UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR,

Complainant,

v.

JOHNSON CONTROLS, INC.,

Respondent.

OSHRC Docket No. 90-2179

DECISION

BEFORE: FOULKE, Chairman, WISEMAN and MONTOYA, Commissioners.

BY THE COMMISSION:

This case is before the Commission for review pursuant to 29 U.S.C. § 661(i), section 12(i) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-78 ("the Act"). The direction for review states four issues:

1) Did the Administrative Law Judge err in concluding that an elevated blood lead level of 50 μg/100g of whole blood or greater is a "recordable occupational illness" within the meaning of 29 C.F.R. § 1904.2(a)?

2) Did the judge err in concluding that the citation issued to the Respondent was not barred by the statute of limitations in section 9(c) of the Act, 29 U.S.C. § 658(c)?

3) Did the judge err in finding that the alleged violation of 29 C.F.R. § 1904.2(a) was willful?

4) Did the judge err in affirming the $2,000 penalty?

The citation that is involved in this case, presenting one item, alleges that Johnson Controls, Inc., a manufacturer of lead batteries, committed a willful violation of an

occupational recordkeeping regulation published at 29 C.F.R. § 1904.2(a).[1] During an inspection conducted by the Occupational Safety and Health Administration ("OSHA"), of the United States Department of Labor, at one of Johnson's plants, located in Geneva, Illinois, an OSHA compliance officer compared Johnson's own safety and health records concerning the medical condition of employees with the OSHA-required records of occupational injuries and illnesses ("OSHA 200's"). The comparison revealed that, on twenty-seven occasions from April 1988 through December 1989, the employer failed to record employee blood-lead levels in excess of 50 μg/100g on the OSHA 200's.

I. Was the Citation Barred by the Statute of Limitations?

Section 9(c) of the Act, 29 U.S.C. § 658(c), the Act's statute of limitations to which the direction for review in this case refers, states that "[n]o citation may be issued . . . after the expiration of six months following the occurrence of any violation." OSHA began its inspection in this case in February 1990 and closed it in June 1990. OSHA issued the citation less than one month later, in July 1990, alleging that there were uncorrected omissions in the OSHA 200's at Johnson's plant in Geneva, Illinois.

The Commission held in *Johnson Controls, Inc.*, 15 BNA OSHC 2132, 2136, 1993 CCH OSHD ¶ 29,953, p. 40,965 (No. 89-2614, 1993) (lead and separate opinions) ("*Johnson I*"), that "an uncorrected error or omission in an employer's OSHA-required injury [and illness] records may be cited six months from the time the Secretary does discover . . . the facts necessary to issue a citation." The twenty-seven instances of unrecorded elevated blood-lead levels that are involved in the case now before us were still unrecorded in

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[1]The regulation states, in pertinent part:

> Each employer shall . . . (1) maintain . . . a log and summary of all recordable occupational injuries and illnesses . . . and (2) enter each recordable injury and illness on the log and summary . . . . For this purpose form OSHA No. 200 or an equivalent . . . shall be used. The log and summary shall be completed in the detail provided in the form and instructions on form OSHA No. 200.

A related definitional regulation, 29 C.F.R. § 1904.12(c), defines "recordable occupational injuries or illnesses" as "[n]onfatal cases without lost workdays which result in transfer to another job" and "any diagnosed occupational illnesses which are reported to the employer but are not classified as fatalities or lost workday cases."

Johnson's OSHA 200's when the compliance officer made his inspection. Therefore, for the reasons stated in *Johnson I*, the citation issued to Johnson regarding its recordkeeping at its plant in Geneva, Illinois, was not barred by the statute of limitations in section 9(c) of the Act, 29 U.S.C. § 658(c).

II. Are Elevated Blood-Lead Levels Illnesses?

In *Johnson I*, 15 BNA OSHC at 2139-43, 1993 CCH OSHD at pp. 40,969-73, the Commission determined that an abnormal physiological condition such as an elevated blood-lead level is recordable as an illness within the meaning and intent of the Act. The parties' arguments in the case now before us are virtually identical to those we addressed in *Johnson I*, and we see nothing further to be added. Therefore, for the reasons stated in *Johnson I*, we hold that each of the twenty-seven instances of elevated blood-lead levels that the compliance officer discovered during the inspection in this case was a "recordable occupational illness" within the meaning of 29 C.F.R. § 1904.2(a).

III. Was the Alleged Violation Willful?

OSHA grouped the twenty-seven instances of unrecorded blood-lead levels as one citation item and classified the alleged violation as willful because, OSHA asserted, the following circumstances demonstrate Johnson's willful disregard of or indifference to a known duty. Since 1986, excessive blood-lead levels have been an express subject of record-keeping, according to the "Recordkeeping Guidelines for Occupational Injuries and Illnesses," a publication of the Labor Department's Bureau of Labor Statistics ("BLS Guidelines"). *See Johnson I*, 15 BNA OSHC at 2137, 1993 CCH OSHD at p. 40,966 (quoting pertinent instruction from BLS Guidelines). Also, in July 1989, Johnson had received a citation, the one which gave rise to *Johnson I*, for failure to record a blood-lead level in excess of 50 μg/100g at the company's plant in Milwaukee, Wisconsin.

From these events, the Secretary reasons, the employer knew from the 1986 BLS Guidelines of the Secretary's interpretation of his recordkeeping regulation. In addition, the employer knew from the 1989 citation for failure to record an elevated blood-lead level that the Secretary was enforcing his interpretation. Nevertheless, the employer persisted in applying its own interpretation and declined to comply with the Secretary's. In the

Secretary's opinion, there can be no good faith in these circumstances. "[A]n employer must follow the law even if it has a good faith belief that its own policy is wiser." *RSR Corp. v. Brock*, 764 F.2d 355, 363 (5th Cir. 1985) ("*RSR*"). In addition, the Secretary states, regarding Johnson's reliance on Commission cases such as *Amoco Chem. Corp.*, 12 BNA OSHC 1849, 1853-54, 1986-87 CCH OSHD ¶ 27,621, p.35,903 (No. 78-250, 1986) ("*Amoco*"), "[r]eliance on an administrative decision for which there is a substantial possibility of reversal is not . . . reasonable." For this proposition, the Secretary refers to *NLRB v. Sav-on Drugs*, 728 F.2d 1254, 1256 (9th Cir. 1984), and *Dole v. East Penn Mfg. Co.*, 894 F.2d 640, 645-46 (3d Cir. 1990).

Subsequent to a hearing before a Commission administrative law judge, the judge upheld the Secretary's willful classification, finding that the employer knew what the recordkeeping regulation meant but declined to obey. Johnson now takes exception on the basis that "[i]t is simply impossible to find the Company in willful violation of OSHA regulations when the law *unequivocally* support[ed] the Company's position and Complainant [had to] argue for a change in the law for the [c]itation to be upheld [in the case of *Johnson I*]." The "law" to which Johnson refers is *Amoco*. In the employer's opinion, its own interpretation of the Secretary's recordkeeping regulation was held in reasonable good faith, under *C.N. Flagg & Co.*, 2 BNA OSHC 1539, 1541, 1974-75 CCH OSHD ¶ 19,251, p. 23,027 (No. 1409, 1975), and *General Motors Corp., Electro-Motive Div.*, 14 BNA OSHC 2064, 2068-69, 1991 CCH OSHD ¶ 29,240, pp. 39,168-69 (No. 82-630, 1991) ("*General Motors*").

Willfulness is established by evidence that an employer that knew of a standard's requirement either violated it intentionally or showed plain indifference to employee safety. *Id.* *Accord*, *Brock v. Morello Bros. Constr.*, 809 F.2d 161, 164 (1st Cir. 1987) ("*Morello*") (awareness of unlawfulness or state of mind of indifference), *cited in Secretary of Labor v. Union Oil*, 869 F.2d 1039, 1047 (7th Cir. 1989) ("*Union Oil*") ("colorable argument" against rule's applicability is "nonfrivolous interpretation" that is not willful); *RSR*, 764 F.2d at 362 ("voluntary action, done either with an intentional disregard of, or plain indifference to, the requirements"); *Trinity Indus., Inc.*, 15 BNA OSHC 1579, 1586, 1992 CCH OSHD ¶ 29,662,

p. 40,188 (No. 88-1545, 1992) ("*Trinity*") ("a heightened awareness that can be considered a conscious disregard or plain indifference"); *E.L. Jones and Son, Inc.*, 14 BNA OSHC 2129, 2133, 1991 CCH OSHD ¶ 29,264, p. 39,232 (No. 87-8, 1991) ("intentional disregard for the requirements of the Act or plain indifference to employee safety"). An employer's mere familiarity with an applicable standard does not establish willfulness. *See Wright and Lopez, Inc.*, 8 BNA OSHC 1261, 1265, 1980 CCH OSHD ¶ 24,419, p. 29,777 (No. 76-3743, 1980). Instead, such familiarity must be combined with either an actual awareness, at the time of the violative act, that it was "unlawful," or a "state of mind . . . such that, if he were informed of the [standard], he would not care." *Morello*, 809 F.2d at 164. A company's conscious decision to adopt a policy deviating from that which OSHA has pronounced to be the correct course of action under a standard is willful behavior unless supported by a reasonable belief, held in good faith, that the company's policy is correct. *See RSR*, 764 F.2d at 363.

In the case now before us, it appears -- at least with respect to the instances that occurred later in time -- that Johnson consciously decided to deviate from what OSHA explicitly considered necessary for complete recordkeeping regarding elevated blood-lead levels. Prior to the earliest cited instance, which was an elevated blood-lead level detected in April 1988, the DOL had issued the BLS Guidelines for recordkeeping. At some point Johnson apparently had notice of these guidelines, as we determined in *Johnson I*, 15 BNA OSHC at 2141 and 2136 n.6, 1993 CCH OSHD at pp. 40,970-71 and 40,966 n.9. At no time has Johnson argued otherwise. The 1986 publication makes the requirement to record elevated blood-lead levels plain enough. *See Johnson I*, 15 BNA OSHC at 2137, 1993 CCH OSHD at pp. 40,966 (quoting pertinent language from BLS Guidelines). But, more to the point, the July 1989 citation for the Milwaukee plant would have signaled to Johnson that OSHA was enforcing the interpretation as stated in the BLS Guidelines. Thus, surely as to the instances that occurred after July 1989, Johnson either intentionally disregarded the Secretary's interpretation or was plainly indifferent to it. Notably, the tenor of Johnson's argument in this case is that the company consciously took a position consistent with *Amoco*, not OSHA, and meant to adhere to it. As in *Johnson I*, which arose at the Milwaukee

battery plant, we have in the record in this case arising at the Geneva battery plant an affidavit from a physician supporting the company's position that elevated blood-lead levels are not illnesses and avowing that he has been "[s]ince 1969 . . . an occupational medicine consultant for the Company's Battery Division." We therefore infer that we are dealing here with a company-wide policy founded on expert advice contrary to that of OSHA.

As Johnson realizes, and appropriately argues, the real question on the willfulness issue is one of good faith. Willfulness is negated if the employer held a belief in good faith that its own interpretation was reasonable in the circumstances. *Trinity*, 15 BNA OSHC at 1586, 1992 CCH OSHD at p. 40,188. A "colorable argument" can be held in good faith. Of course, an employer's belief must have been "nonfrivolous." *See Union Oil*, 869 F.2d at 1047, *citing Morello*, 809 F.2d at 165. Moreover, "the mere fact that [an employer] did not abandon its good-faith interpretation of a standard while the validity of that interpretation was being litigated" does not automatically negate good faith. *Trinity*, 15 BNA OSHC at 1586-87, 1992 CCH OSHD at p. 40,189. An employer may in good faith hold even an erroneous belief as long as the belief is plausible under the circumstances.

Our extensive discussion of the rationale behind the company's policy not to record elevated blood-lead levels in *Johnson I* reveals that the policy was plausible, though erroneous. The company had colorable arguments in support of its decision -- arguments that even led to an oral presentation before the Commission. *Johnson I*, 15 BNA OSHC at 2133, 1993 CCH OSHD at 40,962 (reference to oral argument). It is true that we did ultimately reject Johnson's interpretation of the pertinent sections of the Act and the Secretary's regulation implementing them. However, even a "strained" interpretation can be sufficiently plausible to be held in good faith if a prudent attorney could reasonably analyze the enforcing agency's position and advise his client, an employer, to adhere to another position, in light of the statute and any pertinent case law. *See General Motors*, 14 BNA OSHC at 2069, 1991 CCH OSHD at pp. 39,168-69. It is in this regard that we believe Johnson's attorney demonstrated the requisite prudence. Specifically, in light of the Commission precedent represented by *Amoco*, "it was not imprudent" for Johnson's attorney to counsel the company to comply with that case law. It also was not imprudent for him "to

counsel [the company] to ask the Commission to clarify" the meaning of the recordkeeping regulation in light of OSHA's conflicting interpretation before entering upon a policy of literal compliance with the BLS Guidelines that the DOL had issued to provide guidance to employers for keeping their OSHA 200's. *Compare General Motors*, 14 BNA OSHC at 2069, 1991 CCH OSHD at p. 39,168. The case on which the Secretary principally relies, *RSR*, is distinguishable on the basis that it involved a studied deviation in the face of an adverse court decision. 764 F.2d at 363. Johnson only persisted in the face of OSHA's rulemaking interpretations and the one enforcement citation. In other words, Johnson was merely disagreeing with a prosecutor, not a judge.

We also weigh in the balance the fact that employers are not required to abate violations pending adjudication before the Commission and its judges. Of course, "[o]nce an employer has been cited for an infraction under a standard, this tends to apprise the employer of the requirement of the standard and alert him that special attention may be required to prevent future violations of that standard." *Dun-Par Engineered Form Co. v. Marshall*, 676 F.2d 1333, 1337 (10th Cir. 1982). Nevertheless, while *Johnson I* was pending, the company had no obligation to rectify the lined-out entry in the Milwaukee records that were involved in *Johnson I*, and the company could justifiably have regarded *Johnson I* as a test case upon whose outcome would depend the viability of the company policy in question. The obligation to abate the Milwaukee error only began when *Johnson I* was issued.

IV. Penalty

The Secretary proposed a penalty of $2,000 for the alleged willful violation in this case, but, in view of the following facts, we assess a penalty of $500 for the other-than-serious violation that we uphold. *See Atlas Indus. Painters*, 15 BNA OSHC 1215, 1218, 1991 CCH OSHD ¶ 29,439, p. 39,673 (No. 87-619, 1991), *aff'd without published opinion*, 976 F.2d 743 (11th Cir. 1992)(table) (violation classified as other-than-serious where Secretary neither alleged nor tried violation as serious, only as willful). Johnson is a large company that, because of its recent policy of not recording elevated blood-lead levels, has generated a considerable number of recordkeeping inaccuracies at the plant involved in this case. As we

indicated in *Johnson I*, 15 BNA OSHC at 2133-34, 1993 CCH OSHD at 40,962-63, such inaccuracies affect employees by misleading them about the nature of their working conditions and by withholding information from organizations, other governmental agencies, and individuals performing research in the safety and health field for the purpose of isolating the causes and cures of occupational injuries and illnesses.

V. Order

Accordingly, we affirm the citation item as an other-than-serious violation, and assess $500 in penalty.

Edwin G. Foulke, Jr.
Chairman

Donald G. Wiseman
Commissioner

Velma Montoya
Commissioner

Dated: April 1, 1993

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SECRETARY OF LABOR,	:	
Complainant,	:	
v.	:	Docket No. 90-2179
JOHNSON CONTROLS, INC.,	:	
Respondent.	:	

NOTICE OF COMMISSION DECISION

The attached decision and order by the Occupational Safety and Health Review Commission was issued on April 1, 1993. **ANY PERSON ADVERSELY AFFECTED OR AGGRIEVED WHO WISHES TO OBTAIN REVIEW OF THIS DECISION MUST FILE A NOTICE OF APPEAL WITH THE APPROPRIATE FEDERAL COURT OF APPEALS WITHIN 60 DAYS OF THE DATE OF THIS DECISION.** See Section 11 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 660.

FOR THE COMMISSION

Ray H. Darling, Jr.

April 1, 1993
Date

Ray H. Darling, Jr.
Executive Secretary

Docket No. 90-2179

NOTICE IS GIVEN TO THE FOLLOWING:

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SECRETARY OF LABOR
Complainant,
v.

JOHNSON CONTROLS, INC.
Respondent.

OSHRC DOCKET
NO. 90-2179

NOTICE OF DOCKETING OF ADMINISTRATIVE LAW JUDGE'S DECISION

The Administrative Law Judge's Report in the above referenced case was docketed with the Commission on December 19, 1991. The decision of the Judge will become a final order of the Commission on January 21, 1992 unless a Commission member directs review of the decision on or before that date. ANY PARTY DESIRING REVIEW OF THE JUDGE'S DECISION BY THE COMMISSION MUST FILE A PETITION FOR DISCRETIONARY REVIEW. Any such petition should be received by the Executive Secretary on or before January 8, 1992 in order to permit sufficient time for its review. See Commission Rule 91, 29 C.F.R. 2200.91.

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

Executive Secretary
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Petitioning parties shall also mail a copy to:

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If a Direction for Review is issued by the Commission, then the Counsel for Regional Trial Litigation will represent the Department of Labor. Any party having questions about review rights may contact the Commission's Executive Secretary or call (202) 634-7950.

FOR THE COMMISSION

Ray H. Darling, Jr.

Date: December 19, 1991

Ray H. Darling, Jr.
Executive Secretary

DOCKET NO. 90-2179

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DOCKET NO. 90-2179

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SECRETARY OF LABOR,
Complainant,

v.

JOHNSON CONTROLS, INC.,
Respondent,

and

INTERNATIONAL UNION OF ELECTRICAL WORKERS, AFL-CIO,
Authorized Employee Representative.

OSHRC Docket No. 90-2179

DECISION AND ORDER

This is an action by the Secretary of Labor to affirm one item of a willful citation issued by the Occupational Safety and Health Administration to Johnson Controls Company for the alleged violation of a regulation relating to recordkeeping adopted under the Occupational Safety and Health Act of 1970. The matter arose after a compliance officer for the Administration inspected a worksite of the Company, and the Agency concluded that the respondent violated the regulation when it failed to record a number of instances where employees had blood-lead readings in excess of 50 micrograms

per 100 grams of whole blood. The company disagreed with the citation and filed a notice of contest. Thereafter the parties filed a Complaint and Answer with this Commission, and the matter was scheduled for hearing. The parties have now submitted cross motions for partial summary judgment in lieu of a formal hearing.

The citation in question charged that:

> 29 CFR §1904.2(a): The log and summary of occupational injuries and illnesses (OSHA Form No. 200 or its equivalent) was not completed in the detail provided in the form and the instructions contained therein:
>
> Test results showing elevated blood-lead levels exceeding 50 micrograms per 100 grams of whole blood were not recorded on the OSHA-200 log and summary forms for 1988 and 1989.

Then followed a list of instances where individuals had unrecorded blood-lead levels over 50 ug/100g.

The respondent denied that it was in violation of the regulation inasmuch as the workers suffered no occupational illness or injury. The Company also contended that the citation was barred by the statute of limitations; that the alleged violation was not willful in nature; and that the penalty proposed was excessive.

The regulation at 29 CFR §1904.2(a) provides for the recording and reporting of occupational injuries and illnesses and reads as follows:

> Each employer shall * * * maintain in each establishment a log and summary of all recordable occupational injuries and illnesses for that establishment; * * *. For this purpose Form OSHA No. 200 * * * shall be used. The log and summary shall be completed in the detail provided in the form and instructions on Form OSHA 200.

On the back of every OSHA Form 200 an occupational illness is defined as any abnormal condition or disorder caused by exposure to environmental factors associated with employment.

The Bureau of Labor Statistics' guidelines consider an occupational illness as an abnormal condition which is defined as an "atypical condition of an employee which may be of either a chemical, physical, biological or psychological in nature."

The guidelines also inform the employers that they are required to conduct surveillance and monitoring testing for employees working with hazardous substances, such as lead, but that test results are not recordable unless the elevated blood-lead levels exceed 50 micrograms per 100 grams of whole blood.

The recording and reporting regulations further provide for recordkeeping by employers covered by the Act as necessary and appropriate for enforcement of the law in order to develop information regarding causes and prevention of occupational illnesses and to maintain a program of collection, compilation, and analysis of occupational health statistics.

Since the blood-lead level of the employees in question exceeded the 50 micrograms per 100 grams of whole blood, the respondent was required under the regulation to report and record the readings.

In this conclusion I am buttressed by an affidavit of Dr. Charles W. Fishburn submitted by the respondent in connection with its Motion. In this document, Dr. Fishburn stated that normal blood-lead levels for individuals with no occupational

exposure generally range from 9/ug/100g of whole blood to 15ug/100g of whole blood. Clearly, therefore, readings above 50 ug/100g denote an abnormal range.

The respondent argues that there is no record evidence that a mere elevated blood-lead level constitutes an illness, but that is not the issue in this case. Indeed, there is no charge that the employees in questions were ill. As indicated in the regulation, its purpose is to develop information regarding causes and prevention of occupational diseases and to maintain a program of collection, compilation, and analysis of occupational health statistics. The requirement to report blood-lead levels exceeding 50ug/100g is directed to that end.

Furthermore, Section 8(c)(1) of the Act states that all employers are to keep such records as the Secretary of Labor might require by regulation. The Commission's interpretation of that provision is contained in the case of *Secretary of Labor v. General Motors Corporation*, Docket No. 76-5033, 8 BNA OSHC 2036, 1980, wherein it held:

> Examination of the legislative history of these provisions shows a clear congressional intent that this reporting requirement be interpreted broadly in order to develop information for future scientific use.

I conclude that the respondent was in violation of regulation 29 CFR §1904.2(a) when it failed to record employee blood-lead levels over 50ug/100g as charged in the citation.

The respondent next argues that since the alleged violations occurred on December 18, 1989, and the citation was issued on July 2, 1990, the complainant did not issue the citation within the six month period of the statute of limitations in the Act. This position is at variance with Commission rulings to the effect that the statute of limitations

under Section 9(c) of the Act does not begin to run regarding violations of the Act until the Administration discovers or reasonably should have discovered a violation. In this case the Agency discovered the facts during the investigation which began in February, 1990. The citation was therefore timely served upon the respondent.

The respondent also contends that the alleged violation was not willful as stated in the citation. A willful violation is considered to be one committed with intentional, knowing, and voluntary disregard for the requirements of the Act. In this case the respondent knew the regulation required reporting for specific blood-lead levels and was also previously cited for this infraction. Yet it disregarded notices to employers with respect to lead reporting and continued to refrain from recording these violations. I conclude that the citation was properly categorized as willful.

Finally, the respondent objects to the $2,000 penalty as excessive but makes no alternative suggestion. In view of the respondent's size and its unwillingness to assist in the purpose of the Act and its reporting regulations to collect, compile, and analyze occupational health statistics and thus further the objectives of the Act, the recommended penalty is affirmed.

The Complainant's Motion for Partial Summary Judgment is granted. The Respondent's Motion for Partial Summary Judgment is denied.

Sidney J. Goldstein
Judge, OSHRC

Dated: December 9, 1991