir. 1984).

The Secretary has sufficiently established that employees unwittingly exposed to known carcinogens over their working life are exposed to a serious risk of harm. Exposures to carcinogens are admittedly cumulative; timely written notification of exposures is, therefore, required to allow exposed employees to track their increased risk of developing cancer.[3] Such information allows the employees to determine for themselves the need for medical surveillance or to refuse future work in areas of potential exposure. This is especially important where, as here, single job employers do not maintain medical surveillance for itinerant laborers. Failure to provide the required notification within the

[3] As evidenced by the testimony of employee Terry White, oral notification places an undue burden on the employee to recall and record monitoring results and is inadequate to fulfill the requirements and/or purpose of the standard.

time period established by the standard could result in unacceptable cumulative exposures for some workers.

Penalty

The Secretary has proposed a penalty of $2,250.

The gravity of the cited violation is moderate. Approximately forty boilermakers worked in the economizer area for a three- to five-week period (Tr. 34, 56-57). Large overexposures were recorded in the earliest monitoring, April 17. Although some workers were provided oral notification of the results, monitored employees did not receive written notification of their exposures until over a month later; exposed employees not monitored received no written notification.

G-UB-MK is a large company (Tr. 97, 596-597) with 427 craftsmen on the Colbert worksite at one point (Tr. 628). It has no history of prior violations (Tr. 97). The Secretary denied a good faith reduction based on G-UB-MK's failure to implement a safety and health program at the Colbert site (Tr. 98).

Taking the relevant factors into consideration, the undersigned finds that an additional 10 per cent reduction for good faith is warranted. Due to time constraints (Tr. 604), G-UB-MK temporarily adopted TVA's safety and health program rather than develop their own (Tr. 605-610). Although, as discussed below, that program may not have been tailored to meet the specific requirements of G-UB-MK's contract, this Judge cannot say the deficiencies in the program are sufficiently flagrant to demonstrate bad faith. In view of this circumstance, and considering the gravity factor to be moderate, a penalty of $1,500 will be assessed.

Serious Citation No. 1, Item 2a

Section 1910.1018(q)(3)(i) requires that:

> The employer shall make available upon request all records required to be maintained by paragraph (q) of this section to the Assistant Secretary and the Director for examination and copying.

The regulation clearly states that records required under the Act shall be provided to the Secretary *upon request*. The immediate compliance requisite precludes the fabrication or sanitization of required records.[4] G-UB-MK's refusal to provide the requested records to Compliance Officer Ratliff at the time of the inspection, therefore, constitutes a violation of the Act.

Penalties

Items 2a and 2b involve similar hazards that may increase the potential for harm. The proposed combined penalty is discussed below.

Serious Citation No. 1, Item 2b

Section 1910.1018(q)(3)(ii) provides:

> Records required by this paragraph shall be provided upon request to employees, designated representatives, and the Assistant Secretary in accordance with 29 CFR 1910.20(a) through (e) and (g) through (i).

Site representative Faulkner's undisputed testimony establishes that site manager Amundson was aware that Faulkner's May 28, 1992, letter requesting "all test results" referred, *inter alia*, to arsenic monitoring results, which Faulkner had verbally requested from Amundson a few days earlier. It is also undisputed that Faulkner did not receive the requested monitoring until October 22, 1992. This circumstance establishes a violation of the cited standard.

Classification

G-UB-MK argues that its failure to provide the required records should be classified as *de minimis*. The Commission, however, has held that access to medical and exposure records can play a crucial role in protecting employee health where employees are exposed to toxic substances within the scope of their employment. *General Motors Corp.*,

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[4] There is no suggestion, and this Judge does not imply, that G-UB-MK's refusal to provide exposure records was so motivated.

Electro-Motive Div., 14 BNA OSHC 2064, 1991 CCH OSHD ¶ 29,240 (Nos. 82-630, 84-731 & 84-816, 1991). G-UB-MK employees were overexposured to arsenic for an undetermined period. Failure to provide the compliance officer and employee representative with monitoring results delayed their ability to evaluate the arsenic hazard and assess the need for engineering or work practice controls. The violation here was properly deemed serious.

Penalty

The Secretary proposes a combined penalty of $2,250.

The relevant factors have been set forth in the penalty section for item 1. For the reasons discussed there, the proposed penalty is deemed excessive. The court considers the gravity factor to be moderate for items 2(a) and (b), and a further reduction for good faith is allowed. A total penalty of $1,500 is assessed.

Alleged Violations of § 1926.58

G-UB-MK had contracted with TVA to repair boiler No. 5, replacing the superheat element and economizer tube, and rehabilitating the chimney, precipitator and turbo generator (Exh. C-8, C-8a; Tr. 71, 532). This was undertaken in addition to "regular operations on end work maintenance" (Tr. 532). On the date of the inspection, G-UB-MK employees were engaged in cutting and welding pipe in the "penthouse" at the top of boiler No. 5 (Tr. 16-17).

G-UB-MK was aware that asbestos insulation had originally been used in the No. 5 boiler, but believed that it had since been removed (Tr. 632-633, 753). Asbestos monitoring was conducted in the penthouse on May 7, 1992, after an inspector discovered suspicious insulating material in the penthouse (Tr. 546, 633-634), and from May 19 through the date of the inspection (Tr. 59). Asbestos results require no laboratory testing and are available within thirty minutes of sampling (Tr. 503). The results of this monitoring were provided to the boilermakers' union job steward and posted at the boilermakers' lunchroom and tool room (Tr. 459, 487, 639, 657-658, 717, 720-721). All results obtained in monitoring were

below the OSHA PEL of .2 fibers per cubic centimeter over an eight-hour day, and below the action level of .1 fibers per cubic centimeter (Tr. 60).

David Faulkner testified that he requested asbestos monitoring results from Feezell and Amundson on May 18 or 20, 1992, after learning that boilermakers had been exposed to asbestos in the penthouse (Tr. 212-215, 242-244). Faulkner stated that he was advised all the data was not yet in (Tr. 216). However, a May 20, 1992, letter addressed to Faulkner containing asbestos sampling results was given to Faulkner by another employee on or about May 22, 1992 (Tr. 221). Faulkner admitted its contents were readily available to employees on the site (Tr. 234). Faulkner received the results of monitoring conducted after May 20 on October 22, 1992 (Tr. 236-237).

On May 28, 1992, Faulkner filed a grievance with Amundson which requested that the asbestos results be sent to the union halls of the trades represented on G-UB-MK's Colbert worksite and posted at the worksite itself (Exh. C-9; Tr. 222-223, 253).

Ratliff testified that asbestos is recognized as a cause of lung cancer. Without access to monitoring records, employees cannot know whether they are being adequately protected from exposure to asbestos, or whether to seek medical attention (Tr. 62). Approximately forty employees were working in the penthouse area when monitoring was conducted (Tr. 63).

Applicability of the Construction Standards

Part 1926 of the Act contains the safety and health regulations for construction. Those regulations are applicable to employers who are actually engaged in construction, alteration and/or repair of a building or structure, or who are engaged in operations that are an integral and necessary part of construction work. *United Geophysical Corp.*, 9 BNA OSHC 2117, 1981 CCH OSHD ¶ 25,579 (No. 78-6265, 1981), *aff'd without published opinion*, 683 F.2d 415 (5th Cir. 1982).

The Secretary has established that G-UB-MK was engaged in construction. G-UB-MK contracted solely for, and was engaged solely in, the repair, alteration and maintenance of TVA structures; specifically boiler unit No. 5. G-UB-MK's operations were separate from, and in no way ancillary, to the actual operation of the boiler unit. *See Royal*

Logging Company, 7 BNA OSHC 1744, 1979 CCH OSHD ¶ 23,914 (No. 15169, 1979), *aff'd*, 645 F.2d 822 (9th Cir. 1981). The cited construction standards are applicable.

Serious Citation No. 1, Item 3

The citation states:

> 29 CFR 1926.58(n)(5)(ii): Upon request, the employer did not make any exposure records required by 29 CFR 1926.58(f) and (n) available for examination and copying to affected employees, former employees, designated representatives, or the Assistant Secretary in accordance with 29 CFR 1910.20(a)-(e) and (g)-(i):
>
> > a) Boiler 5, site labor representative did not receive asbestos exposure monitoring results after a written request was filed with the site manager.

The record establishes that site representative Faulkner requested, but was not provided asbestos exposure monitoring results taken after May 20, 1992, until October 22, 1992. However, those results were posted on the site and were readily available to employees as well as to Faulkner, whose duties took him to the work areas for all the crafts on the site. As a practical matter, the court concludes respondent substantially complied with the intent of the standard by posting the results at the worksite. It did, however, seriously violate the standard's mandate to furnish the results to the employees designated representation upon request. The gravity factor is considered low, and a penalty of $500 is deemed appropriate.

Alleged Violations of § 1926.59

It is undisputed that G-UB-MK employees were exposed to hazardous chemicals including asbestos, arsenic, welding fumes and ceramic fibers (Tr. 64, 70-71), and that a written hazardous communication program was, therefore, required at the site.

Because of time constraints, G-UB-MK had not developed their own program, but expressly adopted the TVA program in its entirety (Exh. R-1; Tr. 65, 157, 603-604, 675-676). The TVA program, however, did not contain a list of chemicals which G-UB-MK employees would be using (Tr. 66, 146). In addition, the TVA program states that TVA's technical

services would be responsible for procuring all material safety data sheets (MSDSs), and for providing hazard communication training.

Compliance Officer Ratliff testified that TVA was not, in fact, responsible for procuring G-UB-MK's MSDSs (Tr. 66, 145-146). While G-UB-MK relied on TVA to provide its MSDSs, it did not actually arrange for the necessary MSDSs to be maintained on the jobsite (Tr. 686). Neither was TVA responsible for training G-UB-MK employees. G-UB-MK conducted its own safety training, which consisted of a thirty-minute orientation (Tr. 77, 675). Compliance Officer Ratliff testified that the employees she interviewed during the inspection did not know the location of MSDSs (Tr. 77; *See also* testimony of Randy Pittman, Tr. 565). David Faulkner testified that upon his hiring, he had received only five or ten minutes of orientation from Mr. Amundson which did not include any information regarding MSDSs (Tr. 210-211). Terry White testified that he specifically asked where MSDSs were kept and was told by Don Feezell that there were none at the time (Tr. 279-280).

Ratliff testified that G-UB-MK employees had not received hazardous chemical training (Tr. 77). Faulkner confirmed he did not receive any hazardous chemical training until approximately a month after the OSHA inspection (Tr. 211, 229, 239). Terry White verified he was not provided with any health hazard information on arsenic or asbestos or any other hazardous chemical prior to the OSHA inspection (Tr. 284). Sidney Dobbs, Jerry Greer and Randy Pittman, boilermakers who worked both in the penthouse and economizer (Tr. 449, 470-471, 542-543), confirmed they had never received any training on the health effects of either arsenic or asbestos (Tr. 448-449, 478, 565-567).

Serious Citation No. 1, Item 4

Section 1926.59(e)(1) requires that:

> Employers shall develop, implement, and maintain at the workplace, a written hazard communication program for their workplaces which as least describes how the criteria specified in paragraphs (f),(g), and (h) of this section for labels and other forms of warning, material safety data sheets, and training will be met, and which also includes the following:

> (i) A list of the hazardous chemicals known to be present using an identity that is referenced on the appropriate material safety data sheet (the list may be compiled for the workplace as a whole or for individual work areas) . . .

Amendment

As a threshold matter, the undersigned finds that G-UB-MK's request to dismiss this item based on OSHA's failure to provide adequate notice of the specific allegations is without merit.

G-UB-MK argues that the citation charges it only with failing to develop a hazard communication program. At the hearing, however, the Secretary's counsel stated that item 4 was based not on the absence of a program, but on inadequacies of the TVA program adopted by G-UB-MK. Respondent maintains that it was deprived of an opportunity to defend itself against those charges.

The citation states:

> a) Boiler 5, a written hazard communication program had not been developed for employees exposed to hazardous chemicals such as asbestos, arsenic, welding fumes and ceramic fiber.

Although the citation does not list specific deficiencies in G-UB-MK's program, OSHA's compliance officer enumerated those at the hearing, and G-UB-MK's attorney fully explored the matter on cross-examination (Tr. 144-168). The entire TVA program (Exh. R-18) was entered into evidence at trial, and its contents examined. This Judge cannot find that G-UB-MK is prejudiced by amendment of the pleadings to allege deficiencies in G-UB-MK's adoption of the TVA hazard communication program. The pleadings are, therefore, amended to conform to the evidence. *Advance Bronze, Inc. v. Dole,* 917 F.2d 944, 955 (6th Cir. 1990); *See also Bland Construction Company*, 15 BNA OSHC 1031, 1991 CCH OSHD ¶ 29,325 (No. 87-992, 1991).

The Violation

The evidence establishes that G-UB-MK had not developed or implemented its own written hazard communication program describing how the criteria in 29 CFR 1926.59(f), (g), and (h) will be met.

Section 1926.59(e)(3) provides:

> The employer may rely on an existing hazard communication program to comply with these requirements, provided that it meets the criteria established in paragraph (e).

Any hazard communication program adopted must, according to the standard, describe in writing how OSHA requirements regarding MSDSs and training will be met. It must also include a list of the hazardous chemicals known to be present in the employer's work areas.

G-UB-MK failed to tailor TVA's program to reflect the particular work conditions which would be encountered by its employees as required by the standard. Nothing in the written materials distinguishes between TVA's and G-UB-MK's procedures for making MSDSs or hazardous chemical training available to employees. Nor is any distinction made between the hazardous chemicals known to be present in the TVA facility as a whole and those to which G-UB-MK employees will be exposed.

References in a written program stating that a third party, TVA, was responsible for providing services actually provided by G-UB-MK are potentially misleading to employees using the program, as is an overinclusive list of hazardous chemicals. The undersigned finds that the cited standard requires an employer who wishes to adopt a hazardous chemical program developed by another employer must tailor the adopted program to address the concerns of its own employees. G-UB-MK was, therefore, in violation of the §1926.59(e).

Classification & Penalty

The record establishes that the cited violation was serious in nature. The Secretary maintains that without a written program, training in hazardous chemicals may not be implemented, exposing employees to serious harm. Employees who have not been trained

in the hazardous chemicals to which they are exposed in their workplace may not recognize symptoms of exposure and seek medical surveillance. They may not request protective control measures or personal protective equipment and may not be aware of effective emergency control measures.

In fact, as discussed below, under Citation No. 1, item 5, G-UB-MK did not implement the hazardous chemical training required under § 1926.59(h) for employees actually exposed to chemical hazards. The violation is serious.

The Secretary has proposed a penalty of $1,350. As discussed above, an additional reduction for moderate gravity and good faith is warranted. A penalty of $1,000 is assessed.

Serious Citation No. 1, Item 5

Section 1926.59(h) provides:

> *Employee information and training.* Employers shall provide employees with information and training on hazardous chemicals in their work area at the time of their initial assignment, and whenever a new hazard is introduced into their work area.[5]

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[5] Section 1926.59(h) mandates that training include:

> (1) *Information.* Employees shall be informed of:
>
> (i) The requirements of this section;
>
> (ii) Any operation in their work area where hazardous chemicals are present; and,
>
> (iii) The location and availability of the written hazard communication program, including the required list(s) of hazardous chemicals, and material safety data sheets required by this section.
>
> (2) *Training.* Employee training shall include at least;
>
> (i) Methods and observations that may be used to detect the presence or release of a hazardous chemical in the work area (such as monitoring devices, visual appearance or odor of hazardous chemicals when being released, etc.);
>
> (ii) The physical and health hazards of the chemicals in the work area;

(continued...)

It is undisputed that training was not provided to employees exposed to hazardous chemicals such as asbestos, arsenic, welding fumes and ceramic fiber.[6] G-UB-MK relied instead on training previously provided by other employers, specifically TVA, for whom many of the boilermakers had previously worked (Tr. 748-750). Though many of the boilermakers had prior hazardous communication program training (Tr. 751), G-UB-MK also employed at least 56 newly hired apprentices and boilermakers who had never worked for TVA before (Tr. 569, 788-789). The evidence does not reflect that these employees or, for that matter, any of G-UB-MK's employees, received hazardous communication training directly from G-UB-MK prior to the Secretary's inspection.

G-UB-MK violated the cited standard by its failure to provide any of its employees with the required training. Item 5 will be affirmed.

Classification & Penalty

For the reasons previously discussed, the undersigned finds that item 5 is a serious violation with moderate gravity. A penalty of $1,500 is considered appropriate and will be assessed.

"Other" Than Serious Citation No. 2, Item 1

Section 1910.20(g)(1) requires:

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[5](...continued)

> (iii) The measures employees can take to protect themselves from these hazards, including specific procedures the employer has implemented to protect employees from exposure to hazardous chemicals, such as appropriate work practices, emergency procedures, and personal protective equipment to be used; and,
>
> (iv) The details of the hazard communication program developed by the employer, including an explanation of the labeling system and the material safety data sheet, and how employees can obtain and use the appropriate hazard information.

[6] Upon hiring, written materials provided to G-UB-MK employees generally warn that there are hazards associated with exposure to asbestos and advise the use of control measures and personal protective equipment (Tr. 162-163). This fact does not equate to training.

> Upon an employee's first entering into employment, and at least annually thereafter, each employer shall inform current employees covered by this section of the following:
>
> (i) The existence, location, and availability of any records covered by this section;
>
> (ii) The person responsible for maintaining and providing access to records; and
>
> (iii) Each employee's rights of access to these records.

Compliance Officer Ratliff testified the employees she interviewed during her inspection confirmed that, upon hiring, they had not been told of the existence, location and availability of employee exposure records covered by § 1910.20. They were not informed of the person responsible for maintaining and providing access to records or of their rights of access to the records (Tr. 81). David Faulkner verified he was not informed of the location or availability of monitoring records at the Colbert site (Tr. 230). White, Dobbs, Greer and Pittman testified they were never informed of their right to review the results of G-UB-MK's hazardous chemical monitoring or of the location of the results of such monitoring (Tr. 289, 452, 480, 572).

The Violation

G-UB-MK does not dispute the allegations set forth by the Secretary but argues that the cited section is inapplicable because it had no exposure monitoring records at the time of its employees' initial employment. This argument is without merit. G-UB-MK's interpretation of the standard would allow employers creating records required under § § 1910.20 for the first time to withhold this information from employees for up to a year--an absurd result.

As discussed above, G-UB-MK was aware prior to the start of the boiler rehabilitation that both arsenic and asbestos were potentially present at the worksite, and should have reasonably anticipated that monitoring and the creation of exposure records might become necessary. In any event, once actual monitoring commenced, it was the employer's duty to fulfill the requirements of the standard.

Classification and Penalty

G-UB-MK argues that this violation should properly be classified as *de minimis*. The undersigned does not agree. As discussed under serious Citation No. 1, items 1 and 2 above, access to exposure records are necessary to allow exposed employees to track their increased risk of developing cancer, to determine the need for medical surveillance, or to refuse future work in areas of potential exposure. Therefore, there is some relationship between employee safety and health and an employer's failure to inform those employees of the availability of hazardous chemical exposure records. This item will be affirmed as "other" than serious with no penalty assessed as proposed by the Secretary.

"Other" Than Serious Citation No. 2, Item 2

Section 1910.134(b)(1) provides:

> Written standard operating procedures governing the selection and use of respirators shall be established.

Compliance Officer Ratliff based this charge upon her conclusion that G-UB-MK had not established a written respirator program covering the procedures for selection and use of respirators which would provide protection against contaminants, such as arsenic, welding fumes and ceramic fibers (Tr. 84).

At the hearing of this case, G-UB-MK introduced a copy of TVA's respirator training manual, which was part of the TVA safety program adopted by G-UB-MK (Tr. 187). Ratliff, after reviewing the manual, testified the TVA procedures were adequate to meet the requirements of the standard (Tr. 188). She further testified that neither Feezell nor Amundson gave her the manual at the time of her inspection or at a September 3, 1992, closing conference but had shown her only a TVA policy statement concerning respirators and facial hair (Tr. 83-87).

The Violation

The cited standard requires only that a respiratory program be established. Under the facts of this case, the Secretary has not shown by a preponderance of the evidence that G-UB-MK violated the cited standard.

Item 2 of Citation No. 2 will be vacated.

"Other" Than Serious Citation No. 2, Item 3

Section 1910.134(b)(3) provides:

> (b) *Requirements for a minimal acceptable program*. . . (3) The user shall be instructed and trained in the proper use of respirators and their limitations.

Moldex 2200 dust masks were in use at the Colbert site (Tr. 84). Compliance Officer Ratliff testified, without contradiction, that the Moldex 2200 dust and mist respirator, which purifies the air being breathed, is a NIOSH-certified respirator (Tr. 191). Ratliff concluded that employees using the respirators were not instructed and trained in their proper use and limitations (Tr. 88-89), and that employees were using the dust masks to reduce their exposure to "flu gas," or sulfur dioxide, against which the Moldex 2200 provides no protection (Tr. 89-90). Ratliff's main concern was that the Moldex 2200 is not approved for use in atmospheres containing asbestos, arsenic, welding fumes or hazardous air contaminants to which G-UB-MK employees were potentially exposed (Tr. 80, 92).

Terry White confirmed he had received no training or information on respirator use at the Colbert site (Tr. 285). Faulkner testified he was unaware of any respirator program, and had not received any instruction on the limitations of the dust mask in use at the jobsite (Tr. 226-227). Sidney Dobbs testified he never received any training in the use or limitations of respirators, including the dust mask he wore when working around dust in the penthouse (Tr. 446-447). Jerry Greer stated he did not receive respirator training. Without management approval, Greer used a twin canister respirator he found in a tool box on the site until the filters became too clogged for further use (Tr. 474-476).

Amundson testified he instructed new employees to wear disposable paper respirators according to "the instructions on the box" when he conducted their orientation. He also informed them they should be clean shaven when using the masks and that the masks were ineffective for fumes and hazardous vapors (Tr. 681-682). Amundson admitted that he did not conduct the orientation for later hires but delegated that duty to his staff (Tr. 675-677).

The Violation

The testimony of G-UB-MK employees establishes that training was not provided to all employees wearing disposable respirators. Amundson had no direct knowledge of the contents of the employee orientations which, if conducted at all, were conducted by others; his testimony is, therefore, insufficient to rebut the Secretary's evidence.

Nor is there any merit to G-UB-MK's argument that some employees had prior respirator training (Respondent's Brief, pg. 82). There is no evidence that G-UB-MK made an effort to ascertain the prior training level of each employee. Moreover, not all the employees testifying, *e.g.*, Dobbs and Greer, had received any prior training in the use of respirators by G-UB-MK or any of their previous employers.

In support of its argument that this item should be vacated, G-UB-MK cites *Kenco Casing & Pulling, Inc.*, 11 BNA OSHC 1911, 1983 CCH OSHD ¶ 26,839 (No. 82-210, 1984); *Blocksom & Co.*, 11 BNA OSHC 1255, 1983 CCH OSHD ¶ 26,452 (No. 76-1897, 1983); and *Gulf Oil Corp.*, 11 BNA OSHC 1477, 1983 CCH OSHD ¶ 26,529 (No. 76-5014, 1983). In *Kenco*, an unreviewed administrative law judge decision which has no precedential value, the ALJ found the involved employees had actually received the necessary training from a previous employer and held § 1910.134(b)(3) "does not require that the employees' specific employer must have given him the training." *Id.* at 1912. The facts in *Kenco* are, therefore, distinguishable from the facts at bar. *Blocksom* is also inapposite on both the facts and the law. In that case, the employer initially had respirators on the worksite for use by its employees in the event of fire. At the time of the Secretary's inspection, however, the employer had changed its policy from one in which the employees would actually engage in fire-fighting operations and require the respirators to one where the fire would be fought

by nearby fire departments and employees would immediately vacate the premises. In view of this circumstance, the Commission vacated the citation holding:

> The cited standard requires that the user of a respirator be properly trained in its use and limitations. The mere presence of respirators on a jobsite does not trigger the training requirement. In this case, it appears that Blocksom at one time did intend that the respirators would be used by employees in fighting fires. However, at the time of the alleged violation, Blocksom no longer intended that the respirators be used but had a policy to evacuate the plant in the event of any fire beyond immediate control and to rely on its automatic sprinkler system and the nearby fire departments to control all other fires. Thus, under the circumstances of this case, training in the respirators was not required. *Id.* at 33,595-596.

Gulf Oil is also distinguishable upon the facts. In *Gulf*, the Commission overturned a violation of § 1910.134(b)(3) upon its conclusion that the Secretary's evidence failed to show "exposure to hazardous air contaminants." It, therefore, held "a hazard requiring the use of respirators must be shown before an employer is obligated to provide respirator training."[7] *Id.* at 33,819. Since the evidence in the case at bar reflects actual or potential exposure of employees to toxic chemicals, these employees should have been provided with appropriate respirators and should have been trained in their use and limitations.

Exposures to toxic chemicals is established by the record. Up to 125 boilermakers were potentially exposed to toxic substances for approximately two months (Tr. 80) without the benefit of proper training.

For the reasons previously discussed, an additional reduction in the Secretary's proposed penalty of $900 is appropriate. A penalty of $500 will be assessed.

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[7] In his dissenting opinion in *Gulf*, Commissioner Cleary takes issue with his colleagues' insistence that the Secretary must establish actual or potential employee exposure to dangerous levels of toxic substances before the cited standard is triggered. In his view, it is unnecessary to show exposure in excess of the PEL (permissible exposure limits) established in § 1910.1000 before § 1910.134 can be applied. *Id.* at 33,820-821. In the opinion of the undersigned, Commissioner Cleary's views expressed in his dissent more accurately interpret the intent and purpose of the respirator standard. Recent Commission decisions reflect a trend more in line with Cleary's dissent and in favor of a liberal construction of the respirator standard to protect employees actually and/or potentially exposed to air contaminants from the health consequences of such exposures. *See Power Fuels, Inc.*, 1991 CCH OSHD ¶ 29,304 (No. 85-166, 1991); *Pride Oil Well Services*, 1992 CCH OSHD ¶ 29,807 (No. 87-692, 1992).

"Other" Than Serious Citation No. 2, Item 4

Section 1926.59(g)(8) requires:

> The employer shall maintain copies of the required material safety data sheets for each hazardous chemical in the workplace, and shall ensure that they are readily accessible during each work shift to employees when they are in their work area(s).

Compliance Officer Ratliff testified that during her inspection, TVA safety personnel could not locate an MSDS for welding rods which contain hazardous chemicals (Tr. 92-94, 199). Joseph Thomas, a TVA maintenance superintendent, testified that the compliance officer was able to locate all the MSDSs she was looking for except the welding rod sheet (Tr. 742). Later that day or the next, Thomas was able to locate the missing MSDSs which had been misfiled (Exh. R-4; Tr. 746-747). While this circumstance may constitute a technical violation of the standard, the evidence is insufficient to show G-UB-MK had knowledge of the cited condition. The court views this occurrence as a "clerical error" which was corrected upon discovery.

The Violation

In order to prove a violation of section 5(a)(2) of the Act, the Secretary must show, *inter alia*, that the cited employer either knew or could have known of the condition with the exercise of reasonable diligence. *See, e.g., Walker Towing Corp.*, 14 BNA OSHC 2072, 2074, 1991 CCH OSHD ¶ 29,239, p. 39,157 (No. 87-1359, 1991). The Secretary failed to prove that G-UB-MK knew or should have known the missing MSDS had been misfiled.

Item 4 of Citation No. 2 will be vacated.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

All findings of fact and conclusions of law relevant and necessary to a determination of the contested issues have been found specially and appear in the decision above in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

ORDER

1. Serious Citation No. 1, item 1, alleging a violation of § 1910.1018(e)(5)(i), is affirmed and a penalty of $1,500 is assessed.

2. Serious Citation No. 1, items 2a and 2b, alleging violations of § 1910.1018(q)(3)(i) and (ii), are affirmed and a penalty of $1,500 is assessed.

3. Serious Citation No. 1, item 3, alleging a violation of § 1926.58(n)(5)(ii), is affirmed and a penalty of $500 is assessed.

4. Serious Citation No. 1, item 4, alleging a violation of § 1926.59(e)(1), is affirmed and a penalty of $1,000 is assessed.

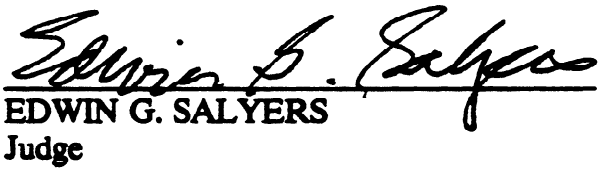
5. Serious Citation No. 1, item 5, alleging a violation of § 1926.59(h), is affirmed and a penalty of $1,500 is assessed.

6. "Other" than serious Citation No. 2, item 1, alleging a violation of § 1910.20(g)(1), is affirmed without penalty.

7. "Other" than serious Citation No. 2, item 2, alleging a violation of § 1910.134(b)(1), is vacated.

8. "Other" than serious Citation No. 2, item 3, alleging a violation of § 1910.134(b)(3), is affirmed and a penalty of $500 is assessed.

9. "Other" than serious Citation No. 2, item 4, alleging a violation of § 1910.59(g)(8), is vacated.



EDWIN G. SALYERS
Judge

Date: March 24, 1994