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

SECRETARY OF LABOR, Complainant, v. ALL ERECTION & CRANE RENTAL CORP., Respondent.	OSHRC Docket No. 09-1451

ON BRIEFS:

John Shortall, Attorney; Heather R. Phillips, Counsel for Appellate Litigation; Joseph M. Woodward, Associate Solicitor of Labor for Occupational Safety and Health; M. Patricia Smith, Solicitor of Labor; U.S. Department of Labor, Washington, DC
For the Complainant

Tod T. Morrow, Esq; Morrow & Meyer LLC, North Canton, OH
For the Respondent

DECISION

Before: ROGERS, Chairman; ATTWOOD, Commissioner.

BY THE COMMISSION:

This case arises from a clean-up operation conducted in Cleveland, Ohio, by All Erection & Crane Rental Corporation at a building it owned, which had fallen into disrepair. After inspecting the worksite, the Occupational Safety and Health Administration issued All Crane a six-item, serious citation and a one-item, other than serious citation, alleging violations of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678. Following a hearing, Administrative Law Judge Dennis L. Phillips affirmed all but one of the citation items. All Crane sought review of the judge's decision, and the case was directed for review to consider two of the affirmed items: a violation of 29 C.F.R. § 1910.151(a), a provision of the medical services and first aid standard, based on All Crane's alleged failure to obtain medical treatment for a worker injured during the clean-up operation; and a violation of 29 C.F.R.

§ 1910.1001(j)(2)(i),[1] a provision of the asbestos standard, based on All Crane's alleged failure to conduct an asbestos survey of the building. For the reasons set forth below, we vacate both items.

DISCUSSION

"In order to prove a violation . . . the Secretary must show by a preponderance of the evidence that (1) the cited standard applies, (2) there was a failure to comply with the cited standard, (3) employees had access to the violative condition, and (4) the cited employer either knew or could have known of the condition with the exercise of reasonable diligence." *Astra Pharm. Prods., Inc.*, 9 BNA OSHC 2126, 2129, 1981 CCH OSHD ¶ 25,578, pp. 31,899-900 (No. 78-6247, 1981), *aff'd in pertinent part*, 681 F.2d 69 (1st Cir. 1982). Based on our review of the record, the Secretary failed to establish All Crane's noncompliance with both § 1910.151(a) and § 1910.1001(j)(2)(i).[2]

I. Serious Citation 1, Item 4 – 29 C.F.R. § 1910.151(a) (Medical Services)

As part of All Crane's clean-up operation, workers threw debris out windows from the building's upper floors into an open-air courtyard below. One of the workers ("Worker-A") was in the courtyard and was injured when a table leg thrown from an upper-level window hit her in the head. Worker-A approached Matt Johnson, an All Crane maintenance foreman and supervisor of the clean-up workers, and showed him that there was a lump near her left temple caused by the table leg. Johnson offered to take Worker-A to a nearby hospital, but she declined the offer. However, Worker-A accepted Johnson's offer to drive her to a nearby store where he bought ice for her to apply to her injury. He also took pictures of her injury and told her she did not have to continue working for the rest of the day. Worker-A returned to work the following day, and the day after that signed a "Medical Treatment Refusal" form at the request of Labor Ready—a company that supplied workers, including Worker-A, to All Crane for the project—in which she stated that she had voluntarily declined treatment of her injury.

[1] At the time the citation was issued, this provision appeared at § 1910.1001(j)(2)(i). It now appears at § 1910.1001(j)(3)(i). *See* Hazard Communication, 77 Fed. Reg. 17,574, 17,778 (Mar. 26, 2012) (final rule). We will refer to § 1910.1001(j)(2)(i) for consistency with the citation.

[2] All Crane argues that that its clean-up work was part of a construction project and, therefore, the cited general industry standards do not apply. Because we vacate these citation items on the ground that the Secretary failed to show noncompliance, we need not reach this issue.

Based on the circumstances of Worker-A's injury, the Secretary alleges that All Crane violated § 1910.151(a), which provides that "[t]he employer shall ensure the ready availability of medical personnel for advice and consultation on matters of plant health."[3] The judge affirmed this item, concluding that All Crane was "obligated to advise [Worker-A] . . . that medical personnel were readily available for advice and consultation," to "tell [her] that she needed to, or should, have her head injury examined by a doctor or other medical personnel," to provide "treat[ment] by [some]one at the building trained in first aid," and/or to contact "a physician or nurse by telephone for advice or consultation." On review, All Crane argues that it complied with § 1910.151(a) by offering to take Worker-A to a nearby hospital, and was not required under the standard to take further action upon her refusal of the offer.[4] The Secretary responds that All Crane's offer fell short of "ensur[ing]" that medical personnel were readily available, in particular because the company "knew that [Worker-A] had sustained a head injury serious enough to raise a bump."

When the meaning of a provision is in dispute, as it is here, "we first examine the language of the standard." *Nooter Constr. Co.*, 16 BNA OSHC 1572, 1574, 1993-1995 CCH OSHD ¶ 30,345, pp. 41,837-38 (No. 91-0237, 1994). Section 1910.151(a) states only that an employer must "ensure the *ready availability* of medical personnel," 29 C.F.R. § 1910.151(a) (emphasis added). The term "available" is defined as "accessible" or "obtainable," and "ready" means "prepared for immediate use." Webster's New Collegiate Dictionary 77, 954 (1979). Taken together, these definitions show that the "ready availability" of an item means that it must

[3] On review, All Crane claims that § 1910.151(a) is inapplicable here because it refers to "plant health," and the company's worksite was not a plant. All Crane, however, did not raise this argument before the judge, so we decline to address it. *See* Commission Rule 92(c), 29 C.F.R. § 2200.92(c) ("The Commission will ordinarily not review issues that the Judge did not have the opportunity to pass upon."); *Altor, Inc.*, 23 BNA OSHC 1458, 1461 n.7, 2011 CCH OSHD ¶ 33,135, p. 55,132 n.7 (No. 99-0958, 2011) ("[W]e see no basis to address that issue given the Secretary's failure to preserve her objections before either of the judges that were assigned to this matter below."), *aff'd*, 498 F. App'x 145 (3d Cir. 2012) (unpublished).

[4] All Crane also argued before the judge and in its petition for review that it could not be cited for a violation predicated on Worker-A's injury, because she was one of the workers provided to All Crane by Labor Ready and, therefore, was not an employee of the company for purposes of the OSH Act. *See, e.g., Allstate Painting & Contracting Co.*, 21 BNA OSHC 1033, 1035, 2004-2009 CCH OSHD ¶ 32,804, p. 52,506 (No. 97-1631, 2005) (consolidated) ("[T]he Secretary has the burden of proving that a cited respondent is the employer of the affected workers at the site."). The judge concluded otherwise, and we find no reason to question this determination.

be close at hand—actual obtainment is not necessarily required. *See, e.g., Froedtert Mem'l Lutheran Hosp., Inc.*, 20 BNA OSHC 1500, 1510, 2002-2004 CCH OSHD ¶ 32,703, p. 51,737 (No. 97-1839, 2004) ("The standard [at 29 C.F.R. § 1910.1030(f)(2)(i)] . . . requires only that the vaccine be 'made available' . . . [and] does not require . . . that exposed employees agree to receive . . . any vaccine at all."). This is consistent with the provision immediately following § 1910.151(a), which indicates that a nearby hospital qualifies as the "ready availability" of medical personnel, because it requires employers to have "a person . . . adequately trained in first aid" at the worksite only "[i]n the absence of a[] . . . hospital in near proximity." 29 C.F.R. § 1910.151(b).

Contrary to the Secretary's claims here, All Crane made medical personnel readily available to Worker-A when Johnson offered to take her to the hospital. There is no evidence that Worker-A exhibited any signs of distress or disorientation that should have caused Johnson to question her capacity to meaningfully choose whether to consult with medical personnel. In fact, the record shows that after she was hit by the table leg, Worker-A walked up to one quarter-mile, with no ill effects, to report the injury to Johnson. In these circumstances, Johnson acted reasonably in respecting her decision to refuse the offer, and complied with the requirement to "ensure the ready availability of medical personnel for advice and consultation." 29 C.F.R. § 1910.151(a).

We also find no support in the record for the judge's characterization of All Crane's response to Worker-A's injury as unreasonable. First, the judge found that Johnson allowed Worker-A to refuse treatment while "believ[ing] that she was subject to the effects of having recently smoked marijuana." But Johnson's testimony shows that he did not believe Worker-A was under the influence of marijuana at the time of the injury. Rather, he had heard that Worker-A smoked marijuana, and he simply speculated that she refused treatment because she was worried about being drug-tested at the hospital. Second, the judge found that All Crane's photographic documentation of Worker-A's injury and her completion of the "Medical Treatment Refusal" form show "that [All Crane's] primary focus . . . was on [its] concerns for potential liability . . . rather than any actual concern for [Worker-A's] medical well[-]being." We disagree. Completion of the form was requested by Labor Ready, not All Crane. In any event, such basic business procedures do not undermine Johnson's offer at the outset to drive

Worker-A to the hospital, and there is no evidence in the record to support the judge's characterization of Johnson's offer as "half-hearted."[5]

In short, the record shows that All Crane acted reasonably under the circumstances presented by Worker-A's injury, and we therefore conclude that the company complied with the cited standard. Accordingly, we reverse the judge and vacate Citation 1, Item 4.

II. Other-than-Serious Citation 2, Item 1 – 29 C.F.R. § 1910.1001(j)(2)(i) (Asbestos)

Under this item, the Secretary alleges a violation of 29 C.F.R. § 1910.1001(j)(2)(i), which requires building owners to survey their worksites for asbestos:

> Building and facility owners shall determine the presence, location, and quantity of [asbestos-containing material] and/or [presumed asbestos-containing material] at the work site. Employers and building and facility owners shall exercise due diligence in complying with these requirements to inform employers and employees about the presence and location of [asbestos-containing material] and [presumed asbestos-containing material].

The Secretary claims that All Crane violated this provision because "a survey had not been completed . . . to determine the presence, quantity and location of asbestos-containing materials" in the building where the clean-up crew was working.[6] The judge, relying on the CO's testimony and that of All Crane claims manager and former safety manager Charles Boettner, found that the company did not conduct an asbestos survey of the building, and he affirmed this item.

The evidence as to whether All Crane conducted an asbestos survey is equivocal at best and reflects the record's limited development. The CO testified that when she asked Boettner for the survey during the inspection, he told her that he "was not sure whether a survey had been done" and "thought perhaps another entity might have done" one. Similarly, Boettner testified that he "ha[d] no knowledge whether [the company] did or did not" conduct such a survey. But the Secretary did not question him further on this point or lay a foundation that might have established Boettner as the individual at All Crane who would know if an asbestos survey had

[5] In fact, when testifying about whether Johnson offered to drive her to the hospital, Worker-A admitted, without equivocation or additional comment, that he did, and that someone from All Crane "mentioned [that] you might want to go to the hospital."

[6] The Secretary appears to focus on whether All Crane "possess[ed]" an asbestos survey, even though the cited provision of the standard requires no such physical document. The provision that follows does require building owners to "maintain records of all information . . . known to [them] concerning the presence, location and quantity of [asbestos containing material] . . . in the building/facility," 29 C.F.R. § 1910.1001(j)(2)(ii), but All Crane was not cited under that provision.

been conducted. Nor did the Secretary submit into evidence any discovery—such as interrogatories, document requests, requests for admission, or responses thereto—to establish that such a survey had not been conducted. Consequently, on this record, the CO's testimony that she "was never able to track down an asbestos survey" does not establish All Crane's failure to conduct one.[7]

Under these circumstances, we conclude that the Secretary has not carried his burden of showing that All Crane failed to "determine the presence, location, and quantity of [asbestos-containing material] . . . at [its] work site." 29 C.F.R. § 1910.1001(j)(2)(i). Accordingly, we reverse the judge and vacate Citation 2, Item 1.

ORDER

We vacate Citation 1, Item 4, and Citation 2, Item 1.

SO ORDERED.

/s/
Thomasina V. Rogers
Chairman

/s/
Cynthia L. Attwood
Commissioner

Dated: January 23, 2014

[7] The Secretary implies as much on review, stating that the record here merely "rais[es] at least the strong inference that All Crane did not possess [such] a survey." Indeed, we note that the OSHA 1B worksheet prepared by the CO—introduced by All Crane at the hearing and admitted into evidence by the judge—suggests that some type of assessment was conducted. According to the worksheet, "[t]here have been at least 2 asbestos removal projects" at All Crane's building, and "[i]n both cases someone had identified that the pipe insulation was asbestos-containing and a specific need arose to have it removed."

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SECRETARY OF LABOR,

Complainant,

v.

ALL ERECTION & CRANE RENTAL CORP.,

Respondent.

OSHRC Docket No. 09-1451

APPEARANCES:

Paul Spanos, Esquire, U.S. Department of Labor, Cleveland, Ohio
For the Complainant.

Tod T. Morrow, Esquire, Morrow & Meyer LLC, North Canton, Ohio
For the Respondent.

BEFORE: Dennis L. Phillips
Administrative Law Judge

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") under section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq*. ("the Act"). On May 5, 2009, the Occupational Safety and Health Administration ("OSHA") began an inspection of a work site of Respondent, All Erection & Crane Rental Corp. ("Respondent" or "All Crane"). As a result of the inspection, on July 24, 2009, OSHA issued to All Crane a six-item "serious" citation and a one-item "other" citation. All Crane contested the citations and

the proposed penalties. The hearing in this matter was held in Cleveland, Ohio, on April 13, 2010. Both parties have filed post-hearing briefs. The Secretary has filed a reply brief. The affirmative defenses of "greater hazard," "unpreventable employee misconduct" and "unpreventable misconduct of third parties" raised by Respondent in its Answer are found to have been abandoned by Respondent and lack merit. (Answer, at p. 2). *See Dole Packaged Food Co. et al.,* 1989 WL 223471, at * 4 (Nos. 88-0665 and 88-2672, 1989).

Background

All Crane, located in Independence, Ohio, is in the business of renting, repairing and selling cranes and other construction equipment. It employs about 190 employees and has been in business since 1964. Due to a debt judgment owed by a creditor, All Crane acquired the Richman Brothers Building ("building") that had previously housed a clothing manufacturing business. The building, located at 1600 East 55 Street, Cleveland, Ohio, is an older property with more than 600,000 square feet. All Crane attempted to sell the building but was unsuccessful. The building fell into disrepair. Some months before the OSHA inspection, the City of Cleveland ("the City") ordered All Crane to clean up and dispose of the debris inside the building. The City also ordered All Crane to secure the building, as transients and others were breaking into the property. The debris in the building included combustible materials, such as wood, and pigeon waste, as windows were broken and areas of the roof were gone. (Tr. 21-22, 25-27, 129, 140, 145, 161, 178, 195, 200, 208-12; Exh. H, at pp. 1-4).

All Crane contracted verbally with CR Construction ("CR") to board up the windows of the building. It next asked CR to do the cleanup work, but after two or three days was dissatisfied with the company in that regard. All Crane then learned of Labor

Ready ("LR"), located in Bedford, Ohio which provides workers for various types of jobs. Charles Boettner, All Crane's claims manager, spoke with LR's Mark Walsh, who stated that he had a crew with experience in cleanup/debris removal work. Mr. Boettner met with Mr. Walsh to further discuss the job. Mr. Walsh also visited the site with Mr. Boettner to assess the work that was to be done. On April 9, 2009, Mr. Boettner and Ms. Lilly Gorman, LR's Contract Manager, signed Exhibit 7, a contract between All Crane and LR for LR to provide workers for the cleanup work at the building. The contract, entitled "Confirmation of Rates and Services," has two pages. Page 2 is "The Addendum to Confirmation of Rates and Service" ("Addendum") (together the two pages are referred to as the "contract"). (Tr. 70, 76-77, 82, 212-21; Exhs. 7, A, E, at p. 1).

Page 1 of the contract sets out general responsibilities of the parties. Paragraph 1 on page 1 sets out LR's responsibilities as follows:

> Labor Ready Responsibilities. Included in Labor Ready's Regular Bill Rate are all wages, withholdings, FICA, Medicare, payroll taxes, unemployment insurance and workers' compensation insurance….

Paragraph 2 on page 1 sets out All Crane's responsibilities as follows:

> Customer Responsibilities. Provide adequate supervision and accurately record all hours worked, including overtime….

Paragraph 4 on page 1 of the contract describes safety responsibilities:

> Safety! Since our **[LR] workers will be under your [All Crane] supervision, they [LR workers] need to be included in your [All Crane] safety program and you [All Crane] are required to comply with safety regulations and provide any necessary site-specific safety training and equipment** except as otherwise stated in the Addendum attached hereto and incorporated by reference herein. Labor Ready conducts a 20-point pre-employment safety screening and provides general safety awareness through our Health & Safety Program. We [LR] can also provide drug and background screening at your [All Crane] request for an additional fee. [Bracketed Material and emphasis added].

The Addendum at page 2 of the contract describes the job and sets out

further party responsibilities:

> All Crane desires to hire Labor Ready to provide employees to perform general debris clean-up work, **dispose of debris into an elevator shaft**, and broom-sweep floors and stairwells (the "Work") at the following property owned by All Crane Richmond Brothers Building, E. 55th Street, Cleveland, Ohio (the "jobsite")…. [emphasis added]. [T]he parties hereto agree as follows:
>
> 1. Labor Ready's Representations and Obligations. Labor Ready acknowledges and agrees as follows:
>
> (a) To furnish competent employees who are generally familiar with and experienced in building construction clean-up operations;
> (b) To provide a roster of the names of Labor Ready's employees assigned to perform the Work at the Jobsite, and update the roster if/when any changes are made;
> (c) To perform the Work in strict compliance with the Contract and all specifications and/or directions provided by All Crane;
> (d) To perform the Work in accordance with the schedule provided by All Crane, including any revisions thereto;
> (e) To designate two (2) employees to work the elevator shaft area at the Jobsite who are qualified to perform such Work;
> (f) To provide its [LR] employees, and require such employees to wear, the following safety equipment: hard hat, safety glasses, dust mask, gloves, and steel-toe boots;
> (g) To provide its [LR] employees with sufficient quantities of water and hand sanitizer.
>
> 2. All Crane's Representations and Obligations. All Crane acknowledges and agrees as follows:
>
> (a) To provide at least one (1) on-site supervisor to direct Labor's Ready's employees' Work;
> (b) To provide one restroom facility for the employees' use;
> (c) **To provide** trash bags, shovels, brooms, flashlights, 4-wheel carts, and **other equipment** for the [LR] employees' use during the performance of their [LR workers] Work.
>
> … [Bracketed material and emphasis added].

(Tr. 219; Exhs. 7, A).

After the contract was signed, work began at the site. Matt Johnson and Jaime Vernon, Maintenance Superintendent, were the two All Crane employees who supervised the LR employees at the site. The supervisors opened up the building in the morning and

told the LR employees what areas to clean out that day. The supervisors also operated the forklift and the backhoe All Crane had provided at the site. The backhoe was used to put debris into dumpsters that were placed in different areas of the building, and the forklift was used to move the dumpsters into and out of the building. LR employees cleaned up the pigeon waste on the floors and in the stairwells by shoveling and/or sweeping the material and then putting it into the dumpsters. They disposed of other debris from the upper floors to the ground floor down open elevator shafts. They also threw debris from upper-level windows to an open-air courtyard below. Mr. Boettner and Mr. Walsh visited the site periodically during the course of the project. (Tr. 29-37, 42, 61-62, 76-79, 83, 178-80; Exh. A, at p. 1). Mr. Boettner admitted that All Crane was responsible for supervising LR workers at the jobsite. (Tr. 231).

On April 27, 2009, the debris in the courtyard was about two stories high. Three LR employees were told to go down to the courtyard, get up on the pile and drag debris down from the pile so that the backhoe could pick up the debris and put it in a dumpster. One of these employees was ***{redacted}***. ***{redacted}*** climbed up onto the pile. She was standing on top of the pile in the afternoon when another LR employee, Gordon, threw a wooden table leg out a window on the fifth floor. ***{redacted}***was not wearing a hardhat and the wood struck her left temple, causing a large lump on her head. The lump "swelled up" to where she "could see it with" her own eyes. ***{redacted}***went looking for Mr. Johnson "screaming about what had happened" and found him in a parking lot outside the building. He offered to take her to the hospital, but she declined to go. She did not receive any medical attention after her injury. Instead, Mr. Johnson drove her to a local store

where she obtained ice to apply to the lump on her head.[1] She testified that the next day, April 28, 2009, she "came back [to the job]. I wanted to pretend like I was fine, and nothing was wrong with me. And I have to make money. I had to do what I had to do. This was the only job that I had offered to me at the time." The lump went away after four or five days. On April 29, 2009, two days after she was injured on the job, ***{redacted}*** signed Exhibit B, an LR form captioned "Medical Treatment Refusal."[2] The form stated that "I **voluntarily** choose to defer medical treatment of the injury indicated above."[3] (Tr. 35-40, 59-60, 67, 184-85).

OSHA received a complaint about the job site, and Sharon Danann, an industrial hygienist ("IH") with OSHA, entered the job site at about 10:30 a.m., May 5, 2009. She first met with Mr. Johnson, who told her that he was the foreman and that her inspection could not proceed without Mr. Boettner. Messrs. Boettner and Vernon arrived in about an hour, along with Attorneys Robert Kracht and Charles Nemer. Mr. Walsh was also present, at least initially. The IH conducted a brief opening conference. She then began her inspection walk around at about 11:30 a.m. No employees were working during the inspection, although they were present at the site. The IH saw an unguarded elevator shaft

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[1] Mr. Johnson also took photographs of her injury with his cell phone. She did not go back to work, but waited for a ride to get home. (Tr. 38-39).

[2] At the top of the form, it stated:

> **This form should not be completed if the injured worker has already sought medical treatment!** This form is only … documentation tool. It does not at [sic] "waive" the worker's right to seek medical treatment and/or file a claim at any time. In the Event … form is completed but the injured worker seeks treatment for this injury at a future date, this Refusal becomes void and the branch must IMMEDIATELY initiate and complete the full claims reporting process.
> …
> Labor Ready is concerned with every employee's well being. In the event you elect to not seek medical attention… must document that Labor Ready has not in any way influenced your decision to not seek treatment.

(Exh. B).

[3] On the form, ***{redacted}*** stated that she had been struck on her forehead by a wooden object thrown out of a fifth story window of the building by Gordon and that a large lump developed on her forehead. (Exh. B).

on the fifth floor of the building, and she learned employees had been disposing of items down the shaft. She also saw pigeon waste in various areas, and she learned there were insufficient respirators and coveralls at the site to protect employees from the dust created by sweeping and shoveling the waste. She further learned employees had not had medical evaluations before using the respirators and had not been fit-tested or trained in their use. The IH additionally learned that hardhat use was not being enforced at the site and that no medical consultation had been provided for an employee who had a head injury. (Tr. 86-101, 130, 157-58, 182-85, 227; Exhs 1, at pp. 2-3, E, at p. 3).

The IH made other observations. She noted there were paint particles on the floors the workers had been cleaning up. She was concerned that the paint contained lead. She also noted that a part of the building's concrete ceiling had fallen in and that employees had been cleaning up that material, which more than likely contained silica. The IH also had concerns about asbestos. She learned no asbestos survey or monitoring for lead had been done and that employees were not told of the hazards of silica. (Tr. 101-02, 124-28, 148). The IH interviewed four LR workers on site on May 5, 2009,[4] and five or six more LR workers off site. She also interviewed four All Crane employees, including Messrs. Johnson, Boettner, Vernon and Kirk Ward, All Crane's safety director. (Tr. 148-49).

IH Danann noted in her Inspection Narrative (OSHA-1A) that:

> Many of the employees reported flu-like symptoms, typically during the project but some report symptoms a month or more after the site was closed. Symptoms included coughing, wheezing and other asthma-like symptoms; excessive fatigue; night sweats and chills; and gastro-intestinal symptoms, including extreme nausea and pain. Some employees had missed work due to illness but the employees had not sought medical attention. In discussions about how they could obtain medical services, there was concern expressed about filing workers compensation claims, with the fear being that Labor Ready would no longer give them work if they did

[4] In her Inspection Narrative (OSHA-1A), Ms. Danann indicated that she contacted LR Workers ***{redacted}***, ***{redacted}***, ***{redacted}***, and ***{redacted}***. (Exh. E, at pp. 1, 3).

> so (in other words, would retaliate against them for filing claims). One employee had her blood lead tested but it was very low (2 ug/dl) [2 micrograms per deciliter].

(Tr. 167; Exh. E, at p. 3).

Whether the Work at the Site was Construction

All Crane asserts that the project involved "repairs, alterations and clean out" of the building and was thus construction work. It also asserts that it acted as a general contractor, subcontracting with various companies with expertise in those areas (*i.e.*, one to do repairs, another to do cleanup, and still another to do trucking work). All Crane contends that the citation incorrectly alleges violations of OSHA's general industry standards. It further contends that, because the construction standards apply in this case, the citation items must be vacated. (R. Brief, at pp. 9, 12).

The Secretary disputes All Crane's assertions. She contends that All Crane was properly cited, as the general industry standards apply to a given working condition, unless they are preempted by industry-specific standards. *See, e.g., B&B Insulation, Inc. v. OSHRC*, 583 F.2d 1364, 1369 n.9 (5th Cir. 1978); *Brock v L.R. Willson & Sons, Inc.*, 773 F.2d 1377, 1380-81 (D.C. Cir. 1985). She also contends the construction standards apply only to actual construction work or to related activities that are an integral and necessary part of construction work. Activities that otherwise could be considered construction work should not be so considered when done solely as part of a non-construction operation. *Royal Logging Co.*, 7 BNA OSHC 1744, 1749-50 (No. 15169, 1979); *aff'd*, 645 F.2d 822 (9th Cir. 1981). As the Secretary notes, the Commission focuses on the work activity itself, rather than on the physical site. *Id.* As she further notes, the contract that All Crane signed describes the work as "perform[ing] general

debris clean-up work, dispos[ing] of debris into an elevator shaft, and broom-sweep[ing] floors and stairwells." *See* Exh. 7, at p. 2; s*ee also* S. Reply Brief, at pp. 2-4. I agree with the Secretary.[5] I find that the general industry standards, and not the construction standards, apply. All Crane's arguments are rejected.

Whether All Crane was the Employer of the Employees at the Site

All Crane contends it was not the employer of LR's workers at the site for the same reason above, *i.e.*, it acted as a general contractor and subcontracted with various companies, including LR. (R. Brief, at pp. 9-11). The Secretary contends All Crane was the employer of LR's workers at the site, based upon the facts of this case and the factors set out in the Supreme Court's *Darden* decision. *Nationwide Mut. Ins.Co. v. Darden*, 503 U.S. 318 (1992). As the Secretary notes, the Court stated in *Darden* as follows:

> In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party. (Citations omitted).

Id. at 323-24.

The Supreme Court has held that, in the context of a federal labor statute, the control exercised over a worker is the "principal guidepost." *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 448 (2003). And the Commission has held that, regardless of the employees' employment relationship with one company,

[5] As the Secretary notes, All Crane itself identifies the project as cleanup work. (R. Brief, at p. 4).

another company may qualify as an "employer" under the Act if that other company exercises control. *Barbosa Group, Inc.*, 21 BNA OSHC 1865, 1867(No. 02-0865, 2007). (S. Brief, at pp. 11-12).

The Commission addressed a situation analogous to the one here in *Froedtert Mem. Lutheran Hosp., Inc. ("Froedtert")*, 20 BNA OSHC 1500, 1508 (No. 97-1839, 2004). There, the Commission used the factors in *Darden* and found that housekeepers from a staff leasing company were employees of the hospital as it directed their work, supplied their tools and materials, assigned shifts and supervised their work. 20 BNA OSHC at 1506-08. The Court agrees with the Secretary that, upon applying the Darden factors to the facts of this case, All Crane was the employer of the LR employees at the work site.

The Darden Factors

1. The hiring party's right to control the manner and means by which the product is accomplished. The contract between All Crane and LR specifically addressed "clean-up work." (Exh. 7, at p. 2). It also specifically set out All Crane's responsibility for providing adequate supervision, complying with safety regulations, and providing any necessary site-specific safety training and equipment. (Exh. 7, at p. 1, ¶¶ 2, 4). The contract further required LR to perform the work "in strict compliance with the Contract and all specifications and/or directions provided by All Crane" and "in accordance with the schedule provided by All Crane." (Exh. 7, at p. 2, ¶ 1(c)-(d)). Mr. Boettner and Mr. Johnson both testified to the effect that All Crane directed the LR workers as to the areas to clean up, the methods for doing so, and the means of disposing of debris. (Tr. 79, 179, 200).

The record shows that LR did not direct the work at the site. Mr. Boettner selected LR as the company that would provide the temporary labor at the site. He never expected LR to assign jobs, supervise or direct the workers. (Tr. 70, 83). The contract did not require LR to provide any supervision at the site.[6] Rather, it required All Crane to provide "at least one (1) on-site supervisor to direct [LR]'s employees' Work." ***{redacted}*** testified that no one from LR ever directed her work at the site, that All Crane did so, and that when she had questions about safety she went to Mr. Johnson. (Tr. 30-31).

In view of the above, All Crane directed and controlled the day-to-day activities of the LR workers at the site. This factor weighs in favor of finding that the workers were employees of All Crane. As noted above, this factor is the "principal guidepost."

2. The source of the instrumentalities and tools. The record shows that All Crane provided the LR employees with most of the instrumentalities and tools they used. The contract required All Crane to provide "trash bags, shovels, brooms, flashlights, 4-wheel carts and other equipment for the employees' use during the performance of their Work." (Exh. 7, at p. 2, ¶ 2(c)). All Crane also provided the forklift and backhoe at the site. (Tr. 78). The contract obligated LR to provide and require the use of certain safety equipment, *i.e.*, hardhats, safety glasses, dust masks, gloves and steel-toe boots. (Exh. 7, at p. 2, ¶ 1(f)). LR provided at least some of this equipment to the employees, but it did not enforce the equipment's use as it provided no supervision at the site. [7] (Tr. 29-31, 36-37, 43-44, 52, 61-62, 231). The contract clearly stated that All Crane was responsible for supervising the employees and including them in its safety program and complying with

[6] Mr. Boettner testified Mr. Walsh had assured him verbally that the crew at the site would include a "lead person." Mr. Boettner agreed, however, that the contract had no such statement. (Tr. 81-82, 221-22; Exh. 7). Further, there is no evidence that a "lead person" was ever at the site with the other LR workers.

[7] Mr. Boettner said, for example, that on one of his visits to the site, he saw LR employees using dirty respirators. He called Mr. Walsh and told him to provide more dust masks. (Tr. 222).

safety regulations. (Exh. 7, at p. 1, ¶¶ 2, 4). Further, All Crane provided coveralls to LR's workers at the site. (Tr. 40-41, 64, 192-93). And, Mr. Johnson indicated that, when LR did not provide items it should have, such as gloves and dust masks, All Crane supplied the employees with "what they needed." (Tr. 193-94, 203-04).

Based on the above, this factor supports a finding that All Crane was the employer of the LR workers at the site.

3. The location of the work. The work took place in a building All Crane owned. This factor weighs in favor of finding that All Crane employed the LR workers at the site.

4. The duration of the relationship between the parties. The contract between LR and All Crane indicates a relationship of indefinite duration for the cleaning up of the site. This factor bolsters a finding that the supplied workers were employees of All Crane.

5. Whether the hiring party has the right to assign additional projects to the hired party. The record shows that All Crane had the right to assign additional projects to the workers. Mr. Johnson, for example, testified that he would assign additional projects to the workers once they finished a project. (Tr. 200). This factor supports a conclusion that All Crane was the employer of the employees LR supplied to work at the site.

6. The extent of the workers' discretion over when and how long to work. The record shows the LR workers had no discretion in this regard. All Crane set the workers' schedule, and the contract stated the work was to be done "in accordance with the schedule provided by All Crane." (Exh. 7, at p. 2, ¶ 1(d)). This factor weighs in favor of finding that the LR workers were employees of All Crane.

I find the above factors to be the most significant in regard to this case. This is especially true as to the first factor, that of control. The other factors set out in *Darden*

(for example, the skill required and the hired party's role in hiring and paying assistants) are either not relevant or not that important in the context of this case. And, while LR's "regular bill rate" included wages and the required withholdings and insurance, this was an administrative matter that had no bearing on which entity controlled the work and the workers at the site. Based upon my findings with respect to the foregoing factors, I conclude that All Crane was the employer of the LR workers at the job site.[8]

Jurisdiction

Respondent All Crane has admitted all of the elements necessary to establish jurisdiction in this matter. *See* All Crane's Answer, ¶¶ 1, 2 and 3. I find, therefore, that the Commission has jurisdiction over the parties and the subject matter in this case.

The Secretary's Burden of Proof

To demonstrate a violation of a specific OSHA standard, the Secretary must prove that: (1) the cited standard applies, (2) its terms were violated, (3) employees were exposed to the violative condition, and (4) the employer knew or could have known with the exercise of reasonable diligence of the violative condition. *Astra Pharmaceutical Prod.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981).

Serious Citation 1, Item 1

Item 1 alleges a violation of 29 C.F.R. 1910.23(b)(1), which requires "[e]very wall opening from which there is a drop of more than 4 feet" to be guarded. The citation alleges there was an unguarded elevator shaft on the fifth floor in the northwest corner of

[8] In so concluding, I have considered All Crane's assertion that the Court should "give effect to the allocation of safety responsibilities found in the contract between All Crane and [LR]." (R. Brief, at p. 10). Mr. Boettner testified that he believed he had "contracted away" All Crane's safety obligations to LR. (Tr. 78). As the Secretary notes, however, the terms of the contract do not support Mr. Boettner's testimony. (Exh. 7, at p. 1, ¶ 4). As she also notes, an employer cannot contract away its obligations under the Act. (S. Brief, at p. 17).

the building. (Tr. 229; Exh. H, at p. 4). IH Danann identified Exhibit 1, page 2 as a photo she took of an unguarded elevator shaft on the fifth floor. Mr. Boettner also admitted that the shaft was open during IH Danann's inspection. (Tr. 231). She learned employees had been disposing of items down the shaft, which was a drop of about 75 feet. (Tr. 90-91). ***{redacted}*** testified there were two open elevator shafts on the fifth floor. She said she had worked near one, like the one in Exhibit 1, when she was sweeping and shoveling pigeon waste on that floor. She also said she had swept near the edge of the open shaft. She had seen other workers in the area sweeping, shoveling and cleaning materials out. There was no guarding or barrier in front of the open shaft when she was working there. (Tr. 32-34).

The Secretary notes that besides the above, the contract itself stated that the work included "dispos[ing] of debris into an elevator shaft." (Exh. 7, at p. 2). It also stated that LR was to "designate two (2) employees to work the elevator shaft area at the Jobsite who are qualified to perform such Work." (Exh. 7, at p. 2, ¶ 1(e)). Further, Mr. Boettner testified that All Crane "wanted two [LR] off to the side of that elevator shaft, to prevent anybody coming in too close to that [shaft]. It was also understood that the people in the building would bring that debris – construction debris, two by fours, wood tables, whatever the case may be, up to the elevator shaft and two other – one other [LR] or maybe two other [LR] people would push that in to the shaft."[9] Mr. Boettner also admitted that the contract required LR workers to dump debris down the elevator shaft. (Tr. 84, 231-33; Exh. 7, at p. 2, ¶ 1(e); S. Brief, at pp. 18-19).

[9] Mr. Johnson testified that only All Crane employees worked near the unguarded elevator shafts. (Tr. 180). I agree with the Secretary that that testimony was not credible in light of the other evidence of record.

All Crane contends there was no violation of the standard; no employees were exposed to the cited shaft at the time of the inspection, as work there had been completed. (R. Brief, at p. 13). That contention is rejected. The testimony of the IH, ***{redacted}*** and Mr. Boettner shows that work had in fact taken place near the cited shaft, even if no one was working there when the IH was at the site on May 5, 2009. (Tr. 32-34, 154). That no LR employees were exposed at the time of the inspection itself is of no moment. The Court finds that ***{redacted}*** and other LR workers were exposed to an unguarded elevator shaft located on the fifth floor.[10] (Exh. H, at p. 4). The Secretary has met all the elements of her burden of proof as to this item. Item 1 is affirmed as a serious violation, as it is clear that a fall down a 75-foot elevator shaft would most likely be fatal.

The Secretary has proposed a penalty of $3,500.00 for this item. In determining an appropriate penalty, the Commission is required to give due consideration to the gravity of the cited condition and to the employer's size, history and good faith. *See* section 17(j) of the Act. The IH testified the gravity of this item was high, with greater probability, as a fall down the shaft would have been fatal. She also testified All Crane was given reductions of 20 and 10 percent, for size and lack of history of violations in the previous three years. No credit was given for good faith.[11] (Tr. 128-29; Exh. F, at p. 1). I find the proposed penalty appropriate. A penalty of $3,500.00 is assessed.

Serious Citation 1, Item 2

Item 2 alleges a violation of 29 C.F.R. 1910.132(a), which provides that:

> Protective equipment, including personal protective equipment for eyes, face, head, and extremities, protective clothing, respiratory devices, and

[10] In her worksheet, IH Danann indicated that ***{redacted}***, ***{redacted}***, ***{redacted}***, and ***{redacted}***, and ***{redacted}***, as well as LR worker ***{redacted}***, were exposed to the unguarded elevator shaft in the northwest corner of the building's fifth floor. (Tr. 164-65; Exh. F, at pp. 1-2).

[11] These same reductions were applied to all of the proposed penalties. (Tr. 129).

> protective shields and barriers, shall be provided, used, and maintained in a sanitary and reliable condition wherever it is necessary by reason of hazards of processes or environment, chemical hazards, radiological hazards, or mechanical irritants encountered in a manner capable of causing injury or impairment in the function of any part of the body through absorption, inhalation or physical contact.

The citation alleges that an adequate supply of coveralls was not available to employees who were cleaning up pigeon fecal material. It also alleges that hardhat use was not enforced for employees working in the interior courtyards when debris was being thrown from the fifth floor.

The record clearly shows that the work the LR employees did at the site included sweeping and shoveling pigeon waste. (Tr. 33-35, 92-93, 200, 206). IH Danann identified Exhibit 1, at p. 3 as two photos she took on the building's fourth floor. The first shows pigeon waste and feathers on equipment around which workers had cleaned. The second shows an area where workers had been sweeping pigeon waste. The IH testified that her concern with the pigeon fecal matter was histoplasmosis, a fungus that grows in bird waste. Shoveling or sweeping such material creates dust, which, when inhaled, can cause symptoms similar to an acute respiratory influenza. Such symptoms can persist for months or years if untreated, and the condition can cause blindness or even death. The IH said the best way to clean up bird waste is to use a suction system. If protective equipment is used instead, workers must have appropriate respirators with proper fit and coveralls that include hoods and foot coverings. The IH also said that cleaning up or changing clothing before leaving the site is essential so vehicles are not contaminated. IH Danann learned, in her interviews of employees, that there were not enough coveralls at the site for the LR workers. She also learned that many LR workers who had been at the

site had flu-like symptoms that were consistent with histoplasmosis. (Tr. 91-96, 130, 148-49, 157-58, 167-68).

{redacted} testified there were disposable suits at the site left over from a previous abatement effort that All Crane offered to employees for cleaning up pigeon waste.[12] She described the suits as "lightweight" and "like paper," and she said they were meant to be discarded after one day. She also said that while "paper suits" were initially available, they ran out after a "day or two," after which she and others would go through the damaged suits to find the "best one." Eventually, there were no more usable paper suits. ***{redacted}*** stated the cleanup work, that included shoveling fecal matter into a dumpster, created a lot of dust, which got on her clothes, and that she did not change her clothes before leaving the site for home. She further stated that no one ever told her she was required to wear the paper suits or coveralls. (Tr. 40-43, 157-58).

As the IH indicated, protective clothing was required at the site so that employees could remove it at the end of their work day and not contaminate their vehicles or homes with the dust containing the pigeon fecal matter. The IH has an M.S. in environmental health sciences and industrial hygiene from the Harvard School of Public Health.[13] She has been an IH with OSHA for almost 20 years. (Tr. 86-88, 93). I observed her demeanor as she testified and found her a sincere and believable witness. I thus credit her opinions about the hazards of the work at the site and the need for the protective clothing. I also observed ***{redacted}*** demeanor as she testified, including her facial expressions and body language. I found her a believable witness, and her testimony is supported by what the IH

[12] The contract did not call for LR to supply coveralls at the jobsite. (Tr. 157; Exh. 7). LR did not supply employees with coveralls. (Tr. 192).

[13] Ms. Danann is a certified industrial hygienist and certified safety professional. She is also an adjunct faculty member at Case Western Reserve University, where she recently taught a course on asbestos exposure in the workplace. (Tr. 87-88).

learned when she spoke to the LR employees. ***{redacted}*** testimony is also credited.[14] Under the contract, LR agreed to provide its employees with specific items of safety equipment that included "hard hat, safety glasses, dust mask, gloves, and steel-toe boots." (Exh. 7, at p. 2, ¶1(f)). All Crane was obligated under the contract to provide "other equipment" for employees to use during the performance of their work at the building. (Exh. 7, at p. 2, ¶ 2(c)). All Crane failed to provide sufficient and adequate coveralls to LR workers at all times when working at the job site. Based on ***{redacted}*** testimony and that of the IH, I find the standard applies, that the terms of the standard and the contract were not met, and that employees, including ***{redacted}***, were exposed to the cited condition. The knowledge element is also met. All Crane knew what the cleanup work involved and it supplied paper protective suits early-on. (Tr. 40-41, 86-88, 95-96, 157-58, 191-93, 200, 206; Exh. F, at p. 5). The Secretary has shown the alleged violation.

As to the hardhat allegation, the circumstances of ***{redacted}*** head injury are set out earlier in this decision, *supra*. ***{redacted}*** testified that LR provided her with a hardhat but that no one ever told her to wear it. She indicated she often did not wear her hardhat and that many of the LR workers did not wear their hardhats. The two workers, Chuck and Joanne, who were in the area with her when she was struck, also were not wearing hardhats. She said that hardhat use was never enforced and that All Crane personnel, like Messrs. Boettner and Johnson, had seen her working without her hardhat.[15] (Tr. 36-37, 52, 68). The Court finds that three LR workers, including ***{redacted}***, were not wearing hardhats while working at the job site on April 27, 2009.

[14] All Crane disputes ***{redacted}*** credibility. All Crane's assertions in this regard are addressed in Item 4.
[15] All Crane took no disciplinary action against ***{redacted}*** for not wearing a hardhat that day. (Tr. 40).

Mr. Johnson was not present when ***{redacted}*** was injured, but he saw her right after the incident. He testified that she had her hardhat in her hand at the time. He also testified he had always seen her wearing a hardhat when one was required. He said the "whole crew was pretty good about that" and that "[e]veryone there wore their hardhats in the areas they were supposed to." He indicated ***{redacted}*** could have been hit in the head even with a hardhat on, as "something could have [come] up." (Tr. 189-91, 201-03).

Based on the record, the Court finds that All Crane violated the cited standard. ***{redacted}*** has been found to be credible. And Mr. Johnson's testimony, that something could have come up and struck ***{redacted}*** in the forehead or temple, even if she had a hardhat on, is simply not believable.[16] (Tr. 201-03). The record shows that the standard applies, that its terms were not met, and that employees were exposed to the cited hazard.

The record also shows All Crane had either actual or constructive knowledge of the cited condition. ***{redacted}*** testified that Messrs. Boettner and Johnson had seen her working without a hardhat. (Tr. 36-37). And, as the Secretary asserts, All Crane would have known of the condition if it had exercised reasonable diligence. In particular, if All Crane had provided adequate supervision, it would have known the LR employees were not using their hardhats.[17] The building had five floors and over 600,000 square feet. The employees could be assigned to work anywhere in the building. The two supervisors were Messrs. Johnson and Vernon. Mr. Johnson was usually on the ground floor, and Mr. Vernon was on the upper floors. (Tr. 29-31, 83). The record indicates it often was

[16] Other evidence supports a finding that Mr. Johnson's testimony was not credible. The IH testified that Mr. Johnson introduced himself to her as "foreman." (Tr. 89). And, Mr. Boettner testified that Messrs. Johnson and Vernon were the All Crane supervisors at the site. (Tr. 83). Despite this evidence, Mr. Johnson testified that he was an hourly, not a management, employee. (Tr. 194).

[17] *See Dun-Par Engineered Form Co.*, 12 BNA OSHC 1962, 1965-66 (No. 82-928, 1986) (Employer knew, or with reasonable diligence could have known, that employee exposed to fall hazard through foreman). The Court finds that All Crane failed to adequately supervise employees and take measures to prevent the occurrence of the affirmed cited violations.

difficult to find a supervisor. When the IH arrived, for example, she entered the facility and had to call out for some time before Mr. Johnson responded. And, when ***{redacted}*** was injured, she had to go looking for Mr. Johnson. She found him outside the building in a parking lot. (Tr. 37, 189-90). Mr. Boettner testified he made "spot checks" during his visits to see if the LR workers were wearing their safety equipment. (Tr. 82, 222-25). Such visits cannot replace adequate daily supervision. It is clear that no such supervision was provided. The Secretary has proved knowledge and the alleged violation.[18]

Item 2 is affirmed as a serious violation. The IH's testimony above establishes the serious nature of the failure to provide sufficient coveralls at the site. And while ***{redacted}*** head injury healed without medical treatment, her injury plainly could have been more serious, or even fatal. The Secretary has proposed a penalty of $1,750.00 for Item 2. The IH testified this item had low severity, but greater probability. (Tr. 130; Exh. 5, p. 5). On the basis of this testimony, and taking into account the other penalty factors, I find the proposed penalty appropriate. A penalty of $1,750.00 is assessed.

Serious Citation 1, Item 3

Item 3 alleges violations of OSHA's respiratory protection standard, as follows:

> Item 3a – 29 C.F.R. 1910.134(a)(2) – A respirator shall be provided to each employee when such equipment is necessary to protect the health of such employee.
>
> Item 3b – 29 C.F.R. 1910.134(e)(1) – The employer shall provide a medical evaluation to determine the employee's ability to use a respirator, before the employee is fit tested or required to use the respirator in the workplace.
>
> Item 3c – 29 C.F.R. 1910.134(f)(1) – The employer shall ensure that employees using a tight-fitting face piece respirator pass an appropriate

[18] I agree with the Secretary that Mr. Johnson was a supervisor and that his knowledge of the conditions at the site is imputable to All Crane. (S. Brief, at pp. 22-23).

qualitative fit test (QLFT) or quantitative fit test (QNFT) as stated in this paragraph.

Item 3d – 29 C.F.R. 1910.134(k)(1) – The employer shall ensure that each employee can demonstrate knowledge of why the respirator is necessary and how improper fit, usage, or maintenance can compromise the protective effect of the respirator.

The record shows that LR provided N95 disposable, filtering face piece respirators ("dust masks") for the LR workers to use at the site. According to ***{redacted}***, LR provided one dusk mask a day to each employee.[19] The masks got dirty easily and if they got wet they were unusable, such that she and others at times cleaned up the pigeon waste without wearing masks. ***{redacted}*** was neither evaluated medically to determine her ability to use the masks nor offered the opportunity for such an evaluation. She was not fit tested before using a mask, and no one ever trained her in how to use one. She was never told she was required to use a mask. (Tr. 43-46). The IH testified the masks were necessary to protect the employees.[20] According to the IH, a medical evaluation was necessary to ensure using the mask would not strain the employee's heart or lungs. A fit test was required to ensure proper fit; without proper fit, the employee would not be protected. And without training, the employee would not know how to use the mask properly. The IH did not believe the masks were being used properly due to the fact that several of the masks employees showed her were dirty on the inside, indicating that there was leakage and that they were not a good fit. IH Danann testified that adequate dust masks or respirators were necessary to protect the workers' health. Without these, the workers were breathing the spores of the histoplasma capsulatum fungus. (Tr. 95-99).

[19] All Crane employees who were not LR workers wore two-piece, full-face, screw-on filtered respirators. (Tr. 43, 97).

[20] The IH's testimony about the hazards of cleaning up pigeon waste is discussed earlier in this decision.

Messrs. Boettner and Johnson both testified that medical evaluations, fit testing and training in the use of the masks were not provided by All Crane for the LR workers at the site. (Tr. 73-74, 203-04).[21] And yet, under the contract, All Crane was obligated to "provide any necessary site-specific safety training and equipment" except as otherwise stated in the addendum. (Exh. 7, at p. 1, ¶ 4).[22] All Crane failed to provide training in the use of masks to the LR workers. IH Danann also testified that LR did not have a comprehensive dust mask respiratory protection program. (Tr. 137-39). The record indicates that Mr. Johnson sometimes gave masks to the employees. (Tr. 64, 193). It also indicates that in one instance, Mr. Boettner called Mr. Walsh and told him to provide more masks. Mr. Boettner testified:

> Q: Was there ever a time when you learned that there may be an inadequate supply of respirators on the job site?
>
> A: Personally.
>
> Q: Okay. Tell us about that.
>
> A: I went down just to take a little walk around and see how progress was going. And I could tell that some of the Labor Ready people had dirtied masks. And I asked if there was any, and I don't know who told me but they said that they were out.
>
> Q: What did you do in response to that?
>
> A: I immediately called Mark Walsh and I said your people are not properly protected, and you better get some respirators down here today.

(Tr. 222, 224).

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[21] Mr. Johnson knew that LR was not complying with the contract by not supplying personal protection equipment to all of the LR workers. (Tr. 193).

[22] *See* All Erection & Crane Rental's Employee Guide to Respiratory Protection ("Respiratory Guide") that called for All Crane to provide respirator training and instruction to any employee under All Crane's direct and immediate control if the employee had not previously received it. (Exh. 8, at p. 42) The Respiratory Guide also held its supervisors responsible for ensuring that only employees who received respiratory training and medical evaluation performed activities requiring respiratory protection. Its supervisors were also responsible for ensuring that respirators were properly worn, fitted and maintained. (Exh. 8, at pp. 25, 34-36).

Mr. Boettner further testified that he made no effort to return to the site to check to insure LR workers were wearing proper dust masks. (Tr. 222-23).

{redacted} testified that she and others, at times, worked without masks as not enough were available.[23] (Tr. 43-44). And the IH testified that some masks workers brought her were dirty inside, indicating improper fit. (Tr. 97-98). The record demonstrates the alleged violations. The knowledge element is established through the testimony of Messrs. Boettner and Johnson and the IH, and the Court's prior discussion of All Crane's actual or constructive knowledge of conditions at the job site.[24]

This item is affirmed as serious; the IH's testimony shows the serious nature of the cited conditions. (Tr. 93-99, 167-68). The proposed penalty for this item is $1,400.00. The severity of the violations was medium, and the probability was lesser. (Tr. 130; Exh. F, at pp. 9, 12, 15, 18). I find the proposed penalty appropriate, and it is assessed.

Serious Citation 1, Item 4

Item 4 alleges a violation of 29 C.F.R. 1910.151(a), which requires the employer to "ensure the ready availability of medical personnel for advice and consultation on matters of plant health." The IH testified this item was based on the fact that All Crane did not require ***{redacted}*** to have a medical consultation after her head injury. The IH

[23] In her worksheet, IH Danann indicated that ***{redacted}***, ***{redacted}***, ***{redacted}***, and ***{redacted}***, and ***{redacted}***, as well as LR worker ***{redacted}***, were exposed to these conditions at the job site. The Court finds that this was so. (Tr. 165; Exh. F, at pp. 9-10, 12-13, 15-16, 18-19).

[24] *See also* IH Danann's Worksheet:

> Employer Knowledge: er was aware that the supply of respirators was not always adequate. According to ee statements, "Labor Ready ["] and 'All Crane' were fighting over who should buy the dust masks. Several of the ees I interviewed confirmed that the supply of respirators ran out and was not immediately replaced, so that ees had to continue clean-up operations involving pgeon [sic] fecal material, without dust masks.

(Exh. F, at ¶ 23, at p. 10).

said only a medical professional can determine how serious such a head injury is. She also said the consequences could have been very serious if ***{redacted}*** had a concussion and simply gone home. She noted that if an employee refuses to go for medical treatment, it is the employer's responsibility to insist that the employee seek medical consultation. (Tr. 99-101, 159-60). When there is a head injury, concerns for an employee's well being are not necessarily alleviated in the event an employee says he or she does not want medical treatment.[25] The IH's testimony in this regard was as follows:

> Q: Take a look back at the head injury. Doesn't it alleviate your concern if the employee said she didn't want medical treatment after her head injury?
>
> A: Absolutely not.
>
> Q: Why not?
>
> A: The employee herself or himself is not qualified to make that determination. It's very common for employees to say I'm fine. They can have a host of motivations for feeling that they may not be employed by the company. Again, that is very, very common. And that could be a motivation for not seeking medical attention. And we see this in the kind of form that has already been introduced to this proceeding. That absolutely flies in the face of what is known medically about what kind of attention is needed, so that we can determine whether there's a serious underlying condition or not, as a result of an injury.

(Tr. 100-01).

All Crane contends it did not violate the standard as it offered to take ***{redacted}*** to the hospital and she refused to go. All Crane also contends that ***{redacted}*** was not a credible witness in this matter. It notes she first testified it was only "mentioned" that she might want to go to the hospital. (Tr. 39). In this regard, she testified:

> Q: Good question. Did anybody from All Crane tell you to go to the hospital and get your head looked at?

[25] ***{redacted}*** agreed Mr. Johnson had offered to take her to the hospital and that she had refused to go. She also agreed she had signed Exhibit B, a form of LR, entitled "Medical Treatment Refusal," stating that she voluntarily refused treatment. (Tr. 39-40, 52-54, 59-60; Exh. B).

> A: I believe it was mentioned, you might want to go to the hospital. But it was not a requirement. It was not a no, we're going to go and that's it. Look at your head. It's swelling. It's black. It's blue. Matt at that time had a cell phone on him, and he was taking photos of my injury.

(Tr. 38-39).

Later, ***{redacted}*** agreed Mr. Johnson had offered to take her and she refused. (Tr. 59-60). Also, she initially testified that she did not sign a form refusing medical treatment. (Tr. 39-40). Later, she agreed she had signed Exhibit B two days after her injury, as noted above.[26] (Tr. 52-54, 59-60; Exh. B). As stated atop the Medical Treatment Refusal form, the form may be viewed as a company instrument designed to inhibit an employee injured on the job from seeking medical treatment since it requires the employee to "IMMEDIATELY initiate and complete the full claims reporting process" should the employee seek treatment for his or her injury.[27] All Crane claims that ***{redacted}*** did not want to go to the hospital as LR would have required a drug test and she feared she would fail it. It further claims that she left the job site angry about her injury and about being reassigned to another area. (R. Brief, at pp. 16-17, 19-20).

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[26] I do not agree that ***{redacted}*** testimony about the offer to go to the hospital was contrary to her later testimony. I also do not agree that ***{redacted}*** initial testimony about not signing a statement was inconsistent with her later testimony that she did. She did not sign any Medical Treatment Refusal form on April 27, 2009, the day she was injured. She explained that she signed the form two days after suffering her head injury as she had feared LR would no longer send her to the site if she admitted she had been hurt. She also explained that that site was the only job LR had at the time and that she wanted to be able to work. (Tr. 53-54). She testified that, after applying ice to her head injury, she "just wanted to pretend like I would be fine and everything would be okay because I didn't want to lose the job." (Tr. 39). Her concern for her job has proven to be well founded. The whole group of about fifteen LR workers who worked at the job site is no longer getting work from LR. (Tr. 172). The Court found ***{redacted}*** to be a credible witness overall, as set out *supra*, and much of her testimony is supported by other evidence of record.

[27] As noted, Mr. Johnson took photographs of ***{redacted}*** head injury just after it happened, and LR insisted that ***{redacted}*** execute a Medical Treatment Refusal form. This shows that the primary focus of All Crane and LR was on their concerns for potential liability relating to the injury, rather than any actual concern for the medical well being of one of their employees.

I disagree with All Crane's claim about why ***{redacted}*** did not want to go to the hospital. Mr. Johnson testified he overheard her say she liked to "smoke pot," and he concluded she did not want to go because she would fail a drug test. (Tr. 187-88). There is no evidence, however, that LR would have required a drug test if ***{redacted}*** had gone to the hospital for a head injury or otherwise consulted with medical personnel. (Tr. 39-40). Furthermore, Mr. Johnson has been found to not be a believable witness, and his testimony about ***{redacted}*** alleged drug use around April 27, 2009 is not credited.[28] Finally, I disagree with All Crane's claim that ***{redacted}*** left the site angry about her injury and about being reassigned, such that she "colored" her testimony in this matter. (R. Brief, at p. 16). ***{redacted}*** testified that on April 27, 2009 she was "really upset" about her injury and because she "knew that LR was going to pull me off the job because they were so reluctant to send me as a women out there to the job, and now I'm hurt." (Tr. 37-38). She also testified she was unhappy about the reassignment as she was to be separated from Mr. Johnson and the others she been working with as a group. (Tr. 67, 225-26).[29] The Court rejects All Crane's arguments that ***{redacted}*** was untruthful when she testified that she was not concerned about failing a drug test on April 27, 2009.

Turning to whether All Crane violated the standard, All Crane's contention that it did not is rejected. Mr. Johnson testified that he offered at least four times to take ***{redacted}*** to the hospital. (Tr. 186). I find that he offered once, based on ***{redacted}*** testimony, and that she declined. (Tr. 38, 59-60). As the IH indicated, this was insufficient. Under these circumstances, All Crane was obligated to do more than make a

[28] ***{redacted}*** said she had told the Secretary's counsel she had smoked marijuana in the past. (Tr. 58-59). She denied smoking marijuana in April, 2009. She also testified that she was not concerned on April 27, 2009 that if she sought medical treatment she would have tested positive for marijuana. (Tr. 55, 59).
[29] After being separated from Mr. Johnson, ***{redacted}*** told Mr. Boettner that she was fully capable of working just as hard as a man. (Tr. 225-26).

half-hearted offer to drive ***{redacted}*** to a hospital. All Crane was obligated to advise ***{redacted}*** after she suffered her head injury that medical personnel were readily available for advice and consultation.[30] Mr. Johnson did not tell ***{redacted}*** that she needed to, or should, have her head injury examined by a doctor or other medical personnel. (Tr. 205). She was not treated by anyone at the building trained in first aid. No one contacted a physician or nurse by telephone for advice or consultation. Instead, Respondent essentially argues it was prudent for Mr. Johnson to allow ***{redacted}***, after suffering a head injury, to make a supposedly sound decision to forego seeking advice or consultation from medical personnel at a time when he believed that she was subject to the effects of having recently smoked marijuana. (R. Brief, at p. 19). Such a position is irresponsible. All Crane's action in handling the incident was unreasonable. Item 4 is affirmed. All Crane disputes the serious classification, noting Mr. Johnson's testimony that the injury was a "small bump." (Tr. 184). ***{redacted}*** described her injury on Exhibit B as a "large lump" on her forehead. (Exh. B). I find that ***{redacted}*** injury was serious and that it could easily have been much more serious. This item is thus affirmed as serious.

The Secretary has proposed a penalty of $2,450.00 for this item. The IH testified this item had medium severity and greater probability. (Tr. 131; Exh. F, at p. 21). The Court finds the proposed penalty appropriate. A penalty of $2,450.00 is therefore assessed.

Serious Citation 1, Item 5

Item 5 alleges two violations of OSHA's lead standard. The cited standards provide as follows:

[30] Respondent concedes that it could have called an ambulance to the job site. (R. Brief, at p. 20-21).

> Item 5a – 29 C.F.R 1910.1025(d)(2) – Each employer who has a workplace or work operation covered by this standard shall determine if any employee may be exposed to lead at or above the action level.
>
> Item 5b – 29 C.F.R. 1910.1025(l)(1)(i) – Each employer who has a workplace in which there is a potential exposure to airborne lead at any level shall inform employees of the content of Appendices A and B of this regulation.

Both IH Danann and ***{redacted}*** testified they had concerns about the paint they saw in the building, as lead is common in older paints.[31] ***{redacted}*** testified that there was no discussion at the site about the hazards of lead. The IH took two samples of white "paint peelings" and one sample of green paint peelings from the fourth floor of the west side of the building during her inspection. The IH had the samples sent off for analysis at OSHA's Salt Lake Technical Center.[32] (Tr. 27-28, 46-47, 101-25; Exh. 3). There was no evidence as to how old the paint was or when it was applied to the building.

Under the lead standard, employers are required to "monitor employee exposures" and base:

> initial determinations on the employee exposure monitoring results and any of the following, relevant considerations:
>
> (A) Any information, observations, or calculations which would indicate employee exposure to lead;
> (B) Any previous measurements of airborne lead; and
> (C) Any employee complaints of symptoms which may be attributable to exposure to lead.

(29 C.F.R. § 1910.1025(d)(2)(3)).

In this instance, the Secretary has failed to prove that there was sufficient information, observations, or calculations which would indicate employee exposure to lead; any previous measurements of airborne lead; or any employee complaints of

[31] IH Danann also testified that she was concerned that some of the paint she saw was green, which is more likely to contain lead. (Tr. 101-02).
[32] The analysis results were not admitted as evidence in this case. (Tr. 102-24).

symptoms which may be attributable to exposure to lead in the building that were known, or through the exercise of due diligence should have been known, to Respondent on or before April 27, 2009. The LR employees did not engage in any demolition, blasting or scraping of paint while working in the building. Rather, they swept the floors and disposed of debris. (Tr. 161, 229).

There is no evidence that shows information or calculations which indicated employee exposure to lead in the building on or before April 27, 2009. There is no evidence of any previous measurements of airborne lead in the building. There is no evidence of any potential exposure to airborne lead at any level in the building. And there is no evidence of any employee complaints of symptoms reported to either All Crane or LR before IH Danann's inspection. The personal observations of the IH and ***{redacted}*** were insufficient to establish a presence of lead in the building. Respondent had no obligation to monitor for lead exposure or inform employees of Appendices A and B on or before April 27, 2009.[33] The Court further concludes that the Secretary failed to prove that employees were exposed to the hazard of lead exposure, airborne or otherwise, in the building or that Respondent had knowledge of the cited conditions. The Secretary has failed to prove violations of either of the cited standards. Accordingly, Serious Citation 1, item 5, is vacated in its entirety.

Serious Citation 1, Item 6

Item 6 alleges a violation of 29 C.F.R. 1910.1200(h), which is a part of OSHA's hazard communication standard. The cited standard states that:

[33] Mr. Boettner testified that All Crane had not monitored for lead at the site and had not informed employees of the contents of Appendices A and B of the lead standard. (Tr. 75-76, 124-25).

> Employers shall provide employees with effective information and training on hazardous chemicals in their work area at the time of their initial assignment, and whenever a new physical or health hazard the employees have not previously been trained about is introduced into their work area.

IH Danann testified that she was concerned about exposure to silica at the site. According to the IH, materials like concrete, cement, brick and mortar virtually always contain silica sand. She said that in one wing of the building a whole section of the roof had collapsed; she believed that material contained silica.[34] She also said the cleanup work the employees were doing included the material that had fallen on the floor.[35] The IH noted that if employees are not told of the hazards of a particular substance, they may not take the proper precautions to protect themselves. She further noted that inhaling silica can cause silicosis, a progressive lung disease with no treatment or cure that is similar to asbestosis. Once silica is inhaled into the lungs it stays in the lungs and it is "progressively fatal." (Tr. 124-28; Exh. F, at p. 30).

{redacted} testified that no one at the site told her of the hazards of silica or any other hazardous chemicals. She also stated that she did not receive any training relating to silica before she started working at the job site.[36] (Tr. 47-48). Mr. Boettner conceded that no such hazardous chemical information or training was provided by All Crane.[37] (Tr. 76, 126; Exh F, at p. 31, ¶23). Based on the record, the Court finds that the standard applies, that its terms were not met and that employees were exposed to the cited hazard. Mr.

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[34] The IH's Worksheet (OSHA-1B) indicated that "the bulk sample of cementitious material taken from the floor of this area was 30.0% silica." (Exh. F, at p. 30).

[35] The IH's Worksheet (OSHA-1B) stated that "Some of this was material that the ees had been engaged in cleaning up, including material similar to that in the bulk sample that was 30.0% silica." (Exh. F, at p. 31).

[36] In her worksheet, IH Danann indicated that ***{redacted}***, ***{redacted}***, ***{redacted}***, and ***{redacted}***, along with ***{redacted}*** and ***{redacted}***, were exposed to these conditions at the job site. The Court finds that this was so. (Tr. 166; Exh. F, at pp. 30).

[37] The IH also testified that LR was not offering training on some of the substances to which LR workers were exposed to at the job site. (Tr. 136).

Boettner testified that All Crane was unaware of the hazards of silica with respect to the cleanup work at the site. (Tr. 76). The Court finds, however, that All Crane could have known of those hazards with the exercise of due diligence. The Court further finds that this item was a serious violation. Item 6 is thus affirmed as serious.

A penalty of $1,750.00 was proposed for this item. The record shows that this item had high severity and lesser probability. (Tr. 31-32; Exh. F, at p. 29). I find the proposed penalty appropriate. A penalty of $1,750.00 is assessed.

Other Citation 2, Item 1

This item alleges a violation of 29 C.F.R. 1910.1001(j)(2)(i), which provides that:

> Building and facility owners shall determine the presence, location, and quantity of ACM and/or PACM at the work site. Employers and building and facility owners shall exercise due diligence in complying with these requirements to inform employers and employees about the presence and location of ACM and PACM.[38]

{redacted} testified she was concerned about asbestos due to the building's age.[39] Upon arriving at the site, she saw air purifiers that are used in asbestos abatement and bags marked with "asbestos" on them. She also saw "paper suits" like those that are worn for asbestos abatement.[40] ***{redacted}*** had done asbestos removal work before and was familiar with that type of equipment. There was no such work done while she was there, and she did not know if it had been completed. (Tr. 27-28, 40, 60-61).

When IH Danann asked Mr. Boettner about it, he was not sure whether an asbestos survey had been done. He thought another entity might have done one. The IH

[38] ACM, or asbestos containing material, is any material with more than 1% asbestos; PACM, or presumed asbestos containing material, is presumed to be in buildings built before 1980. *See* 29 C.F.R. 1910.1001(b).
[39] ***{redacted}*** testified that she learned before going to the site that the building was close to 100 years old. (Tr. 27). The Court finds that the building was built before 1980.
[40] ***{redacted}*** said the paper suits, which were evidently left there by an asbestos abatement contractor, were the ones All Crane provided to her and other LR workers for their cleanup work. The IH also stated that the suits had been left there by an asbestos removal contractor. (Tr. 28, 156).

researched the matter and learned that asbestos removal permits had been issued twice in the past. She was never able to locate an asbestos survey. (Tr. 128; Exh F, at p. 33).

Mr. Boettner testified he had no knowledge of whether All Crane did an asbestos survey at the site.[41] (Tr. 78). In light of his testimony, and that of the IH and ***{redacted}***, I find that the standard applies, that All Crane did not comply with it, and that employee access has been shown. In addition, All Crane should have known it was required to conduct an asbestos survey. This item is affirmed as an other violation; the record shows the condition had minimal severity and lesser probability. (Tr. 132; Exh. F, at p. 32). No penalty was proposed for this item, and none is assessed.

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

1. Item 1 of Serious Citation 1, alleging a violation of 29 C.F.R. 1910.23(b)(1), is affirmed, and a penalty of $3,500.00 is assessed.

2. Item 2 of Serious Citation 1, alleging a violation of 29 C.F.R. 1910.132(a), is affirmed, and a penalty of $1,750.00 is assessed.

[41] The asbestos standard requires the building owner to "determine the presence, location, and quantity of ACM and/or PACM at the work site." 29 C.F.R. § 1910.1001(j)(2)(i). This Respondent failed to do. The Court also finds that Respondent has not shown through any rebuttal that the PACM did not contain asbestos. *See* 29 C.F.R. § 1910.1001(j)(8). Employers and building and facility owners are also required to exercise due diligence in complying with these requirements to inform employers and employees about the presence and location of ACM and PACM. This too, Respondent failed to do. (Exh. F, at pp. 32-34). In her worksheet, IH Danann indicated that ***{redacted}***, ***{redacted}***, ***{redacted}***, and ***{redacted}***, along with ***{redacted}*** and ***{redacted}***, were exposed to these conditions at the job site. The Court finds that this was so. (Tr. 166; Exh. F, at pp. 32-33).

3. Item 3 of Serious Citation 1, alleging violations of 29 C.F.R. 1910.134(a), 29 C.F.R. 1910.134(e)(1), 29 C.F.R. 1910.134(f)(1) and 29 C.F.R. 1910.134(k)(1), is affirmed, and a penalty of $1,400.00 is assessed.

4. Item 4 of Serious Citation 1, alleging a violation of 29 C.F.R. 1910.151(a), is affirmed, and a penalty of $2,450.00 is assessed.

5. Item 5 of Serious Citation 1, alleging violations of 29 C.F.R. 1910.1025(d)(2) and 29 C.F.R. 1910.1025(l)(1)(i), is VACATED.

6. Item 6 of Serious Citation 1, alleging a violation of 29 C.F.R. 1910.1200(h), is affirmed, and a penalty of $1,750.00 is assessed.

7. Item 1 of Other Citation 2, alleging a violation of 29 C.F.R. 1910.1001(j)(2)(i), is affirmed, and no penalty is assessed.

/s/
The Honorable Dennis L. Phillips
U.S. OSHRC JUDGE

Date: 14 Mar 2011
Washington, D.C.