Secretary of Labor, Complainant, v. M & D Power Constructors, Inc., Respondent.	OSHRC Docket No. **97-1177**

APPEARANCES

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Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

M&D Power Constructors, Inc. (M&D), is an industrial maintenance and construction contractor who routinely performs repair work for the power generation industry (Tr. 16). On April 22, 1997, the Occupational Safety and Health Administration (OSHA) initiated an inspection of M&D's work at Alabama Power Company's Greene County Steam Plant in Forkland, Alabama (Tr. 113-114). As a result of the inspection, M&D received three citations which it timely contested.

On May 6, 1998, the Secretary and M&D filed a stipulation and joint motion settling all matters relating to serious Citation No. 1 and the "other" than serious Citation No. 3 issued July 9, 1997. The settlement agreement is approved by this Decision and Order.

The matters involving willful Citation No. 2 remain in dispute. Citation No. 2 alleges that M&D willfully violated 29 C.F.R.: § 1910.1018(h)(1) (item 1a) by not requiring employees to wear respirators to reduce their exposure to inorganic arsenic; § 1910.1018(h)(3)(ii) (item 1b) by not performing qualitative face fit tests for employees using respirators; § 1910.1018(j)(1) (item 2) by not requiring employees working in inorganic arsenic-regulated areas to wear appropriate protective work clothing; § 1910.1018(m)(2)(i) (item 3a) by not requiring employees

working in inorganic arsenic-regulated areas to shower; and, § 1910.1018(m)(2)(ii) (item 3b) by not providing shower facilities to employees working in inorganic arsenic-regulated areas.

The hearing was held May 18 - 19, 1998, in Birmingham, Alabama. The parties stipulated jurisdiction and coverage. The Secretary's motion to amend the willful citation to plead in the alternative serious violations and to modify the date of the alleged violations to include March 8 through April 22, 1997, was granted (Tr. 5-6).

M&D argues that the air heaters are not inorganic arsenic-regulated areas after the old air baskets are removed. This argument is rejected and the violations are affirmed as willful.

Background

M&D, incorporated in 1991, with offices in Tuscaloosa, Alabama, performs maintenance and construction work for power plants in Alabama. At the time of OSHA's inspection, M&D employed approximately 200 employees, primarily hired from the Boilermakers Union (Tr. 58, 95). M&D does not maintain a pool of full-time employees. M&D is owned and controlled by David Dunn, who was previously the president of Brock & Blevins, another contractor engaged in repair work at power generation plants. While Dunn was president, Brock & Blevins received serious citations on April 16, 1991, for violations of the various arsenic standards at § 1910.1081 (Exh. C-1; Tr. 10-11, 13, 16).

In March, 1997, as a result of a planned outage by Alabama Power at its Greene County Steam Plant in Forkland, Alabama, M&D under two contracts agreed to perform maintenance and repair work on the Unit 2 boiler and other work. The "Boiler Work" contract described the work to be performed on the Unit 2 boiler (Exh. C-3; Tr. 22-23). The "Outside Power House Work" contract described the other work to be performed, including the removal of air heater baskets from the Unit 2 air heaters and the demolition of an old precipitator known as the "cold side" precipitator (Exh. C-2; Tr. 19, 21). The "cold side" precipitator had not been in operation for several years (Tr. 31, 34, 459, 466-467). The contracts were completed in June, 1997 (Tr. 95).

Similar to most coal fired steam generation plants, Unit 2 at the Greene County Plant consists basically of a boiler, a turbine and a generator (Tr. 26). The Unit 2 coal fired boiler is

located in a building that is approximately 300-400 feet wide, 400 feet long, and 220 feet high (Tr. 414-415). Coal, pulverized to a fine powder, is burned in the boiler to heat water, which creates steam to power the turbine, which drives the generator to produce electricity (Tr. 26, 413).

A byproduct of burning coal is fly ash (coal dust). The fly ash is commonly known in the industry to contain inorganic arsenic[1] (Exh. C-11; Tr. 27). It is also common knowledge that fly ash containing inorganic arsenic is deposited by the coal burning process in various parts of the unit, including the boiler, precipitators and air heaters (Exh. C-4; Tr. 27). As the coal is burned, the exhaust containing fly ash exits the boiler and passes to the air heaters. The exhaust is used to heat the air heaters, which are essential to heating the boiler to capacity (Tr. 415, 442).

The Unit 2 boiler has two units (sides) of air heaters, referred to as the "A" and "B" air heaters (Tr. 18, 416). The "A" and "B" air heaters are identical in structure and function, but are completely separate. Each air heater is approximately 20 feet wide, 40 feet long, and 30 to 35 feet high. Each air heater has an inside area containing baskets and an outside area. It looks like a "ferris wheel." Inside each air heater are 12 sections of "cold side" baskets and approximately 12 sections of "hot side" baskets. There are 14 baskets per section (Tr. 416-417, 421). The baskets are described as a "bundle of real thin plates that will heat up quickly. And, eventually, they heat up and they wear. From the fly ash going through them, they wear out and they will begin to fall apart" (Exh. C-32; Tr. 425).

After the exhaust passes through the air heater, it continues through duct work to the precipitator before being released through a smoke stack. Since the exhaust contains fly ash with inorganic arsenic, it cannot be released directly into the environment (Tr. 31). The precipitator removes the fly ash from the exhaust before it exits through the smoke stack. The precipitator consists of large metal plates (or curtains) which have been electrified to attract and collect the fly ash. A mechanical "rapper" is used to vibrate the fly ash-laden plates, mechanically causing the fly ash to fall into ash hoppers below the precipitator (Tr. 88-89).

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[1]Inorganic arsenic is a poison. Exposure by inhalation, ingestion, or skin contact can cause death or serious physical harm due to lung cancer, damage to internal organs, such as the liver and lymphatic system, and skin cancer (Appendix A of § 1910.1018).

While at the Greene County Steam Plant, M&D worked two 10-hour shifts (Tr. 96). The field superintendent for M&D was Raymond Honeycutt (Tr. 407). Tommy Payne, one of M&D's assistant superintendents, supervised the work on the air heaters and the precipitator (Tr. 96, 403). Honeycutt was responsible for ensuring that air monitoring was conducted and, if required, to designate the "regulated areas." To perform the air monitoring, Honeycutt arranged for Envirochem, Inc., to conduct the personal monitoring (Tr. 467).

On March 10, 1997, Envirochem monitored the boiler "penthouse" and found that the level of arsenic was below the permissible exposure limit (PEL) of 10 micrograms per cubic meter of air ($\mu g/m^3$) at an 8-hour time weighted average (TWA). Envirochem also monitored employees working in the air heaters as well as other locations on March 12 and March 26, 1997 (Exh. C-12). On March 12, the one employee in the air heaters (Che Russell) showed an 8-hour TWA exposure level to arsenic of 45.03 $\mu g/m^3$. The March 26 monitoring results in the air heaters found that the arsenic exposure levels for one employee (David Kilgore) was 4.12 $\mu g/m^3$ and for another employee (Jacob Vail) was 44.38 $\mu g/m^3$. Envirochem's monitoring records do not identify which air heater was monitored.

Prior to the air monitoring, Honeycutt designated inside both "A" and "B" air heaters as regulated areas. The air heaters were the only areas designated as regulated areas (Tr. 465, 468-469). However, after the old baskets are removed from the air heaters and the inside is washed, Honeycutt testified that no hazard to arsenic exposure remains (Tr. 426-427).

Based on three formal employee complaints[2] alleging, among other things, the lack of respirator training, respirator fit testing, and showers, OSHA Industrial Hygienist (IH) Lisa Darsey Strunk inspected M&D's work at the plant (Tr. 114). On April 23, 1997, she conducted air monitoring for inorganic arsenic on four employees (Che Russell, David James, Jacob Vail,

[2]M&D's argument during the hearing that OSHA agreed not to conduct employee complaint inspections of contractors at power plants without first providing the contractor an opportunity to resolve the complaint is rejected. OSHA denies the agreement applied to the Greene County Steam Plant (Tr. 372). Such agreements are discretionary with OSHA, and M&D made no showing of prejudice. The complaints received by OSHA alleged the lack of respirator training, respirator fit testing and showers. If verified, the employees were subject to a potential exposure to inorganic arsenic. M&D does not allege that OSHA's inspection was conducted in an unreasonable manner. M&D is not prejudiced and fails to show that an agreement precluded this inspection.

John Foley) who were installing new baskets in air heaters A and B. Her air monitoring results found the exposure levels for inorganic arsenic in the air heaters ranged from 1.8 (Vail) to 5.2 (James) $\mu g/m^3$ (Exhs. C-20, C-27, R-3, R-4; Tr. 163-164, 201, 242, 258).

Discussion

Preliminary Matter

Regulated Area

M&D does not dispute that the inside of air heaters A and B were regulated areas within the meaning of the arsenic standards during the removal of the old baskets (Resp. Brief, p. 9). IH Strunk agrees that employees working inside the air heaters were potentially exposed to inorganic arsenic (Tr. 337). According to M&D, approximately one-half of the employees assigned to the air heaters worked outside the air heaters (Tr. 429-430).

M&D designated the inside of the air heaters as regulated areas on March 10. M&D's monitoring results on March 12 and 26, 1997, showed exposure levels inside the air heaters were potentially four times the 10 $\mu g/m^3$ PEL for inorganic arsenic. Honeycutt, field superintendent, was aware that removing the old baskets from inside the air heaters was known to cause excessive arsenic exposure (Tr. 426-427).

However, after the old baskets are removed and the inside of the air heater is high-pressure spray washed, M&D argues that there is no potential exposure to excessive levels of arsenic. M&D claims that Envirochem's March 26 monitoring result showing one employee (David Kilgore) below 5 $\mu g/m^3$ establishes that the old baskets had been removed from air heater "B" and that it had been cleaned. The reading was below the action level for inorganic arsenic. The other March 26 monitoring result with an exposure level above the PEL was, according to M&D, taken inside air heater "A." M&D argues that air heater "A" was cleaned by March 29 and therefore it also ceased to be a regulated area (Resp. Brief, p. 10-12).

M&D's argument is based on speculation and not supported by objective data. The arsenic standard requires the employer to establish regulated areas where worker exposures to inorganic arsenic, without regard to the use of respirators, are in excess of the permissible limit. *See* § 1910.1018(f). As a regulated area, the employer, among other things, is responsible to

demarcate the area, limit access, require employees to wear respirators and protective work clothing, and ensure that employees shower at the end of the work period.

In order to determine if a location needs to be designated as a regulated area, the standard requires initial monitoring and additional monitoring. Section 1910.1018(e) provides that:

> Determinations of airborne exposure levels shall be made from air samples that are representative of each employee's exposure to inorganic arsenic over an eight (8) hour period.

Envirochem's monitoring records do not identify which air heater was monitored. If M&D had intended to use Envirochem's March 26 air monitoring as the basis for removing the regulated area designation, it is reasonable to assume that it would have had objective documentation and not rely on speculation. Also, M&D's daily time records do not identify on which air heater work was being performed. The time records only show that for the period from March 11 through April 3, 1997, old baskets and seals were being removed from inside the air heaters (Exhs. C-8[3]).

To remove the regulated area designation from an air heater, it must be shown that the employee (Kilgore) with the low exposure level was in fact working inside air heater "B" and that his exposure was representative of other employees in the air heater. Both propositions are not shown by the record. Kilgore did not testify. The monitoring records and time records do not show in which air heater he was working. Also, as IH Strunk noted, the different exposure levels for the two employees (Vail and Kilgore) may have been due to the nature of their responsibility. Vail, a journeyman boilermaker, may have been engaged in tasks which caused a greater exposure level (Exh. C-22; Tr. 265-266, 329). Kilgore, on the other hand, was a helper-trainee (Exh. C-24; Tr. 182).

Also, the contention that Vail was working in air heater "A" is inconsistent with Honeycutt's reason for requesting the Envirochem's monitoring on March 26. Honeycutt testified that the air monitoring was to show that the "B" side was no longer a regulated area (Tr.

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[3]To show the nature of the work performed in the air heaters, the time records cite the applicable paragraph in the work contract (Exh. C-2). For example, "3.3.3.1.," which is found at page 37 in exhibit C-2, refers to the removal of preheater baskets. On April 1, other work initiated in the air heaters include replacing doors (3.3.4.1.) and repair work (3.3.3.6.).

428). If accepted, it is reasonable to conclude that both Kilgore and Vail were working in air heater "B." There was no reason to have monitored air heater "A" because baskets were still being removed.

If not accepted, Kilgore's exposure was not shown as representative of the employees working inside air heater "B." The record indicates that not all of the baskets and seals had been removed by March 26. Honeycutt testified variously that the baskets in air heater "B" had been removed by March 26, 27 or 28; he was not sure (Tr. 427-428, 446). If March 27 or 28 was the last day for removing baskets from air heater "B," baskets were still being removed during the air monitoring on March 26. Also, M&D's daily time records show that employees continued to remove air heater baskets through April 3 (Exh. C-8). Honeycutt testified that the old baskets in air heater "A" were removed two to three days after completing air heater "B." If his estimate is correct, the baskets were not removed from air heater "B" until March 28. Again, this is two days after the monitoring by Envirochem on March 26. Since the removal of air heater baskets was "firm price work," there was no incentive for M&D to overstate the time spent removing baskets.

Although the time records show no removal of old baskets after April 3, there is no objective evidence until the April 23 air monitoring by OSHA on which to base a determination to remove the regulated area designation. In fact, IH Strunk was advised by field superintendent Honeycutt that both air heaters were still considered regulated areas (Tr. 131, 136, 323-324). Honeycutt also testified that the air heaters were considered regulated areas at the time of OSHA's inspection because of the lack of proper air monitoring (Tr. 468-469). He knew that additional monitoring was needed before he could reasonably conclude that the level of inorganic arsenic on either side of the air heater was below the PEL (Tr. 131, 136, 324). There was no reason for M&D's failure to request additional air monitoring after March 26.

Further, when OSHA monitored the air heater on April 23, 1997, the exposure levels were still near the action level of 5 $\mu g/m^3$ for inorganic arsenic. This was almost a month after the time when Honeycutt stated the levels should have been "nonexistent" (Exhs. C-20, C-27; Tr. 164-166, 201). Based on his experience, Honeycutt testified that even before all of the baskets are removed, the exposure levels inside the air heaters were normally "borderline and maybe a

little high" (Tr. 425). M&D's air monitoring results, however, were more than four times the PEL, more than "borderline" and far more than a "little high." By OSHA's April 23 air monitoring, the air heaters should have been completely clean, containing no arsenic levels at or near the action level.

It was M&D's responsibility to protect its employees and to determine if the exposure levels were below the PEL. Such responsibility is not satisfied by the "past experience" of a superintendent and speculation. The determination must be based on objective information, such as representative air monitoring results. "When an employer who knows of a problem with excessive amounts of a regulated air contaminant takes measures to reduce the overexposure, reasonable diligence also requires measurements to determine whether and how much the employees are still overexposed." *Seaboard Foundry, Inc.*, 1983 CCH OSHD ¶ 26,522, at p. 33,775 (No. 77-3964, 1983). In the absence of air monitoring, the record shows that employees who worked in either air heater from March 11 through April 22, 1997, were potentially exposed to inorganic arsenic in excess of the PEL. Thus, the air heaters remained regulated areas until April 23, 1997.

Alleged Violations

Item 1a - § 1910.1018(h)(1) respirator usage

The citation alleges that "respirators were not required to be worn by any employee working in a regulated area during the outage beginning on or about March 13[4], 1997." At the time of the alleged violation, Section 1910.1018(h)(1) required that:

> The employer shall assure that respirators are used where required under this section to reduce employee exposures to below the permissible exposure limit and in emergencies.

M&D does not dispute that employees should have worn respirators while working inside the air heaters at least until March 26, 1997. M&D's written inorganic arsenic program requires the use of respirators in regulated areas (Exh. C-4). IH Strunk observed two types of respirators

[4]The Secretary amended the date to March 8, the first day of the outage.

used by M&D, the 3M-9920 and the 3M-9970, which are considered acceptable to protect against arsenic exposure (Exh. C-14; Tr. 141-142, 150).

Che Russell, a boilermaker helper-trainee (first level apprentice) was monitored on March 13, 1997. His monitoring results showed an exposure level to inorganic arsenic of 45 $\mu g/m^3$ (Exh. C-12). In his signed interview statement to OSHA, Russell stated that respirators were required and he was wearing a respirator on the day monitored (Exh. C-21). He also stated that during a safety meeting, the "safety man" told employees to wear protective clothing and respirators while working inside the air heaters. Russell stated that employees wore respirators for the first four or five weeks of work. He had not worn any protection for "2 to 3 weeks" prior to the OSHA interview. Russell was not told or shown the results of his air monitoring or the results of other employees.

Most of the other employees who provided written interview statements, however, stated that respirators were not required. IH Strunk took statements from three other employees (Vail, Kilgore, and Scully) and the foreman, Tommy Lewis, who worked inside the air heaters. The employees did not testify. The written statements were admitted, pursuant to Rule 801(d)(2)(D) of the Federal Rules of Evidence. In terms of the weight given the statements, any ambiguity is resolved in favor of M&D because there was no opportunity for cross-examination. However, the statements were provided to M&D prior to hearing so that it was able to properly prepare a defense.

Tommy Lewis, boilermaker foreman, was in charge of the employees working in the air heaters (Tr. 144-145). His responsibility included employees' safety and health (Tr. 400). In his statement, Lewis stated:

> Masks[5] and suits have been available but it is not mandatory for them to wear them. There are plenty available but most people don't wear them. When we were taking out the baskets most people wore them because it was dusty. Half of the people wore them and half did not. Masks and suits were never mandatory not even when they were removing baskets (Exh. C-16).

[5]Employees referred to respirators as masks (Tr. 150).

Jacob Vail, journeyman boilermaker, was monitored on March 26, 1997. His exposure level was 45 $\mu g/m^3$ (Exh. C-12). Vail stated that he was not required to wear a respirator and was not wearing one when monitored (Exh. C-22). The time records show that Vail worked a full 10-hour shift on almost every day between March 11 through April 3, 1997, removing old air heater baskets (Exh. C-8). He stated that he wore a mask "one or two days at the start of the project." Vail stated that no one told him to wear respiratory protection.

David Kilgore, a boilermaker helper, was also monitored by Envirochem on March 26. His exposure level was below the PEL for arsenic (Exh. C-12). Kilgore stated, "I have not throughout this job wore a mask all the time" (Exh. C-24). He wore a respirator when monitored. The time records indicate that he worked in the air heaters almost every day for 10 hours per day from March 24 through April 22, 1997 (Exh. C-8). Kilgore stated that he was not told respiratory protection was required. He only wore a respirator when he was "doing something that would stir up a lot of dust."

Frank Scully, journeyman boilermaker, stated that he had worked on the project for approximately six weeks and did not wear a mask "by choice" (Exh. C-17). "I have not worn a mask at all on this job." According to the time sheets, Scully worked in the air heater removing old baskets from March 25 through March 31, and then performed other jobs in the air heaters through April 22, 1997 (Exh. C-8).

Field superintendent Honeycutt claimed that Vail and other employees wore respirators in the air heaters (Tr. 456). However, Honeycutt's testimony is contradictory and unreliable. Honeycutt remained in his office most of the time. His office was 75 feet from the main building (Tr. 414, 439). He relied on assistant superintendents and foreman. He testified that assistant superintendent Tommy Payne had reported to him "once or twice a week" that "he had to get on certain ones--I cannot recall any names--about them not wearing their respirators" (Tr. 449). Honeycutt, however, took no personal action to assure that employees wore their respirators (Tr. 447). No employees were reprimanded (Tr. 327).

The weight of evidence establishes that employees were not required to wear respirators while working inside the air heaters. Employees did not regularly wear the respirators. A violation of § 1910.1018(h)(1) is affirmed.

Item 1b - § 1910.1018(h)(3)(ii) respirator fit testing

The citation alleges that employees who worked in the air heaters did not receive respirator qualitative or quantitative fit testing. At the time of the alleged violations, Section 1910.1018(h)(3)(ii) required that:

> The employer shall perform qualitative fit tests at the time of initial fitting and at least semi-annually thereafter for each employee wearing respirators, where quantitative fit tests are not required.

When an employee is given a respirator, the respirator must be fit tested to ensure that the respirator exhibits minimum face piece leakage and fits properly. An improperly fitted respirator is unlikely to provide the rated level of protection (Tr. 161).

M&D had two types of single-use negative pressure disposable respirators available (Exh. C-14; Tr. 139, 141, 303). One respirator, the 3M 9970, is approved for use in areas such as inside the air heaters where the level of inorganic arsenic is above the PEL. In M&D's contracts with Alabama Power, respirator fit testing and pulmonary function testing were reimbursable at $25 per worker per shift (Exhs. C-2, p. 7; C-3, p. 7). However, none of the employees interviewed by OSHA stated that fit testing was performed, nor did M&D determine whether the employees had been previously fit tested for the type of respirator (Tr. 167).

Che Russell, helper-trainee, who wore a respirator, stated that he had not been fit tested and was not shown how to wear the respirator (Exh. C-21). Jacob Vail, a boilermaker, also stated that he had not been fit tested (Exh. C-22). Vail stated that he was familiar with fit testing because he had previously worn respirators while working at chemical plants for another employer. David Kilgore, a helper, also stated that he was not familiar with fit testing (Exh. C-24).

Field superintendent Honeycutt agreed that M&D did not perform respirator fit testing at this project (Tr. 458). Although he was familiar with the fit testing requirements, Honeycutt told IH Strunk that "he felt like these employees had worn respirators on other jobs they had been on and it wasn't necessary" (Tr. 160). Employees David James and Donald Vickery stated in their interviews that they had been fit tested by other employers (Exhs. C-26, C-27). However, they

were not fit tested by M&D, and there is no showing that they were fit tested on the same respirators used by M&D.

During the hearing, Honeycutt testified that he did not feel it was necessary "on the assumption that some of these employees had worked for us two or three weeks before, and they come in and they told me that they had already had fit tests" (Tr. 458). Honeycutt, however, did not identify the employees and M&D maintained no written records identifying the employees who had been fit tested (Tr. 189-190). The Boilermakers Union did not perform respirator fit testing or maintain records of members fit tested (Tr. 352-353).

Therefore, the record clearly establishes that employees who worked inside the air heaters were not fit tested with the 3M-9970 respirator. M&D does not dispute that the employees were not fit tested (M&D Brief, p. 22). A violation of § 1910.1018(h)(3)(ii) is affirmed.

Item 2 - § 1910.1018(j)(1) appropriate work clothing

The citation alleges that at the Unit 2 air heaters and Unit 2 precipitator, M&D did not ensure that coveralls were worn by all employees working in regulated areas. Section 1910.1018(j)(1) requires that:

> Where the possibility of skin or eye irritation from inorganic arsenic exists, and for all workers working in regulated areas, the employer shall provide at no cost to the employee and assure that employees use appropriate and clean protective work clothing and equipment.

The work clothing and equipment required by the standard includes coveralls or similar full-body work clothing, gloves, shoes, and face shields, or vented goggles. None of the employees interviewed reported any skin rashes or eye irritations (Russell, Exh. C-21; Foley, Exh. C-23; Kilgore, Exh C-24). Protective "Tyvek" suits were available to employees working inside the air heaters (Tr. 302).

Field superintendent Honeycutt testified that Payne, an assistant superintendent, came to him "several times and said that he had reprimanded and talked to someone" about not wearing protective clothing in a regulated area (Tr. 448). As superintendent, Honeycutt relied on his assistant superintendents and foremen (Tr. 440). IH Strunk testified that both Honeycutt and

Payne told her that no employee had ever been reprimanded (Tr. 327). Honeycutt testified that, "We never did fire anybody for it [not wearing protective clothing in regulated areas], which, you know, I guess that maybe should have been done at times" (Tr. 448).

There is no evidence that Honeycutt or Payne communicated the need for protective clothing to the shift foreman, Thomas Lewis. Lewis stated that "[m]anagement has not informed me of the arsenic levels nor told me that personal protective equipment needs to be mandatory" (Exh. C-16). He stated that, "I have not discussed the hazards of arsenic with the men because I have not been made aware of them or told to discuss arsenic hazards with them. I have not seen any arsenic results posted." It was Lewis' responsibility to ensure that the employees working in the air heaters wore appropriate protective clothing (Tr. 440-441).

Frank Scully, a journeyman boilermaker, stated that he had not worn a Tyvek suit at all on the job until the day before his interview with OSHA (Exh. C-17). According to Scully, Lewis asked the air heater crew to wear the Tyvek suits after OSHA arrived on site. Scully worked in the "A" side air heater.

Jacob Vail, another journeyman boilermaker, stated that he had never been required to wear a Tyvek suit (Exh. C-22). He said that the suits were "offered, but there were times when [they were] not available." Vail stated that at the time when the crew was removing the old baskets, "the dust was bad" and "[w]hen they ran out of masks and suits, it would sometimes take them a day or two to get them." He wore a Tyvek suit when he was monitored.

Che Russell, a boilermaker helper, stated that he had been required to wear the Tyvek suit for the first "4-5 weeks" but after that "the foreman stopped bringing them" (Exh. C-21). During the OSHA inspection, he was welding new baskets in the air heaters.

The record establishes that not all employees working inside the air heaters were required by M&D to wear protective work clothing. Also, some employees did not at all times wear appropriate protective clothing in the air heaters.

The Old Precipitator

The citation also alleges a failure to wear protective work clothing at the Unit 2 precipitator. Under the contract with Alabama Power Company, M&D was required to demolish

an old cold side precipitator (Exh. C-2; Tr. 19). Prior to M&D's demolition work, the precipitator was cleaned by vacuum (Tr. 459).

The function of a precipitator is to remove the fly ash before the exhaust is released through the smoke stack (Tr. 88-89). As the fly ash accumulates, it is continually removed from an operating precipitator (Tr. 35). However, the precipitator M&D contracted to demolish had not been in operation for several years (Tr. 31).

There is no dispute that the precipitator was not designated by M&D as a regulated area. The precipitator was demolished by torch-cutting it down from the outside (Tr. 90). Also, M&D does not dispute that employees involved in demolishing the precipitator were not required to wear protective work clothing. There is some evidence that Honeycutt refused to permit them to use the clothing available at the site while working on the precipitator (Exhs. C-25, C-26). However, Honeycutt told IH Strunk that the precipitator work was a "nasty job and that the employees could not have worked in that area without wearing protective clothing and equipment" but that "some did and some didn't" (Tr. 205, 459).

Donald Vickery, a journeyman boilermaker, stated that while demolishing the precipitator "[i]t was really dusty. We had to shovel a lot out of our way and blow the rest with a torch" (Exh. C-25). He stated that he had taken a Tyvek suit to wear from the M&D office. However, when Honeycutt observed him taking the suit, he told Vickery that "the precipitator was not a regulated area" and made it clear that protective suits were not for employees working on the precipitator. Honeycutt denied that he ever prevented any employee from obtaining a protective suit (Tr. 475). David James, a boilermaker, stated the protective suits were not available for work on the precipitator demolition (Exh. C-26). James recalled being told that "the white suits were for working in the boiler around the arsenic" and that "if Alabama Power wasn't paying for the suits, we couldn't have them."

M&D had not performed precipitator demolition work before the Alabama project (Tr. 24). There is no dispute that M&D did not conduct air monitoring to determine if employees were exposed to inorganic arsenic above the PEL (Tr. 423-424). Honeycutt knew that the employees were exposed to large amounts of dust while performing the demolition work (Tr. 205). He knew that the levels of inorganic arsenic in the air heater were four times the PEL

(Exh. C-12). Also, Honeycutt knew that fly ash could be in the precipitator as well as the air heaters.

M&D's written arsenic program states that arsenic may be found in the fly ash and hard scale that form on the boiler, percipitator and related equipment (Exh. C-4). The program further provides that personal protective equipment "shall be utilized in boilers, precipitators or other areas of potential arsenic exposure until monitoring results indicate exposure levels were below the Action level." A reasonably prudent employer would have performed air monitoring or had some other objective basis for determining the lack of arsenic exposure. M&D failed to make this determination. Therefore, the precipitator is considered a regulated area and employees should have worn protective work clothing while in the area.

A violation of § 1910.1018(j)(1) is affirmed.

Items 3a and 3b - §§ 1910.1018(m)(2)(i) and 1910.1018(m)(2)(ii) showers and shower facilities

The citation alleges that shower facilities were not available, and employees who worked in a regulated area failed to shower at the end of the work period. The employees were "only provided with hand washing facilities that consisted of a water trough." Section 1910.1018(m)(2)(i) provides that:

> The employer shall assure that employees working in regulated areas or subject to the possibility of skin or eye irritation from inorganic arsenic shower at the end of the work shift.

Section 1910.1018(m)(2)(ii) provides that:

> The employer shall provide shower facilities in accordance with 1910.141(d)(3).

The air heaters and old precipitator were regulated areas. Despite the contract[6] with Alabama Power Company, M&D agreed to provide shower trailers for their employees (Tr. 62-63). M&D arranged with AMCO, an insulation contractor, to use AMCO's shower trailer at the

[6]The contract provides that Alabama Power was to provide a shower and change trailer (Exh. C-2, p. 21).

project in exchange for AMCO's use of M&D's bus. Field superintendent Honeycutt testified that AMCO's employees were to stop work 30 minutes prior to M&D so that the shower trailer was available (Tr. 409). The shower trailer was located more than 200 yards from M&D's office trailer. It was not visible from the trailer (Tr. 63-64).

When IH Strunk attempted to inspect the shower trailer, it was padlocked, and Honeycutt could not locate the key. The lock had to be cut off (Tr. 383-385). Foreman Thomas Lewis stated that the shower trailer had been locked for "about two months" (Exh. C-16). He stated that "the men didn't want to shower. They just wanted to wash their hands."

Honeycutt admits that he had not taken steps to determine whether the assistant superintendents and foremen were requiring employees who worked in the regulated area to shower. He "depended on them to tell me they were" (Tr. 440). Honeycutt was aware of the requirements for showering after working in a regulated area (Tr. 438). He never went to the shower trailer. A daily shower list prepared by the foreman was maintained in M&D's office (Exh. C-5; Tr. 441). The purpose of the shower list was to document the number of employees who needed protective work clothing and respirators (Tr. 43-44, 399, 403, 441). According to IH Strunk, Honeycutt stated that "he couldn't make the employees shower" (Tr. 227).

A comparison of the employees' time sheets who worked in the air heaters to the shower lists indicates that not all of the employees who were signing the shower lists were, in fact, taking showers (Exhs. C-5, C-8). For example, the names of Jacob Vail and Che Russell do not appear on the March 11, 1997, shower list, although they were shown working in the air heaters that day removing old heater baskets. Also, Jacob Vail, whose name appears on the shower list for March 13, 21 and 22, stated that foreman Lewis asked him to sign the shower list, although he never showered (Exh. C-22).

Thomas Payne, assistant superintendent, agreed that employees who worked in a regulated area needed to shower at the end of the shift (Tr. 404). It was his responsibility to ensure that employees did shower (Tr. 438). However, Payne stated that he had never gone to the shower trailer to determine whether employees were showering (Tr. 400). Payne testified that he discussed with Lewis the need for employees to shower (Tr. 399).

Lewis stated that he told Payne on two occasions that the shower trailer was locked (Exh. C-16). Payne denied being told this (Tr. 397-398). Lewis stated that he did not require employees to shower. He claimed that "the men didn't want to shower. They just wanted to wash their hands."

Frank Scully stated that he had been told by Lewis, his foreman, that he needed to shower, but he had not been showering because he did not think it was necessary (Exh. C-17). He said that he washed his hands and face in a 55-gallon drum.

Che Russell stated that the showers had been locked after the first week on the job (Exh. C-21). After that, Russell, who signed the shower list, stated "they put a wash basin outside the shower trailer and told us to wash our face and hands."

Jacob Vail stated that the showers had been available "probably the first 2 ½ weeks while they were [demolishing] the ductwork," but had been locked since then (Exh. C-22). He also stated that "right over where the showers are there is a wash basin. We wash our hands and face and the foreman [Lewis] asks us to sign the shower record."

John Foley, boilermaker apprentice, stated when he started to work in the air heater, his foreman, Owen Hardiman, told him that he would have to shower. However, Foley stated that "this means cleaning up at the 55-gallon trough. Everybody knows the showers are locked and we sign the shower log" (Exh. C-23).

The record establishes that M&D failed to provide shower facilities and require employees who worked in a regulated area to shower after their shift, in violation of §§ 1910.1018(m)(2)(i) and 1910.1018(m)(2)(ii). There is no dispute that washing the face and hands does not constitute taking a shower.

Willful Classification for Citation No. 2

The violations were classified by OSHA as "willful." The court agrees. A willful violation is "one committed with intentional knowing or voluntary disregard for the requirements of the Act, or with plain indifference to employee safety." *Conie Construction, Inc.*, 16 BNA OSHC 1870, 1872 (No. 92-264, 1994). A willful violation differs from other classifications of violations by a heightened awareness of the illegality of the conduct or conditions and by a state

of mind showing conscious disregard or plain indifference. A violation is not willful, however, if the employer has a good faith belief that it was not in violation. *Atlantic Battery Co., Inc.*, 16 BNA OSHC 2131, 2139 (No. 90-1747, 1994).

There is no dispute that at the Alabama Power project, M&D had a written inorganic arsenic program. To assist in compliance, M&D spent $17,000 to hire a private safety consultant (Tr. 94, 288). The safety consultant was on site full-time, normally sixty hours per week. Also, the Boilermakers Union had a safety representative designated to work on the M&D project who conducted safety walk-around inspections (Tr. 352, 357-358). There is no showing that either safety representative detected any problems with M&D's compliance with inorganic standards.

M&D's contracts with Alabama Power provided additional pricing for protective clothing, respirator fit testing and pulmonary function tests, air monitoring and analyses, and shower facilities (Exhs. C-2, C-3). M&D performed initial air monitoring and additional air monitoring on March 26, 1997 (Exh. C-12). There is no dispute that M&D designated the air heaters as regulated areas, even prior to the initial monitoring (Tr. 131). M&D posted signs designating the air heaters as regulated areas and warning employees of the potential arsenic hazard (Tr. 136, 469). M&D made available to employees appropriate respirators and protective work clothing for use in the regulated areas. A shower trailer was contracted from another company.

Also, M&D had weekly safety meetings (Tr. 411). M&D hired employees from the Boilermakers Union with the expectation that employees were experienced and trained in safety (Tr. 345). As described by Honeycutt, "most of these men know if they've been doing this more than one job, that its for their own protection to wear this equipment" (Tr. 433). The union's MOST (Mobilization, Optimization, Stabilization and Training) program provided the employees with general safety training (Exhs. C-36, R-5; Tr. 348-350). However, as stated in the pamphlet, the MOST training was not intended to replace an employer's safety and health training. The union program states that it was a "supplemental program only. It does not replace a contractor's program, or, for that matter, his responsibility under OSHA to have one" (Exh. C-15, p. 4).

However, based on M&D's awareness of the compliance requirements for inorganic arsenic exposure and its lack of enforcing those requirements, M&D's indifference or disregard

was willful. David Dunn, M&D's president, had received a serious citation in 1991 as president of Brooks and Blevins. The citation alleged numerous violations of the arsenic standard, including the failure to require respirators, protective work clothing, and showers (Exh. C-1). The citation was settled with an agreement by Brooks and Blevins to develop a written compliance program for inorganic arsenic (Tr. 15-16). Raymond Honeycutt, M&D's field superintendent on the Alabama Power project and who had also worked for Brooks and Blevins, knew the requirements of the arsenic standards (Tr. 125, 435, 440).

Other than making the equipment available and stating that respirators, clothing and showers were required in regulated areas, there is no showing that field superintendent Honeycutt and his assistant Payne took action to ensure that employees utilized the equipment. To the contrary, the evidence shows that M&D's enforcement was non-existent. Honeycutt testified that Payne reported the failure of employees to wear respirators "once or twice a week" (Tr. 449). Instead of taking direct action after being notified, Honeycutt "just more or less talked to him [Payne] and told him he needed to make them wear them." There is no showing that Payne took any action or that Honeycutt did any follow-up.

The written statement of foreman Lewis indicates that he was not aware that respirators and protective clothing were mandatory while performing work in the air heaters (Exh. C-16). M&D's argument that Lewis was not in a supervisory position is rejected. Lewis was designated a "foreman" for the air heaters. M&D placed him in charge of the crew working on the air heaters (Tr. 470-471). The crew ranged from 5 to 18 employees. M&D relied on Lewis, as a foreman, to direct the employees' work, as well as ensure they complied with the safety requirements (Tr. 440). Lewis' statement is supported by employees who worked in the regulated areas. The employees' statements show that the use of respirators and work clothing was discretionary with employees (Exhs. C-17, C-22, C-24).

The air monitoring results of March 26 did not relieve M&D from continuing to consider the air heaters as regulated areas. There was no objective evidence offered which justified removing the regulated area designation. Also, there was no air monitoring performed on the demolition work of the old precipitator, a location known to M&B with the potential for excessive arsenic exposure.

As discussed, despite its contractual obligations, there is no evidence that any employees were fit tested on the respirators used by M&D or that after the first week any showers were taken. M&D does not dispute that employees were not fit tested (M&D Brief, p. 22). Even Che Russell, helper trainee, who stated that respirators were required, also stated that he was not shown how to wear a respirator (Exh. C-21). M&D also concedes that "at some point employees apparently stopped showering, but continued to certify to the Company that they had showered" (M&D Brief, p. 27). M&D maintained a shower list which purportedly identified that employees were showering (Exhs. C-5, C-8). However, a cursory comparison of the time sheets for work in the air heaters and the shower lists shows numerous discrepancies. The shower lists were maintained in M&D's office trailer.

Based on its lack of enforcing the respirator, work clothing and shower requirements for inorganic arsenic exposure, the record establishes that M&D acted with reckless disregard or plain indifference. The willful violations are affirmed.

Penalty Considerations for Citation No. 2

The Commission is the final arbiter of penalties in all contested cases. In determining an appropriate penalty, the Commission is required to consider the size of the employer's business, history of previous violations, the employer's good faith, and the gravity of the violation.

M&D is entitled to credit for size and history. M&D employed in excess of 250 employees, 200 employees worked on the Alabama Power project (Tr. 95, 112). The crew working in the air heaters ranged from 5 to 18 employees (Exh. C-7; Tr. 471). M&D's business is cyclic. During some months, it employed less than 20 employees (Tr. 478-479). David Dunn, president of M&D, testified that the company's net worth in 1998 was approximately $100,000 (Exh. R-7; Tr. 491).

Since its incorporation in November, 1991, M&D has not received a prior OSHA citation (Tr. 228, 477). Also, during the inspection, there is no showing that M&D was uncooperative. It maintained written safety and health programs. There were weekly safety meetings. A full-time safety consultant and a union safety representative were hired for the project.

For failing to require respirators and fit testing, in violation of §§ 1910.1018(h)(1) and 1910.1018(h)(3)(ii), a grouped penalty of $12,000 is assessed. There is no record that respirator fit testing was performed on the employees working inside the air heaters. Also, employees, based on written statements, did not wear respirators in regulated areas. Despite having a written policy and appropriate respirators available at the project, M&D failed to adequately enforce their use. M&D must take responsibility to ensure that its respirator policy is complied with by employees. There is no evidence of discipline or verbal warnings.

A penalty of $12,000 is also assessed for failing to require the use of appropriate work clothing, in violation of § 1910.1018(j)(1). Again, the record shows that M&D failed to enforce the use of work clothing in regulated areas despite its written policy and having the Tyvek suits available at the project. The argument that employees are experienced, trained by the union, and personally choose not to wear the safety protection equipment does not relieve M&D as their employer of its responsibility to enforce employee safety protection.

For failing to have shower facilities and require employees to shower, in violation of §§ 1910.1018(m)(2)(i) and 1910.1018(m)(2)(ii), a grouped penalty of $12,000 is assessed. The record shows that M&D initially arranged for a shower trailer. However, for whatever reason, it was not used, except for the first week, and employees were not required to shower. M&D maintained shower lists. During the OSHA inspection, the trailer was locked and M&D did not have access to a key.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

ORDER

Based upon the foregoing decision, it is ORDERED;

Serious Citation No. 1:

1. Items 1a through 1c, violations of §§ 1910.1018(e)(1)(iii), 1910.1018(e)(2), and 1910.1018(e)(5)(i), pursuant to settlement agreement, are affirmed and a grouped penalty of $1,575 is assessed.

2. Item 2, violation of § 1910.1018(j)(2)(viii), pursuant to settlement agreement, is affirmed and a penalty of $1,575 is assessed.

3. Item 3, violation of § 1910.1018(m)(1), pursuant to settlement agreement, is affirmed and a penalty of $675 is assessed.

4. Item 4, violation of § 1910.1018(m)(3)(ii), pursuant to settlement agreement, is affirmed and a penalty of $675 is assessed.

5. Item 5, violation of § 1910.1018(n)(1)(i)(A), pursuant to settlement agreement, is affirmed and a penalty of $2,250 is assessed.

6. Item 6, violation of § 1910.1018(o)(1)(i), pursuant to settlement agreement, is affirmed and a penalty of $1,125 is assessed.

7. Item 7, violation of § 1910.1200(h)(1), pursuant to settlement agreement, is affirmed and a penalty of $675 is assessed.

8. Item 8, violation of § 1910.120(q)(1), pursuant to settlement agreement, is affirmed and a penalty of $675 is assessed.

Willful Citation No. 2:

1. Items 1a and 1b, violations of §§ 1910.1018(h)(1) and 1910.1081(h)(3)(ii), are affirmed as willful and a grouped penalty of $12,000 is assessed.

2. Item 2, violation of § 1910.1018(j)(1), is affirmed as willful and a penalty of $12,000 is assessed.

3. Items 3a and 3b, violations of §§ 1910.1018(m)(2)(i) and 1910.1018(m)(2)(ii), are affirmed as willful and a grouped penalty of $12,000 is assessed.

Other Than Serious Citation No. 3:

1. Item 1, violation of § 1910.1018(j)(2)(v), pursuant to settlement agreement, is affirmed and no penalty is assessed.

2. Item 2, violation of § 1910.1018(k)(4), pursuant to settlement agreement, is affirmed and no penalty is assessed.

KEN S. WELSCH
Judge

Date: April 5, 1999