FROM THOMAS B. BONNEY TO MEMORANDUM

PITTSBURGH OFFICE

May 2, 1972

RE: SECRETARY OF LABOR VS. ASARCO

Airborne concentrations of lead in the working area were known to be at times above the TLV. Because of this the hearing examiner rejected the employer's contention that the exposures did not constitute a serious hazard because of the existance of a preventive program consisting of periodic surveys, ventilation measurements, physical examinations (including blood and urine sampling), re-assignment of employee when biological levels were excessive, supervision of employees work habits and the use of respirators in high concentration areas. The examiner contended that under the Act, employers are not permitted to provide unsafe, unhealthful or hazardous working conditions for their employees even though the adverse effects of the working conditions are attempted to be minimized. In this case, the presence of unsafe concentrations of lead should have been determined by air sampling and comparing the values with the TLV rather than by biological testing. Although the use of biologic testing is encouraged, it must not be used as a control of lead hazards, but rather as a diagnostic tool to determine if employees have absorbed excessive quantities of lead.

The examiner concurred that the use of respirators is justifiable but only as a temporary measure. Their use on a continuous basis, as was the case in this instance, transferred the responsibility of compliance with the Act from the employer to the employees. This consequence is clearly contrary to the congressional intent underlying the Act.

The examiner contended that the only proof necessary to show that Section 5(a)(1), the "General Duty Clause", was violated was to show that a hazard is likely to cause serious physical harm or death. It doesn't depend on proof that a hazard has produced injury. It is sufficient to show that harmful concentrations of lead (i.e., in excess of the TLV) existed, which was the case in this instance.

The finding that the employer was in violation of the general duty clause of the Act was upheld and the employer was required to pay a $600 fine and to install engineering controls within six months.

T. B. Bonney

TBB:mh

PLAINTIFF'S
EXHIBIT
AL-1399

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ALCOA

SF-4563 (REV 11-68)

CCH
#42 - 3/22/72

Within this group, a standard covering the guarding of floor and wall openings and holes was violated 22 times, and a standard setting forth general requirements was violated 19 times. Standards covering ladders and stairs were violated 19 times, while only one violation of scaffolding safety requirements was appealed. Other groups of OSHA standards in which a relatively high rate of violation occurred included general environmental controls, fire protection, personal protective equipment, means of egress, and materials handling and storage.

Violations of safety and health standards for construction, shipbuilding, ship repairing, and longshoring occurred in categories similar to those in which violations occurred under OSHA's standards. The majority of these standards was violated only once, although a construction standard covering scaffolding was violated ten times, and another construction standard covering guardrails, handrails, and covers was violated six times. A breakdown of the standards violated and the number of times each violation was cited appear at ¶ 8354.

Refusal to Process Job Safety Grievance Is Unlawful, NLRB Says

An employer unlawfully refused to process a union grievance concerning plant safety. According to the complaint, both employees and management carried exposed knives in the plant. The employer's defense was that the matter had been settled when it posted a notice warning employees to refrain from walking around the plant with unsheathed knives. However, an NLRB panel noted, the new grievance contained serious charges that the safety measures embodied in the notice were being ignored. Therefore, it was concluded that the employer violated its bargaining duty by refusing to process the grievance. This case, *American Beef Packers, Inc.*, appears in CCH LABOR LAW REPORTS at 1972 CCH NLRB ¶ 23,620.

Exposure to Excessive Lead Violates General Duty Clause

It was not enough that an employer monitored employees' exposure to airborne lead and reassigned them to other work if blood and urine samples showed excessive concentrations of lead. Once employees were exposed to levels of airborne lead in excess of that generally considered to be safe, and where continued exposure could cause serious physical harm, the company violated the general duty clause of the Occupational Safety and Health Act.

American Smelting and Refining Company was found to have permitted employees to be exposed to airborne concentrations of lead in excess of the .2 mg/M³ level generally accepted as the maximum safe limit. In the first place, according to Hearing Examiner William E. Brennan, the company is not even following its own safety program with any degree of consistency. In the second place, it is not enough to operate a program which takes effect *after* the damage is done. The company has a duty to provide a safe workplace—not simply to minimize the effects of an existing hazard. The Hearing Examiner's Report appears at ¶ 8353.

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¶ 8353 GENERAL DUTY CLAUSE VIOLATED BY EXCESSIVE LEAD EXPOSURE

Secretary of Labor v. American Smelting and Refining Company. Hearing Examiner's Report. OSHA Docket No. 10. March 1, 1972.

General Duty Clause—Violation—Determination—Airborne Lead Concentration

Where evidence established that (1) the generally accepted level of airborne concentrations of lead considered to be safe is .2 mg/M³, (2) continued exposure to concentrations greater than that level are likely to cause serious physical harm to employees, and (3) the employer permitted employees to be exposed to concentrations greater than the safe limit, a citation based on the employer's failure to conform to the general duty clause of the Act, ¶ 6110, was proper.

Back references: ¶ 2021; 6110.

Determinations

WILLIAM E. BRENNAN, Hearing Examiner: The employer was issued a citation on July 7, 1971, alleging a violation of Section 5 (a)(1) of the Act, ¶ 6110, by permitting employees to be exposed to airborne concentrations of lead in excess of generally accepted safe levels. The citation permitted 48 hours for the implementation of appropriate administrative controls (respirators, rotations, etc.) and 60 days for the installation of feasible engineering controls (such as ventilators). A penalty of $600 was proposed.

A pre-hearing conference was held at which the parties (employer, employee representative and Secretary) agreed that the matter was properly before the Hearing Examiner, that the proposed penalty would be proper if any penalty was in order, that the administrative controls had been properly implemented, and that the 60-day period allowed for installing proper engineering controls was too short a period of time.

Issues presented to the Hearing Examiner for determination were:

1. What was the generally accepted level of airborne concentration of lead considered to be safe?

2. Did the concentrations at the plant constitute a recognized hazard causing or likely to cause death or serious physical harm to employees?

3. What engineering controls are feasible and reasonable, and what period of time should be allowed to install them?

The hearing was held on October 27 and 28, 1971.

Findings of Fact

Responding to a complaint from the union that hazardous concentrations of lead existed in the plant's atmosphere, the employer's establishment was inspected on June 30, 1971, and a determination to that effect was made after air samples taken from seven employees showed five were exposed to concentrations significantly in excess of .2 mg/M³.

Testimony and evidence was introduced to the effect that the Threshold Limit Value for airborne lead concentrations is .2 mg/M³. In Finding Number 18, the Hearing Examiner found that "Respondent therefore knew, or should have known, of this generally recognized safe level of airborne concentrations of lead."

The Hearing Examiner rejected the employer's contention that the exposures in question did not constitute a serious hazard because of its preventive program, consisting of periodic hygiene surveys and inspections, ventilation measures, physical examinations (including blood and urine sampling), reassignment of employees when the physical examinations showed excessive lead concentrations, supervision of employees' work habits, and the use of approved respirators in high concentration areas.

The following material is from the Hearing Examiner's Report:

This position presents the following difficulties:

1. It misconstrues the responsibilities placed upon employers by Congress, ". . . to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources . . . ." (Section 2(b) [¶ 6103] of the Act). In short, the Act places the responsibility upon employers to provide safe and healthful working conditions for [their] employees, as far as possible. It does not allow employers to provide unsafe, unhealthful or hazardous working conditions for [their] employees even though the adverse effects of such working conditions are attempted to be minimized. Respondent's position puts the cart before

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the horse. Its first responsibility is, by all reasonable measures, to provide safe and healthful working conditions. This must be done by this Respondent by reducing the levels of airborne concentrations of lead in its Omaha plant, to the generally recognized safe level of .2 mg (pb)/M³, or as close to that figure as is possible.

2. Assuming arguendo that Respondent's position is permitted by the Act, for reasons which are not clear in the record, its preventive program simply has not worked. As will be discussed infra, Exhibits G-15 and G-15A [not reproduced] clearly establish that by its own criteria, i.e., blood samples of its employees, certain employees working at its Omaha plant where there existed concentrations of airborne lead in excess of the safe limit, had absorbed lead to dangerous levels.

* * *

20. The Secretary's position in this case is that the proper means to detect unsafe levels of airborne concentrations of lead is by the utilization of air sampling and that the proper measure to be used to determine if unsafe conditions exist, is the TLV figure of .2 mg/M³. Further, that when the work place has concentrations of airborne lead in excess of this figure, feasible engineering controls, i.e., ventilation systems must be installed to reduce these levels. He has no objection to the use of biological testing and encourages its use by employers, not as a control of lead hazards, but rather as a diagnostic tool to determine whether employees have absorbed dangerous amounts of lead. The evidence of record clearly supports this position.

Exhibit G-17 published by the Lead Industries Association, has the following statement:

"The keynote of an effective industrial hygiene program is prevention. Our point of view is simply that excessive lead absorption can be controlled, and is best controlled, by engineering methods. Certain medical tests are mentioned in this booklet, but only as adjuncts or supplements to engineering control." (Ex. G-17, p. 2).

In his chapter "Industrial Lead Poisoning," Dr. Kehoe states:

"Adequate systematic sampling of the air of workrooms while work is in progress, and the use of accurate methods for the analysis of such samples, will serve to portray the general distribution and the order of severity of the lead hazard. In a plant in which the quality of sanitary facilities and of the general hygienic performance is good, the results of air analysis will demonstrate the hazard or the lack of it with considerable accuracy and will indicate clearly what is to be done and where to begin. (Ex. G-6, p. 963).

* * *

"In a generally well-designed and well-managed plant, the problem is straightforward and comparatively simple. Mechanical measures of control can be applied where and as they are needed, the results being checked by air-sampling and analysis until the desired conditions have been achieved. Under the unsatisfactory conditions referred to above, however, and even under the best of conditions, considerable time may be required to obtain and install the necessary equipment. It may be highly important, therefore, to do all that can be done to reduce existing lead hazards, pending their elimination by more adequate or permanent means. In such instances the use of respirators is fully justified as a temporary expedient for the control of otherwise unavoidable respiratory exposure to lead.

* * *

"It has been implied above that respirators should be regarded as temporary means for preventing the inhalation of lead compounds. This implication was intentional. Occasional situations arise that necessitate the use of respiratory equipment of some type, and certain intermittent operations of brief duration may best be dealt with in this manner; but in the main, exposure to lead should be prevented by other means, not only for the sake of the comfort and the efficiency of the workmen but also on account of the continued care and supervision that are required to see that this type of equipment is used properly and effectively. (Ex. G-6, pp. 963-964).

* * *

"As has been indicated previously, the control of occupational exposure to lead through the maintenance of a safe environment is essentially a mechanical problem, which therefore lies within the province of the engineer."

Nothing in the evidence of this record rebuts these statements, which essentially voice the Secretary's position herein and rather accurately state the objectives of the Act relating to this case.

21. Respondent's position that its "preventive program" has in effect cancelled out any hazard to its employees is not supported by the evidence.

Dr. Kehoe in his writings set forth in Exhibit G-6 discusses at considerable length the significance of various lead levels in human blood, and concluded that lead—"Values in excess of 0.08 mg. per 100 g.

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of whole blood of themselves, however, denote the actual occurrence of dangerous absorption of lead."

Exhibits G-15 and 15A [not reproduced] present the results of Respondent's biological monitoring program over an approximate two-year period, 1970-71. It sets forth the amounts of lead found upon analysis in the urine and blood of its employees identified therein. Of the 491 employees listed in Exhibit G-15, a total of 41, or over 8% had, at one time or another, levels of lead in their blood in excess of .08 mg. per 100 grams of whole blood. Several employees had lead levels of .101 mg. or higher. One employee, #77 listed on page 18 of Ex. G-15 had levels of .379 and .433 mg. pb, levels which Respondent's witness Dr. Kehoe testified (TR. 224) as indicative of a ". . . very severe, very dangerous exposure to lead."

This exhibit demonstrates the weakness of Respondent's position here. Rather than doing more to reduce the levels of lead in its plant's atmosphere by further engineering controls, i.e., ventilation systems, it waited until some of its employees had absorbed excessive and dangerous amounts of lead to take corrective measures. Such a program in effect uses the employees as a test device to determine hazardous conditions. This is precisely what the Act is intended to prohibit. (Sections 2(b) [¶ 6103] and 5(a)(1) [¶ 6110]).

A further problem presented by biological sampling is, of course, that it measures absorbed lead in humans from all sources and does not identify the specific source of absorbtion. For this reason, the Secretary's position that biological testing cannot be used to establish lead hazards in a work place, nor can they properly be used as an enforcement tool, is accurate.

Respondent's Director of Environmental Sciences testified that under Respondent's "preventive program," if a blood test showed a lead level of .08 mg. he would suggest another blood test be taken within 3 to 5 weeks. Exhibit G-15 [not reproduced] clearly shows that this generally was not done, the time periods between tests in employees with these lead levels running from two to nine months.

Respondent's "preventive program" allegedly called for the transfer of employees when biological sampling revealed high lead absorption. Although Exhibits G-15 and G-15A [not reproduced], it is true, do show that the lead levels of employees generally and ultimately showed reductions from levels in excess of .08 mg. per 100 grams, to levels below this figure, it cannot be concluded on the evidence of this record that these reductions were caused by transferring employees.

The transferring of employees from job-to-job can be considered only as a stop-gap measure at best. It does not constitute a removal of the hazard, rather the removal of an employee from the hazard. It is not within the contemplation of the Act, for such a measure does not protect the employee ". . . over the period of his entire working life." The Congressional intent of the Act as to this point is clearly set forth in the Report of the Senate Committee on Labor and Public Welfare on S. 2193 in the following words: "Such standards should be directed at assuring, so far as possible, that no employee will suffer impaired health or functional capacity, or diminished life expectancy, by reason of exposure to the hazard involved, even though such exposure may be over the period of his entire working life." (Senate Report No. 91-1282, 91st Congress, 2d Session p. 7).

Furthermore, transferring employees presents significant problems not only to the employee but to employers as well as was in effect admitted by the Respondent. It means changing employees to other work tasks to which they are not accustomed and in which they assumedly are less skilled, in which they may have less interest, for which they may be less qualified and which may pay less or provide less opportunity for future advancement. Such transfers may also add extra accident risk.

The availability of approved respirators in work places having high concentrations of airborne lead, another aspect of Respondent's "preventive program," without more, means nothing. To be effective, obviously, the respirators must be worn at all times that employees are working in such areas. The uncontradicted evidence of this record shows that, although approved respirators were provided by Respondent to its employees, they were not worn by these employees as a general practice. During the inspection of June 30, 1971, the Secretary's representatives saw many employees with respirators hanging loosely around their necks, not in place or in use, except for one employee working inside of a kettle chipping out solidified lead. Some of Respondent's employees put respirators in place when they were approached by the Secretary's representative during this inspection.

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The evidence of this record establishes that the use of respirators is ". . . justified as a temporary expedient for the control of otherwise unavoidable exposure to lead. . . . "Their use on a permanent 8-hour-a-day basis is neither desirable nor feasible. They are uncomfortable to wear, especially where workroom temperatures are elevated. Their use on a permanent basis transfers the responsibility for compliance with the Act from the employer to his employees. Such a consequence is contrary to the Congressional intent underlying the Act as stated in the Senate Committee Report on the Act:

> "The Committee does not intend the employee-duty provided in Section 5(b) to diminish in any way the employer's compliance responsibilities or his responsibility to assure compliance by his own employees. Final responsibility for compliance with the requirements of this Act remains with the employer." (S. Report No. 91-1282, 91st Cong. 2d Session, pp. 10-11).

22. The second issue presented in this case, based upon the evidence of this record is answered as follows:

The conditions which existed at Respondent's Omaha plant on June 30, 1971, as they related to airborne concentrations of lead, did constitute a recognized hazard that was causing or was likely to cause death or serious physical harm to Respondent's employees.

The levels of airborne concentrations of lead found in the furnace, retort (cupel), and crane operating areas of Respondent's plant, significantly exceeded the generally accepted safe level of .2 mg/M³. The existence of such levels as were found, as set out in Finding number 16 supra if allowed to continue unabated, constitutes a recognized hazard within the meaning of Section 5(a)(1) [¶6110] of the Act.

The testimony of Respondent's witnesses to the contrary is not persuasive.

Respondent's witness Nelson testified substantially that no hazard existed because of Respondent's "preventive program." The evidence however establishes that this program was not successful in its execution, for reasons not made clear on this record.

The opinion of Respondent's witnesses Dr. Kehoe, Cole, and Kaplan to the effect that there was no recognized hazard present in Respondent's plant were predicated upon Mr. Nelson's testimony and the assumption that Respondent's "preventive program" was effective. As such, these opinions are not persuasive and do not effectively rebut the opinion of the Secretary's qualified industrial safety witness and the documentary evidence heretofore identified.

Respondent also argues that no hazard likely to cause death or serious physical harm to employees existed at its Omaha plant becasue no evidence was presented that any of its employees suffered from lead intoxication or had been in any way injured by the airborne concentrations of lead found to exist at its plant. The quick answer to this argument is that proof of a violation of Section 5(a)(1) [¶6110] of the Act does not depend upon proof that a hazard has produced injury. All that is required is a showing that the hazard is likely to cause serious physical harm or death. Section 5(a)(1) [¶6110] of the Act is intended to prevent the existence of conditions which are likely, if uncorrected, to cause serious physical harm. Section 17(k) [¶6173] provides that, ". . . a serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists . . . ."

The evidence of this record establishes that if the high levels of airborne concentrations of lead found in Respondent's plant are not reduced by feasible engineering controls, serious physical harm in the form of varying degrees of lead intoxication are highly probable and likely because Respondent's "preventive program" has not been effective in the past to prevent high lead absorption by its employees, and there is no assurance on this record that its good faith attempts in the future will be any more effective.

Exhibit G-11, "*Handbook of Industrial Toxicology*", by E. R. Plunkett, M. D., lists the following signs and symptoms of lead intoxication: [deleted].

Under the conditions found to exist at Respondent's Omaha plant, there is a substantial probability that serious physical harm may result therefrom. These conditions, if continued unabated, would result in Respondent's employees evidencing one or more of the signs and symptoms of lead intoxication listed above [deleted]. This probability exists because of the levels of lead in the air of this plant significantly in excess of the TLV of .2 mg/M³, and because the preventive measures taken by Respondent are of a temporary nature and cannot reasonably be expected to protect its employees during their work lines at this work place.

Thus, the conditions found to exist at Respondent's Omaha plant on June 30, 1971, considering all the circumstances as set forth in this record, constitute a serious violation within the meaning of Sections 5(a)(1) [¶ 6110] and 17(k) [¶ 6173] of the Act.

23. Having found a serious violation of the Act, the remaining factual question presented concerns proper abatement. Under the citation as amended, the Secretary takes the position that feasible engineering controls to reduce the concentration of the airborne contaminent (lead) must be implemented within 6 months from any final order herein. The evidence of this record supports this position.

The Respondent presented at this hearing, plans for increased ventilation at its' Omaha plant, which are intended to be recommended for implementation by the plant's manager. These plans represent another step in Respondent's ongoing program of plant improvements, in which it has been engaged for the past decade.

Respondent's plant manager, after consultation with Respondent's engineering department and an Industrial Hygienist, stated their opinion that these plans, ". . . if implemented, would quite probably reduce the general ambient air in the areas involved (retort and cupel departments to less than .2 of a . . . speaking of lead levels now . . . milligram(s) per cubic meter. And I agree they most probably would do that. But there would remain some times, some places where at times the level may exceed .2. The general ambient air in these areas would quite probably be reduced under .2."

The Secretary's independent consulting Industrial Hygienist, Mr. Soule, aftter touring Respondent's Omaha plant on September 14, 1971, concluded that Respondent's plant could be modified by engineering methods to insure that the TLV for lead would not be exceeded.

Respondent's witness Mr. Kaplan testified, "Now, by enough engineering work, one could get the airborne contamination below the .2 milligram for normal, ordinary, routine plant events [and] operations. It would be very difficult, perhaps even impossible, literally to prevent there being ever any excursion above that that was significant because of the problems with unplanned events." He gave two examples of such "unplanned events:" a crack and leak occurring in a lead pot and the occasional need for a worker to make an adjustment in a ventilating hood.[4] He further stated; "So I would say the (that) adequate engineering would cover the normal routine plant events."

The testimony of Respondent's witness to Mr. Godsey is highly conjectural and does not rebut the other evidence of this record that engineering controls are feasible. His testimony as to the possible cost of plant modifications to institute engineering controls was admittedly an "educated guess", not supported by any written analysis, and insufficient to support any findings concerning the cost of implementing feasible engineering controls.

Under the circumstances of this case, the best method for Respondent to furnish its employees ". . . a place of employment which [is] free from recognized hazards that are causing or are likely to cause death or serious physical harm . . ." (Sec. 5(a)(1) [¶ 6110]) is by the implementation of feasible engineering controls, to wit, adequate ventilation systems, even though such controls may be costly. Such costs have become a necessary cost of doing business with the passage of the Act. Senator Yarborough made the following observations on this question of costs:

> "This is legislation that has been needed in the country for many years. We have no national comprehensive occupational health and safety bill. If a man in a manufacturing plant in one State were to put into effect safety measures to protect his workers and across the State line that practice was not followed, theoretically there would be a cheaper operational base. * * * We need a Federal statute, not to try to federalize things, but to equalize the cost in one industry vis-a-vis another. We know the costs would be put into consumer goods but that is the price we should pay for the 80 million workers in America." (Cong. Rec. (Senate) Nov. 16, 1970, p. S 18269).

24. Respondent employs from 290 to 300 employees at its' Omaha plant. Of this number, approximately 60 work in the lead melting area, 15 in the retort area, 10 in the cupel area and from 10 to 12 in the crane operating area. Thus, at a minimum, not less than 95 employees may be affected at one time or another by the high levels of airborne concentrations of lead found to exist at this plant.

[4] [Prior footnotes not reproduced—CCH.] These excursions are examples of circumstances in which the temporary use of approved respirators are proper and agreed to be such by the Secretary. (See Secretary's brief p. 24).

Conclusions of Law

1. Jurisdiction of this action is conferred upon the Commission by Section 10(c) [¶ 6141] of the Act.

2. At all times involved in this action, Respondent herein was an employer engaged in a business affecting commerce within the meaning of Section 3(5) [¶ 6104] of the Act.

3. Those individuals identified by name in Findings of Fact number 16 [deleted] were employees of Respondent on June 30, 1971.

4. At all times involved in this action, the Respondent furnished employment to its employees at a work place within the City of Omaha, State of Nebraska, and the Act is applicable to such employment within the meaning of Section 4(a) [¶ 6105] of the Act.

5. On July 7, 1971, the Secretary, pursuant to the provisions of Sections 9(a) [¶ 6136] and 10(a) [¶ 6139] of the Act, issued to this Respondent a Citation for Serious Violation of Section 5(a)(1) [¶ 6110] of the Act and a Notification of Proposed Penalty thereon in the amount of $600.00.

On July 20, 1971, pursuant to the provisions of Section 10(c) [¶ 6141] of the Act, this Respondent timely filed with the Secretary its notification of intent to contest this Citation, the period established for abatement and the proposed penalty. The Secretary thereupon transmitted this case to the Commission which, pursuant to the provisions of Section 10(c) [¶ 6141] of the Act, has jurisdiction of the parties and of the subject matter herein.

6. The United Steelworkers of America and its Local Chapter 461 of Omaha, Nebraska, through its counsel filed its appearance dated September 9, 1971, and participated in this case as the authorized employee representative.

7. Section 5(a)(1) [¶ 6110] of the Act provides that:

> "Each employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.

Contrary to Respondent's argument this Section of the Act is sufficiently definite and certain so as not to be violative of the due process clause of the Constitution because of vagueness.

Congress made findings in Section (2a) [¶ 6102] of the Act, as follows:

> "The Congress finds that personal injuries and illnesses arising out of work situations impose a substantial burden upon, and are a hindrance to, interstate commerce in terms of lost production, wage loss, medical expenses, and disability compensation payments."

The substantive provisions of the Act are clearly reasonably calculated to alleviate these burdens on commerce. This Act is remedial legislation designed to correct conditions burdening commerce and as such must ". . . be construed in the light of the mischief to be corrected and the end to be attained," and with "recognition of the aims which Congress sought to achieve." *U. S. v. Silk*, et al., 331 U. S. 704, 713 (1947). This Act must be construed in the light of "the policy of the legislation as a whole." *U. S. v. American Trucking Association*, 310 U. S. 534, 543 (1940), drawing "substance from the policy and purposes of the Act, the circumstances and background of particular employment relationships, and all of the hard facts of industrial life." *NLRB v. Adkins Co.*, 331 U. S. 398, 403 (1947).

The "general duty" provisions of Section 5(a)(1) [¶ 6110] of the Act are explained in Senate Report 91-1282 (hereinafter S. Rep.) to accompany S. 2193 as follows:

GENERAL DUTY

> "The committee recognizes that precise standards to cover every conceivable situation will not always exist. This legislation would be seriously deficient if any employee were killed or seriously injured on the job simply because there was no specific standard applicable to a recognized hazard which could result in such a misfortune. Therefore, to cover such circumstances the committee has included a requirement to the effect that employers are to furnish employment and places of employment which are free from recognized hazards to the health and safety of their employees.
>
> "The committee has concluded that such a provision is based on sound and reasonable policy. Under principles of common law, individuals are obliged to refrain from actions which cause harm to others. Courts often refer to this as a general duty to others. Statutes usually increase but sometimes modify this duty. The committee believes that employers are equally bound by this general and common duty to bring no adverse effects to the life and health of their employees throughout the course of their employment. Employers have primary control of the work environment and should insure that it is safe and healthful. Section 5(a) [¶ 6110], in pro-

viding that employers must furnish employment 'which is free from recognized hazards so as to provide safe and healthful working conditions,' merely restates that each employer shall furnish this degree of care." (S. Rept. p. 9).

The meaning of "recognized hazard," words added to S. 2193 on motion of Senator Javits, was explained by the Senator as follows:

"5. Modification of General Duty.—As the result of this amendment the general duty of employers was clarified to require maintenance of a workplace free from 'recognized' hazards. This is a significant improvement over the Administration bill (S. 4404 a rival bill), which requires employers to maintain the workplace free from 'readily apparent' hazards. That approach would not cover non-obvious hazards discovered in the course of inspection." (S. Rept. 91-1282, p. 58, parenthetical material supplied).'

Congressman Daniels in agreeing to modify his bill (H. R. 16785) so as to limit the general duty requirement to "recognized hazards," as the Senate had already done with S. 2193, explained the difference between "recognized hazards" and "readily apparent hazards" as follows:

"A recognized hazard is a condition that is known to be hazardous, and is known not necessarily by each and every individual employer but is known taking into account the standard of knowledge in the industry. In other words, whether or not a hazard is 'recognized' is a matter for objective determination; it does not depend on whether the particular employer is aware of it. * * * A danger, in other words, may be recognized as such in the industry, but may not be apparent to an employer who is ill-informed and does not choose to investigate the danger of the situation." (Cong. Rec. Nov. 23, 1970).

In short, "recognized hazards" is an objective test. It is a hazard that is of common knowledge or general recognition in the particular industry in which it occurs, detectable by the senses or is of such wide, general recognition as a hazard in the industry that there are generally known and accepted tests for its detection. (U. S. Code Cong. and Admin. News. 1970, Vol. 3, pp. 5222, 5223).

Section 5(a)(1) [¶ 6110] of the Act, in many respects is a statement of the common law duty of employers that they must take care to avoid harming their employees, and in so doing they are charged with the knowledge and must exercise the care, of a reasonably prudent man.

The possibility that there may be a factual question inherent in interpreting a duty imposed by a statute does not mean the statute is unconstitutionally vague. The statutory language must be viewed in the light of the facts of the case, for "That which is reasonably well understood by those to whom its terms are addressed sets an adequate standard of definiteness." *U. S. v. Eastern Air Lines, Inc.*, 192 F. Supp. 187, 193-194 (S. D., Fla., 1961).

As the Supreme Court has stated:

". . . But few words possess the precision of mathematical symbols, most statutes deal with untold and unforeseen variations in factual situations, and the practical necessities of discharging the business of government inevitably limit the specificity with which legislators can spell out prohibitions. Consequently, not more than a reasonable degree of certainty can be demanded." *Boyce Motor Lines, Inc. v. U. S.*, 342 U. S. 337, 340 (1952).

Section 5(a)(1) [¶ 6110] of the Act establishes objective requirements to which employers must adhere with a reasonable degree of certainty. When this Section is read in conjunction with the description of the violation as set forth in the Citation, as further particularized by the Secretary's response to Respondent's motion for more definite statement, the violation was adequately described to sufficiently inform the Respondent of the nature of the violation to allow it to prepare its case.

8. The maximum amount of airborne concentrations of inorganic lead generally recognized and accepted as safe by qualified and experienced Industrial Hygienists is .2 milligrams per cubic meter of air, expressed as the Threshold Limit Value of .2 mg/M³.

9. Levels of airborne concentrations of inorganic lead, significantly in excess of the Threshold Limit Value of .2 mg/M³, were found to exist in the breathing zones of several of Respondent's employees on June 30, 1971, as detailed in Finding of Fact number 16 [deleted]. These conditions, which represented the normal working conditions for the areas identified, constituted a recognized hazard that [was] likely to cause, if continued unbated, death or serious physical harm to Respondent's employees, and as such, constituted a violation of Section 5(a)(1) [¶ 6110] of the Act.

10. The temporary abatement called for in the Citation, i. e., the "administrative

controls" of Respondent providing approved respirators, the rotation of employees, and any other appropriate measures, provided Respondent implements these measures consistently until permanent abatement controls can be implemented, is reasonable under the circumstances of this case.

11. The time period of 60 days allowed in the original Citation for permanent abatement by the implementation of feasible engineering controls was not reasonable. Under the circumstances of this case it is reasonable to require the Respondent to implement feasible engineering controls to reduce the levels of airborne concentrations of lead in the furnace, retort, cupel and crane operating areas of its plant to that level generally recognized as safe .2mg/M³, or as close to that level as is possible. A period of 6 months from any final order herein to accomplish this permanent abatement is reasonable.

12. Due consideration having been given to the provisions of Section 17(j) [¶ 6172] of the Act, it is determined that the penalty proposed by the Secretary, under the circumstances, is not inappropriate.

Further, Respondent's position that the civil penalties proposed by the Secretary and assessed by the Commission are unconstitutional because although denominated as "civil penalties" they are in fact a "criminal penalty" which may be imposed, "if at all" only by a federal court, not an administrative tribunal, is not supported in the law.

The assessment of monetary civil penalties through administrative proceedings has long been held not to abridge the due process clause of the Constitution. *Helvering v. Mitchell*, 303 U. S. 391 (1938).

Congress clearly in Section 17 of the Act differentiated between "civil penalties" as civil sanctions, and "criminal sanctions" and "fines." Compare Section 17(a), (b), (c), (d), (j), [¶ 6163-6166, 6172] and (l) to 17(e), (f) and (g) [¶ 6167-6169].

As the Ninth Circuit has clearly stated:

". . . it has long been settled that Congress may provide civil proceedings for the collection of penalties which are civil or remedial sanctions rather than punitive, and provide that the determination of the facts upon which the liability for such a penalty is based may be by executive officers or administrative agencies." *Olshausen v. Commissioner of Internal Revenue*, 273 F. 2d. 23, 27 (CA 9, 1959). See also: *Spoten v. Bowles*, 146 F. 2d. 602 (CA 8, 1945).

13. The Citation and Notice of Proposed Penalty issued herein were properly served upon this Respondent and the Citation was posted by this Respondent and notice of hearing was served upon the authorized employee representative consistent with the provisions of Section 9(b) [¶ 6137] of the Act and the regulations promulgated thereunder.

Based upon the foregoing findings, conclusions and determinations, and pursuant to the provisions of Section 10(c) [¶ 6141] of the Act, it is hereby,

ORDERED:

1. That the Citation for Serious Violation dated July 7, 1971, is amended by striking the words "60 days" therein and substituting the words "6 months from the entry of a final Order herein."

2. That the Citation for Serious Violation dated July 7, 1971, as amended, and the Proposed Penalty of even date, addressed to this Respondent as issued by the Secretary, are hereby affirmed.

Dated: March 1, 1972 Rockville, Maryland

WILLIAM E. BRENNAN

Presiding Examiner

¶ 8354 EMPLOYERS CONTEST 259 VIOLATIONS IN FIFTY CASES REVIEWED

Back reference: ¶ 2021.

A review of fifty cases recently ruled on by the Occupational Safety and Health Review Commission shows that employers contested 259 violations of safety and health standards. The employers appealed 223 violations of 40 Occupational Safety and Health standards; 29 violations of 14 standards promulgated under the Contract Work Hours and Safety Standards Act; and seven violations of an identical number of standards promulgated under the Longshoremen's and Harbor Workers' Compensation Act.

A chart of the standards violated and the number of times each was cited in the fifty cases follows. Violations of standards promulgated under the Longshoremen's and Harbor Workers' Compensation Act, and the