UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR, Complainant, v. L & B PRODUCTS, CORP., Respondent.	DOCKET NO. 95-1722

Appearances: For Complainant: Esther D. Curtwright, Esq., Office of the Solicitor, U. S. Department of Labor, New York, NY.; For Respondent: Sidney Manes, Esq., Green & Seifter , Syracuse, NY.

Before: Judge Covette Rooney

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission pursuant to Section 10(c) of the Occupational Safety and Health Act of 1979 (29 U.S.C. §651, *et seq.*)("the Act"). Respondent, L & B Products, Corp., ("L & B) at all times relevant to this action maintained a worksite at 99 South Third Street, Hudson, NY, where is was engaged in the business of furniture manufacturing. Respondent admits that it an employer engaged in a business affecting commerce and is subject to the requirements of the Act.

From April 25, 1995 to August 31, 1995, Compliance Safety and Health Officer ("CO") Christopher R. Adams conducted a health inspection of the aforementioned worksite. He visited the worksite approximately ten times between those two dates (Tr. 36). As a result of this inspection, on October 20, 1995, Respondent was issued three citations, alleging serious, willful, and other-than-serious violations with a proposed total penalty in the amount of $58,050.00. By timely Notice of Contest L & B brought this proceeding before the Review Commission. A hearing was held before the undersigned on June 17 through June 20, 1997 and June 23 through June 24, 1997. Counsel for the parties have submitted Post-Hearing Briefs and this matter is ready for disposition.

THE INSPECTION

CO Adams testified on behalf of the Secretary. CO Adams is an industrial hygienist, and conducts workplace inspections for health hazards. On April 25, 1995, he began a general scheduled inspection of L & B. Consulting a lay-out of the L & B facility, given to him by L & B employee Dean Vander Schaaff, CO Adams gave a general description of L & B. (Tr. 10, Exh. C-1).[1] The

[1] The term "Tr." refers to the transcript of the hearing in this matter. The term "Exh." refers to the exhibits.

facility had more than fifteen departments which were engaged in converting the raw goods into the finished products. CO Adams indicated that he walked through the cast iron warehouse, into the fabricating department, which is made up of the welding department and the punch press area (Tr. 13). CO Adams also examined the polishing department, the plating department, and the electrostatic paint booths and paint lines (Tr. 14, 16-17). In addition, he examined the glide line and the upholstery department (Tr. 17-18).

CO Adams testified that when he arrived at the facility, he asked to speak with whoever was in charge of safety and health. He was then introduced to Bob Harring (Tr. 11). CO Adams testified that present at the opening conference were Mr. Harring, union representative Arthur Rochester, and Dean Vander Schaaff. CO Adams stated that Mr. Harring introduced Mr. Vander Schaaff as a wood products engineer, and as someone responsible for safety and health (Tr. 12).[2] CO Adams testified that he began his inspection by visiting various departments of the facility with Mr. Vander Schaaff and Mr. Rochester. During this initial inspection, he identified specific areas which he believed required additional monitoring tests (Tr. 13-17). In the polishing department, he noted that employees were performing operations that involved a lot of machinery which was "very loud". As a result of that observation, he used a sound level meter to take noise level readings in order to obtain an initial if the noise levels exceeded OSHA exposure limits. He determined that their noise may exceed the OSHA exposure limit and decided that he would need to return and take additional measurements (Tr. 15-16). He returned on April 26, 1996 and continued to take initial noise sample tests. On May 3, 4, 10, and 16, 1995, he conducted full shift noise sampling pursuant to the OSHA noise standard (Tr. 30, 38-39). Mr. Vander Schaaff and Mr. Rochester accompanied him on those visits (Tr. 38-40). CO Adams testified that on May 23, 1995, he discussed a number of issues with Mr. Vander Schaaff - including whether there were any confined spaces at the site; whether respondent had records of audiograms being given to employees and whether respondent had a hearing conservation program (Tr. 40). On June 1, 1995, CO Adams returned to the worksite and conducted full shift sampling for dust exposure in the sanding department (Tr. 41-41). Mr. Vander Schaaff and Mr. Rochester accompanied him while he performed air monitoring (Tr. 42). On that date he also discussed with Mr. Harring noise exposure and whether there was a hearing conservation

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[2] Mr. Vander Schaaff testified that he is a wood products engineer without any formal training, including any training in safety and health (Tr. 741). He stated that he is not the health and safety director (Tr. 741-42). Mr. Vander Schaaff testified that he cannot hire and fire, but he can recommend the purchase of PPE or other equipment (Tr. 743). However, in a taped conversation with CO Adams in May of 1995, he acknowledged that he did work with "health and safety", and when asked how long he had been responsible for safety and health, Mr. Vander Schaaff responded "I don't know. I would say that just about a year ago, December-ish, somebody said, Dean, see if you can straighten this out for us. I think Mr. Harring said, straighten this problem out." (Exh. R-2, p. 202 , Tr. 857). As of August, 1996, Mr. Vander Schaaff was still receiving correspondence form the Utica Mutual Insurance Company concerning safety and health matters. (Tr. 859-60, Exh. C-40). The undersigned finds that this acknowledgment along with his active participation in the instant inspection, as set forth in the testimony adduced at trial, establish that he was actively involved with "health and safety matters" at L & B.

program at the worksite (Tr. 42). On June 8, 1995, CO Adams visited the worksite again to continue his conversation with Mr. Harring and Mr. Vander Schaaff about the hearing conservation program (Tr. 42). He visited the worksite on August 31, 1995, to continue his conversation with Mr. Harring as to the history of hearing protection at L & B. He also spoke to Mr. Vander Schaaff about the hearing conservation program on that date (Tr. 44). On September 14, 1995, he along with CO Terry Harding conducted a closing conference with L & B. Messrs. Vander Schaaff, Rochester, and Harring participated in this conference. Dr. Carter and Mr. Chantry, whom CO Adams had not previously met, also participated in the meeting. During the closing conference he discussed all the alleged violations to date.

ADMISSIONS OF EMPLOYEES

Respondent objects to the statements made to CO Adams by employees and management during the course of his inspection. (Respondent's Brief, pp. 6-8).[3] The Review Commission has acknowledged that statements to compliance officers by employees and foremen during the course of inspections are not hearsay but admissible admissions under Rule 801(d)(2)(D) of the Federal Rules of Evidence. *Regina Construction Co.*, 15 BNA OSHC 1044, 1048 (No.87-1309, 1991). The rule states:

(d) Statements which are not hearsay.

> A statement is not hearsay if . . .(2) Admissions by party opponent. The statement is offered against a party and is . . . (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship.

"Although admissions under Rule 801(d)(2)(D) are not inherently reliable, there are several factors that make them likely to be trustworthy, including: (1)the declarant does not have time to realize his own self-interest or feel pressure from the employer against whom the statement is made; (2) the statement involves a matter of the declarant is well-informed and not likely to speak carelessly; (3) the employer against whom the statement is made is expected to have access to evidence which explains or rebuts the matter asserted. 4 D. Louisell & C. Mueller, *Federal Evidence* §426 (1980 & Supp. 1990)." *Id.* The record reveals that these statements met the aforementioned tests. CO Adams simultaneously questioned employees and management as he made each observation. The employees were persons who actually worked with the equipment and their statements were made spontaneously. There was no evidence introduced by Respondent that these employees were concerned about their own self interest or felt pressure from the employer. Additionally, other than cross examining CO Adams about his discussions with employees, Respondent produced no evidence to rebut these statements. Respondent has had ample opportunity to rebut these statements. Accordingly, these statements constitute admissions whose reliability is unrefuted. *See George Campbell Painting Corp.*, 17 BNA OSHC 1979, n. 7 (No. 93-0984, 1997).

THE SECRETARY'S BURDEN OF PROOF

The Secretary has the burden proving her case by a preponderance of the evidence. In order to establish of violation of an occupational safety or health standard, the Secretary had the burden of

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[3] Respondent asserts that these employees were unidentified, however, a review of the record reveals otherwise. CO Adams provided the names of various employees - management and hourly - during the course of his testimony.

proving: (a) the applicability of the cited standard, (b) the employer's noncompliance with the standard's terms, (c) employee access to the violative conditions, and (d) the employer's actual or constructive knowledge of the violation (*i.e.* the employer either knew, or with the exercise of reasonable diligence could have known, of the violative conditions).
Atlantic Battery Co., 16 BNA OSHC 2131, 2138 (No, 90-1747, 1994).

The undersigned finds that L & B's manufacturing business is subject to the requirements of the general industry standards, and finds that a review of the record reveals that all of the cited violative conditions were conditions which the cited standards were effectuated to prevent. Accordingly, the cited standards are applicable.

The undersigned also notes at this time that Respondent alleges that the drafting of the citations was not of sufficient particularity to have afforded him adequate notice of what he did wrong and the issues in controversy. (Respondent's Brief, p. 9-10). The citation particularity requirement of Section 9(a) of the Act is intended to given an employer fair notice as to the nature of the alleged violation. The extreme sanction of vacating a citation for lack of particularity should only be taken where the employer has shown it was prejudiced in its ability to defend on the merits. An examination of the record as a whole reveals that Respondent was neither prejudiced in its ability to contest nor in its efforts to defend itself against the allegations of the citation. Additionally, I find that the language of the citation is substantially similar to the language of the standard, and that the areas at issue are described in reasonable detail. Consequently, I hold that the citation did provide adequate notice to the Respondent. Furthermore, the closing conference was attended by six representatives of the Respondent, none of whom indicated that they did not understand the citations as they were reviewed each instance as well as abatement dates.[4]

EMPLOYER KNOWLEDGE: GENERALLY

To satisfy the element of knowledge, the Complainant must prove that a cited employer either knew, or with the exercise of reasonable diligence could have known of the presence of the violative condition. *Seibel Modern Manufacturing & Welding Corp.*, 15 BNA OSHC 1218, 1221 (No. 88-821, 1991); *Consolidated Freightways Corp.*, 15 BNA OSHC 1317, 1320-1321 (No. 86-351, 1991). Employer knowledge is established by a showing of employer awareness of the physical conditions constituting the violation. It need not be shown that the employer understood or acknowledged that the physical conditions were actually *hazardous. Phoenix Roofing, Inc., 17 BNA OSHA 1076,1079 (No. 90-2148, 1995), aff'd without op., 79 F. 3d 1146 (5th Cir. 1996)* citing *East Texas Motor Freight v. OSHRC, 671 F.2d 845, 849 [10 BNA OSHA 1456] (5th cir. 1982); Vanco Constr., 11 BNA OSHA 1058, 1060 n.3 (No. 79-4945, 1982).* With respect to constructive knowledge the Secretary establishes it by showing that an employer could have known of the violative conditions if it had exercised reasonable diligence. In *Pride Oil Well Service*, 15 BNA OSHC 1809 (No. 87-692, 1992), the Review Commission set forth criteria to be considered when evaluating reasonable diligence.

> Reasonable diligence involves several factors, including an employer's "obligation to inspect the work area, to anticipate hazards to which employees may be exposed, and

[4] The undersigned also recognizes that this argument was raised as an affirmative defense by Respondent in its Answer- Paragraph XIV. Respondent presented no evidence to meet its burden of proving this affirmative defense.

> to take measures to prevent the occurrence." *Frank Swidzinski Co.*, 9 BNA OSHC 1230, 1233 (No. 76-4627, 1981) . . . Other factors indicative of reasonable diligence include adequate supervision of employees, and the formulation and implementation of adequate training programs and work rules to ensure that work is safe. (citations omitted).

Id. at 1814.

"Because corporate employers can only obtain knowledge through their agents, the actions and knowledge of supervisory personnel are generally imputed to their employers, and the Secretary can make a prima facie showing of knowledge by proving that a supervisory employee knew of or was responsible for the violation." *Todd Shipyards Corporation*, 11 BNA OSHC 2177, 2179 (No. 77-1598, 1984). *See also Dun Par Engineered Form Co.*, 12 BNA OSHC 1962 (No. 82-928, 1986)(the actual or constructive knowledge of an employer's foreman can be imputed to the employer); *Superior Electric Co.*, 17 BNA OSHA 1636 (No. 91-1597, 1996)(when an supervisory employee has actual or constructive knowledge of the violative conditions, that knowledge is imputed to the employer). In the instant matter, not only did CO Adams interview a number of foremen/supervisors during his walkaround, but he was accompanied by the employee who was introduced to him as in charge of safety - Dean Vander Schaaff. The actions and/or inactions of these individuals were imputable to L & B.

The record establishes that all of the cited conditions were in plain view and that supervisory personnel were present throughout the work operation. This constitutes constructive of the violative conditions. *American Airlines, Inc.* 17 BNA OSHC 1552, 1555 (No. 93-1817 and 93-1965, 1996). In the instant matter, the undersigned finds that Respondent's supervisory personnel had a duty to determine the hazards to which their employees may have been exposed and to have eliminated such hazards. In view of the conspicuous location, the readily observable nature of the conditions and the presence of supervisory personnel in the cited areas, the undersigned finds that had Respondent's supervisory personnel exercised reasonable diligence, they would have known and recognized the cited conditions. Accordingly, a finding of constructive knowledge has been established.

SERIOUS VIOLATIONS

Citation 1, Item 1a

§1910.132(a): Application. Protective equipment, including personal protective equipment for eyes, face, head, and extremities, protective clothing, respiratory devices, and 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.[5]

> *(a)*: On 5/4/95 in the table top area where an employee working on the leaf tops was working with Hybond without wearing gloves.

[5]L & B and the Secretary stipulated that: "L&B provided personal protective equipment to its employees such as various types of gloves, safety glasses, goggles, rubbers, over-the-shoe boots, respirators, ear plugs, ear muffs, as evidenced by the purchase orders that were just testified to by Mr. Vander Schaaff between the periods of 1985 to 1995." (Tr. 770)

1. Employer Noncompliance

CO Adams observed an employee using Hy-Bond Eighty Contact Adhesive to attach formica onto plywood table leaves. CO Adams testified that the employee poured the adhesive into a roller pan, and used a paint roller to roll glue across both the top of the plywood and the piece of formica. He would then join the two pieces together. Using the roller, he would then apply glue to the edge of the plywood, and to a piece of formica edging. Those pieces where joined together. CO Adams testified that during this process, adhesive would drip from the side of the piece. He observed the employee using his finger to remove the excess glue from the edge of the table. The employee would then wipe his finger with a cloth (Tr. 46-47, 470, 472).

CO Adams observed that the employee was not wearing gloves during this process. (Tr. 47). The Material Safety Data Sheet for the adhesive indicates that "[l]iquid material may be absorbed through the skin in harmful amounts. May cause defatting and irritation of the skin." (Exh. C-4). CO Adams testified that the handle of the paint roller did not appear to have glue on it. He stated that the employee was exposed to the glue when he wiped off glue that seeped out from the joined materials (Tr. 470-71). CO Adams testified that when he asked the employee why he was not wearing gloves, the employee told him that he did not think gloves were necessary when working with this glue (Tr. 51, 473). Accordingly, the employee was not using PPE.

2. Employee Access to the Violative Condition

In light of the fact that the employee was not wearing any gloves, the employee was exposed to t he glue when he wiped off glue that seeped out from the joined materials. CO Adams observed the employee's skin contacting the adhesive. The employee had access to the violative condition.

3. Employer Knowledge of the Violation

CO Adams discussed the issue of gloves with the department supervisor. CO Adams testified that the supervisor indicated that gloves were available (Tr. 473). L & B had constructive knowledge of the violative condition. L & B was not exercising reasonable diligence in ensuring the use of PPE. The employee came in contact with the adhesive in plain view, and the record indicates that supervisors were present throughout the workplace.

(b): On 5/4/95 in the table top area an employee working on a chair back press using Pilot Powdered Urea Glue and the gloves he was wearing were cracked.

1. Employer Noncompliance

CO Adams observed an employee making chair backs from layers of plywood. The employee used Pilot Brand Powdered Urea glue by mixing the powdered glue with water and pouring the mixture in to a roller pan. The employee would roll the glue onto pieces of plywood. The pieces of plywood were layered on top of each other to form a three to four inch chair back. A machine would then bend the layered wood into the proper form (Tr. 48, 478-79). CO Adams observed that the employee was wearing gloves. However, the gloves were cracked, and there were spots where the outside protective layer was missing (Tr. 48-49, 475, Exh. C-6). CO Adams determined that cracked surface was the gloves themselves, and not just dried glue cracked on the gloves (Tr. 474). The MSDS for the glue indicated that users should "[a]void prolonged or repeated contact," and the glue "[m]ay cause irritation on prolonged or repeated contact."(Exh. C-5)

The undersigned finds that the damaged gloves do not provide sufficient protection from a compound that should be avoided. In addition, the PPE was not maintained in a reliable condition

2. Employee Access to the Violative Condition

CO Adams observed the employee using the gloves. Therefore, the employee had access to

the violative condition.

3. Employer Knowledge of the Violation

CO Adams testified that he spoke with the employee about the gloves. The employee told him that those gloves were supplied to him by L & B (Tr. 51, 52). He indicated that when he spoke with the supervisor about the gloves, the supervisor to him he would get other gloves for the employee. L & B had constructive knowledge of the violative condition. L & B was not exercising reasonable diligence in ensuring the use of PPE. The employee used the defective gloves was in plain view, and the record indicates that supervisors were present throughout the workplace.

Citation 1, Item 1b

§1910.132(d)(2): The employer shall verify that the required workplace hazard assessment has been performed through a written certification that identifies the workplace evaluated; the person certifying that the evaluation has been performed; the date(s) of the hazard assessment; and, which identifies the document as a certification of hazard assessment.

1. Employer Noncompliance

CO Adams listed in the instance description the following examples of the lack of employee protective equipment to demonstrate that L & B had not performed a workplace hazard assessment (Tr. 57):

(a): 4/26/95 For the employee who working in the table top area with a router and was wearing regular prescription glasses without side shields.

CO Adams testified that he observed an employee working in the table top area operating a router. The employee was not wearing safety glasses, he was wearing regular prescription glasses (Tr. 53). CO Adams determined this by asking the employee if his glasses were safety prescription glasses. The employee told him they were not. (Tr. 54, 482). CO Adams testified that he discussed this with the supervisor, identified as "Dave," who told him that the employee was wearing his own glasses (Tr. 481-82).

(b) 5/3/95 For the employee who worked in the polishing department with a Bader machine and was wearing regular prescription glasses instead of safety glasses.

CO Adams testified that he spoke to the employee described in the above example and determined that he was wearing prescriptions glasses, not prescription safety glasses (Tr. 483-84). CO Adams stated that he discussed the employee's glasses with the department supervisor, Angelo Perry. He testified that supervisor Perry told him that he thought the prescription glasses provided enough protection (Tr. 483).

(c) 5/10/95 For the employee in the plating department who was moving chairs from the nickel line to the brass line and was not wearing an apron, gloves, and protective boots.

CO Adams testified that the employee listed in the above example may be exposed to nickel plating solution still on the chairs that he is moving (Tr. 490-91). CO Adams indicated that when the employees move the chairs, they are attached to a hanger (Tr. 493). Although the chairs are put into a rinse tank before they are moved, CO Adams testified that employees may still be exposed to a combination of nickel plating solution and water from the rinse tank (Tr. 491-92, 494-95).

(d) 6/1/95 For the employees in the chair sanding area who were not required to wear safety glasses when sanding the chairs.

CO Adams testified that he asked Mr. Vander Schaaff he had ever done a hazard assessment to determine what personal protective equipment ("PPE") was necessary at this facility.

CO Adams testified that Mr. Vander Schaaff told him that he had not done one and that he did not understand what a hazard assessment was (Tr. 57, 485-86). Mr. Vander Schaaff also testified that at the time of the inspection, he did not know what a hazard assessment was (Tr. 754). CO Adams testified that he explained that a hazard assessment would include going to different departments, observing employee tasks, and determining what types of PPE were necessary to protect the employees (Tr. 486-87). CO Adams further testified that Mr. Vander Schaaff indicated that he knew of no one at the facility who had prepared such an assessment[6] (Tr. 485) .

2. Employee Access to the Violative Condition

CO Adams determined via his observations that some employees were not wearing PPE. This lack of adequate protection indicated that employees were exposed to the violative condition.

3. Employer Knowledge of the Violation

L & B ad constructive knowledge of the violation - with the exercise of reasonable diligence, they could have known of the violative condition. L & B should have know that no hazard assessment had been performed.

Citation 1, Item 1c

§1910.132(f)(1): (f) Training. (1) The employer shall provide training to each employee who is required by this section to use PPE. Each such employee shall be trained to know at least the following:

(I) When PPE is necessary;
(ii) What PPE is necessary;
(iii) How to properly don, doff, adjust, and wear PPE;
(iv) The limitations of the PPE; and,
(v) The proper care, maintenance, useful life and disposal of the PPE.

CO Adams testified that he spoke with approximately ten employees concerning PPE training. He testified that none of these employees indicated that they had been trained. (Tr. 725). In addition, CO Adams indicated he spoke with the employee listed in the following instance descriptions to determine if they had received training. (Tr. 58-59).

(a) 4/26/95 For the employee who working in the table top area with a router and was wearing regular prescription glasses without side shields.

1. Employer Noncompliance

CO Adams determined that the employee described above needed safety glasses because the employee was using a table router to trim off excess formica from table leaves. The table router is a flat table, with a bit protruding up from the table. The employee runs the table leaves past the router bit. This caused formica debris to be thrown into the air, possibly injuring the employee (Tr. 59).

2. Employee Access to the Violative Condition

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[6] L & B suggested that exhibits C-23 and C-29 constituted a workplace hazard assessment. C-23 is an industrial hygiene report generated by an insurance company. The report makes a brief reference to respirators and hearing protection. C-29 contains a short list of recommendations that include the use of eye protection and dust masks by painters, and discussed the use of hearing protection. (Exh. C-29). CO Adams testified that although some of the things considered in those documents should be considered in a workplace hazard assessment, these documents would not constitute a workplace hazard assessment. (Tr. 489-90, 725).

CO Adams observed this employee working with out PPE. As such, this employee was exposed to the hazardous condition.

3. Employer Knowledge of the Violation

L & B had constructive knowledge of the violative condition - with the exercise of reasonable diligence, they could have known of the violative condition. L & B should have known that employees had not received adequate training.

(b) 5/3/95 For the employee who worked in the polishing department with a Bader machine and was wearing regular prescription glasses instead of safety glasses.

1. Employer Noncompliance

CO Adams observed the employee described above working on the Bader machine. He described the Bader as a large sanding machine with a three or four foot long belt sander. The employee places chair framework onto the sander and removes the excess material used to weld pieces of the chairs together. This process creates sparks, and throws metal debris into the air (Tr. 59-60).

2. Employee Access to the Violative Condition

CO Adams observed this employee working without adequate PPE. As such, the employee was exposed to the violative condition.

3. Employer Knowledge of the Violation

L & B had constructive knowledge of the violative condition - with the exercise of reasonable diligence, they could have known of the violative condition. L & B should have known that employees had not received adequate training.

(c) 6/1/95, For the employees in the chair sanding area who were not required to wear safety glasses when sanding the chairs.

1. Employer Noncompliance

CO Adams observed employees using hand-held air-powered sanders to smooth out the surface of wooden chairs. Employees place the chairs at eye level during this process. CO Adams testified that employees got "real close" to make sure that they were smoothing out the chair sufficiently (Tr. 60, 74, Exh. C-8). The employee pictured in Exh. C-8 was not wearing eye protection (Tr. 75). This operation generated flying wood dust (Tr. 60).

2. Employee Access to the Violative Condition

CO Adams observed employees working without adequate PPE. As such, employees had access to the violative condition.

3. Employer Knowledge of the Violation

L & B had constructive knowledge of the violative condition - with the exercise of reasonable diligence, they could have known of the violative condition. L & B should have known that employees had not received adequate training.

(d) 5/10/95 For the employee in the plating department who was moving chairs from the nickel line to the brass line and was not wearing an apron, gloves, and protective boots.

1. Employer Noncompliance

CO Adams observed this employee taking chairs off the nickel line and carrying the chair to the brass finishing line. CO Adams testified that the chairs were wet when the employee was moving them. The employee was wearing cotton gloves, which CO Adams testified provided insufficient protection, as they merely absorb the liquid (Tr. 61). Although the chairs were put into a rinse tank before they were moved, CO Adams testified that employees may still be exposed to a combination

of nickel plating solution and water from the rinse tank (Tr. 491-92, 494-95). CO Adams said that this employee told him that the dripping solution caused his socks to turn green (Tr. 724-26). CO Adams opined that this indicated that the solution dripping from the chairs could not be water (Tr. 725-26). CO Adams stated that PPE is required because the employee was working around hazardous chemicals, such as sodium hydroxide, sulfuric acid, and the nickel plating solution[7] (Tr. 62).

The nickel plating solution is a combination of four different chemicals, including Isobrite 829, M&T nickels anodes, M&T liquid nickel chloride, and nickel sulphate (Tr. 66, Exh. C-7). Isobrite 829 requires the use of rubber protective gloves and chemical safety goggles. M&T nickel chloride requires that employees use chemical safety goggles, that employees not wear contact lenses, and the use of rubber, neoprene, or nitrile gloves. Nickel sulphate requires the use of goggles or a face shield, rubber or neoprene gloves, and rubber aprons and boots to prevent skin contact (Tr. 71, Exh C-7).

CO Adams testified that he discussed the employee described above with the supervisor of the plating line, Angelo Perry. He stated that supervisor Perry told him that he did not think that such protections were necessary (Tr. 504).

2. Employee Access to the Violative Condition

CO Adams observed this employee working without adequate PPE. As such, the employee was exposed to the violative condition.

3. Employer Knowledge of the Violation

L & B had constructive knowledge of the violative condition - with the exercise of reasonable diligence, they could have known of the violative condition. L & B should have known that employees had not received adequate training. In addition, L & B had access to the MSDS for the chemicals that the employee was exposed to. The MSDS's clearly indicate the type of PPE necessary when working with these chemicals.

Citation 1, Item 1d

§1910.133(a)(1): (a) General requirements. (1) The employer shall ensure that each affected employee uses appropriate eye or face protection when exposed to eye or face hazards from flying particles, molten metal, liquid chemicals, acids or caustic liquids, chemical gases or vapors, or potentially injurious light radiation.

(a) On 4/26/95 in the table top area where an employee working on the router was wearing regular prescription glasses without side shields.

1. Employer Noncompliance

CO Adams testified that this employee was exposed to flying pieces of formica and wood while using the router. CO Adams indicated that he spoke with the employee, and determined that the glasses he was wearing were regular prescription glasses, not safety glasses (Tr. 72, 76). This employee was also described in Item 1b, instance (a), and 1c instance (a). CO Adams testified that Mr. Vander Schaaff was with him when he made this observation (Tr. 75).

2. Employee Access to the Violative Condition

CO Adams observed this employee's exposure to flying pieces of wood and formica, and he observed the employee working without adequate eye protection. Therefore, the employee was exposed to the violative condition.

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[7]Exh. C-7 contains the MSDS for the nickel plating solution.

3. Employer Knowledge of the Violation

L & B had constructive knowledge of the violative condition. The employee was working without adequate eye protection in plain view, and the record indicates that supervisors were present throughout the workplace.

(b) On 5/3/95 in the polishing department where an employee working on a Bader machine was wearing regular prescription glasses without side shields.

1. Employer Noncompliance

CO Adams observed an employee working in the polishing department exposed to sparks and flying pieces of metal (Tr. 72). This employee was also described in Item 1b, instance (b), and 1c instance (b). CO Adams testified that he spoke to the employee and determined that he was wearing prescriptions glasses, not prescription safety glasses. (Tr. 483-84).

2. Employee Access to the Violative Condition

CO Adams observed this employee working near flying particles without adequate eye protection. As such, the employee was exposed to the violative condition.

3. Employer Knowledge of the Violation

L & B had constructive knowledge of the violative condition. The employee was working in plain view, and the record indicates that supervisors were present throughout the workplace.

(c) On 6/1/95 on the sanding line where employees are not required to wear safety glasses when sanding the chairs with the vibratory sander.

1. Employer Noncompliance

CO Adams testified that employees on the sanding line were exposed to airborne dust created during the sanding of wood chairs. This employee was also described in Item 1b, instance (d), and 1c instance (c). Employees place the chairs at eye level during this process. CO Adams testified that employees got "real close" to make sure that they were smoothing out the chair sufficiently (Tr. 60, 74, Exh. C-8). This employee pictured in Exh. C-8 was not wearing eye protection (Tr. 75). CO Adams testified that Mr. Vander Schaaff was with him when he made this observation, and that he discussed with Mr. Vander Schaaff the need for employees to wear eye protection (Tr. 75-76).

2. Employee Access to the Violative Condition

CO Adams observed the employees working around airborne dust without adequate eye protection. As such, the employee were exposed to the violative condition.

3. Employer Knowledge of the Violation

L & B had constructive knowledge of the violative condition. The employees were sanding without eye protection in plain view, and the record indicates that supervisors were present throughout the workplace.

Penalty - Items 1a, 1b, 1c, and 1d

CO Adams testified that the severity of the injury to hands and eyes would be low; and the probability of the violation was lesser because there was a lesser probability of an injury occurring (Tr. 61, 72, 118, 122). The Secretary's adjusted proposed penalty was $1, 350.00.[8]

Citation 1, Item 2

§1910.146(c)(1): (c) General requirements. (1) The employer shall evaluate the workplace to

[8] See discussion **PENALTY**, *infra* p. 17.

determine if any spaces are permit-required confined spaces.

(a) 5/23/95, For the confined space onsite such as the plating waste tank and the saw dust collection hopper.

1. Employer Noncompliance

CO Adams testified that he asked Mr. Vander Schaaff if L & B had any confined spaces or permit-required confined spaces (Tr. 77). CO Adams stated that Mr. Vander Schaaff was not sure what a confined space was, so he explained that an example of a confined space may be a tank or a hopper (Tr. 78, 506-07). He indicated that Mr. Vander Schaaff told him L & B had a plating waste tank outside, and no one had done an evaluation of the tank to determine whether it was a permit-required confined space (Tr. 78, 507). Mr. Vander Schaaff testified that CO Adams briefly explained what a confined space was, and that he told CO Adams that L & B might have some confined spaces (Tr. 752-53).

CO Adams testified that Mr. Vander Schaaff took him to the plating waste tank. Exhs. C-9 and C-10 show the small hatch to the tank, located on an outside a cement driveway (Tr. 79-80, 727, Exhs. C-9, C-10). The plating tank was 10 ½ feet wide, 12 ½ feet long, and 5 feet deep. (Tr. 123, 512-13). CO Adams stated Mr. Vander Schaaff suggested that he speak to the head of maintenance, Nate Morrison, about the dimensions and uses of the tank. (Tr. 727-28). Through conversations with maintenance supervisor Morrison, he determined that the tank would fall under the confined space standard, because it had a limited means of access, and it was not designed for continuous occupancy.[9] (Tr. 88, 512). CO Adams indicated that the door to the tank was locked, and that he did not open the door. (Tr. 508-10). Mr. Vander Schaaff's testimony confirmed that this door was locked (Tr. 754). Mr. Vander Schaaff also testified that he told CO Adams that employees entered the tank. (Tr. 852-53).

CO Adams further testified that he observed a sawdust hopper that collects the sawdust from the table top operation (Tr. 82, Exhs. C-11, C-12). He testified that, based on the definition in section 1910.146(b), he determined that the area was a confined space (Tr. 84). He observed a limited means of entry, and it was not designed for continuous human occupancy (Tr. 88). Mr. Vander Schaaff testified that the doors to the hoppers were bolted closed (Tr. 754).

CO Adams testified that as required by the cited regulation, the employer must evaluate confined spaces to determine if they are permit-required confines spaces.[10] CO Adams testified that

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[9] Section 1910.146(b) provides that:
"Confined space" means a space that:

(1) Is large enough and so configured that an employee can bodily enter and perform assigned work; and

(2) Has limited or restricted means for entry or exit (for example, tanks, vessels, silos, storage bins, hoppers, vaults, and pits are spaces that may have limited means of entry.); and

(3) Is not designed for continuous employee occupancy.

[10] A permit-required confined space is defines in Section 1910.146(b) as "a confined space that has one or more of the following characteristics:

(1) Contains or has a potential to contain a hazardous atmosphere;

such a determination could be made through a visual inspection. (Tr. 510).

2. Employee Access to the Violative Condition

CO Adams testified that he believed the areas that L & B failed to assess were in fact confined spaces. He was told that employees did enter the plating waste tank (Tr. 95). Mr. Vander Schaaff also testified that employees entered said tank (Tr. 852-53). As such, employee were exposed to the violative condition.

3. Employer Knowledge of the Violation

L & B had constructive knowledge of the violative condition - with the exercise of reasonable diligence, they could have known of the violative condition. The confined spaces discovered by CO Adams were in plain view of the employer, CO Adams further testified that the employer could have began the assessment process through a visual inspection.

Penalty

CO Adams testified that the he assessed the probability of the violation as "lesser, because the employee do not enter the confined spaces on a regular basis." (Tr. 123). He classified the severity as medium, because he determined that the most likely injury would be an employee falling an breaking bones. (Tr.123). The Secretary adjusted proposed penalty was $1,800.00.

Citation 1, Item 3

§1910.252(b)(2)(iii): Protection from arc welding rays. Where the work permits, the welder should be enclosed in an individual booth painted with a finish of low reflectivity such as zinc oxide (an important factor for absorbing ultraviolet radiations) and lamp black, or shall be enclosed with noncombustible screens similarly painted. Booths and screens shall permit circulation of air at floor level. Workers or other persons adjacent to the welding areas shall be protected from the rays by noncombustible or flameproof screens or shields or shall be required to wear appropriate goggles.

(a) On ~~5/25/95~~ 4/25/95 in the welding where the screen for the welding booths had holes or were completely ripped open exposing passing employees to weld flash.

1. Employer Noncompliance

CO Adams testified that the welding department was part of the fabrication department (Tr. 96). He stated that some of the welding curtains had large rips and holes in them up to two feet wide that exposed employees to welding rays. Some of these holes were 2 feet in length, others were smaller. One of the curtains was ripped and could not be completely closed (Tr. 97-98). CO Adams testified that there were 10 welding screens. Approximately five of the screens were adjacent to areas were employees could be exposed to welding rays. Of those curtains, half of them had holes (Tr. 98-99).

2. Employee Access to the Violative Condition

CO Adams observed employees exposed to the welding rays that escaped from the torn curtains. CO Adams further testified that the welding area was adjacent to the punch press area, and he observed an employee working on a saw directly next to one of the welding booths(Tr. 97, 519). CO Adams estimated that ten employees worked in the welding area, and eight to ten employees

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(2) Contains a material that has the potential for engulfing an entrant;

(3) Has an internal configuration such that an entrant could be trapped or asphyxiated by inwardly converging walls or by a floor which slopes downward and tapers to a smaller cross-section; or

(4) Contains any other recognized serious safety or health hazard."

worked in the punch press area (Tr. 519). In addition, several employees from the polishing area come into the area to retrieve chairs, passing by the holes in the welding screens (Tr. 519, 728-29). CO Adams notes reflected that employees Jack Alger and G. Davis were exposed to welding rays (Tr 517-18).

3. Employer Knowledge of the Violation

L & B had constructive knowledge of the violative condition. The ripped curtains were in plain view, and the record indicates that supervisors were present throughout the workplace. CO Adams testified that he discussed the torn screens with welding department supervisor Angelo Perry, and supervisor Perry said that he would have the curtains fixed (Tr. 521-22).

Penalty

CO Adams testified that he determined that the severity of the violation was low. He described the potential injury as "weld flash." He indicated that employees may feel as through they had a grain of sand in their eye. This condition is irritating, and lasts a few days. However, the eye normally recovers (Tr. 126). He assessed the probability as "greater," based on the number of holes in the welding curtains, and the number of people who walked in and out of that area during the day (Tr. 126). The Secretary's adjusted proposed penalty was $2,250.00.

Citation 1, Item 4

§1910.1200(h)(1): (h) "Employee information and training." (1) 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. Information and training may be designed to cover categories of hazards (e.g., flammability, carcinogenicity) or specific chemicals. Chemical-specific information must always be available through labels and material safety data sheets.

(a) 4/26/95, For employees who worked with hazardous chemicals in the wood division such as stains such as #1826 American Walnut and various lacquers manufactured by Lilly and also Celo-Set by Laurence-David, Inc. and were not trained on the hazards of the chemicals they worked with.

1. Employer Noncompliance

CO Adams testified that employees worked with flammable paints and lacquers, and a chemical called Celo-Set, similar to wood putty (Tr. 99). He indicated that these employees do spray painting in booths and on a spray line using various flammable lacquers. CO Adams testified that he asked employees if they had any training concerning the hazards of these chemicals. The employees told him that they had not been trained, and that they were not sure of the health hazards associated with the chemicals they were using (Tr. 113). He testified that he spoke with wood division employee Mary Coleman, and she told him that she did not have any training on the labeling system used by L & B. He also spoke with wood division employee Donna Shrader, who told him that she had not been trained as to the hazardous chemicals she was working with (Tr. 457-58). CO Adams indicated that the MSDS's for the material in instance (a) were made available to him, and that he reviewed the MSDS for the products manufactured by Celo-Set and Lilly (Tr. 443). Exh. C-17 is a MSDS for lacquer thinner (Tr. 451). CO Adams testified that he also relied on the MSDS for 1826 American Walnut, Exh. C-14 (Tr. 452, Ex. C-14).

CO Adams testified that Mr. Vander Schaaff indicated that a hazardous communications program existed, but that employees had not been trained within the past year (Tr. 446-47). Mr. Vander Schaaff testified that he and a union employee created a "hazcom" program. He indicated

that they put the program into effect by training new and current employees (Tr. 744). He stated that they showed employees how to read MSDS's, told them of the hazards in their work areas, and showed them available personal protective equipment. He stated that the curriculum "didn't last long." (Tr. 744). Both CO Adams and Mr. Vander Schaaff testified that Mr. Vander Schaaff gave CO Adams a copy of this program (Tr. 449, 831, Exh. C-34[11]). Mr. Vander Schaaff also testified that to the best of his knowledge, employees and new hires received information about the personal protective equipment that was available (Tr. 745-46). Exh. C-29, a letter addressed to Mr. Vander Schaaff, Health and Safety Manager, from Aleksandra Nawakowski, Industrial Hygiene Consultant (dated November 30, 1994) indicated that Mr. Vander Schaaff had taken over the health an safety program, and that he had organized the MSDS for that they area easily available for employees. The letter also stated that Mr. Vander Schaaff was "in the process of relaying this information to employees at the safety meetings." (Exh. C-29, p. 446; Tr. 449-50)

CO Adams opined that L & B did not provide employees with effective information on the hazardous chemical that they worked with at the time of their initial assignment, or whenever a new chemical about which they had not been trained was introduced into their work area (Tr. 111-12). He testified that he determined this by speaking with Mr. Vander Schaaff, Mr. Harring, and with various employees (Tr. 113). CO Adams also testified that Mr. Vander Schaaff told him the last hazard communication training took place one year before the inspection. CO Adams stated that several of the employees he interview had only been working at L & B for several months, therefore those employees could not have received the training that Mr. Vander Schaaff discussed (Tr. 115-16).

(b) For employees who worked with hazardous chemicals in the wood shop such as Hybond 80 manufactured by Specialty Products Division and Pilot Powdered Urea Resin Glue manufactured by Pilot Chemical Company. 4/26/95

CO Adams testified that he observed employees working with Hybond 80 contact adhesive and Pilot Powdered Urea resin glue. (These hazardous nature of these glues is discussed in Citation 1, Item 1a.). CO Adams spoke to the employee he observed applying the Hybond 80 contact adhesive to table tops and to the employee applying Pilot Powdered Urea resin glue to chair backs, and they told him that they had not received training on the hazardous chemicals that they worked with (Tr. 113-14).

(c) For employees who worked with hazardous chemicals in fabrication such as Weld Kleen 350 manufactured by Weld-Aid Products and compressed gas cylinders of Acetylene. 4/25/95

CO Adams testified that he observed employees working with Weld Kleen 350 in performing their job duties. The employees were also working with compressed gas cylinders. CO Adams testified that he asked these employee if they had ever been trained on the hazards associated with Weld Kleen 350 or compressed gas cylinders of acetylene. They told him that they had not been trained.[12] (Tr. 114-15, Exh. C-13).

(d) For employees who worked with hazardous chemicals in the plating room such as Sodium Hydroxide and Sulfuric Acid and were not trained on the hazards of the chemicals

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[11]Exh. C-34, the "Training Program," appears to be an outline of what should be done to establish a hazardous communications program.

[12] The MSDS for Weld Kleen 350 lists the only toxicity as "eye irritant." (Exh. C-13)

they worked with. 4/25/95.

CO Adams observed employee working in the plating room with hazardous chemicals like sodium hydroxide and sulfuric acid. He testified that he asked the employees if they had training on the hazardous of these chemicals. They told him that they did not (Tr. 115).[13]

2. Employee Access to the Violative Condition

CO Adams determined through employee interviews that employees were not provided with effective information and training on hazardous chemicals. As such, employee were exposed to the violative condition.

3. Employer Knowledge of the Violation

L & Bhad constructive knowledge of the violative condition - with the exercise of reasonable diligence, they could have known of the violative condition. L & B should have known that new employees had not received training.

Penalty

CO Adams determined that the severity of the violation was medium. He testified that employees were working with flammable materials, and materials that posed other health hazards, but had not been trained on how to protect themselves. He stated that the resulting injury would be of medium severity, resulting in a limited period of disability. He assessed the probability as "greater," because he determined that, due to their lack of knowledge, employees would be more likely to injure themselves (Tr. 128). The Secretary's adjusted proposed penalty was $3,150.00.

SERIOUS CLASSIFICATION

Section 17(k) of the Act, 29 U.S.C.. §666(k) of the Act, provides that a violation is "serious" if there is " a substantial probability that death of serious physical harm could result" from the violation. In order to establish that a violation should be characterized as serious, the Secretary need not establish that an accident is likely to occur, but must show that an accident is possible and it is probable that death or serious physical harm could occur. *Flintco Inc., 16 BNA OSHA 1404, 1405 (No 92-1396, 1993).*

The undersigned finds that the serious nature of the aforementioned citations has been established by the Secretary. In each of the citations the Secretary proved that serious physical harm could result because of noncompliance.

PENALTY

Once a contested case is before the Review Commission, the amount of the penalty proposed by the Complainant in the Citation and Notification of Proposed Penalties is merely a proposal. What constitutes an appropriate penalty is a determination which the Review Commission as the final arbiter of penalties must make. In determining appropriate penalties "due consideration" must be give to the four criteria under Section 17(j) of the Act, 29 U.S.C., §666(j). These "penalty factors" are: the size of the employer's business, the gravity of the violation, the employer's good faith, and its prior history. *J.A. Jones Construction Co.*, 15 BNA OSHC 2201, 2213-14 (No. 87-2059, 1993). These factors are not necessarily accorded equal weight.

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[13] CO Adams testified that one employee in the plating department, Charlie Cook, Jr., he indicated that he had been trained. (Tr. 466)

Generally speaking, the gravity of a violation is the primary element in the penalty assessment. *Trinity Indus., Inc.*, 15 BNA OSHC 1481, 1483 (No. 88-2691, 1992). The gravity of a particular violation depends upon such matters as the number of employees exposed, the duration of the exposure, the precautions taken against injury, and the likelihood that any injury would result. *J.A. Jones, supra.*

CO Adams testified that he considered the severity and the probability of the citations classified as serious. He stated that severity depends on the most likely resulting injury, and probability is the likelihood of the resulting injury occurring (Tr. 118). In proposing penalties, he considered the gravity of the violation, the size of the company, good faith, and the L & B's history of OSHA violations (Tr. 188). CO Adams testified that he applied a 10 percent reduction to each citation item for history (Tr. 119, 121). L & B had not been cited for any serious, willful, or repeated violations in the past three years. He further testified that he did not give a reduction for size, as L & B employed over 250 employees - per information provided by Bob Harring (Tr. 119-21). He indicated that no reduction for good faith was given, because the OSHA field operations manual dictates that no reduction be given for good faith when a willful violation is issued (Tr. 121) .

After considering the above factors and the gravity of each violation, the undersigned finds that the Secretary followed the procedures prescribed in Section 17(j) and that the proposed penalties are appropriate.

WILLFUL VIOLATION

Citation 2, Item 1

§1910.95(c)(1): (c) "Hearing conservation program." (1) The employer shall administer a continuing, effective hearing conservation program, as described in paragraphs (c) through (o) of this section, whenever employee noise exposures equal or exceed an 8-hour time-weighted average sound level (TWA) of 85 decibels measured on the A scale (slow response) or, equivalently, a dose of fifty percent. For purposes of the hearing conservation program, employee noise exposures shall be computed in accordance with appendix A and Table G-16a, and without regard to any attenuation provided by the use of personal protective equipment.

1. Employer Noncompliance

CO Adams testified that during his walk-around, he used a sound level meter to do an initial screening of the workplace (Tr. 132). CO Adams determined that employees may be exposed to noise in excess of 85 dB.[14]

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[14] CO Adams described the Cell brand sound level meter he used during this part of his inspection, marked for identification as Exh. C-2 (Tr. 19). CO Adams testified that a sound level meter is used to determined decibel ("dB") levels of sound in the workplace (Tr. 20). CO Adams testified that the sound level meter can determine sound levels in one of four different ranges. The meter can read on the "A" weighted scale in both the low and high range, and on the "C" weighted scale in both the low and high range. The low range reads sounds between 30 dB and 100 dB, and the high range reads sound between 65 dB and 135 dB. (Tr. 21).

Before using the meter in the field, CO Adams testified that he calibrates the meter to ensure that it is working correctly. He stated that he first checks the batteries with a volt meter, then uses an acoustical calibrator to test the meter, marked for identification as Exh. C-3 (Tr. 23). When the

Following his initial determinations, CO Adams testified that he conducted a full shift noise sampling in the polishing department, the table top area, the wood chair area, the sanding department, and the spray booths and spray lines and found that employees were exposed to a continuous noise level of greater than 85 dB over an 8 hour time weighted average ("TWA").[15] (Tr. 129, 133). CO Adams testified that individual employees' 8 hour time weighted average exposures were measured with a dosimeter, marked for identification as Exh. C-20.[16] (Tr. 136). He indicated that these exposures required that the employer institute a hearing conservation

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acoustical calibrator is activated, a red light indicates if he battery is functioning properly. The calibrator emits a sound at a frequency of 1000 hertz, at 114 dB (Tr. 24-25). If the sound level meter indicates that the sound emitted from the acoustical calibrator is between 113.5 dB to 114.5 dB, the sound level meter is functioning correctly (Tr. 25).

[15] CO Adams indicated that time weighted average combines the noise level and the duration of exposure to measure the accumulation of noise levels. The louder the noise, the shorter an employee's permissible exposure time. He testified that, under the standard, for each 5 dB increase in noise level, the employee's exposure time must be cut in half. (Tr. 593).

[16] The dosimeter is attached to the employee's belt or pocket. A 3 foot cords leads to a microphone that is usually placed on the employee's shoulder in his or her hearing zone. The machine is turned on at the beginning of the employee's work day, and is left on until lunch. The machine is then put into a "stand-by" mode, and returned to the employee after lunch. The employee wears the machine until the end of his or her shift (Tr. 136-37, 597-99). CO Adams testified that when activated, the dosimeter reads initially zero. The dosimeter is not turned off during the lunch, instead, it is put in "stand-by." The machine is no longer reading sound, but it is still on and retaining data (Tr. 137, 599, 628-29). During monitoring, the microphone picks up ambient noise in the workplace, and well as impulse noises (Tr. 599).

CO Adams testified that before he begins to monitor employees, he calibrates every dosimeter. He activates the dosimeter to check the batteries, then waits for the dosimeter to perform a self-diagnostic. He then emits a 94 dB sound from the acoustical calibrator, and confirms that the dosimeter reads the sound as between 93.5 to 94.5 dB. He then emits sounds of 114 dB and 124 dB from the acoustical calibrator, and checks the corresponding reading on the dosimeter. (Tr. 137-39)

While the dosimeters are measuring employee exposure, CO Adams testified that he used a sound level meter to verify the reading on the dosimeters. (Tr. 616) CO Adams testified that the margin of error for the dosimeter is plus or minus two dBA, while the margin of error for the sound level meter is plus or minus one dBA. (Tr. 615-16, 698)

During the monitoring process, CO Adams recorded employee exposure on a series of worksheets, which he explained in detail during direct examination. (Exh. C-18) CO Adams testified that he correlated marks on the dosimeters with marks on the worksheets, to determine which employees should be wearing a particular dosimeter. (Tr. 626-27)

program.[17] (Tr. 129)

CO Adams testified about how he determined that the employees described in the instance descriptions below were exposed to noise levels in excess of an 8 hour time weighted average of 85 dBA. CO Adams indicated that in all of the instance descriptions, the parenthesis after the words "daily exposure limit" should read 85 dBA, the action level under the standard, not 90 dBA as indicated in instance descriptions.[18] (Tr. 356-57, 361, 363, 365, 367-70). Exhibit C-18 consists of the results from fourteen individual noise survey reports for full shift sampling conducted by Mr. Adams.

> *(a)* For the employee who worked in the polishing area on the floor grinder next to another employee polishing chair frames who was exposed to a continuous noise level at 150% of the permissible daily exposure limit (8-hr time weighted average sound level of ~~90~~ 85dBA) or an equivalent sound level of approximately 93 dBA for the time sampled. Sampling was performed for 431[19] minutes during one shift on 5/3/95. Zero exposure was

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[17] CO Adams indicated that, as required by the standard, the 85 dB exposure was measured on the A scale. This scale weighs the different frequencies of noise, and gives more weight to frequencies that have a greater effect of the ears. He testified that frequencies that fall on the lower end of the spectrum, starting at 20 hertz, are not given as much weight as frequencies between 2000 and 4000 hertz. (Tr. 129-30). He also indicated that TWA was measured in slow response, that is, in one second increments. (Tr. 130-31)

The standard also provides that "equivalently, a dose of fifty percent" requires the administration of a hearing conservation program. CO Adams testified that this refers to the way sound may be measured under the standard. A 100 percent dose under the standard is equal to an average of 90 dB. A 50% dose is equivalent to an average of 85 dB. (Tr. 131)

[18] Section 1910.95, Appendix A, Part II provides that:

> "Compliance with paragraphs (c)-(r) of this regulations is determined by the amount of exposure to noise in the workplace. The amount of such exposure is usually measured with an audio dosimeter which gives a readout in terms of "does." In order to better understand the requirements of the amendment, dosimeter readings can be converted to an "8 hour time-weighted overage sound level. (TWA) "

Table A-1 is used to convert "percent noise exposure" or "dose" to "8-hour time-weighted average sound level." (TWA). CO Adams testimony indicated that he used sampling that measured the employee's percentage dose over 80 dB or 90 dB. The dosimeters cannot determine exposure at 85 dB. (Tr. 341, 345). However, in accordance with the standard, CO Adams used Table A-1 to determine the that standard had been violated.

[19] CO Adams testified that there is a minute or two difference between the total time of the dosimeter's use in minutes, and the total time of employee monitoring expressed in hours and minutes. CO Adams testified this was because the minutes calculation, determined from the "time on, time off" notations on his worksheets, were taken from his watch. The monitoring time expressed

assumed for the unsampled period of the shift.

(b) For the employee who worked in the polishing area on the floor grinder polishing next to the employee in instance a who was exposed to a continuous noise level at 152% of the permissible daily exposure limit (8-hr time weighted average sound levels of ~~90~~ 85dBA) or an equivalent sound level of approximately 93 dBA for the time sampled. Sampling was performed for 430 minutes during one shift on 5/3/95. Zero exposure was assumed for the unsampled period of the shift.

(c) For the employee who worked in the polishing area on the floor grinder single unit (PG WHEEL) polishing tubes and other chair parts who was exposed to a continuous noise level at 137% of the permissible daily exposure limit (8-hr time weighted average sound levels of ~~90~~ 85dBA) or an equivalent sound level of approximately 92 dBA for the time sampled. Sampling was performed for 407 minutes during one shift of 5/3/95. Zero exposure was assumed for the unsampled period of the shift.

(d) For the employee who worked in the polishing area in the corner on the Bader machine polishing seat backs and bottoms who was exposed to a continuous noise level at 86% of the permissible daily exposure limit (8-hr time weighted average sound levels of ~~90~~ 85dBA) or an equivalent sound level of approximately 89 dBA for the time sampled. Sampling was performed for 429 minutes during one shift on 5/3/95. Zero exposure was assumed for the unsampled period of the shift.

(e) For the employee who worked in the polishing area just inside the door on the Bader machine polishing seat backs and bottoms who was exposed to a continuous noise level at 91% of the permissible daily exposure limit (8-hr time weighted average sound levels of ~~90~~ 85dBA) or an equivalent sound level of approximately 89 dBA for the time sampled. Sampled was performed for 433 minutes during one dBA for the time sampled. Sampling was performed for 433 minutes during one shift on 5/3/95. Zero exposure was assumed for the unsampled period of the shift.

(f) For the employee who worked in the wood ship on the Router routing out fiber board seat bottoms who was exposed to a continuous noise level at 145% of the permissible daily exposure limit (8-hr time weighted average sound levels of ~~90~~ 85dBA) or an equivalent sound level of approximately 93 dBA for the time period sampled. Sampling was performed for 420 minutes during on shift on 5/4/95. Zero exposure was assumed for the unsampled period of the shift.

(g) For the employee who worked in the wood shop feeding the table saw who was exposed to a continuous noise level at %76 of the permissible daily exposure limit (8-hr

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in hours and minutes was indicated on the dosimeter itself. (Tr. 696-97).

time weighted average sound levels of ~~90~~ 85dBA) or an equivalent sound level of approximately 88 dBA for the time sampled. Sampling was performed for 397 minutes during one shift on 5/4/95. Zero exposure was assumed for the unsampled period of the shift.

(h) For the employee who worked in the table top area on the formica saw who was exposed to a continuous noise level at 102% of the permissible daily exposure limit (8 hr-time weighted average sound levels of ~~90~~ 85dBA) or an equivalent sound level of approximately 90 dBA for the time sampled. Sampling was performed for 424 minutes during on shift on 5/4/95. Zero exposure was assumed for the unsampled period of the shift.

(I) For the employee who worked in the polishing area on the 101 machine polishing table columns who was exposed to a continuous noise level at 95% of the permissible daily exposure limit (8-hr time weighted average sound levels of ~~90~~ 85dBA) or an equivalent sound level of approximately 89 dBA for the time sampled. Sampling was performed for 123 minutes during one shift on 5/10/95. Zero exposure was assumed for the unsampled period of the shift.

(j) For the employee who worked in the spray painting booth SB8 who was spraying wooden chairs and parts of chairs and who was exposed to a continuous noise level at 152% of the permissible daily exposure limit (8-hr time weighted average sound levels of ~~90~~ 85dBA) or an equivalent sound level of approximately 93 dBA for the time sampled. Sampling was performed for 435 minutes during one shift on 5/16/95. Zero exposure was assumed for the unsampled period of the shift.

(k) For the employee who worked in the spray painting booth SB9 who was spraying wooden chairs and parts of chairs and who was exposed to a continuous noise level at 157% of the permissible daily exposure limit (8-hr time weighted average sound levels of ~~90~~ 85dBA) or an equivalent sound level of approximately 93 dBA for the time sampled. Sampling was performed for 431 minutes during on shift on 5/16/95. Zero exposure was assumed for the unsampled period of the shift.

(l) For the employee who worked in the spray painting booth SB6 who was spraying wooden chairs and parts of chairs and who was exposed to a continuous noise level at 114% of the permissible daily exposure limit (8-hr time weighted average sound levels of ~~90~~ 85dBA) or an equivalent sound level of approximately 90 dBA for the time sampled. Sampling was performed for 430 minutes during one shift on 5/16/95. Zero exposure was assumed for the unsampled period of the shift.

(m) For the employee who worked on the spray line in booth SB2 who was spraying wooden chairs and parts of chairs and who was exposed to a continuous noise level at 70% of the permissible daily exposure limit (8-hr time weighted average sound levels of ~~90~~ 85dBA) or an equivalent sound level of approximately 87 dBA for the time sampled.

Sampling was performed for 413 minutes during one shift on 5/16/95. Zero exposure was assumed for the unsampled period of the shift.

(n) For the employee who worked in the sanding booth who was sanding wooden chairs and was exposed to a continuous noise level at 77% of the permissible daily exposure limit (8-hr time weighted average sound levels of ~~90~~ 85dBA) or an equivalent sound level of approximately 88 dBA for the time sampled. Sampling was performed for 430 minutes during one shift on 5/16/95. Zero exposure was assumed for the unsampled period of the shift.

CO Adams determined that 22 employees were exposed to noise levels above the permissible exposure limit (Tr. 214). He determined this by counting all of the employee he sampled, represented by the fourteen instances, and eight other employees who were performing similar jobs. He testified that the noise exposure of those employees would be the same (Tr. 214). Based on these exposures, L & B was required to administer a hearing conservation program.[20] He testified a to what is required for an effective hearing conservation program(Tr. 212-213). Mr. Adams stated that among the requirements of the standard the employer must provide appropriate hearing protective equipment (PPE) and ensure its proper use; mandate the wearing of the (PPE) when employees are exposed to 90 dBA or grater, provide base line audio grams and thereafter yearly audiograms; training on the effects of noise and the employer must determine which areas of the workplace require a hearing conservation.

CO Adams testified that he reached the conclusion that the respondent did not have an effective hearing conservation program from his conversations with Mr. Harring and Mr. Vander Schaaff, and his review of insurance reports provided to him by Mr. Vander Schaaff[21] (Tr. 213, Exhs. C-21 -29). After he received the aforementioned documents he questioned both Mr. Vander Schaaff and Mr. Harring as to their knowledge of the need of a hearing conservation program. CO Adams testified that on May 23, 1995 he asked Mr. Vander Schaaff if he was aware that hearing tests needed to be done an he said "yes", he had heard that once, but could not recall who told him (Tr. 256-257). On June 1, 1995, CO Adams asked Mr. Vander Schaaff if he recalled receiving Exh 26 - a letter to Mr. Vander Schaaff from the Hearing and Speech Assessment & Rehabilitation Center which responded to his inquiry about the need for annual hearing screenings and base line evaluations per OSHA requirements. Mr. Vander Schaaff responded that he recalled making an inquiry about a noise survey. When asked what he had done with the information received, he stated that he gave it to Mr. Harring (Tr. 260). CO

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[20] L & B introduced two OSHA opinion letters, addressing hearing conservation. Exh. R-1, dated August 15, 1983, addresses the issue of when OSHA contemplates issuing a citation. This letter is irrelevant to this action, as it assumes an employer in fact has a hearing conservation program in place. Exh. R-2, dates June 6, 1985, clarifies the definition of the term "effective hearing conservation program." This letter is also irrelevant, as L & B did not have a hearing conservation program in place at the time of the inspection.

[21] Mr. Vander Schaaff acknowledged that he provided the documents to CO Adams (Tr. 817)

Adams testified that he asked Mr. Harring on June 1, 1995, why audiometric testing had not been done and was told that "it" had gotten pushed aside. (Tr. 261-262). On June 8, 1995, CO Adams was told by Mr. Harring that a hearing conservation program had not been instituted because the company was under financial hardship and could not afford to do other things besides production and that his biggest responsibility was to meet payroll and something had to get pushed aside (Tr. 262, 703-706). Mr. Harring told Mr. Adams that to his knowledge no audiometric testing had been conducted at the facility since 1990 (Tr. 708).

CO Adams testified that during the inspection he asked Mr. Vander Schaaff whether employees had been told that they needed to wear hearing protection, and Mr. Vander Schaaff replied that the company provided hearing PPE, but did not mandate its use (Tr, 838). Mr. Vander Schaaff informed him that he believed that individual supervisors advised employees to wear hearing protectors, however, the company had no policy which required the wearing of PPE (Tr. 267-268, 273). CO Adams also testified that he asked employees while he performed his full shift sampling, if they had been told that they needed to wear hearing protection. All employees stated that the wearing of hearing protection was mot mandated by the company (Tr. 269-273). He also asked employees who recalled being tested for the noise levels whether they had been told the results. The employees said they had not been told the sample results (Tr. 277-78).

L & B argues that Exh. C-23, an Industrial Hygiene Report dated October 11, 1988, Exh. C-24, an Industrial Hygiene Report, dated January 27, 1988, and Exh. R-10 indicate that the "intent of the regulations were met" by L & B.[22] (L & B Brief, p. 18). As addressed in the willful discussion, infra, Exh. C-23 and C-24 recommend the implementation of a hearing conservation program, they do not constitute a such a program. Mr. Vander Schaaff testified that Exh. R-10, labeled "Hearing Conservation Program," went into effect during the tenure of Tom Chantry, a health and safety consultant (Tr. 833, 839). He estimated that his tenure began in the early fall of 1995, or "October-ish" of 1996 (Tr. 840). CO Adams conducted his inspection between April 25, 1995 to August 31, 1995. Mr. Vander Schaaff also testified that this document did not exist to his knowledge at the time of the inspection (Tr. 840). The noise monitoring results attached to the document include the sampling conducted by the insurance companies in 1986, 1987, 1988, and a sampling conducted in 1994. They also include the sampling conducted by CO Adams, and noise sampling conducted by Tom Chantry in October and November of 1996. (Exh. R-10, pp. 14-18). In view of the weight of the evidence of noncompliance, this argument is without merit.

The Secretary has established that L & B did not have any hearing conservation program. L & B did not monitor its worksite to determine employee exposure levels; did not notify employees of the results of the sporadic exposure level monitoring conducted by others; did not establish an audiometric testing program to establish employee baseline hearing levels; did not mandate the wearing of hearing PPE for employees it had reason to believe were exposed to levels at 90 dBA or above and by its own admission, any hearing information received had been pushed aside to save money.

2. Employee Access to the Violative Condition

CO Adams determined that employees were exposed to noise levels greater than the

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[22]L & B also introduced copies of L & B work rules. These rules required that employees wear personal protective equipment. (Exhs. R-6, R-7, R-8, R-9)

permissible exposure limit via his noise sampling. It has also been established that the employer did not have a hearing conservation program in place at the time of the inspection. As such, employee were exposed to the violative condition.

3. Employer Knowledge of the Violation

The information contained in documents C-21 through C-29 reveal that L & B knew it was required to have a hearing conservation program (Tr. 219). As addressed in the willful discussion, infra, L & B had knowledge that a hearing conservation program was not in place.

4. The Serious Nature of the Violation

The Review Commission has characterized hearing loss as serious physical harm within the meaning of Section 17(k) of the Act, and furthermore, the failure to make audiometric tests available as resulting in serious physical harm. *See Secretary of Labor v. Minature Nut and Screw Corp.*, 17 BNA OSHC 1557 (No. 93-2535, 1996). CO Adams testified that he classified this violation as serious because an injury from exposure to excessive could be a permanent disability from the hearing loss (Tr. 218-19). The undersigned finds that the L & B's failure to implement an effective continuing hearing conservation program could result in serous physical harm to its employees - hearing loss. Furthermore, the sampling results indicate the serious nature of the expected injury.

5. The Willful Nature of the Violation.

CO Adams testified that he based his willful classification on interviews with Bob Harring, L & B general manager, and with Mr. Vander Schaaff, and Exhs. C-21 through C-29 (Tr. 219, 677). He stated that he believed that L & B knew they needed to institute a hearing conservation program, and through a conscious decision, decided not to. CO Adams testified that Mr. Vander Schaaff gave him exhibits C-21 through C-29 when he asked Mr. Vander Schaaff if any audiometric tests had been performed on L & B employees. Mr. Vander Schaaff checked a filling cabinet for in his office, and produced these documents. Mr. Vander Schaaff testified that he recalled providing documents C-23 through C-29 to CO Adams, although he does not know why these files were put in his office (Tr. 814-15, 817-18). A summary of the evidence relied on by CO Adams is as follows:

> Exh. C-21 is an audiogram of L & B employee Ed Brusso. CO Adams testified that this audiogram was identified as the only one the company was able to find (Tr. 225). CO Adams testified that this audiogram, performed in 1980, indicated to him that L & B knew the OSHA standard required audiograms (Tr. 231).
>
> Exh. C-23 is an Industrial Hygiene Report, dated October 11, 1988. The report lists the contacts as Bob Harring, General Manager and Dean Vander Schaaff, Product Engineer. The report was prepared L & B's insurance company American Mutual. The document's introduction indicates that an industrial hygiene service visit was made to L & B on October 3, 1988 (Exh. C-23, p. 423). The report states that the "purpose of this industrial hygiene visit was to follow up the December 1987 visit regarding efforts to implement a hearing conservation program..." (Exh. C-23, p. 424). The report concludes that "[s]pot checking of noise levels indicate that employees are still exposed to noise in excess of the audiometric action level of 85 dBA for 8 hours, and shall be included in each HCP (required by the Hearing Conservation Amendment, April 7th, 1983). Employees exceeding the 90 dBA permissible exposure limit (PEL) require mandatory hearing protection. (See Appendix, N-95 attached for requirements)." (Exh. C-23, page 424).

The report also notes that no hearing conservation program was in existence. (Exh. C-23, page 424). A copy of the hearing conservation standard was attached. (Exh. C-23, pp. 430-432).

Exh. C-24 is an Industrial Hygiene Report, dated January 27, 1988. Contacts are listed as Lee Zelinger, President, Bob Harring, General Manager, Dean Vander Schaaff, Product Engineer. The report was prepared by American Mutual. The report states that "[t]he purpose of this industrial hygiene visit was to provide additional assistance in your efforts to implement a Hearing Conservation Program (HCP) . . . Noise monitoring was conducted to help you document which employees should be included in your program. A previous visit on March 10, 1986 included documentation of noise exposure." (Exh. C-24, p. 411). The report recommends:

> ". . . that a hearing conservation program (HCP) be instituted as described in Appendix N-95 attached. A comprehensive HCP includes a number of parameters. A brief outline of a HCP, as detailed in the . . .OSHA Hearing Conservation Amendment to the noise Standard (reference 20 C.F.R. 1910.95, effective April 17, 1983) is provided in Appendix N-95 of this report. Additional information on the development of an HCP can be obtained from American Mutual's industrial hygiene unit through your local servicing consultant.
>
> Apparently most of the employees have had their base line audiograms, the other employees, in terms of years of service, will be expected to stay with the company and should get their annual audiograms as required by the OSHA standard. New employees should get a base line audiogram after working a short time when it appears they will stay on the job. High turnover has been a problem and will create excessive costs for the HCP.."

(Exh C-24, pp. 414-15).

This document also indicates that "[a] hearing test program has been started, but was discontinued because of high turnover." (Exh. C-24, p. 414) The report recommended that a hearing conservation program be instituted. (Id.)

Exh. C-25 is a letter to Richard Hallenbeck from Christopher P. Quenelle, an audiologist with the Hearing Assessment and Rehabilitation Center. The letter is dated August 19, 1990. The letter indicted the costs of a hearing conservation program. CO Adams testified that the letter indicated that in August of 1990, L & B was aware of the need to conduct audiograms. (Tr. 246).

Exh. C-26 is a letter to Mr. Vander Schaaff from Christopher P. Quenelle, dated January 9, 1994. Mr. Quenelle states in the letter that the correspondence is in response to a telephone conversation with Mr. Vander Schaaff on December 30, 1993. The letter states that "[a]t that time you indicated that you had a number of employees who required annual haring screening and base line evaluations as per the OSHA requirements. . . . As you know, OSHA requires yearly monitoring and re-evaluation of all employees who are exposed to levels of noise above the eight (8) hour time weighted average (TWA) of 85 dB. OSHA also requires that where employees may be exposed to noise levels above 85 dBA, TWA, measurements to be taken to determine what those levels are." (Exh. C-26, p. 394) .

Mr. Vander Schaaff testified that he made the call referenced in the above letter

because he was asked by Mr. Harring to check on hearing testing (Tr. 818). He stated that Mr. Harring did not indicate why Mr. Vander Schaaff should make this call, other than he should "see what he could find out about hearing tests for the people." (Tr. 819-20). Mr. Vander Schaaff testified that when he received this letter, he passed it along to Mr. Harring (Tr. 820).

Exh. C-27 is a letter to Mr. Vander Schaaff, Product Engineer, from Robert Almond, Utica Mutual Insurance Company. The letter is regarding "Noise Level Readings of January 21, 1994." The letter recalls a meeting between Mr. Vander Schaaff and Mr. Almond on January 21, 1994, and indicates the result of a noise survey are attached. The letter states:

> "The OSHA 'Action Level' for exposure based on a 'Time Weighted Average' for noise exposure is in the 85 dB range and as the results show, most of the shop exceeds that level.
>
> Given the findings, my general recommendation to you is that a professional be consulted and that for now, hearing protection is a must in all areas. My recommendations (attached) are bare minimum requirements. Please follow the recommendations of the professional you consult with if they differ or exceed those that I have made...."

(Exh. C-27, p. 436)

Mr. Vander Schaaff testified that after he received this letter, he forwarded it to Mr. Harring. (Tr. 820) He stated that he met with Mr. Almond on January 25, 1994, because Mr. Almond was L & B's insurance representative, and was on the site for a regular visit. (Tr. 821). Mr. Vander Schaaff suggested that the letter was addressed to him because he accompanied Mr. Almond on his tour of the facility. (Tr. 821-22).

Exh. C-28 is another letter to Mr. Vander Schaaff from Robert Almond, Utica Mutual Insurance Company. The letter is dated November 28, 1994. Recommendation 94-10-3 states "[i]mplement a hearing conservation program in the facility." Written on the top of the document is the word "Bob." Mr. Vander Schaaff testified that he made this notation, and passed the document onto Mr. Harring (Tr. 825, 827).

Exh. C-29 is a letter addressed to Mr. Vander Schaaff, Health and Safety Manager, from Aleksandra Nawakowski, Industrial Hygiene Consultant. The letter is dated November 30, 1994. The letter indicates that "Mr. Dean Vander Schaaff, Product Engineer, responsible for the plant's health and safety program, requested a comprehensive industrial hygiene survey to assist him in identifying potential health hazards." (Exh. C-29, p. 445). The report recommends "[t]o summarize our findings, the company should have a written formal policy on Hearing Conservation. Baseline audiograms should be established for each employee working in the areas where noise levels average or exceed 85 decibels. The areas which we identified were the machine shop, paint booth, powdered paint area, wood shop." (Exh. C-29, p. 448) It further indicates "[t]o reduce employee exposure to noise, wearing of hearing protective devices should be made mandatory in the machine shop, paint booths, powdered paint areas and wood shop. A formal Hearing Conservation program should be written and implemented for these areas to conform with OSHA standard. An attempt should be made to reduce the noise levels by engineering controls." (Exh. C-29, p. 449) Also attached were brief

employee evaluations of noise exposure. (Exh. C-29, p. 456)

Mr. Vander Schaaff testified that he recalled meeting with Ms. Nawakowski. (Tr. 826). He also testified that he made the notation "Bob" on the top of the document, and forwarded the document to Mr. Harring. (Tr. 828-29). However, Mr. Vander Schaaff could not recall sitting down to talk with Mr. Harring about these letters. (Tr. 831).

CO Adams testified that he asked Mr. Vander Schaaff if he knew that annual hearing tests should be conducted, and Mr. Vander Schaaff responded in the affirmative. (Tr. 259). He also testified that although Mr. Vander Schaaff told him that he did not recall all of the reports, he must have seen the reports, because his name was on them. (Tr. 259-60). During a taped interview, when questioned as to whether he was aware that noise levels in the plant exceeded the OSHA permissible exposure limits, Mr. Vander Schaaff stated "I don't know. Well, okay, yes, I do, because I saw some. We had our insurance company do stuff, do some readings." (Exh. R-2, 204, Tr. 858).

CO Adams read into the record a portion of Exh. C-38, CO Adams's paraphrased notes from an interview with Bob Harring, with Mr. Vander Schaaff present. His notes indicated that Mr. Harring, when questioned about the hearing conservation program, stated "[w]e ran out of time and money to do it, we do not have enough people and it got overlooked. Our biggest responsibility was to meet payroll and 'something had to get pushed aside.'" (Tr. 704-06, Exh. C-38 - quote is from the notes).

Mr. Vander Schaaff testified that he recalls audiometric testing at the plant at one point. He believed that a mobile testing unit came to the facility two or three times, but he could not remember when the unit was last at the facility (Tr. 748). He testified that some monitoring was done between 1988 and prior to May or April of 1995 by some of L & B's insurance companies. He indicated that these were the files he gave to CO Adams. (Tr. 750).

In addition, Exh C-43, dated February 17, 1987, is a letter to L & B president Leo Zelinger from Eugene T. Rossi, Senior Loss Control Consultant, American Mutual Insurance Companies. The report relates to a "loss control visit" on January 22, 1987. The report notes that "[n]o formalized audiometric testing is going to be completed in the near future. This is a top management decision. The other aspects of the Hearing Conservation Program including the training of employees, the use of personal protective equipment, and attempts to engineer the noise will continue. The writer does urge the use of audiometric testing as a medical surveillance of the effectiveness of the overall Hearing Conservation Programs. This will obviously indicate any change of hearing of employees and also fulfill the OSHA Noise Standard." (Exh. C-43, p. 3)

Suggestion S-87-1-2 of that same letter states: "The full compliance of the hearing Conservation Program is urged. The introduction of audiometric testing to the noise areas will be the cornerstone of this particular program." (Exh. C-43, p. 4).

A violation is willful if it is committed with intentional, knowing or voluntary disregard for the requirements of the Occupational Safety and Health Act (the "Act") *L.E. Myers Co., 16 BNA OSHA 1037, 1046, 1993 CCH OSHD ¶ 30,016, p.41,132 (No. 90-945, 1993); Williams Enterp., 13 BNA OSHA 1249, 1256, 1986-87 CCH OSHD ¶ 27,893, p. 36,589 (No. 85-355, 1987).* A willful violation is differentiated from a nonwillful violation by a heightened awareness, a conscious disregard or plain indifference to employee safety. *General Motors Corp., Electro-Motive Div., 14 BNA OSHA 2064, 2068, 1991 CCH OSHD ¶ 29,240, P. 39,168, 1991)*

(consolidated); Williams, 13 BNA OSHA at 1256-57, 1986-87 CCH OSHD at p. 36,509. A violation is not willful if an employer had a good faith belief that the violative condition conformed to the requirements of the Act. The test of good faith is an objective one, that is, "whether the employer's belief concerning the factual matters in question was reasonable under all of the circumstances."*Morrison-Knudsen Co.\Yonkers Contracting Co.*,16 BNA OSHC 1105, 1124 (No. 88-572, 1992).

The undisputed evidence in this record unequivocally established that L & B was aware of the need for a hearing conservation from 1987 on. Exhibits C-42 and C-43 were 1987 letters addressed to Leo Zelinger, former president of L & B. Both letters state that the decision not to conduct formalized audiometric testing in the near future was a decision of top management. (Tr.869). These were the first of many such letter to L & B. As late as 1994 L & B was again made aware of the requirements of the Act (Exhs. 27-29). Yet despite this information L & B did nothing. The testimony of Mr. Vander Schaaff and the documents he provided CO Adams unequivocally establish the conscious disregard for employee health and safety exhibited by L & B since 1987. The record further establishes that L & B additionally made a conscious and deliberate decision to admittedly disregard employee health and safety for economic reasons.[23]

6. Penalty

CO Adams testified that the severity of the violation was medium because he believed the most likely injury would be hearing loss and the probability was assessed greater because of the number of employees who were not wearing any hearing protection and the length of time that employees had worked at the site without receiving audiometric testing (Tr. 274). He believed that twenty-two employees were exposed to this violative condition. The unadjusted willful classification resulted in a $55,000.00. In light of the fact that the violation was willful no adjustment was made for good faith, and no adjustment was made for size because L & B employed over 250 employees. An adjustment was made for history which resulted in an adjusted gravity based penalty of $49, 500.00.

After considering the above factors and the gravity ot he instant violation, the undersgined finds that the Secretary followed the procedures prescribed in Section 17(j) and that the proposed penalty is appropriate.

OTHER THAT SERIOUS VIOLATIONS

CO Adams did not assess any penalties for the violations within this citation. The undersigned finds that the record reveals that these violations had a direct and immediate relationship to safety and health, however, they did not present the probability of death or serious injury. They were also promptly abated. Accordingly, these violations were appropriately assessed as other than serious.

Citation 3, Item 1

§1910.20(g)(1)(I):

(g) "Employee information." (1) Upon an employee's first entering into employment, and at least

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[23] The undersigned further finds that L & B's attempt to claim that it had adopted a hearing conservation program via Exhibit 10 is at most ludicrous in light of the evidence in this record.

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;

(a) For exposure records concerning noise, chemical exposure and any other medical records related to their exposure in their workplace.

1. Employer Noncompliance

CO Adams stated that covered under this standard would be any employee on which L & B had conducted some type of exposure monitoring (Tr. 276). He testified when he spoke with employees in the sanding booths about monitoring for exposure to noise and chemicals, some employees told him that they had been sampled before, but had never received those results (Tr. 276-78). He indicated that employee Paul Uhnak told him he had not been made aware of his noise exposure levels (Tr. 278, 537). CO Adams testified that he asked Mr. Vander Schaaff about the employee records, and Mr. Vander Schaaff indicated that employees had not received them. (Tr. 279)

2. Employee Access to the Violative Condition

The information obtained by Co Adams from employees and Mr. Vander Schaaff - employees had not received copies of their monitoring results - established that employees were exposed to the violative condition.

3. Employer Knowledge of the Violation

L & B had constructive knowledge of the violation - with the exercise of reasonable diligence, they could have known of the violative condition. L & B should have know that employees did not receive their results.

Citation 3, Item 2

§1910.20(g)(1)(ii): The person responsible for maintaining and providing access to records;

(a) For exposure records covered by §1910.20.

1. Employer Noncompliance

CO Adams testified that he spoke with Mr. Vander Schaaff and asked him whether L & B informed current employees upon entering their employment and at least annually thereafter of the person responsible for maintaining and providing accessed to records under Section 1910.20 (Tr. 279-80). He stated that Mr. Vander Schaaff told him he had not provided records to employees, and that he knew of no one from L & B who had informed employees of their records (Tr. 280, Exh. R-2). CO Adams further testified that his conversation with employee Paul Uhnak, who indicated that he had not received his sampling results, convinced him that this standard had been violated (Tr. 282-83, 540).

2. Employee Access to the Violative Condition

CO Adams' investigation revealed that employees were not aware of the person responsible for maintaining records covered under section 1910.20(g)(1)(ii). As such, employees were exposed to the violative condition.

3. Employer Knowledge of the Violation

L & B had constructive knowledge of the violation - with the exercise of reasonable diligence, they could have known of the violative condition. L & B should have know that employees did not receive their results.

Citation 3, Item 3

§1910.(g)(1)(iii): Each employee's rights of access to these records.

(a) For exposure records covered by 1910.20.

1. Employer Noncompliance

CO Adams testified that he spoke with employees, who informed him that they did not know that they had a right to access to their records (Tr. 281). CO Adams also relied on his conversation with Paul Uhnak in reaching this determination (Tr. 281-82).

2. Employee Access to the Violative Condition

CO Adams determined that employees were not aware that they had a right to access their records. As such, the were exposed to the violative condition.

3. Employer Knowledge of the Violation

L & B had constructive knowledge of the violation - with the exercise of reasonable diligence, they could have known of the violative condition. L & B should have know that employees did not receive their results.

Citation 3, Item 4

§1910.94(d)(9)(ii): All persons required to work in such a manner that their feet may become wet shall be provided with rubber or other impervious boots or shoes, rubbers, or wooden-soled shoes sufficient to keep feet dry.

(a) On 5/10/95 in the plating area where the employee removes the chairs from the nickel line and puts them on the brass line and he did not have anything on his shoes to prevent his feet from getting wet.

1. Employer Noncompliance

CO Adams testified that observed employee Charlie Cook, Jr. moving chairs from the nickel plating line to the brass plating line. CO Adams noticed that employee Cook was wearing canvas sneakers, and that his feet sometimes got wet (Tr. 284-85). CO Adams spoke to employee Cook, who told him that the water turned his socks green, and caused his feet to itch (Tr. 284, 544-45). CO Adams believed that the rinse water had become contaminated with the hazardous chemicals used prior to the rinse.

2. Employee Access to the Violative Condition

CO Adams observed employee Cook working in canvas shoes, in an area where his feet became wet. As such, the employee was exposed to the violative condition.

3. Employer Knowledge of the Violation

L & B had constructive knowledge of the violative condition. Employee Cook was working in plain view, and the record indicates that supervisors were present throughout the workplace.

Citation 3, Item 5

§1910.94(d)(9)(iii): All persons required to handle work wet with a liquid other than water shall be provided with gloves impervious to such a liquid and of a length sufficient to prevent entrance of liquid into the tops of the gloves. The interior of gloves shall be kept free from corrosive or irritating contaminants.

(a) On 5/10/95 for employees who move chairs from the nickel line to the brass line and was only wearing cotton gloves.

1. Employer Noncompliance

CO Adams observed an employee taking chairs off the nickel line and walking them to brass line. The employee was wearing cotton gloves, that CO Adams opined would only serve to

absorb the liquid (Tr. 258-86). CO Adams testified that even though the chairs are rinsed in water before moving, by the end of the day there was enough solution mixed in to contaminate the water (Tr. 727)

2. Employee Access to the Violative Condition

CO Adams observed this employee working with gloves that was not impervious to liquid. As such, the employee had access to the violative condition.

3. Employer Knowledge of the Violation

L & B had constructive knowledge of the violative condition. The employee was working in plain view, and the record indicates that supervisors were present throughout the workplace.

Citation 3, Item 6a

§1910.141(d)(1): (d) Washing facilities - (1) General. Washing facilities shall be maintained in a sanitary condition.

Instance (a) On 5/4/95 in the men's room which was dirty.

Instance (b) On 5/4/95 in the women's room which was dirty.

1. Employer Noncompliance

CO Adams observed that both the men's room and the women's room were dirty- the sinks and toilets looked like they had not been washed in a long time (Tr. 286-88, 548-49, Exh C-30). CO Adams testified that employee's complained that the restrooms were not clean. He also indicated that the men's room was dirty, and had missing a sink and stagnate water in a sink (Tr. 548-49).

He stated that the women's room was similar to the men's room. The area was dirty. (Tr. 288, 550)

2. Employee Access to the Violative Condition

CO Adams testified that employee's complained about the conditions and that they used the restrooms. As such, employees had access to the violative condition.

3. Employer Knowledge of the Violation

L & B had constructive knowledge of the violative condition. The condition was in plain view, and the record indicates that supervisors were present throughout the workplace.

Citation 3, Item 6b

§1910.141(d)(2)(iii): Hand soap or similar cleansing agents shall be provided.

(a) 5/4/95 For the men's room that did not have any soap.

1. Employer Noncompliance

CO Adams observed that there was not soap or cleansing material in the men's room (Tr. 288-89).

2. Employee Access to the Violative Condition

CO Adams determined that employees used the men's room. As such, they had access to the violative condition.

3. Employer Knowledge of the Violation

L & B had constructive knowledge of the violative condition. The condition was in plain view, and the record indicates that supervisors were present throughout the workplace.

Citation 3, Item 6c

§1910.141(d)(2)(iv): Individual hand towels or sections thereof, of cloth or paper, warm air blowers or clean individual sections of continuous cloth toweling, convenient to the lavatories,

shall be provided.

(a) 5/4/95, For the men's room that did not have any paper towels or other methods for employees to dry their hands.

1. Employer Noncompliance

CO Adams observed that there was not a suitable means for employees to dry their hands in the men's room (Tr. 289).

2. Employee Access to the Violative Condition

CO Adams determined that employee use the restroom. As such, employee have access to the violative condition.

3. Employer Knowledge of the Violation

L & B had constructive knowledge of the violative condition. The condition was in plain view, and the record indicates that supervisors were present throughout the workplace.

Citation 3, Item 7

§1910.141(g)(2): Eating and drinking areas. No employee shall be allowed to consume food or beverages in a toilet room nor in any area exposed to a toxic material.

(a) On 5/10/95 in the Plating department where employees were consuming soda and food in the area around the plating tanks which contain cyanides, sodium hydroxide, and other toxic chemicals.

1. Employer Noncompliance

CO Adams observed employees consuming donuts while sitting on the plating tank, and another employee was drinking soda near the plating tank (Tr. 289-90). Toxic materials in the area included cyanides, sodium hydroxide, and sulfuric acid (Tr. 290). CO Adams testified that he discussed this with Mr. Vander Schaaff, who indicated that he was not aware of this activity (Tr. 554).

2. Employee Access to the Violative Condition

CO Adams observed employees eating near hazardous materials. As such, employees were exposed to the violative condition.

3. Employer Knowledge of the Violation

L & B had constructive knowledge of the violative condition. The condition was in plain view, and the record indicates that supervisors were present throughout the workplace.

Citation 3, Item 8

§1910.212(a)(5) Exposure of blades. When the periphery of the blades of a fan is less than seven (7) feet above the floor or working level, the blades shall be guarded. The guard shall have openings no larger than one-half (1/2) inch.

(a) On 4/25/95 in the glide line where there were 2 stand alone fans that had guards whose openings were 1 and a half inches by various lengths and 1 and 3 quarters by various lengths. The lengths were from 4 to approximately 8 inches.

1. Employer Noncompliance

CO Adams observed operating in the glide line department two stand-alone fans that had guard openings about 1 ½ inches wide and guard lengths that varied between 4 to 8 inches (Tr. 290, 293-94). He measured the openings in the fan. CO Adams testified that the fans were eye level, and that he is 5 feet 8 inches tall (Tr. 291-92). Therefore, the fans were lower than 7 feet.

2. Employee Access to the Violative Condition

CO Adams observed the fans operating in a work area (Tr. 554). As such, employees had

access to the violative condition.

3. Employer Knowledge of the Violation

L & B had constructive knowledge of the violative condition. The condition was in plain view, and the record indicates that supervisors were present throughout the workplace.

Citation 3, Item 9

§1910.305(j)(3)(ii): A means shall be provided to disconnect each appliance.

(a) On 4/25/95 for the Hoover Ball Bearing fan serial number C4342HD41274 which did not have a switch to shut it off.

1. Employer Noncompliance

CO Adams observed a Hoover ball bearing fan on the glide line that did not have a switch to turn the fan on or off (Tr. 299, 556).

2. Employee Access to the Violative Condition

CO Adams observed the fan in a work area. The only means to disconnect the fan would have been to pull the plug (Tr. 557). As such, employees are exposed to the violative condition.

3. Employer Knowledge of the Violation

L & B had constructive knowledge of the violative condition. The condition was in plain view, and the record indicates that supervisors were present throughout the workplace.

Citation 3, Item 10

§1910.1048(d)(1)(I): Each employer who has a workplace covered by this standard shall monitor employees to determine their exposure to formaldehyde.

(a) For employees in the wood table area who worked with Pilot Powdered Urea Resin Glue which contained .1-1% formaldehyde and were not monitored to determined their exposure to formaldehyde.

1. Employer Noncompliance

CO Adams observed an employee working with the Pilot Powdered Urea glue. (see Citation 1, item 1a, instance (b)). CO Adams consulted the MSDS for the glue, and determined that it contained formaldehyde (Tr. 299-300, Exh. C-5). CO Adams sampled employee Carl Enverson for exposure to formaldehyde, and determined that the his exposure was .06 parts per million (Tr. 300-05, 558, Exh. C-33). CO Adams testified that he asked Mr. Vander Schaaff if monitoring was done for formaldehyde, and he indicated that as far as he knew, that operation had not been sampled to determine potential exposure (Tr. 559-60).

2. Employee Access to the Violative Condition

CO Adams determined that the employee was not monitored for formaldehyde. As such, he was exposed to the violative condition.

3. Employer Knowledge of the Violation

L & B had constructive knowledge of the violation - with the exercise of reasonable diligence, they could have known of the violative condition. L & B should have know that employees did not receive their results.

Citation 3, Item 11a

§1910.1200(e)(1): "Written hazard communication program." (1) Employers shall develop, implement, and maintain at each workplace, a written hazard communication program which at 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 employee information and training will be met, and which also includes the following:

1. Employer Noncompliance

Instance (a) For employees who work with hazardous chemicals such as paints and glues the written hazard communication program was not adequate in that it did not sufficiently address the following:

1. Who would be responsible for labeling and how would it be accomplished.
2. Who was currently responsible for maintaining the Material Safety Data Sheets as the personnel director mentioned in the written plan is no longer with L & B Products.
3. Who would conduct the training and when it would be done.

CO Adams testified that the hazardous communication program he received from Mr. Vander Schaaff did not indicate items (1) through (3) listed above (Tr. 310-311).
The program did not properly identify who was responsible for labeling and how labeling would be done (Tr. 310). It did not state who would conduct training and when training would be done (Tr. 311).

Instance (b) The hazard communication program did not address how the requirements of 1910.1200(e)(2)(I)-(iii) will be addressed.

CO Adams testified that the program also did not address the requirements of Section 1910.1200(e)(2)(I)-(iii) (Tr. 311-312) .

2. Employee Access to the Violative Condition

CO Adams determined that employees were working with hazardous materials, and that L & B did not have an adequate hazardous communications program. As such, employee were exposed to the violative condition.

3. Employer Knowledge of the Violation

L & B had constructive knowledge of the violation - with the exercise of reasonable diligence, they could have known of the violative condition. L & B should have know that employees did not receive their results. L & B should have known that their own program did not meet the OSHA standards.

Citation 3, Item 11b

§1910.1200(f)(5)(I): Except as provided in paragraphs (f)(6) and (f)(7) of this section, the employer shall ensure that each container of hazardous chemicals in the workplace is labeled, tagged or marked with the following information:

(I) Identity of the hazardous chemical(s) contained therein;

1. Employer Noncompliance

Instance (a) On 4/25/95 in the Welding Department where there were several unlabeled containers of Weld-Aid Weld Kleen 350.

CO Adams observed an unlabeled spray bottle, that an employee indicated was Weld Kleen 350 (Tr. 313-15, Exh. C-35). CO Adams examined the corresponding MSDS, and determined that the Weld Kleen was a hazardous substance because it was an eye irritant (Tr. 323, Exh. C-13).

Instance (b) On 4/26/95 in the wood chair area next to the touch up booth where there were several unlabeled containers of paint and thinner.

CO Adams observed unlabeled contains of thinner in the wood chair area (Tr. 316, Exh. C-36). Although the cans had stickers on them, they were not filled out to identify the contents (Tr. 319). CO Adams testified that he asked employee Mary Coleman if she knew what was in

the containers. She told him that she thought the cans contained thinner and some paints (Tr. 583).

Instance (c) On 5/4/95 in the table top area where there was an unlabeled container of thinner near the table leaf area.

CO Adams observed the container of thinner in the table top department (Tr. 319, Exh. C-37). The container was labeled, but it did not indicated the contents of the can (Tr. 320). CO Adams testified that the employee who was using the thinner, Phil Mateer, told him what the container held (Tr. 584-585).

2. Employee Access to the Violative Condition

CO Adams testified that he observed employees using hazardous materials in the workplace drawn from unlabeled containers. As such, employees were exposed to the violative condition.

3. Employer Knowledge of the Violation

L & B had constructive knowledge of the violation - with the exercise of reasonable diligence, they could have known of the violative condition. L & B should have know that employees did not receive their results.

Citation 3, Item 11c

§1910.1200(f)(5)(ii): Appropriate hazard warnings, or alternatively, words, pictures, symbols, or combination thereof, which provide at least general information regarding the hazards of the chemicals, and which, in conjunction with the other information immediately available to employees under the hazard communication program, will provide employees with the specific information regarding the physical and health hazards of the hazardous chemical.

1. Employer Noncompliance

Instance (a) On 4/25/95 in the Welding Department where there were several unlabeled containers of Weld-Aid Weld Kleen 350.

CO Adams testified that he observed several unlabeled containers of Weld Kleen (Tr. 350). He determined the contents by asking an employee (Tr. 324-25, Exh. C-35). This appears to be the same material addressed in Citation 3, item 11b, instance (a).

Instance (b) On 4/26/95 in the wood chair area next to the touch up booth where there were several unlabeled containers of paint thinner.

CO Adams testified that he observed several unlabeled containers in a touch up booth. CO Adams asked employee Mary Coleman, and determined that the materials were paints and thinners. The containers were not labeled with the appropriate hazard warning (Tr. 325, 590). These are the same materials address in Citation 3, item 11b. (Tr. 588).

2. Employee Access to the Violative Condition

CO Adams saw employees working with materials that did not indicate appropriate hazard warning. As such, employees were exposed to the violative condition.

3. Employer Knowledge of the Violation

L & B had constructive knowledge of the violative condition. The condition was in plain view, and the record indicates that supervisors were present throughout the workplace.

AFFIRMATIVE DEFENSES

The Respondent plead several Affirmative Defenses in its Answer at Paragraphs XIII to XX. Mr. Dean Vander Schaaff appeared on behalf of Respondent. The undersigned finds that he

presented no testimony or documentary evidence in support of any of Respondent's alleged Affirmative Defenses. A review of his testimony supports the Secretary's case in many instances. The record is void of any other evidence which supports any of the Respondent's alleged affirmative Defenses.

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. See Rule 52(a) of the Federal Rules of Civil Procedure.

ORDER

Based upon the foregoing decision, it is hereby ORDERED that:

1. Citation 1, Items 1a, 1b, 1c, 1d, 2, 3, and 4 are AFFIRMED as Serious violations

2. The Secretary's recommended penalties for the aforementioned affirmed citation items are AFFIRMED. A civil penalty in the amount of $8,500.00 is assessed for Citation 1.

3. Citation 2, Item 1 is AFFIRMED as a Willful violation.

4. A civil penalty in the amount of $49,500.00 is assessed for Citation 2.

5. Citation 3, Items 1, 2, 3, 4, 5, 6a, 6b, 6c, 7, 8, 9, 10, 11a, 11b, and 11c are AFFIRMED as Other than Serious violations.

5. A civil penalty in the amount of $0.00 is assessed for Citation 3.

SO ORDERED.

Covette Rooney
Judge, OSHRC

Dated:

Washington, D.C.