



United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR
Complainant,

v.

LOUISVILLE SCRAP MATERIAL CO., INC.
Respondent.

OSHR DOCKET
NO. 94-2293

**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 September 28, 1995. The decision of the Judge will become a final order of the Commission on October 30, 1995 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 October 18, 1995 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) 606-5400.

FOR THE COMMISSION

Ray H. Darling, Jr.
Executive Secretary

Date: September 28, 1995

DOCKET NO. 94-2293

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SECRETARY OF LABOR,
Complainant,

v.

LOUISVILLE SCRAP MATERIAL CO.,
INC.,
Respondent.

OSHRC Docket No.: 94-2293

Appearances:

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For Complainant

Jeffrey L. Turner
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For Respondent

Before: Administrative Law Judge Nancy J. Spies

DECISION AND ORDER

Louisville Scrap Material Co., Inc., operated scrap processing yards in Tampa, Florida, and other locations. The Tampa facility was sold in July 1994, but LSM continues to operate other scrap processing yards (Tr. 91). LSM reduced large metal objects, primarily railroad cars, to scrap metal for resale. Following an Occupational Safety and Health Administration (OSHA) inspection of its Tampa facility by John Santa Cruz, OSHA issued to LSM two citations on July 13, 1994. The Secretary and LSM reached an agreement on several contested items before the hearing (parties' Stipulation J-24). Remaining for decision are item 1 and items 3 through 9 of serious Citation No. 1. Item 1 addresses the guarding of a grinder. Items 3 through 9 assert violations of separate provisions of the lead standard, § 1910.1025. The

allegations include excessive exposure to lead and failure to utilize the controls, safeguards and practices mandated in response to lead exposure. The parties' main dispute centers on the method Santa Cruz used to sample airborne lead generated in the scrapping out process. A secondary disagreement is whether any asserted violation of the lead standard can be affirmed, even if the sampling was improper.¹

Item 1: Grinder Wheel -- § 1910.215(a)(1)

The Secretary asserts that LSM failed to guard the abrasive wheel of a grinder in violation of section 1910.215(a)(1).² The parties presented scant evidence on this issue. Santa Cruz accompanied by LSM's safety environmental manager, William Jones, proceeded to a trailer on the site during the walk-around inspection. Santa Cruz saw an unguarded Alltrade bench grinder sitting on a table. The grinder was plugged in. Santa Cruz asked, "Who uses it?" Jones "referred [Santa Cruz] to the maintenance person as the user of it, a Mr. Neil Hall . . ." (J-23³; Tr. 25). Santa Cruz did not interview Hall.

Employees have access to a violation when they reasonably are expected to come into contact with the hazard. Jones' admission concerning Hall's use of the grinder, which is afforded weight under Rule 801(d)(2)(D), Fed. R. Civ. P., is relevant to exposure and to employer knowledge. The admission, together with the fact that the grinder was plugged in, indicates that the grinder was available to be used by Hall. Jones' contention at hearing that the grinder was not operational, was based on hearsay and was inadmissible (Tr. 103). Barely sufficient evidence may sustain a violation when not adequately rebutted. *Kaspar Electroplating Corp.*, 16 BNA OSHC 1517, 1521-22 (No. 90-2866, 1993). The gravity of an anticipated injury from the unguarded abrasive grinder was "low . . . cuts and abrasions . . . most likely not requiring hospitalization." A serious injury was not substantially probable (Tr. 40). The violation is properly classified as nonserious. The assessed penalty of \$200.00 reflects the lack of proof as to frequency and duration of exposure and the fact that only one individual was exposed.

¹ The parties differ as to the proper interpretation of trial testimony. Their respective motions to strike all or portions of each other's briefs (and for costs) are without merit and are hereby denied.

² Section 1910.215(a)(1) provides:

(a) *General requirements* - (1) *Machine guarding*. Abrasive wheels shall be used only on machines provided with safety guards as defined in the following paragraphs of this section,

³ The parties' statement of undisputed facts contained in the Agreed Prehearing Statement filed on February 21, 1995, is listed in the record at J-23.

ALLEGED VIOLATIONS OF THE LEAD STANDARD

BACKGROUND

LSM operated a small (300 yards long and ¼ mile wide) metal scrapping facility near the Port of Tampa. LSM most commonly scrapped out railroad cars, usually boxcars, bought from major railroad companies. It also converted various types of heavy equipment, tanks, cables, containers, and miscellaneous materials into scrap metal (Tr. 73, 78, 84, 98).

A rail line ran the length of the property. Items to be scrapped were brought onto LSM's tracks (Exh. C-3; Tr. 93). Fourteen outlets for oxygen and natural gas were located at intervals along the tracks. A crane was used to lift objects from the tracks and to place them at the work stations. LSM employed six or seven "burners" to "thermal cut" the material. Following routine procedures the burners initially disposed of all non-metal portions of the objects. The burners then attached their acetylene torches to the outlets and cut the remaining metal into 2 feet by 5 feet sheets of scrap (Tr. 27, 94, 97). At the end of the process the crane returned and piled and loaded the scrap onto freighters for shipment (Tr. 98, 124).

The burners wore protective equipment, including face shields and respirators. The burners were compensated on a production basis and worked steadily 6 to 8 hours a day in the scrapping process (Tr. 79, 88).

If the surface coating of materials scrapped by LSM contained lead, airborne lead was produced during the heat-cutting process. Since 1978, it has been unlawful to use lead-based paints. The coatings on equipment pre-dating 1978, however, contain lead. In addition, scrapping out brass or copper may yield lead (Tr. 102, 168). It is generally accepted that lead is "associated with rail car torch cutting activities for scrap processing" (Exh. C-1, p 4).

1993 Monitoring By Insurance Company

As he began his inspection, Santa Cruz asked for LSM's air contaminant monitoring results (Tr. 23). LSM had conducted only one air contaminant evaluation. Those results were generated in 1993 from air samples taken by LSM's insurer, CNA Insurance. As part of the insurer's loss control program, CNA employee Steven Ferrell, monitored LSM's employees for six air contaminants, including lead. Ferrell was not a certified hygienist, but was knowledgeable and forthright at the hearing. He received in-house training from his employer. Ferrell collected air samples by placing a filter cassette on the collar of each burner, outside the face shield. Ferrell's tests showed that "eight of nine lead samples exceeded

the OSHA AL [action level]. Six of nine samples exceeded the OSHA PEL [permissible exposure level]" (Exh. C-1; Tr. 11,13,14).⁴

Ferrell detailed the results of his survey to LSM on February 23, 1993, and advised that "comprehensive compliance programs for lead . . . are not in effect per OSHA standards" (Exh. C-1, p. 2). Ferrell suggested to William Jones, LSM's corporate safety environmental manager, that LSM consider using longer torches as one means of reducing lead exposure. Jones countered that possible ergonomic problems could result from use of longer torches. Ferrell did not believe that LSM fully evaluated his suggestion (Exh. C-1; Tr. 19). LSM did not change its procedures or conduct further air monitoring.

OSHA's 1994 Lead Samples

On April 18, 1994, Santa Cruz, a certified industrial hygienist for OSHA, also monitored LSM's burners for air contaminants. As stipulated, Santa Cruz's lead tests are accurate results of what was measured, *i.e.*, the area at the employees' collars not inside the face shield (J-23, p. 3). The time weighted average (TWA) exposure for lead for two employees showed results well above the PEL ($111 \mu\text{g}/\text{m}^3$ and $309 \mu\text{g}/\text{m}^3$) (Exh. C-5).

LSM's Post-Citation Lead Monitoring at Other Facilities

To bolster its argument that monitoring inside the face shield would result in reduced exposure, LSM submitted post-citation lead sampling results. On August 15, 1994, LSM's consultant Lawrence Hilts sampled for lead at the Louisville facility. Hilts placed filter cassettes both inside and outside the face shield (Tr. 142). The raw lead exposure (not time-weighted) was 165 and $118 \mu\text{g}/\text{m}^3$ (outside shield) and 87 and $80 \mu\text{g}/\text{m}^3$ (inside shield). At the Roanoke facility on September 8, 1994, Hilts' samples ranged from $11 \mu\text{g}/\text{m}^3$ to $126 \mu\text{g}/\text{m}^3$ (outside shield) and from $3 \mu\text{g}/\text{m}^3$ to $93 \mu\text{g}/\text{m}^3$ (inside shield). Overall, after calculating the TWA from his data, Hilts estimated that there was an average 31 percent differential when comparing samples taken from inside and outside the face shield (Exh. R-7; Tr. 141- 145).

⁴ The action level (AL) for lead is $30 \mu\text{g}/\text{m}^3$, the permissible level (PEL) is $50 \mu\text{g}/\text{m}^3$ [§ 1910.1025(b)&(c)]. Ferrell's readings all exceeded either the AL or PEL and were as follows: $31 \mu\text{g}/\text{m}^3$; $35 \mu\text{g}/\text{m}^3$; $66 \mu\text{g}/\text{m}^3$; $68 \mu\text{g}/\text{m}^3$; $110 \mu\text{g}/\text{m}^3$; $120 \mu\text{g}/\text{m}^3$; $150 \mu\text{g}/\text{m}^3$; $150 \mu\text{g}/\text{m}^3$.

DISCUSSION

Lead is a toxic metal, long recognized in industrial society as a grave health hazard. Lead may be inhaled, ingested and absorbed into the body (Tr. 39). The lead standard establishes criteria for recognizing, evaluating, and controlling lead exposure. In this case, the Secretary alleges violations of sections (c)--exposure limits; (d)--exposure monitoring; (e)--methods of compliance; (g)--protective clothing and equipment; (i)--hygiene facilities and practices; (j)--medical surveillance; (l)--employee information and training; and (m)--medical surveillance. There are distinct types of protection contemplated within these sections. Sections 1910.1025(c) and (e) are aimed primarily at hazards resulting from direct inhalation of lead from the source, *i.e. the immediate lead-generating process*. Sections 1910.1025(d) and (j) require tests and monitoring to enable an employer to recognize the degree of the hazard. Sections 1910.1025(g), (i), (l) and (m) seek to protect against indirect lead exposure arising from "*additional sources of lead absorption* from inhalation or ingestion of lead that may accumulate on [the employee, his clothes, or his possessions]." Appendix B to § 1910.1025 (emphasis added).

The alleged violations are discussed in turn within those three categories.⁵

Items 3a, 4a and 4b--Lead from the Immediate Source

The first category of asserted violations concerns safeguards aimed primarily at respirable lead generated from the immediate source (items 3a, 4a and 4b). The Secretary alleges LSM's employees were exposed to excessive lead levels in violation of § 1910.1025(c)(1)⁶ (item 3a). He charges that LSM's failure to institute feasible engineering and administrative controls once excessive respirable concentrations were established violated § 1910.1025(e)(1)⁷ (item 4a). The Secretary also alleges that LSM's failure to

⁵ While the alleged violations are discussed within the three groups, for clarity's sake the Order lists the items numerically.

⁶ Section 1910.1025(c)(1) provides:

(c) *Permissible exposure limit (PEL)*. (1) The employer shall assure that no employee is exposed to lead at concentrations greater than fifty micrograms per cubic meter of air (50 $\mu\text{g}/\text{m}^3$) averaged over an 8-hour period.

⁷ Section 1910.1025(e)(1) provides:

(e) *Methods of compliance* - (1) *Engineering and work practice controls*.

(continued...)

have a written compliance program to reduce lead exposure solely by means of engineering and administrative controls violated § 1910.1025(e)(3)(i)⁸ (item 4b).

LSM argues that the Secretary's sampling procedure was defective and thus insufficient to support any violation of the lead standard. LSM contends that lead samples must be collected by placing the filter cassette inside the employees' face shields. OSHA (and LSM's own earlier samples) were taken from the employee's collar area, outside the face shields.

Secretary's Monitoring Procedure Does Not Support Violations

OSHA personnel follow sampling procedures set out in the *Industrial Hygiene Technical Manual (IHTM)* (Exh. R-1). "General sampling procedures" of the *IHTM* require OSHA hygienist to "attach the collection device to the shirt collar or as close as practical to the nose and mouth . . ." (Exh. R-1; p. 1-2). However, "special sampling procedures" govern asbestos and welding fumes (Exh. R-1, p. 1-8):

When sampling for welding fumes, the filter cassette must be placed inside the welding helmet to achieve an accurate characterization of the employee's exposure.

Reports and studies introduced by LSM document a basis for the exception to the general sampling procedure for welders (Exhs. R-8, R-9, R-10, R-11). The existence of a barrier between the welders' face and the fume-producing process alters the path of the fumes and dust and affects the air behind the facial barrier. That which would actually be breathed by the welder from behind the barrier (regardless of respirator use) is the air within the breathing zone. The Commission has held that OSHA must follow its special procedures directive when sampling welding fumes for air contaminants such as lead. *Equitable*

⁷(...continued)

(1) Where any employee is exposed to lead above the permissible exposure limit for more than 30 days per year, the employer shall implement engineering and work practice controls (including administrative controls) to reduce and maintain employee exposure to lead in accordance with the implementation schedule in Table I below, except to the extent that the employer can demonstrate that such controls are not feasible.

⁸ Section 1910.1025(e)(3)(i) requires:

Each employer shall establish and implement a written compliance program to reduce exposures to or below the permissible exposure limit, and interim levels if applicable, solely by means of engineering and work practice controls. . . .

Shipyards, Inc., 13 BNA OSHC 1177 (No. 81-2089, 1987); *Bechtel National*, 13 BNA OSHC 1023 (No. 86-102, 1986) (Burroughs, J).

In Santa Cruz's opinion the special "welding fumes" technique did not apply to LSM. Two issues were raised. Was the sampled medium "welding fumes," and was the full "face shield" worn by LSM employees the functional equivalent of a "welding helmet"? Both questions are answered in the affirmative. First, the Secretary does not seriously dispute that the employees' use of acetylene torches to "thermal cut" metal objects yields "welding fumes" for purposes of air contaminant sampling. "Welding, cutting, and brazing" each generate the same type of fumes when the operation is performed on the same type of base metal with the same type of surface coating (Tr. 185). Welding, cutting, and brazing are such closely allied processes that the by-product of each is properly classified "welding fumes" (Exh R-8, R-11; Tr. 53, 152, 186, 190). Secondly, the appearance and function of the face shield utilized by LSM was substantially similar to that of a "welding helmet." At the time of the investigation, the burners wore Jackson face shields which were clipped onto the back of plastic hard hats (Exh. 4a & 4b; Tr. 134). With the face shield lowered in place, the shield fitted over the face and extended over the chin to the collarbone. Currently, newer, lighter versions of the older "half bucket" welding helmet are on the market. LSM demonstrated that the configuration of its face shields is particularly comparable to the newer helmets (Exh. 5a & b; Tr. 134-136). Both barriers protect a worker's face, particularly the eyes. To require different sampling techniques dependent upon whether the welder/cutter's facial barrier is classified as a "face shield" rather than a welding helmet creates a distinction without a relevant difference.

Sections (c) and (e) of the lead standard addresses the hazard of respirable lead primarily from the immediate source, *i.e.* the fumes and dust generated as the burners are directly engaged in thermal cutting. For purposes of this provision, proof of overexposure must reflect samples taken from inside the face shield. The Secretary did not present this data. His evidence is insufficient to establish overexposure within the meaning of §§ (c) and (e).

Finally, the Secretary contends that even if his sampling was defective, there is sufficient evidence of overexposure to establish the violation. The Secretary suggests that Hilts' 31 percent "inside/outside" differential could be applied to Santa Cruz's sample results. Asserting further that the sample results were so high, even reducing its findings by a hypothetical 200 percent differential (more than the technical literature Exhs. R-8 through R-11 suggests) still results in exposure above the PEL. However, many

variables affect air contaminant sampling, and these may vary to a significant extent (Tr. 164, 166, 190-191). The Secretary bears the burden of establishing overexposure. The Secretary's theoretical percentage differential is too speculative a means to meet this burden.

The Secretary failed to establish that LSM's employees were exposed to lead concentrations in excess of the PEL for purposes of sections (c) and (e). Violations asserted as items 3a, 4a and 4b are vacated.

Items 3b and 7--Recognizing and Monitoring Lead Hazards

Item 3b: § 1910.1025(d)(6)(iii)

The Secretary asserts that LSM failed to monitor employee lead exposure in violation of § 1910.1025(d)(6)(iii).⁹ Approximately one year before OSHA inspected LSM, Ferrell advised the company that it was not in compliance with OSHA standards for lead and that it should conduct "additional exposure monitoring" (Exh. C-1, p. 4).

Section (d) governs "employee monitoring." LSM incorrectly assumes that section (d) requires proof that employees are overexposed for 30 days. Monitoring is an integral part of the standard's protective scheme. Employers must monitor when employees may be exposed to lead at or above the AL. LSM performed the required initial monitoring and was free to dictate the terms of the testing procedure it used. It ignored the results of overexposure because, impliedly, it did not agree with the sampling technique. LSM's position is even less persuasive because LSM did not repeat the tests its way. LSM refused to "repeat monitoring quarterly." The violation is affirmed.

Classification and Penalty

There is no sharp dividing line between rapidly developing acute effects of lead, and chronic effects which take longer to acquire. Lead adversely affects numerous body systems, and causes forms of health impairment and disease which arise after periods of exposure as short as days or as long as several years. Appendix A to § 1910.1025.

⁹ Section 1910.1025(d)(6)(iii) provides:

If the initial monitoring reveals that employee exposure is above the permissible exposure limit the employer shall repeat monitoring quarterly. The employer shall continue monitoring at the required frequency until at least two consecutive measurements, taken at least 7 days apart, are below the PEL but at or above the action level at which time the employer shall repeat monitoring for that employee at the frequency specified in paragraph (d)(6)(ii), except as otherwise provided in paragraph (d)(7) of this section.

A finding of a serious violation does not require that harm would have occurred, but rather that it could have occurred. *Dec-Tam*, 15 BNA OSHC 2072, 2083 (failure to perform initial monitoring for asbestos was “so critical to the health of its employees [the violation could] only be characterized as serious.”) The violation is serious.

The Commission must give “due consideration” to the size of the employer's business, the gravity of the violation, the good faith of the employer, and the history of previous violations in determining the appropriate penalty. *Hern Iron Works, Inc.*, 16 BNA OSHC 1619, 1624 (No. 88-1962, 1994). LSM employed 250 persons; 12 were employed in the Tampa facility, and 4 to 7 burners were exposed to lead contamination. LSM's past efforts and future willingness to follow lead safety procedures is a consideration of good faith and is evaluated here as a negative factor, especially considering its failure to respond to Ferrell's report. In a positive vein, LSM cooperated with the inspection, conducted regular safety meetings and had a formal safety program. OSHA had not inspected LSM within the past three years, and therefore there was no past history of violations (Tr. 40).

Among penalty factors, the gravity of the violation is accorded primary weight. Considerations of gravity include the number of exposed employees, the duration of exposure, precautions taken against injury and the likelihood that injury would result. *Id.* Since 1992, LSM required use of respirators as a precaution against illness from lead exposure (Tr. 91, 106). Implementing a respiratory protection program may have lessened the gravity of the injury to some degree, but it would not be effective for much of the lead exposure at issue in this case.¹⁰ Failure to monitor for air contaminants lengthened potential exposure for at least five employees during their 6 to 8-hour workshifts. A penalty of \$750.00 is assessed for this previously grouped penalty.

¹⁰ In fact, the fallacy of ignoring the other requirements of the lead standards and relying solely on use of respirators was illustrated when, under its previous manager, employees did not routinely wear respirators (Tr. 106). Burner Luis Chaw explained (Tr. 83):

The manager in charge, he would tell us: you are supposed to wear it, but if it bothers you, you know, you can do as you like.

Item 7: § 1910.1025(j)(3)(ii)(D)(3)

The citation alleges that LSM violated § 1910.1025(j)(3)(ii)(D)(3)¹¹ by failing to institute a medical surveillance program which included tests for zinc protoporphyrin (ZPP). Medical surveillance is required for employees who "may be exposed above the AL for more than 30 days." The standard is couched in terms of probability. That LSM's burners may have been overexposed is amply supported by CNA's and OSHA tests results. LSM's post-citation sampling inside the face shield further strengthens that conclusion. Given the repetitive character of the working conditions at LSM and the consistent showing of lead levels in every test administered, employees "may" have been exposed at the AL for more than 30 days. LSM should have instituted a full medical surveillance program. While it acquired at least one set of blood tests for each employee, only two of the tests included an analysis for ZPP (Tr. 37). The violation is affirmed. The gravity of the violation is lessened because LSM performed blood analysis for other indicators which would help reveal lead contamination. A penalty of \$500.00 is assessed.

Items 5a, 6a, 6b, and 6c--Lead Exposure from Additional Sources

Subsections (g), (i), (l) and (m) (items 5a, 5b, 6a, 6b, 6c, 8, and 9), unlike subsections (c) and (e), are not primarily directed at respirable lead from the immediate source. These sections seek to prevent lead contamination from those "additional sources" of lead that accumulate on the employee's skin, clothing and equipment. See Appendix B to § 1910.1025.

As stipulated, Santa Cruz's measurements for lead "are accurate results for what was measured" (J-23, p. 3). He followed the general procedures for lead sampling, properly calibrating his equipment, sampling, and calculating the results (Tr. 28, 32, 67). The rationale is compelling to accept OSHA's findings of overexposure for purposes of sections (g), (i), (l) and (m), even though the samples were taken from outside the face shield. Use of a face shield is not a significant factor in measuring the amount of lead which could be inhaled or ingested from accumulated lead on the employees' clothing and skin.

¹¹ Section 1910.1025(j)(3)(ii)(D)(3) provides:

The employer shall institute a medical surveillance program for all employees who are or may be exposed above the action level for more than 30 days per year. . . (ii) *Content.* Medical examinations made available shall include. . . (D) A blood sample which determines . . . (3) Zinc protoporphyrin.

Accordingly, if sampling methods conform to either the general lead or the specific welding procedures of the *IHTM*, the data may establish violations of these sections of the lead standard.

Items 5a and 5b: 1910.1025(g)(2)(v) and (vii)

Sections 1910.1025(g)(2)(v) and (vii)¹² mandate that lead contaminated clothing will be placed in special containers and that those containers will be labeled with a warning. The parties stipulate that LSM did not place protective clothing in a closed, appropriately labelled, container at the worksite (J-23, p. 2). Since the lead samples taken by Santa Cruz outside the face shield may establish exposure for purposes of section (g), items 5a and 5b are affirmed. Failure to keep lead-contaminated workclothes isolated from employees permits further potential contamination. The effects are serious. After considering the penalty factors previously discussed, a penalty of \$1000.00 is affirmed.

Item 6a: Alleged Serious Violation of § 1910.1025(i)(2)(i)

The parties stipulate that LSM "did not provide change rooms (as that term is used in § 1910.1025) for removal of clothing" or "for changing into and out of work clothing" (J-23, p. 2). If airborne exposure to lead is above the PEL, LSM violated § 1910.1025(i)(2)(i).¹³ As discussed, section (i) addresses the hazards of exposure from additional sources, such as lead contaminated clothes and skin. Accordingly, Santa Cruz's samples establish that exposure levels exceeded the PEL for purposes of section (i), even though the cassette was placed outside the face shield. Failure to afford an employee the opportunity to

¹² Section 1910.1025(g)(2)(v) provides:

The employer shall assure that contaminated protective clothing which is to be cleaned, laundered, or disposed of, is placed in a closed container in the change-room which prevents dispersion of lead outside the container.

Section 1910.1025(g)(2)(vii) provides:

The employer shall assure that the containers of contaminated protective clothing and equipment required by paragraph (g)(2)(v) are labelled as follows: CAUTION: CLOTHING CONTAMINATED WITH LEAD. DO NOT REMOVE DUST BY BLOWING OR SHAKING. DISPOSE OF LEAD CONTAMINATED WASH WATER IN ACCORDANCE WITH APPLICABLE LOCAL, STATE, OR FEDERAL REGULATIONS.

¹³ Section 1910.1025(i)(2)(i) provides:

The employer shall provide clean change rooms for employees who work in areas where their airborne exposure to lead is above the PEL, without regard to the use of respirators.

change from contaminated clothing increases the possibility of exposure, not only for the employee and his family but also for co-workers. The violation is affirmed as serious.

Item 6b: Alleged Serious Violation of § 1910.1025(i)(3)(ii)

It is stipulated that "respondent did not provide shower facilities to employees at the worksite" (J-23, p. 1). Section 1910.1025(i)(3)(ii)¹⁴ requires employers to furnish shower facilities so that employees working in areas where there is lead exposure above the PEL may shower at the end of the workday. Since for purposes of section (i) the Secretary established overexposure by Santa Cruz's test results, the violation is affirmed. Without showers, there was an increased opportunity that lead on the burner's body could be inhaled, ingested and absorbed into the body. The violation is affirmed as serious.

Item 6c: Alleged Serious Violation of § 1910.1025(i)(4)(iv)

The parties agree that "[r]espondent did not require employees to remove surface lead by vacuuming, down draft booth or other cleaning methods" (J-23, p. 1). The Secretary contends LSM therefore violated § 1910.1025(i)(4)(iv).¹⁵ Overexposure is established by Santa Cruz's air monitoring. Employees ate lunch and took breaks in the breakroom of the office trailer (Tr. 38). LSM furnished the burners face shields. Santa Cruz observed employees in the breakroom washing their face shields in the sink. Failure to vacuum or blow off lead from the work clothing or equipment increased chances that lead would be absorbed or ingested by those employees or their fellow workers in the breakroom. The violation is affirmed as serious. Based upon consideration of the factors previously discussed, a combined penalty of \$1100.00 is assessed for items 6a, 6b and 6c.

¹⁴ Section 1910.1025(i)(3)(ii) provides:

The employer shall provide shower facilities in accordance with § 1910.141(d)(3) of this part.

¹⁵ Section 1910.1025(i)(4)(iv) requires:

The employer shall assure that employees do not enter lunchroom facilities with protective work clothing or equipment unless surface lead dust has been removed by vacuuming, downdraft booth, or other cleaning method.

Item 8: Alleged Serious Violation of § 1910.1025(l)(1)(ii)

The citation alleges that LSM did not train employees exposed above the AL in specific areas of lead protection in violation of § 1910.1025(l)(1)(ii).¹⁶ Santa Cruz's sampling results establish that employees were exposed to lead above the AL. The parties stipulate that "employees were not included in an annual training program which included the information in Appendices A and B" (J-23, p. 2). The Secretary also points out that one of the burners did not know what "chelating" was. Even if failing to understand the definition of chelating meant the employee was not trained in the danger of routine use of blood cleansers, the evidence would not establish the violation. Employers violate subsection (v), not (ii), by failing to train in the specific areas asserted as a basis for the violation. LSM instituted a training program, they showed an ISRI video to employees, and required the participation of the employees in the training (Tr. 112, 123). That the program was defective in the specific instances alleged does not violate the standard cited. The violation is vacated.

Item 9: Alleged Serious Violation of § 1910.1025(m)(2)(i)

The asserted violation is that LSM failed to post warning signs in work areas in violation of § 1910.1025(m)(2)(i).¹⁷ The standard requires specific warning signs to alert workers to the danger of eating and smoking in the work area if employees are exposed above the PEL. As with other provisions of the lead standard which are not primarily aimed at respiration of lead from the immediate source, Santa Cruz's samples establish overexposure. The parties stipulate that LSM "did not have any signs regarding lead posted" (J-23, p. 2). The violation is affirmed. LSM's failure to educate and remind employees of the

¹⁶ Section 1910.1025(l)(1)(ii) provides:

The employer shall institute a training program for and assure the participation of all employees who are subject to exposure to lead at or above the action level or for whom the possibility of skin or eye irritation exists.

¹⁷ Section 1910.1025(m)(2)(i) specifies that:

The employer shall post . . . where the PEL is exceeded:

WARNING
LEAD WORK AREA
POISON
NO SMOKING OR EATING

hazards associated with ingestion of lead by posting signs may well increase the potential for exposure. The violation is serious. The same penalty factors previously discussed apply. A penalty of \$825.00 is assessed.

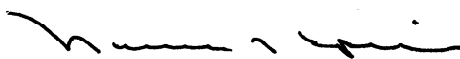
FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

ORDER

Based upon the foregoing decision and the Stipulation of partial settlement, it is ORDERED:

1. As stipulated in J-24, Citation 1, item 2 is affirmed with an assessed penalty of \$450.00; Citation 2, Items 1 and 3 are affirmed without penalty; and Citation 2, item 2 is withdrawn and vacated.
2. Citation 1, item 1 (§ 1910.215(a)(1)) is affirmed and a penalty of \$200.00 is assessed.
3. Citation 1, item 3a (§ 1910.1025(c)(1)) is vacated.
4. Citation 1, item 3b (§ 1910.1025(d)(6)(iii)) is affirmed. A penalty of \$750.00 is assessed.
5. Citation 1, item 4a (§ 1910.1025(e)(1)) is vacated.
6. Citation 1, item 4b (§ 1910.1025(e)(3)(i)) is vacated.
7. Citation 1, items 5a and 5b (§§ 1910.1025(g)(2)(v) and (vii)) are affirmed. A penalty of \$1,000.00 is assessed.
8. Citation 1, item 6a (§ 1910.1025(i)(2)(i)) is affirmed; item 6b (§1910.1025(i)(3)(ii)) is affirmed; and item 6c (§ 1910.1025(i)(4)(iv)) is affirmed. A penalty of \$1,100.00 is assessed.
9. Citation 1, item 7 (§ 1910.1025(j)(3)(ii)(D)(3)) is affirmed. A penalty of \$500.00 is assessed.
10. Citation 1, item 8 (§ 1910.1025(l)(1)(ii)) is vacated.
11. Citation 1, item 9 (§1910.1025(m)(2)(i)) is affirmed. A penalty of \$825.00 is assessed.



NANCY J. SPIES
Judge

Date: September 20, 1995