FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9950 / FAX: 202-434-9949

April 16, 2019

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. PENNSY SUPPLY, INC., Respondent.	CIVIL PENALTY PROCEEDINGS Docket No. YORK 2018-0004 A.C. No. 07-00059-449176 Mine: Bay Road Plant #7

DECISION AND ORDER

Appearances: M. del Pilar Castillo, Esq., Office of the Solicitor, United States Department of Labor, Philadelphia, Pennsylvania, for the Petitioner,

David M. Toolan, Esq., CRH Americas, Inc., Atlanta, Georgia, for the Respondent.

Before: Judge Rae

This case is before me upon a petition for assessment of civil penalties filed by the Secretary of Labor ("the Secretary") pursuant to § 105(d) of the Federal Mine Safety and Health Act of 1977, as amended ("the Mine Act" or the "Act"), 30 U.S.C. § 815(d). At issue are three section 104(a) and two section 104(d) citations issued to Pennsy Supply, Inc. ("Pennsy") as a result of an inspection conducted by an authorized representative for the Department of Labor's Mine Safety and Health Administration (MSHA).

A hearing was held in Dover, Delaware, at which time testimony was taken and documentary evidence submitted. The parties also filed post-hearing briefs. I have reviewed all of the evidence and have cited to the testimony, exhibits, and arguments I found critical to my analysis and ruling herein without including a detailed summary of the testimony given by each witness.

After considering the evidence, and observing the witnesses and assessing their credibility, for the reasons set forth below, I vacate all five citations.

I. STIPULATIONS

The parties have entered into the following stipulations:

1. The Respondent was an "operator" as defined in § 3(d) of the Mine Act, 30 U.S.C. § 803(d), at the mine at which the citations at issue in this proceeding were issued.

2. Operations of Respondent at the mine at which the citations were issued are subject to the jurisdiction of the Mine Act.

3. This proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission.

4. The individual whose name appears in Block 22 of the Citations was acting in her official capacity and as an authorized representative of the Secretary of Labor when the citations were issued.

5. The proposed penalty for the citations at issue in this proceeding will not affect the Respondent's ability to continue in business.

6. The citations contained in Exhibit "A" attached to the Secretary's Petition is an authentic copy with all appropriate modifications or abatements, if any.

Joint Ex. 1.[1]

II. FACTUAL BACKGROUND

Bay Road Plant #7, operated by Pennsy, is a small construction sand and gravel plant located near Dover, Delaware. Tr. 14-15. This case had its origins in a complaint filed by a former Pennsy employee, Steven Horn, with the Occupational Safety and Health Administration (OSHA). Tr. 76. Horn started working for Pennsy sometime in 2016 (the record is unclear as to exactly when) as a plant operator assigned to separate rock and sand into piles of various grades. Tr. 71-72. Horn testified that in his complaint to OSHA (which is not in the record), he alleged that he had been exposed to dangerous levels of lead during a winter maintenance task performed at the plant in mid-February 2017. Tr. 77. OSHA conducted a preliminary investigation but determined it lacked jurisdiction over Pennsy. OSHA referred the complaint to MSHA, which assigned an inspector, Michele Santos-Cranford, to investigate it. Tr. 138. Santos-Cranford, who had been employed at MSHA for nine years and had mining experience dating to 1986, interviewed Horn and, on July 11, 2017, inspected the plant premises.

The task which Horn alleged exposed him to lead poisoning was winter maintenance of a sand screw. *See* Ex. R-1 (a photograph of a sand screw, though not the one on which maintenance was being performed in February 2017). This involved the removal of shoes held onto the screw by bolts, nuts, and washers. Daniel Washburn, a former Pennsy employee who

[1] In this decision, the abbreviation "Tr." refers to the transcript of the hearing. The Secretary's exhibits are numbered Ex. S-1 through S-18, Respondent's Ex. R-1 through R-7.

testified at the hearing, was the lead man in charge of this winter maintenance. Tr. 14. Washburn testified that he removed the shoes, which were secured by two bolts, by grinding through one half of each bolt using a grinder with a cutting wheel. Once the bolts were cut in half, Washburn would strike the bolt with a hammer thereby removing the bolt from the shoe. Tr. 18, 21. Washburn stated he had previously performed this task two or three times a year. Typically, he stated, this task entailed removal of 20 to 30 shoes. On this particular occasion, however, all the shoes were being removed and ones in good condition were being set aside for use on a new sand screw. This meant that an unusually large number of shoes had to be removed. According to Washburn, "well over 100 [shoes] on each side" were removed; Horn stated that "400 to maybe 450 bolts" were removed. Tr. 18, 108. Both Washburn and Horn removed the shoes individually, then handed them to a third employee, Jeff Darling (who did not testify at the hearing), who would sort them according to whether they could be reused or should be disposed of. Tr. 21.

Horn testified he had told Washburn about his prior welding and burning experience, and that Washburn told him, "Steve, if you can help us, we are going to be burning these bolts off...." Tr. 79. Horn stated he had never done this particular task at Pennsy. Tr. 88. Rather than grinding the bolts as Washburn had done in the past and was doing then, Horn opted to use an alternative approach to the task: burning the back end of the bolt, where there was a nut and washer that held the shoe in place, with an acetylene torch. As the metal started to melt from the flame, he would cut close to the back of the bolt so it could fall away from the shoe, thereby releasing the shoe from the sand screw. Tr. 85-86. Horn testified he switched to using a torch because it was "the most feasible and quickest way" to remove his the bolts securing the shoes to the sand screw. Tr. 108. Washburn testified that his supervisor, Jay Clendaniel, stated Horn's torch method took too long, and Clendaniel suggested Horn use the grinder as Washburn was doing. Tr. 42. Clendaniel was not called to testify at the hearing.

Both Horn and Washburn testified that shortly after they began their work on the sand screw, Horn voiced concerns about what he believed to be lead washers behind the bolts they were removing. Tr. 29, 87. Washburn stated he observed Horn's burning with the torch produced "a real white smoke" that had a foul odor. Tr. 28. Horn stated the smoke was "normal for that type of work." Tr. 87. He stated the washers burned and melted into a gray liquid, which splashed onto the floor and produced "a little bit of black smoke," though he did not mention any odor. Tr. 87. Horn subsequently told Washburn that there were lead washers in between the nuts and bolts, and asked whether they should be concerned. Tr. 88. Washburn testified that Horn also asked whether they needed additional personal protective equipment ("PPE"). Tr. 30. Washburn testified he called Clendaniel to relay Horn's concerns, and to suggest that additional breathing protection was necessary. According to Washburn, Clendaniel said no additional PPE was required because the work was being done outside in breezy conditions. Tr. 30. Washburn claimed he called Clendaniel again later that day, and that Clendaniel suggested they wear paper respiratory masks. Tr. 31. Though both men apparently attempted to use paper masks, Washburn testified that "they kept steaming up our safety glasses," and they stopped using them. Tr. 32.

Horn contradicted Washburn's claim that he contacted Clendaniel at all. Horn testified that Washburn told him, "We do this all the time, and nobody ever got sick from it." Tr. 77.

Thereafter, according to Horn, the men "just continued with the job until completion." Tr. 88-89. Horn also testified that he worked with Washburn every hour during the winter maintenance work but never saw Washburn call Clendaniel. Tr. 109, 124-25. Jeff Dawson, the mine's General Manager and Clendaniel's immediate supervisor, testified that "[a]fter the [MSHA] investigation started ... I asked if [Clendaniel] has been notified by anyone about any hazards associated with lead on this job. He said he had not been notified by anyone." Tr. 266. On this issue, upon observing his demeanor, I found Dawson's testimony particularly credible.

Notably, Washburn did not testify that he relayed to Clendaniel Horn's specific concerns about the presence of lead despite his testimony that "I know from past experience, there was lead, definitely lead washers in that." Tr. 24. He stated he knew this because he had helped install the shoes in the past, and had been responsible for ordering replacement washers. Tr. 25, 48. He claimed that, when new replacement washers were installed, "everyone over the years" would ask why lead washers were being used. Tr. 26. However, despite this testimony, Washburn admitted he never raised the issue in regular safety training, did not report any concerns to a confidential mine safety hotline, and never discussed the use of lead washers with mine management. Tr. 41. On this point, Washburn further contradicted himself, testifying that, before this particular task in winter 2017, no one had ever before voiced any concerns about lead washers: "Until this came about, we didn't realize there was an issue, because over the years no one ever said anything [about] it." Tr. 60.

Inspector Santos-Cranford's inspection notes indicate that Clendaniel informed her that he did not know that lead washers were being used in the sand screw, and that he told Horn to stop using the torch because it was generating too much smoke. Ex. S-14 at MSHA047 and MSHA049. She also noted that Dawson told her he did not know lead washers were being used in the sand screw, and that he looked in the sand screw manual to see whether lead washers were listed as a component and found no such indication. Ex. S-14 at MSHA045.

Horn and Washburn disagreed on whether Clendaniel visited site where they were performing the winter maintenance. Washburn first testified that Clendaniel never came by the task site. Tr. 31. But he then testified that Clendaniel suggested Horn switch from using the torch, which he believed was taking too long, to the grinder. Tr. 42. Horn, on the other hand, testified that Clendaniel "always came by because he was following progress in two yards," and would have observed him using the torch. "Once he seen we were working, everyone was moving forward, he would go to the other yard and check progress over there." Tr. 89. Horn also testified, however, that the reason Clendaniel came through was because MSHA was onsite but that they stayed stayed away because work was being done. He then stated that he had "no idea" MSHA was onsite and only heard about it later. Tr. 120.

Horn testified he was offered a position with a car battery manufacturer on Friday, March 31, 2017 at 3:00 PM. He immediately told Washburn that he was leaving Pennsy "as of this moment." Tr. 72. As part of his pre-employment screening for the new employer, Horn's blood lead level was tested. Horn was scheduled to complete paperwork at the new employer on Monday, April 3, 2017, and begin work the following Thursday. Tr. 73. However, on the way to sign the paperwork, the new employer called him and told him that he had a high blood lead level, and that on account of that, it had to revoke its employment offer. Battery manufacturing

involves exposure to lead. Tr. 74. Horn called Pennsy's human resources department soon thereafter and spoke with a representative named Jeff Brown. He asked, "based on leaving my job on Friday at three in the afternoon, that it [is] now one o'clock Monday, what were the opportunities, possibilities of getting my job back[?]" Tr. 74. Horn stated that Brown responded, "no, we have decided to move forward. That is not going to happen." Tr. 74. Horn then asked about whether he could receive worker's compensation based on the results of his lead test, claiming "I was employed by [Pennsy] with the initial contact of lead." Brown asked in response how the company could know he was not exposed to lead "outside of being employed with Pennsy." Horn answered by ending the call, stating "this conversation is over." Tr. 76.

Horn testified he consulted with his doctor and obtained a second lead test. The results were the same. At the hearing, Horn gave one example of what he believed to be memory impairment caused by his heightened lead level in his blood. He recalled that he was driving with his wife down a rural road near his home and became confused. He asked his wife, "if we go this way, is it going to take us to the main road." Horn said she replied, "my God, Steve, you have been down this road 100 times, you know that." Tr. 75. Horn testified he had not received any treatment for the high level of lead in his system. Instead, he stated he had his blood lead level checked once a month and that the levels had decreased over time. Tr. 76.

At some point thereafter, Horn filed a complaint with OSHA, which in turn was referred to MSHA. As previously noted, Santos-Cranford inspected the Bay Road Plant #7 on July 11, 2017. As a result of this inspection, Santos-Cranford issued five section 104(a) citations to Pennsy charging violations arising from Horn's alleged exposure to and poisoning by lead. Pennsy contested the alleged violations and argues that they should all be dismissed. Pennsy also argues that MSHA lacked any basis for modifying two of the citations to allege that Pennsy was highly negligent, and that the two violations resulted from the company's unwarrantable failure to comply with a mandatory safety standard.[2]

The two modified citations, Nos. 8802227 and 8802228, were originally issued pursuant to section 104(a) of the Act, and the degree of negligence for each was designated as moderate. On May 21, 2018, the Secretary filed a Motion to Amend the Petition for Assessment of Penalty requesting that both of these citations be amended to section 104(d) citations with high negligence, which would add unwarrantable failure designations to both citations. In support of the motion, the Secretary alleged that "newly-discovered evidence warrants the amendment of the citations." Mot. to Amend at 3 (May 21, 2018). The Secretary further explained that: "During discovery, the Secretary has learned that the operator had a heightened awareness that its employees were grinding and burning lead. Instead of implementing the required protections required under the Mine Act, the operator trivialized employees' concerns." *Id.* I granted the motion in an order dated May 31, 2018. At the hearing, although Pennsy's counsel repeatedly attempted to elicit from Santos-Cranford testimony providing the bases for the Secretary's unwarrantable failure allegations, the Secretary's counsel repeatedly objected,

[2] The unwarrantable failure terminology is taken from section 104(d) of the Mine Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation.

stating, "I am the one that wrote the amendment. What Mrs. Santos-Cranford thinks about negligence is not really relevant." Tr. 234. When counsel for the operator asked the inspector how long Clendaniel had been aware of the alleged safety condition, again counsel for the Secretary objected again stating, " [s]he doesn't know." The evidence supporting the unwarrantable failure allegations were based upon Washburn's testimony, which was already on the record and which the Secretary argued satisfied his burden as to unwarrantable failure. Tr. 236-238. In the post-hearing brief, the Secretary argued that the violations in question where unwarrantable failures because the Respondent showed "a plain indifference to worker safety" and did not offer mitigating circumstances. [3] Sec. Br. 22-23.

III. CREDIBILITY FINDINGS

Reviewing the record of these proceedings compels me to address and make findings on the credibility of several of the witnesses, particularly Horn and Washburn. I have already noted several instances in the record where Horn and Washburn contradict each other. Neither could agree on the number of shoes removed or the number of days it took to perform the winter maintenance. Neither could agree on whether Clendaniel visited the job site. Neither could agree on the color or smell of the alleged lead fumes. Neither could agree on whether Washburn called Clendaniel to voice Horn's concerns about lead. And, if he did in fact call Clendaniel, Washburn did not actually testify that he told Clendaniel that Horn had an issue with the "lead." Instead, he testified he reported Horn had a problem with generic dust and fumes.

In addition, Washburn testified that, on the one hand, "everyone over the years" would ask why lead washers were being used, yet on the other hand, testified later that, "[u]ntil this came about, we didn't realize there was an issue, because over the years no one ever said anything [about] it." Tr. 26, 60. In contrast to this contradictory testimony, Santos-Cranford's noted indicate that neither Dawson, who I found quite credible, nor Clendaniel knew lead washers were being used in the sand screw.

As to Washburn's claims of having contacted Clendaniel twice by phone in one day about fumes and the need for addition PPE while he and Horn were performing winter maintenance on the sand screw, I have already stated that I credit Dawson's testimony that no such contacts occurred. I find, however, that, contrary to Washburn's testimony, Clendaniel visited the work site and instructed Horn to stop using a torch to remove the bolts, and to instead use a grinder.

Both Horn and Washburn alleged that medical tests established that they had suffered from lead poisoning, allegations upon which the Secretary based much of the case against

---

[3] The Commission has stated that factors such as the length of time the violation has existed, the extent of the violative condition, whether the operator was placed on notice that greater efforts are necessary for compliance, the operator's efforts in abating the condition, whether the violation is obvious or poses a high degree of danger, and the operator's knowledge of the existence of the violation are all to be considered in determining whether conduct is aggravated in the context of unwarrantable failure. *See Consolidation Coal Co.,* 19 FMSHRC 340, 353 (Mar. 2000); *Cyprus Emerald Res. Corp.,* 20 FMSHRC 790, 813 (Aug. 1998), *rev'd on other grounds,* 195 F.3d 42 (D.C. Cir. 1999).

Pennsy. Yet the record is utterly devoid of *any* credible evidence, either documentary or testimonial, from a credible medical source that supports any claim of lead poisoning, much less establishes by a preponderance that such poisoning occurred or may have been caused by lead exposure at the Pennsy work site. I find unconvincing Horn's single example of apparent memory loss, especially in the absence of any credible medical opinion linking such a symptom to lead poisoning. I also find it curious, at least, why if Horn was poisoned by lead he would call to get his job back immediately after being turned down by the battery company. If Horn did, in fact, suffer from lead poisoning, it beggars comprehension why the Secretary failed to place in the record more than anecdotal evidence of such a serious diagnosis. The Secretary's failure to do so leads me to draw a negative inference as to this essential evidentiary lacuna.

As to the Secretary's case in general, the evidence presented at the hearing was all too often vague and cursory, and not supported by any expertise. The most glaring example of this is that, although samples were taken at the Pennsy plant and tested for lead, and although the test results (some of which were positive) were placed in the record (Ex. S-16), the Secretary presented no evidence interpreting those results. There is no indication as to whether the positive test results were high, medium, or low in the context of occupational exposure to lead in some form. Nor was there any testimony linking the presence of the lead found to possible exposure to it in the workplace. Lead washers were found but even the Secretary's primary witness, Santos-Cranford, admitted that "there would be no way for me to prove one way or the other whether these washers [i.e., those collected during sampling] had anything to do with exposure or not." Tr. 171. Although Santos-Cranford testified that this was "[t]he reason why there was no citation issued for exposure," Tr. 171, as I review the citations she did issue, the underlying assumption buttressing them is that Horn was exposed to and poisoned by lead in the workplace.

The Secretary's allegations rest upon there being lead in the workplace at Pennsy, which is accused of failing to have an MSDS for *lead* or to train its employees as to the hazards associated with *lead* or to provide adequate protection to its employees against *lead* exposure or to have in place a system to monitor workplace exposure to *lead* – and all of these allegations are based on an employee allegedly suffering from *lead poisoning*. Exposure to lead is at the very core of the Secretary's case, yet when asked how she relied on the sampling results when issuing the citations at issue, Santos-Cranford was not able to respond in any meaningful way. Tr. 170.

As a result, I am left with a record lacking any specific evidence that when Pennsy employees worked on sand screw, they could have been exposed to impermissible lead levels, and in what form that lead might have entered the working environment such as dust or fumes.

In this regard, Santos-Cranford's statement that "lead content is lead content" is stunningly inapposite. Tr. 162. To establish the need for heightened safety precautions, the Secretary would have to first provide a background level for lead in the environment. Lead is ubiquitous, and "can be found in all parts of our environment – the air, the soil, the water, and even inside our homes." *Learn about Lead*, www.epa.gov/lead/learn-about-lead. Then the Secretary would have to show that, at Pennsy, workers were exposed to lead in the work they performed at levels exceeding (or far exceeding) background exposure. I infer from the lack of any positive test results from common areas at the Pennsy plant that the background lead level there was likely negligible. I also infer that workers were not carrying lead dust particles on their

work clothes, hands or persons from work areas to common areas, therefore negating any claims that miners were exposed to lead dust.

I am struck by the lack of effort the Secretary made to prove this case. There are so many questions left unanswered. I cannot *assume* that something happened at Pennsy that should not have, and that it might have made persons sick. My role is not to give credence to assumptions. Instead, I must look at the evidence and determine if it proves by a preponderance the matters asserted by the Secretary.

Overall, I find that the testimony of both Horn and Washburn was confusing, often disingenuous and self-serving, and, ultimately, lacking in credibility. The Secretary's case I find plagued with inadequately supported assumptions. My findings below on each of the violations reflect this.

IV. LEGAL PRINCIPLES

A mine operator is strictly liable for Mine Act violations that occur at its mine. *Spartan Mining Co.*, 30 FMSHRC 699, 706 (Aug. 2008). The Secretary bears the burden of proving any alleged violation by a preponderance of the credible evidence. *In re: Contests of Respirable Dust Alteration Citations*, 17 FMSHRC 1819, 1838 (Nov. 1995), aff'd sub nom. *Sec'y of Labor v. Keystone Coal Mining Corp.*, 153 F.3d 1096 (D.C. Cir. 1998).

V. FURTHER FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Citation No. 8802224

Citation No. 8802224 was issued by Santos-Cranford on August 1, 2017 after she consulted with Horn and inspected the Bay Road Plant #7. Santos-Cranford relied on Horn's statements and documents in issuing this citation. Tr. 175. The narrative section of Citation No. 8802224 states that Respondent failed to complete and submit a MSHA #7000-1 form in violation of 30 C.F.R. § 50.20(a)[4] after a former employee (i.e., Horn) reported to the company that he had been diagnosed with lead poisoning. The citation alleges moderate negligence. The Secretary proposed a penalty of $116.00. Ex. S-2; Ex. A.

The Secretary argues that Horn reported his alleged diagnosis of lead poisoning to Pennsy's human resources department on April 3, 2017, and that Pennsy then failed to report that

[4] Section 50.20(a) states in relevant part: "Each operator shall maintain at the mine office a supply of MSHA Mine Accident, Injury, and Illness Report Form 7000-1. ... Each operator shall report each accident, occupational injury, or occupational illness at the mine. The principal officer in charge of health and safety at the mine or the supervisor of the mine area in which an accident or occupational injury occurs, or an occupational illness may have originated, shall complete or review the form in accordance with the instructions and criteria in §§ 50.20-1 through 50.20-7. If an occupational illness is diagnosed as being one of those listed in § 50.20-6(b)(7), the operator must report it under this part. The operator shall mail completed forms to MSHA within ten working days after an accident or occupational injury occurs or an occupational illness is diagnosed. ..." 30 C.F.R. § 50.20(a).

alleged diagnosis within the 10-day reporting window designated in section 50.20(a). The Secretary states that Pennsy did not report the alleged lead poisoning until August 1, 2017, well outside the reporting window. Sec. Br. 24.

Pennsy argues it did not violate the standard because it never received any evidence that Horn was diagnosed with an occupational illness, aside from Horn's statements to that effect. Pennsy claims Horn refused to cooperate with its investigation of his alleged illness. Resp. Br. 8-9.

Section 50.20(a) requires operators to submit an MSHA #7000-1 form reporting each accident, occupational injury, and occupational illness occurring at the mine. 30 C.F.R. § 50.20(a). An occupational illness is defined as "an illness or disease which may have resulted from work at a mine or for which an award of compensation is made." 30 C.F.R. § 50.2(e). Notably, section 50.20(a) provides: "If an occupational illness is *diagnosed* as being one of those listed in section 50.20-6(b)(7), the operator must report it under this part." 30 C.F.R. § 50.20(a) (emphasis added). Poisoning by lead is listed in section 50.20-6(b)(7)(iv).

As highlighted above, the plain language of section 50.20(a) requires in the case of an occupational illness an actual diagnosis of such an illness. However, here, Pennsy never had any bona fide diagnosis of lead poisoning, and thus, as is further explained below, was under no obligation to provide MSHA a report of any such alleged poisoning.

On March 31, 2017 at 3:00 PM, Horn received an offer of employment at another company. He immediately quit his job at Pennsy. Tr. 72. However, his new employer revoked the offer of employment after Horn reported that the level of lead in his blood was higher than they would accept for a new employee. When Horn called Pennsy's human resources department to ask for his job back, a request that Pennsy denied, Horn asked about eligibility for worker's compensation on account of lead poisoning. But the Pennsy representative to whom Horn spoke asked how the company could be sure he was exposed to lead at its plant. This led Horn to abruptly terminate the conversation. Tr. 74, 76. He thereafter refused to give Pennsy any other information on his lead test results, never signed a medical release form for Pennsy to retrieve those results, and had not received any medical treatment for the heightened lead level in his blood. Tr. 76, 116, 179. Similarly, although Washburn testified he also tested positive for lead, he never provided any test results to Pennsy, either orally or in any printouts of laboratory tests, nor did he ever sign a medical release form which Pennsy provided him. Tr. 61-62.

At the hearing, the Secretary did not produce any medical records that could have established that Horn and Washburn had been diagnosed with lead poisoning. Nor did the Secretary provide any such documentation to Pennsy. To the contrary, Santos-Cranford testified that she did not provide the company any documentation because "[i]t's not our job." Tr. 179.

I find this particularly curious insofar as, had Horn or Washburn provided medical documentation of a diagnosis of lead poisoning, section 50.20(a) has a low threshold triggering the necessity of reporting an occupational illness, i.e., only that a diagnosed illness *may* have resulted from work at a mine.

The failure to produce the alleged blood tests by Horn or Washburn or the Secretary after being asked to do so left Pennsy with no confirmation of a diagnosed mining-related illness which would give rise to the reporting requirement of section 50.20(a). I note in particular that Pennsy made all reasonable efforts to obtain and confirm the allegations Horn made, but was never provided the information necessary to make any report. Moreover, the record before me is devoid of any evidence that Pennsy ever had any such information. I thus conclude that, under these circumstances, the standard simply did not apply.

Moreover, even if I were to accept as true the unsubstantiated and anecdotal evidence that Horn or Washburn had lead poisoning, I find what evidence that is in the record inconsistent with OSHA guidance on the toxicity of lead. 29 C.F.R. § 1910.1025, App. A, Substance Data Sheet for Occupational Exposure to Lead. I take judicial notice of this OSHA guidance. *Union Oil Co.*, 11 FMSHRC 289, 300 n.8 (Mar. 1989) (official notice may be taken of the existence of extra record information that is not the subject of testimony but is commonly known, or can safely be assumed, to be true). Although this OSHA guidance states that a short term dose of lead can cause acute encephalopathy of the brain, which develops quickly to seizures, coma, and death from cardiorespiratory arrest, "[s]hort term occupational exposures of this magnitude are highly unusual." It is chronic, long-term exposure that results in lead levels in highly toxic ranges. Short term exposure would have to be extremely heavy and concentrated to obtain acutely toxic results. Here, though, Horn was outside in the breeze, had protective clothing on, did the work for a just few days, and was told to stop using a torch to remove the bolts. Tr. 23, 28-30, 43, 78, 80. There is no evidence that either Horn or Washburn suffered any *serious* symptoms consistent with lead poisoning, acute or otherwise. Nor did the Secretary introduce any evidence of how many of the washers that Horn torched were actually lead. Especially in light of the OSHA guidance on lead, I find that the record in no way supports the Secretary's argument that Horn suffered from an occupational illness Pennsy was obligated to report to MSHA.

For these reasons, I find that the Secretary failed to prove that Pennsy had any duty to report Horn's alleged occupational illness pursuant to section 55.20(a), 30 C.F.R. § 55.20(a). Given that I have found no violation, I need not address any other issues related to Citation No. 8802224, including gravity, negligence, and the proposed penalty assessment.

B. Citation No. 8802225

Citation No. 8802225 was issued by Inspector Santos-Cranford on July 31, 2017 following an inspection of the Bay Road Plant #7. This inspection arose out of the same circumstances as the preceding citation. Tr. 137, 182. The citation alleges that Pennsy had no Material Safety Data Sheet ("MSDS") for lead washers available at the mine as allegedly required by 30 C.F.R. § 47.51.[5] The citation alleges moderate negligence. The Secretary proposed a penalty of $116.00. Ex. S-4; Ex. A.

Before conducting her inspection, Santos-Cranford consulted with an MSHA toxicologist (who was not called to testify at the hearing) regarding measuring the alleged existence of lead at

[5] Section 47.51 states in relevant part: "Operators must have an MSDS for each hazardous chemical which they produce or use." 30 C.F.R. § 47.51.

the mine. Tr. 141-42. During her inspection of the mine on July 11, 2017, Santos-Cranford collected several wipe and bulk samples after she explained her methodology to Washburn, supervisor Jay Clendaniel, and General Manager Jeff Dawson. Tr. 141. Santos-Cranford used two sample collection methods: wipe sampling of various surfaces in common areas at the mine (such as the kitchen) and work areas, and the collection of bulk samples (e.g., bolts, nuts, washers, etc.). Tr. 150, 153.

No evidence of lead contamination in common areas was introduced at the hearing. Santos-Cranford obtained bulk samples from a drain near where the winter maintenance task had been performed. Tr. 145. These bulk samples were not proven to have come from the sand screw on which work was actually performed, and were intact, not ground, cut, or melted. Tr. 156-57. Some of these samples, specifically some washers and wipes taken from a sand screw, tested positive for the presence of lead. Tr. 162-63; Ex. S-16 at MSHA 071; Ex. S-17. As I have already noted, Santos-Cranford, admitted that "there would be no way for me to prove one way or the other whether these washers [i.e., those collected during sampling] had anything to do with exposure or not." Tr. 171.

Subsequently, Santos-Cranford requested an MSDS for the washers found onsite. Tr. 187. Santos-Cranford testified that an MSDS identifies hazards associated with a specific material and remedies associated with those hazards. Tr. 183. However, when asked to retrieve an MSDS for the washers, Dawson and Clendaniel were unable to do so. Tr. 187. When Santos-Cranford returned to the mine on August 1, 2017, a book containing MSDS documents, including one for lead washers, had been placed in the scale house for employee use. Tr. 189. The MSDS for lead washers originated from a Canadian supplier which had not manufactured or supplied the lead washers to Pennsy. Ex. S-5 at MSHA 006; Tr. 48, 232.

As a result of finding lead washers on the premises and the identification of traces of lead on the sand screw, as well as the inability of mine employees to provide an MSDS for lead washers on July 11, 2017, Santos-Cranford issued Citation No. 8802225.

I find that, as a matter of law, the Secretary has not established a violation of the cited standard. The requirement in section 47.51 regarding the availability of MSDSs at mines extends to *hazardous chemicals* mine operators produce or use. Elsewhere in Part 47, the term "article" is defined as: "A manufactured item, other than a fluid or particle, that — (1) Is formed to a specific shape or design during manufacture, and (2) Has end-use functions dependent on its shape or design." 30 C.F.R. § 47.11. Under section 47.91, an "article" is generally exempt from the MSDS requirement. 30 C.F.R. § 47.91. I conclude that a washer is by definition an "article" under section 47.11, and thus exempt from the MSDS requirement, because it is neither fluid nor particle, is formed during manufacture into the specific shape of a flat disc, and its end-use function is being "placed beneath a nut or at an axle bearing or a joint to relieve friction, prevent leakage, or distribute pressure." The American Heritage Dictionary of the English Language 1941 (4th ed. 2009).

Notably, under section 47.91, an "article" may not be exempt if, under "normal conditions of use," it releases more than insignificant amounts of a hazardous chemical and poses a physical or health risk to exposed miners. 30 C.F.R. § 47.91. The "normal conditions of

use" here was removal of washer to release shoes from a sand screw. Tr. 88-89. This was done through the grinding of the adjacent bolt and striking the bolt with a hammer, which Washburn testified was the routine practice of removal during winter maintenance, and which produced only sparks from the metal, not fumes or dust. Tr. 17-18, 21, 26, 48-49. Burning the washers as Horn did using an acetylene torch was not common practice at the operation; rather, it was an anomaly. Horn took it upon himself to use a torch directly on the washers – and was directed to cease doing so because it was generating too much smoke. Ex. S-14 at MSHA047 and MSHA049. Clearly, Horn's work on the washers was not a "normal condition of use." Tr. 88. Nor did the Secretary prove that Horn's anomalous approach to removing the washers released any specific hazardous chemical that caused lead poisoning. It is insufficient proof to suggest that correlation between Horn's unsupported allegations of lead poisoning and his anomalous use of a torch on the washers establishes either the existence of lead exposure or that any such exposure caused lead poisoning. Moreover, the Secretary offered no proof that Washburn's method of removal caused the release of any specific hazardous chemical, or that Washburn's method of removal (i.e., grinding the bolt) posed any physical or health risk to exposed miners. Tr. 43, 86-87, 89, 203.

The Secretary has thus failed to establish that, as a matter of law, section 47.51 applies to lead washers. Nor did the Secretary prove that the lead washers were subject to the MSDS requirement under section 47.91 on account of the "normal conditions of use" to which the washers were subjected. I therefore vacate Citation No. 8802225. Given that I have found no violation, I need not address any other issues related to Citation No. 8802225, including gravity, negligence, and the proposed penalty assessment.

C. Citation No. 8802226

Santos-Cranford issued Citation No. 8802226 on August 1, 2019 following her inspection of the Bay Road Plant #7. This citation arose out of the same circumstances as the preceding citations. Tr. 194-95. The narrative section of Citation No. 8802226 states that Pennsy failed to train miners on the specific hazards associated with cutting and grinding connecting bolts and nuts separated by lead washers, in violation of 30 C.F.R. § 47.2(b).[6] The citation alleges moderate negligence, and is designated at significant and substantial (S&S).[7] The Secretary proposed a penalty of $330.00. Ex. S-6; Ex. A.

---

[6] Section 47.2 states in relevant part: "(a) This part applies to any operator producing or using a hazardous chemical to which a miner can be exposed under normal conditions of use or in a foreseeable emergency. ... (b) Operators ... must instruct each miner with information about the physical and health hazards of chemicals in the miner's work area, the protective measures a miner can take against these hazards, and the contents of the mine's HazCom program." 30 C.F.R. § 47.2.

[7] The S&S terminology is taken from section 104(d)(1) of the Act, which distinguishes as more serious any violation that is "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine or safety hazard." 30 U.S.C. § 814(d)(1).

During her July 11, 2017 inspection of the mine, Santos-Cranford asked two miners whether they had been trained on the specific hazards of cutting and grinding bolts and nuts separated by lead washers. Tr. 195, 197. When asked, Washburn, a member of his crew, and a third unidentified employee stated they had not received any such training. When asked at another time and place, Horn answered likewise. Tr. 197-98.

Section 47.2(b) requires operators to instruct miners about the physical and health hazards of *chemicals* the operator produces or uses, and the protective measures a miner can take against such hazards. Section 47.11 defines a chemical as any element, chemical compound, or mixture of these. A lead washer is not an element, a chemical compound, or a mixture of these. Instead, as I have already found in connection with Citation No. 8802225, lead washers are "articles" as defined in section 47.11, and are thus by definition exempt from section 47.2(b). Under section 47.91, an article may not be exempt if, under normal conditions of use, it releases more than insignificant amounts of a hazardous chemical and poses a physical or health risk to exposed miners. 30 C.F.R. § 47.91. Again, as I have already found, the Secretary failed to prove that the lead washers, in their normal conditions of use, failed to meet this criteria for exemption from the standard. Additionally, as I have previously noted, there is no evidence that management knew that any of the replacement washers were made of lead. I thus conclude that Pennsy was not required under section 47.2(b) to train its miners on hazards associated with lead washers.

For these reasons, I vacate Citation No. 8802226. Further analysis of other issues related to Citation No. 8802226, including gravity, S&S, negligence, and the proposed penalty assessment, is unnecessary.

D. Citation No. 8802227

Santos-Cranford issued Citation No. 8802227 on August 1, 2019 following her inspection of the Bay Road Plant #7. This citation arose out of the same circumstances as the preceding citations. Tr. 202. The narrative section of Citation No. 8802227 states that Pennsy failed to provide special personal protective equipment ("PPE") to protect against hazards associated with lead washers, in violation of 30 C.F.R. § 56.15006.[8] The citation, as modified, alleges that the violation was S&S, highly negligent, and an unwarrantable failure. Ex. S-8; Ex. A.

The key elements in the cited standard, section 56.15006, as applied here, are that an operator must provide special PPE when miners encounter "chemical hazards ... capable of causing injury or impairment." 30 C.F.R. § 56.15006. To prove a violation of this standard, the Secretary needed to present credible evidence demonstrating a hazard was present, i.e., working in such a way that created a hazard associated with exposure to lead, that the hazard could (or did) cause injury or impairment, and that PPE was not provided.

[8] Section 56.15006 states: "Special protective equipment and special protective clothing shall be provided, maintained in a sanitary and reliable condition and used whenever hazards of process or environment, chemical hazards, radiological hazards, or mechanical irritants are encountered in a manner capable of causing injury or impairment." 30 C.F.R. § 56.15006.

The record clearly establishes that special PPE was readily available to miners at Pennsy. Dawson, whose testimony I found credible, stated that appropriate PPE was always provided for miners, and that respiratory protection was provided if it was required for a specific job. Clendaniel had the responsibility for submitting requests for specific PPE to Dawson. When asked whether he would have approved such a request for respiratory protection, Dawson testified any such request "[w]ould have been approved immediately." However, Dawson also testified that no such request was made with regard to the task at issue here. Tr. 249-50. As to the need for any specific protection against exposure to lead, as I have previously noted, there is no evidence that Dawson or Clendaniel knew that any of the washers on which Horn and Washburn were working were made of lead. To the contrary, Santos-Cranford's inspection notes indicate that neither of them had any idea that any lead was present at the work site. Ex. S-14. In a telling admission, Santos-Cranford conceded that a requirement for enhanced PPE does not exist where there is no awareness of exposure. When asked "[y]ou still have to be aware there is exposure for [enhanced PPE requirements] to kick in," she replied: "Right." Tr. 244.

Furthermore, the Secretary has not proven that any chemical hazard existed. There is evidence that some lead was present at the Pennsy plant, but no credible testimony or documentary evidence was adduced at the hearing that established that any specific chemical hazards were either present or could have been present where Horn and Washburn were working. Rather the Secretary *assumed* that Horn's unsubstantiated claim of lead poisoning was sufficient to prove that lead fumes were released from washers that may or may not have been lead during the winter maintenance task as not all of the washers were the lead replacement parts. The evidence of an "injury or impairment" is as insubstantial as that pertaining to the chemical hazard that supposedly led to an actual injury. As I have already noted above, Horn's allegations of lead poisoning were utterly lacking in corroboration by medical testimony or documentation. The ease with which such documentation could have been procured, and which may even have been in the Secretary's possession, has already led me to the negative inference that Horn's allegations were less than credible.

For these reasons, I find that the Secretary failed to prove that Pennsy violated section 56.15006 as alleged. Therefore, I vacate Citation No. 8802227. Further analysis of other issues related to Citation No. 880222, including gravity, S&S, negligence, unwarrantable failure, and proposed penalty assessment, is unnecessary.

E. Citation No. 8802228

Citation No. 8802228 was issued by Santos-Cranford on August 1, 2019, and arose out of the same circumstances as the preceding citations. Tr. 208. The narrative section of Citation No. 8802228 states that Pennsy failed to provide a system of exposure monitoring when three miners were allegedly exposed to lead fumes and dust, in violation of 30 C.F.R. § 56.5002.[9] The citation alleges high negligence, S&S, and unwarrantable failure. Ex. S-8; Ex. A.

Section 56.5002 is broadly worded and requires operators to conduct "surveys," a term that is not defined, "as frequently as necessary" when work generates dust, gas, mist, or fumes,

[9] Section 56.5002 states: "Dust, gas, mist, and fume surveys shall be conducted as frequently as necessary to determine the adequacy of control measures." 30 C.F.R. § 56.5002.

and "to determine the adequacy of control measures." 30 C.F.R. § 56.5002. Generally, an agency's interpretation of its own regulation is controlling unless "'plainly erroneous or inconsistent with the regulation.'" *Plateau Mining Corp. v. FMSHRC*, 519 F.3d 1176, 1192–93 (10th Cir. 2008) (finding that Secretary's interpretation of his own regulation is entitled to deference), *quoting Auer v. Robbins*, 519 U.S. 452, 451 (1997). At the hearing, counsel for the Secretary asked Santos-Cranford, who was acting in her official capacity and as an authorized representative of the Secretary of Labor when the citations were issued, what type of "surveys" or "control measures" would have satisfied the requirement of section 56.5002. Santos-Cranford stated:

> [Section 56.]5002 ... would mean on a regular day when just the sand plant is running they could control their dust, let's say, by looking to make sure all their sprayers were running. That is a survey in itself, just by looking out to make sure everything is running fine, or by making sure that the water truck is running on a dusty day. So that control is in place. ... This is a little bit more technical, now you are talking about something that is a fumes [sic] or dust. ... So in itself that is telling you something was wrong, something needs to stop. We need to step back and take a look in itself would be a survey.
>
> You had people who said that they were concerned, just stopping and looking at the situation in itself would have been enough.

Tr. 211. When asked whether any sampling would be required to satisfy the standard in this situation, Santos-Cranford answered, "[s]ampling is not required, only surveying." Tr. 212.

Under this interpretation of the standard by the authorized representative of the Secretary, all that was required for Pennsy to comply with section 56.5002 when Horn's use of an acetylene torch produced excessive smoke was to stop work, look at the situation, and determine the adequacy of control measures. The Secretary's own evidence demonstrates that Clendaniel did *just that* when he told Horn to stop using the torch because it was generating too much smoke. Ex. S-14 at MSHA049. Horn thereafter discontinued using the torch altogether, and work progressed to remove the shoes exclusively with grinders. This approach eliminated the smoke problem. As Washburn testified, when the grinders were used, there "wasn't a lot of dust. There was a little bit, but it was more sparks coming from the grinding of the nuts, sparks from it." Tr. 28. Moreover, grinding the bolts, as Washburn was doing, avoided all contact with any washers, lead or otherwise, because the grinders were only coming into contact with the front end of the bolt, not any washers. Tr. 18, 21. Clendaniel's order to stop using the torch eliminated any alleged hazard along with any excessive smoke, and thus, Pennsy satisfied the requirements of the cited standard as defined by the Secretary.

Far from proving a violation of section 56.5002, the Secretary essentially established that Pennsy complied with that section. I thus find no violation occurred and therefore, vacate Citation No. 8802228. Further analysis of other issues related to Citation No. 8802228, including gravity, S&S, negligence, unwarrantable failure, and the proposed penalty, is unnecessary.

ORDER

Consistent with this Decision, **IT IS ORDERED** that Citation Nos. 8802224, 8802225, 8802226, 8802227, and 8802228 are **VACATED.** Accordingly, these proceedings are **DISMISSED.**

Priscilla M. Rae
Administrative Law Judge

Distribution:

M. del Pilar Castillo, Esq., Office of the Solicitor, U.S. Department of Labor, Suite 630E, The Curtis Center, 170 S. Independence Mall West, Philadelphia, PA 19106

David M. Toolan, Esq., Oldcastle Law Group, 900 Ashwood Parkway, Suite 700, Atlanta, GA 30338