United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR, Complainant, v. L & L PAINTING CO., INC., Respondent, [Redacted], Affected Employee.*	OSHRC Docket No. 05-0050

APPEARANCES:

Scott Glabman, Senior Appellate Attorney; Daniel J. Mick, Counsel for Regional Trial Litigation; Michael P. Doyle, Counsel for Appellate Litigation; Joseph M. Woodward, Associate Solicitor; Howard M. Radzely, Solicitor; U.S. Department of Labor, Washington, DC
For the Complainant

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For the Respondent

Louis Tassan, Esq.; Tassan, Pugatch & Nikolis, Garden City, NY
For the Affected Employee

* Because we discuss the medical condition of the employee in question throughout this opinion, we refer to him as "Affected Employee" rather than by his name out of consideration for his privacy. For this same reason, we have redacted the Affected Employee's name from the Chief Administrative Law Judge's decision.

REMAND ORDER

Before: THOMPSON, Chairman; and ROGERS, Commissioner.

BY THE COMMISSION:

STATEMENT OF THE CASE

L & L Painting Co., Inc. ("L&L") contracted with the Port Authority of New York and New Jersey to remove lead-based paint from the George Washington Bridge and to repaint its two towers. On November 24, 2004, the New Jersey Area Office of the Occupational Safety and Health Administration ("OSHA") issued a citation to L&L alleging one serious violation of 29 C.F.R. § 1926.62(k)(2)(i), a provision of the Lead in Construction Standard, for failing to pay medical removal protection benefits ("MRP benefits") to the Affected Employee, an L&L employee who was medically removed from the bridge project. After conducting a hearing and receiving post-hearing briefs, the Chief Administrative Law Judge ordered the parties to provide certain information pertaining to the Affected Employee's wages and medical bills. Upon receiving the requested information, the judge issued his decision affirming the violation and assessing the proposed penalty of $1,625. The judge also ordered L&L to pay the Affected Employee $16,010.32 for medical expenses and $109,028.40 for other MRP benefits. For the following reasons, we affirm the citation item, but remand for the judge to conduct further expedited proceedings on the amount of MRP benefits to which the Affected Employee is entitled and to recalculate the penalty assessment.[1]

ISSUES

The Secretary alleges that L&L violated § 1926.62(k)(2)(i) by not providing "up to eighteen (18) months" of MRP benefits to the Affected Employee. At issue on review are L&L's claims that: (1) the company did not violate § 1926.62(k)(2)(i) because the Affected Employee waived any entitlement to MRP benefits due to his failure to participate in follow-up medical surveillance; (2) the judge not only lacked the authority to order the payment of MRP benefits, but erred by not providing the company fair notice that benefit calculations were at issue; (3) the judge utilized an improper procedure by issuing a post-hearing order to gather

[1] An inspection of the New York side of the bridge conducted by the New York Area Office of OSHA resulted in the issuance of a separate citation to L&L, which the company also contested. That case, also decided by the Chief Judge, was directed for review and is being remanded by the Commission today. *L & L Painting Co., Inc.*, OSHRC Docket No. 05-0055.

additional evidence regarding the amount of MRP benefits; and (4) the judge inappropriately relied on parts of the record from a companion case involving L&L (Docket No. 05-0055) to evaluate the penalty factors set forth in section 17(j) of the Occupational Safety and Health Act ("the Act"), 29 U.S.C. § 666(j).

FINDINGS OF FACT

On May 7, 2004, the Affected Employee, an L&L employee working on the bridge project, underwent a blood test at a mobile lab that revealed a blood lead level ("BLL") of 76 µg/dl. One week later, on May 14, L&L medically removed[2] him from his position on the New Jersey side of the bridge, and placed him in a different position on the New York side of the bridge. The Affected Employee's personal physician subsequently stated in a letter that the employee was "totally disabled since May 14, 2004 due to lead toxicity" and that "[h]e cannot return to work until a complete work up and therapy is completed." The Affected Employee then brought this letter to his L&L supervisor, and noted that the physician recommended visiting the Mt. Sinai Center for Occupational and Environmental Medicine ("Mt. Sinai"). The Affected Employee's supervisor agreed with that recommendation and gave the employee "a name of someone that worked there . . . to go see." May 24 was the last day the Affected Employee worked on the project.

The Affected Employee was examined at Mt. Sinai on May 27, 2004. His examining physician wrote a letter, dated June 3, stating the Affected Employee had been "advised to take a medical leave of absence until his [BLL] returns to baseline and to begin chelation therapy with biological monitoring," and that he would "then be further evaluated to assess his medical readiness to return to work." The Affected Employee brought the June 3 letter to the same L&L supervisor, who discussed it with both the employee and L&L's vice-president. At that meeting, L&L offered the Affected Employee the opportunity to do "office work" until his BLL decreased sufficiently, but the employee had been advised that he could not work at all.

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[2] Pursuant to §1926.62(k)(1)(i) an employer must remove an employee having exposure to lead at or above the action level on each occasion that a periodic *and* follow-up blood sampling test indicate that the employee's BLL is at or above 50 ug/dl. Here, however, it appears the employer initially medically removed the Affected Employee voluntarily before a follow-up blood test verified the elevated BLL.

Thereafter, on June 5, L&L sent the Affected Employee a signature confirmation FedEx letter, dated June 4, stating that he had not been present for a previously scheduled June 1 follow-up blood test. In the letter, he was advised "to obtain a follow up test immediately." L&L received proof of delivery from FedEx on June 8, but the confirmation indicated that someone other than the Affected Employee had signed for the letter. The Affected Employee had moved before L&L sent the letter but had not provided L&L with a forwarding address, and the person who signed for the letter never turned it over to him. The Affected Employee's attorney subsequently sent a letter to L&L, dated June 9, demanding immediate payment of MRP benefits. Although L&L received the June 9 letter, it did not make any payments to the Affected Employee.

Following the November 2005 hearing and the parties' submission of post-hearing briefs, the judge issued an order on March 14, 2006 requiring the parties to provide him with additional "information" by March 31. Specifically, the judge ordered the Secretary to provide "copies of [the Affected Employee's] unpaid medical bills from May 25, 2004 to November 25, 2005," and to calculate "the total amount of those bills." He ordered L&L to provide "the total amount of the wages that it would have paid [the Affected Employee] from May 25, 2004 to November 25, 2005, had he not stopped working due to his medical condition," and "a summary of how it calculated" those wages. In response to the order, which provided the parties with no opportunity for examination of the evidence or rebuttal, the parties simultaneously submitted the requested information to the judge.

I. MERITS OF THE ALLEGED 29 C.F.R. § 1926.62(k)(2)(i) VIOLATION

PRINCIPLES OF LAW

The Lead in Construction Standard requires an employer to "remove an employee from work having an exposure to lead at or above the action level" where "a periodic and a follow-up blood sampling test conducted pursuant to this section indicate that the employee's [BLL] is at or above 50 µg/dl," or where "a final medical determination results in a medical finding, determination, or opinion that the employee has a detected medical condition which places the employee at increased risk of material impairment to health from exposure to lead." 29 C.F.R. § 1926.62(k)(1)(i), (ii). The employer shall provide an employee up to eighteen months of MRP benefits on each occasion the employee is medically removed due to lead exposure. 29 C.F.R. § 1926.62(k)(2)(i). This requirement is applicable even if the employer, "although not required

by [§ 1926.62(k)] to do so, removes an employee from exposure to lead or otherwise places limitations on an employee due to the effects of lead exposure on the employee's medical condition." 29 C.F.R. § 1926.62(k)(2)(vi). However, "[d]uring the period of time that an employee is medically removed from his or her job or otherwise medically limited, the employer may condition the provision of [MRP] benefits upon the employee's participation in follow-up medical surveillance." 29 C.F.R. § 1926.62(k)(2)(iii).

ANALYSIS

L&L does not dispute it medically removed the Affected Employee from the New Jersey side of the bridge on May 14, 2004, and provided no MRP benefits to him once he stopped working on the New York side of the bridge. L&L argues only that the Affected Employee is not entitled to any MRP benefits because he failed to participate in "follow-up medical surveillance" required under § 1926.62(k)(2)(iii) when he did not attend the scheduled June 1, 2004 BLL test or respond to L&L's June 4 letter. At no point prior to the scheduled June 1 test, however, did L&L condition the Affected Employee's receipt of benefits upon such participation. Additionally, regardless of whether the Affected Employee received L&L's June 4 letter, nothing in it informed him that L&L's payment of MRP benefits would be conditioned on his participation in follow-up BLL testing. In short, at no point before or during the removal period did L&L otherwise notify the Affected Employee of any such condition.

L&L maintains that § 1926.62(k)(2)(iii) does not require an employer to specifically inform its employee that receipt of benefits is conditioned on participation in follow-up medical surveillance. But the word "may," as used in § 1926.62(k)(2)(iii), indicates an employer's reliance on the provision is optional. Absent notification of the employer's reliance on this optional provision, an employee would have no way of knowing that failure to participate in further BLL testing could result in a loss of MRP benefits. Failing to notify an employee of this possibility undermines the very purpose underlying MRP benefits, which is to provide employees with a financial incentive to participate in medical surveillance—without notice that MRP benefits could be cut off, no such incentive exists. *Cf. RSR Corp.*, 11 OSHC BNA 1163, 1168, 1983-84 CCH OSHD ¶ 26,429, p. 33,546 (No. 79-6392, 1983) (discussing purpose of MRP in context of 29 C.F.R. § 1910.1025, the general industry lead standard), *aff'd*, 764 F.2d 355 (5th Cir. 1985). Under these circumstances, we affirm the citation item.

II. MRP BENEFITS CALCULATION

PRINCIPLES OF LAW

The Secretary must draft a citation "'with sufficient particularity to inform the employer of what he did wrong, *i.e.*, to apprise reasonably the employer of the issues in controversy.'" *Alden Leeds, Inc. v. OSHRC*, 298 F.3d 256, 261 (3d Cir. 2002) (quoted case omitted); *see* 29 U.S.C. § 658(a) (requiring that citations "describe with particularity the nature of the violation"). In properly contested cases, "[t]he Commission shall afford an opportunity for a hearing." 29 U.S.C. § 659(c); *see Manti Homes*, 16 BNA OSHC 1458, 1461, 1993-95 CCH OSHD ¶ 30,265, p. 41,683 (No. 92-2222, 1993) (noting the Commission must "ensure that all parties to a controversy have a full, fair and equal opportunity to be heard"). "While 'the fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner[,] the concept is flexible, calling for procedural protection as dictated by the particular circumstances.'" *Oscar Renda Contracting, Inc.*, 17 BNA OSHC 1883, 1888, 1995-97 CCH OSHD ¶ 31,225, p. 43,780 (No. 93-1886, 1997) (quoting *Am. Broad. Cos., Inc.*, 74 F.3d 40, 44 (3d Cir. 1996)). As to each issue in controversy, a party is generally "entitled to present [its] case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts."[3] 5 U.S.C. § 556(d); *see* 29 U.S.C. § 659(c) (cross-referencing 5 U.S.C. § 554); 5 U.S.C. § 554(c) (cross-referencing 5 U.S.C. §§ 556 and 557).

ANALYSIS

As a threshold matter, we reject L&L's contention that the Commission lacks authority to calculate, and order payment of, MRP benefits in this case. The Commission has authority to calculate such benefits in the context of 29 C.F.R. § 1910.1025(k), the MRP benefits section of the general industry lead standard. *See RSR Corp.*, 11 OSHC BNA at 1173, 1185, 1983-84 CCH OSHD at pp. 33,551-52, 33,563 (remanding with instructions to reopen the record "in order to afford the parties the opportunity to present evidence and arguments concerning the amount of MRP benefits which are owed to this employee" in case brought under § 1910.1025(k)); *see also*

[3] In determining claims for money or benefits, a procedure may be adopted for the submission of all or part of the evidence in written form, if doing so would not prejudice a party. 5 U.S.C. § 556(d).

Sec'y of Labor v. E. Penn Mfg. Co., 894 F.2d 640, 647 (3d Cir. 1990) (ordering employer to abate violation by paying overtime benefits plus interest to employees because amount of overtime benefits was undisputed in case brought under § 1910.1025(k)). We see no reason why § 1926.62(k), the MRP benefits section of the Lead in Construction Standard, should be treated any differently.

L&L contends it lacked fair notice that MRP benefits calculations were at issue in this case. Section 1926.62(k)(2)(i), however, plainly states that the employer "shall provide an employee up to eighteen (18) months of [MRP] benefits on each occasion that an employee is removed from exposure to lead or otherwise limited pursuant to this section," and the next paragraph in the standard defines these benefits as including "total normal earnings, seniority and other employment rights and benefits of an employee." The citation and amended complaint track the language of § 1926.62(k)(2)(i) and specify that the employee in question "did not receive [MRP] benefits as defined under this standard, on or about 5/26/04." Thus, the pleadings were drafted "with sufficient particularity" to provide notice that MRP benefits calculations were in controversy.[4] *See Alden Leeds, Inc.*, 298 F.3d at 261.

Nonetheless, the record before us indicates it was not clear to either the Secretary or L&L *when* this issue would be heard and decided by the judge. The focus of the hearing was largely on the issue of noncompliance, and not on the amount of MRP benefits, an issue the Commission has rarely addressed. *See RSR Corp.*, 11 BNA OSHC at 1173, 1185, 1983-84 CCH OSHD at pp. 33,551-52, 33,563. Additionally, in their post-hearing briefs, neither party proceeded as if the amount of MRP benefits had been squarely addressed during the hearing. On the contrary, the Secretary requested in her post-hearing brief that "the Judge retain jurisdiction of this matter to permit a supplemental submission as to the amount of [the Affected Employee's] unpaid medical bills," noting that L&L could calculate "[t]he remainder of [the Affected Employee's] unpaid compensation . . . from its payroll records."

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[4] Indeed, L&L's answer to the complaint indicates its representative understood this fact—L&L contested the citation because, *inter alia*, the Affected Employee had "filed a law suit against [L&L] and filed to receive workers compensation insurance benefits, both of which would impinge upon or negate the required [MRP] benefits." *See Meadows Indus., Inc.*, 7 BNA OSHC 1709, 1711, 1979 CCH OSHD ¶ 23,847, p. 28,924 (No. 76-1463, 1979) ("Whether a citation gives an employer fair notice of the nature of the alleged violation does not depend solely on the language of the citation but may be determined from factors external to the citation . . . .").

Due to the lack of clarity regarding how this uncommon issue would be joined, the amount of MRP benefits was never fully litigated, even when the judge issued his post-hearing order seeking additional information from both parties to resolve the question. As L&L points out on review, the specific information the judge requested from the parties at that time was submitted simultaneously, with no opportunity for either party to further supplement the record or offer rebuttal evidence on the issue. Under these circumstances, a remand is warranted to allow the parties an opportunity to fully litigate the amount of MRP benefits owed to the Affected Employee. *See id.*

L&L raises in its briefs on appeal and in response to the judge's post-hearing order several issues relevant to whether the Affected Employee is entitled to the full eighteen months of MRP benefits. 29 C.F.R. § 1926.62(k)(2)(i). Specifically, L&L asserts that (1) the Affected Employee's eligibility for MRP benefits ended when the blood tests performed by his Mt. Sinai physician showed a BLL of 40 µg/dl or lower on consecutive occasions in July 2004;[5] (2) following the Affected Employee's removal from the New Jersey side of the bridge, his job restarted on June 9, 2005, and ended on August 12, 2005, totaling only an additional fifty-four working days;[6] (3) L&L "does not perform work during the winter months and cuts back to a

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[5] An employee removed due to an elevated BLL shall be returned to his former job status "when two consecutive blood sampling tests indicate that the employee's [BLL] is at or below 50 µg/dl," but where an employee's removal is based on a final medical determination, the employee shall be returned to his former status only when a subsequent final medical determination indicates "the employee no longer has a detected medical condition which places the employee at increased risk of material impairment to health from exposure to lead." 29 C.F.R. § 1926.62(k)(1)(iii)(A)(*1*), (*2*).

[6] "[A]s long as the job the employee was removed from continues, the employer shall maintain the total normal earnings, seniority and other employment rights and benefits of an employee, including the employee's right to his or her former job status." 29 C.F.R. § 1926.62(k)(2)(ii); Lead Exposure in Construction: Interim Final Rule, 58 Fed. Reg. 26,590, 26,605 (May 4, 1993) ("[W]here an employee's job is concluded while the employee is on medical removal, the employee is not entitled to continuing MRP benefits or to the job since, if the employee had not been removed, the employment would have ended in any case."). As OSHA's instruction for the interim final rule creating § 1926.62 explains:

> Generally, with respect to the duration of MRP benefits, the maximum is 18 months or the duration of the job from which the employee has been removed, whichever comes first. The duration of the job would be defined by the specifics of the affected employee's hiring agreement. Whether the job has ended or not,

skeletal crew of key personnel," and the Affected Employee would not have been included in that crew; and (4) any MRP benefits owed the Affected Employee should be reduced by the amount of money he recoups from his worker's compensation claim.[7]

We can resolve now the first issue raised by L&L. In support of its argument that the Affected Employee's eligibility for benefits ended as a result of the blood tests performed in July, L&L contends that the two doctors' notes of May 27 and June 3 do not constitute "final medical determinations" because, among other reasons, the doctors who provided the notes were the employee's own physicians, rather than L&L's, and thus do not qualify as the "examining physician[s]" under the standard.[8] L&L further contends that the Affected Employee consulted his own physicians "without Company agreement or knowledge." However, he provided L&L with two written notes from his physicians indicating a diagnosis of lead toxicity, and recommending medical leave pending treatment and further monitoring. L&L does not dispute that this diagnosis would entitle the Affected Employee to MRP benefits. Indeed, an L&L supervisor not only agreed with the first doctor's recommendation that the Affected Employee see another specialist, but also provided the employee with the name of a physician to consult.

> may be determined by reviewing the job specifications and the status of the project.
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> . . . For example, if an employee is hired to perform sandblasting while a specific bridge is under renovation, MRP would be required to be provided only until all the sandblasting work on that bridge is completed. If an employee has been hired by a contractor as a sandblaster on a continuing basis, working on several projects at the determination of the employer, then MRP would be provided until the employee is returned to his or her former job status, for up to 18 months.

OSHA Instruction CPL 2-2.58, App. A: Regulation Inspection Guidance—1926.62(k) (1993).

[7] According to 29 C.F.R. § 1926.62(k)(2)(iv):

> If a removed employee files a claim for workers' compensation payments for a lead-related disability, then the employer shall continue to provide medical removal protection benefits pending disposition of the claim. To the extent that an award is made to the employee for earnings lost during the period of removal, the employer's medical removal protection obligation shall be reduced by such amount. The employer shall receive no credit for workers' compensation payments received by the employee for treatment-related expenses.

[8] Given the facts here, we need not address this particular argument raised by L&L.

In these circumstances, we find L&L knowingly acquiesced in the choice of at least the Affected Employee's second physician.[9] Based on this acquiescence, and the undisputed medical diagnosis described in the physician's note, we see no reason why the second note should not be treated as a "final medical determination."[10]

As L&L did not exercise its option under the standard to condition the Affected Employee's receipt of MRP benefits on his participation in follow-up medical surveillance, we conclude he is entitled to such benefits. 29 C.F.R. § 1926.62(k)(2)(iii). Although the basis for his removal may have changed over time, ultimately his removal was based on the June 3, 2004 letter. Thus, his eligibility for MRP benefits did not end as a result of his test results showing lowered blood lead levels, as the standard requires a "subsequent medical determination" before an employee medically removed pursuant to a final medical determination can be returned to work. 29 C.F.R. § 1926.62(k)(1)(iii)(2). Accordingly, we affirm a violation of 29 C.F.R. § 1926.62(k)(2)(i) for L&L's failure to provide the Affected Employee with MRP benefits as required under the standard.

With respect to the calculated amount of MRP benefits owed, the judge rejected L&L's challenges due to a lack of evidence in the record. On remand, the parties should be given the opportunity to develop the record as to these particular issues of fact, as well as any other factual matters relevant to the amount of MRP benefits to which the Affected Employee is entitled. To the extent some of the factual matters in question cannot be adequately resolved without additional testimony, a hearing may be necessary to further develop the record.

III. PENALTY

In considering the penalty factors set forth under section 17(j) of the Act, the judge relied on record evidence in the companion case, Docket No. 05-0055, to evaluate the size of L&L's business, as well as its good faith and history of previous violations. 29 U.S.C. § 666(j) (recognizing as penalty factors "the size of the business of the employer being charged, the

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[9] Although the Lead in Construction Standard contemplates that an employer will generally choose the physician who conducts prescribed medical surveillance, the standard also contemplates other circumstances. *See, e.g.*, 29 C.F.R. § 1926.62 app. B (discussing in section VIII of the "Employee Standard Summary" the possibility that an employer and employee might agree on the choice of physician).

[10] Given the facts here, we need not address the status of the first note.

gravity of the violation, the good faith of the employer, and the history of previous violations"). Specifically, the judge noted in his decision that the record in Docket No. 05-0055 shows L&L "has about 400 employees and . . . has been inspected numerous times in the past three years," and that he affirmed "15 citation items in that [companion] case, most of which alleged serious violations of the lead in construction standard." L&L contends that the judge erred by relying on facts outside the record of the present case to assess the proposed penalty.

A judge has the authority to take judicial notice of certain facts, including those that are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). A party, however, "is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made *after* judicial notice has been taken." Fed. R. Evid. 201(e) (emphasis added). Because the judge in this case did not provide notification to the parties that he would be taking judicial notice of certain facts in the record of Docket No. 05-0055 in his decision here, and L&L has objected on review to his reliance on the record in the companion case, L&L should have the opportunity to raise its objections to the judge on remand.

We also note that, in considering L&L's prior citation history, the judge should not have relied on his affirmance of fifteen citation items in Docket No. 05-0055, because that decision was not yet a final order under Commission Rule of Procedure 90(d), 29 C.F.R. § 2200.90(d). *See Vanco Constr., Inc.*, 11 BNA OSHC 1058, 1062, 1983-84 CCH OSHD ¶ 26,372, p. 33,455 (No.79-4945, 1982) ("Until a citation becomes a final order, it may not be considered as evidence of a history of previous violations for the purpose of penalty assessment."), *aff'd*, 723 F.2d 410 (5th Cir. 1984) (per curiam). In addition, the judge should not have relied on the fact that "L&L has been inspected numerous times in the past three years," because only final orders are relevant to an employer's prior history, not the number of times it has been inspected by OSHA. Accordingly, on remand, the judge should reevaluate L&L's "history of previous violations" without regard to prior inspections or the violations in the companion case. Finally, when evaluating the gravity of the violation, the judge should take into consideration any changes made on remand to the amount of MRP benefits owed to the Affected Employee.

CONCLUSIONS OF LAW

Based on the above analysis, we conclude L&L violated § 1926.62(k)(2)(i) by failing to provide the Affected Employee with MRP benefits. We reject L&L's claim that it had conditioned the MRP benefits on his participation in a follow-up medical surveillance program. We thus affirm the citation item as serious.[11]

We further conclude that the Commission has authority both to calculate and order payment of MRP benefits in this case, but that neither party had an opportunity to fully litigate the issue. We reject L&L's claim, however, that the Affected Employee's eligibility for MRP benefits ended under § 1926.62(k)(1)(iii)(A)(*1*) as a result of his test results showing lowered blood lead levels. Nonetheless, with regard to other relevant issues that the parties may raise with respect to the amount of benefits owed, we remand this case to the judge in order to provide the parties with a full opportunity "to present . . . oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts." 5 U.S.C. § 556(d).

Finally, we conclude that in assessing the $1,625 penalty the judge improperly relied upon the order affirming citations in Docket No. 05-0055, L&L's companion case. We also conclude that L&L is entitled to raise its objections to the judge's reliance on parts of the record in Docket No. 05-0055. Accordingly, we remand for the judge to consider any objections that L&L may have to judicially noticed facts and to reconsider the penalty assessment.

[11] L&L does not challenge the judge's serious characterization of the violation.

ORDER

We affirm Citation 1, Item 1. We hereby remand this case to the judge to conduct further proceedings on the issue of MRP benefits and to recalculate the penalty assessment in a manner consistent with this opinion. In view of the fact that this matter involves the payment of benefits, we further order that all proceedings on remand be expedited under Commission Rule 103, 29 C.F.R § 2200.103.

SO ORDERED.

__/s/_____
Horace A. Thompson III
Chairman

__/s/_____
Thomasina V. Rogers
Commissioner

Dated: September 29, 2008

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
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SECRETARY OF LABOR, Complainant, v. : L & L PAINTING CO., INC., Respondent. [redacted], Affected Employee.	OSHRC DOCKET NO. 05-0050

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DECISION AND ORDER

This matter is before the Occupational Safety and Health Review Commission (the Commission) pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 651 *et seq*. (the Act). On June 22, 2004, the New Jersey Department of Health notified

[1]Mr. Campbell represented Respondent at the hearing. After the hearing, Nancy B. Schess and Khristan A. Heagle, with the law firm Klein, Zelman, Rothermel & Dichter, L.L.P., located in New York, New York, filed an appearance as counsel for Respondent for the purpose of filing a post-hearing brief in this matter.

the Occupational Safety and Health Administration (OSHA) that employees of L & L Painting Company who were working on the George Washington Bridge had blood lead levels (BLL=s) of greater than 40 µg/dl. On July 6, 2004, the Hasbrouck Heights, New Jersey OSHA Area Office inspected the New Jersey side of the bridge, and, as a result, issued a one-item citation to Respondent, L & L Painting Company (Respondent or L&L).[2] The citation, issued on November 24, 2004, alleged a serious violation of 29 C.F.R. 1926.62(k)(2)(i), a provision of OSHA=s lead in construction standard.[3] L&L filed a timely notice of contest, and the hearing in this matter was held on November 16 and 17, 2005, in New York, New York. Both parties have filed post-hearing briefs.

The Cited Standard

The cited standard, 29 C.F.R. 1926.62(k)(2)(i), provides as follows:

> (2) *Medical removal protection benefits* (i) *Provision of medical removal protection benefits.* The employer shall provide an employee up to eighteen (18) months of medical removal protection benefits on each occasion that an employee is removed from exposure to lead or otherwise limited pursuant to this section.

As the Secretary notes, the standard provides that, as long as the job the employee was removed from continues, the employer shall maintain the total normal earnings, seniority and other employment rights and benefits of an employee, including the employee=s right to his former job status as though he had not been medically removed from his job or otherwise medically limited. 29 C.F.R. 1926.62(k)(2)(ii). The employer may remove the employee from exposure to lead, provide special protective measures to the employee, or place limitations on the employee, consistent with the medical findings, determinations or recommendations of any of the physicians who have reviewed the employee=s health status. 29 C.F.R. 1926.62(k)(1)(v)(A).

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[2]The George Washington Bridge connects New Jersey to New York, and, as L&L was also working on the New York side, the Manhattan, New York OSHA Area Office inspected L&L on that side of the bridge. That inspection resulted in a citation, and the decision in that case, Docket No. 05-0055, is being issued on the same date as the decision in this case.

[3]As issued, the citation alleged a violation of 29 C.F.R. 1910.62(k)(2)(i). Prior to the hearing, the Secretary filed a motion to amend the complaint to allege a violation of the above-noted standard, and the motion to amend was granted.

As the Secretary further notes, the employer may return the employee to his former job status consistent with the medical findings, determinations, or recommendations of any of the physicians who have reviewed the employee=s health status, with two exceptions: (1) if the initial removal resulted from a final medical determination which differed from the findings, determinations or recommendations of the initial physician, or (2) if the employee has been on removal status for the preceding 18 months due to an elevated BLL, then the employer shall await a final medical determination.[4] 29 C.F.R. 1926.62(k)(1)(v)(B). During the period an employee is medically removed or medically limited, the employer may condition the provision of medical removal protection benefits (MRPB) upon the employee=s participation in follow-up medical surveillance. 29 C.F.R. 1926.62(k)(2)(iii). If a removed employee files a claim for worker compensation payments for a lead-related disability, the employer shall continue to provide MRPB pending disposition of the claim. 29 C.F.R. 1926.62(k)(2)(iv). To the extent an award is made for earnings lost during the removal period, the employer=s MRPB obligation shall be reduced by such amount. *Id*. The employer shall receive no credit for worker compensation payments received by the employee for treatment-related expenses. *Id*. The employer=s obligation to provide MRPB shall be reduced to the extent the employee receives compensation for earnings lost during the removal period either from a publicly or employer-funded compensation program or the employee receives income from employment with another employer made possible by the removal. 29 C.F.R. 1926.62(k)(2)(v).

Background

L&L is a bridge painting company that was hired to repaint the George Washington Bridge; the project began in 2001 and was still ongoing at the time of the hearing in this matter. L&L=s work on the bridge involved removing the old paint by abrasive blasting and then applying new paint. L&L employee [redacted] was medically removed from lead exposure on the New Jersey side of the bridge on May 14, 2004, after a test on May 7, 2004 showed his BLL to be 76 µg/dl, and he was

[4] Final medical determination is defined as the written medical opinion on the employees=health status by the examining physician.... *See* 29 C.F.R. 1926.62(k)(1)(ii)(B).

sent to work on the New York side of the bridge.[5] Following the removal, and during his work on the New York side, [redacted] BLL increased; in fact, when [redacted] went to his primary physician and had another test on May 24, 2004, that test showed his BLL to be over 100 µg/dl.[6] In a letter dated May 27, 2004, the physician stated that [redacted] was totally disabled ... due to lead toxicity and that he could not return to work until a complete work up and therapy is completed. On or about that same date, [redacted] took the letter to Declan Farrington, his supervisor on the job, and told him that his physician had recommended he go to Mt. Sinai; Mr. Farrington responded that Mt. Sinai was a good place to go. [redacted] went to Mt. Sinai and had a further test on May 27, 2004; that test revealed his BLL to be 91 µg/dl. The Mt. Sinai doctor who evaluated [redacted] also wrote a letter, dated June 3, 2004, stating that [redacted] had an unusually high BLL, that he was symptomatic at presentation, and that [redacted] had been advised to take a medical leave of absence, until his BLL returned to baseline, and to begin chelation therapy with biological monitoring. [redacted] went back to L&L on or about June 3, 2004, and showed the second letter to Mr. Farrington. Mr. Farrington offered [redacted] a job working in the office and [redacted] said he would have to talk to his doctor before accepting the job.[7] [redacted] spoke to his doctor at Mt. Sinai, who said he could absolutely not work in the office because of his medical condition. [redacted] had no further contact with L&L officials after June 3, 2004.[8] (Tr. 16-25, 32-33; C-1-3, C-5).

Shortly after June 3, [redacted] hired private counsel. On June 9, 2004, his counsel sent a letter to L&L, to the attention of Ross Levine, L&L=s vice-president. The letter stated [redacted] was pursuing a claim for worker compensation benefits because of his exposure to lead, that he had sustained injuries due to that exposure and was unable to work, and that he had advised counsel L&L had refused to compensate him with MRPB as required by the OSHA lead standard. The letter

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[5]29 C.F.R. 1926.62(k)(1)(i) requires the employer to remove an employee from work with an exposure to lead at or above the action level (30 cg/m3 calculated as an 8-hour TWA) on each occasion that a blood test reveals the employee=s BLL to be at or above 50 µg/dl.

[6][redacted] testified that his last day of work was May 24, 2004. (Tr. 19, 22).

[7][redacted] indicated that Ross Levine, L&L=s vice-president, was on the radio during his meeting with Mr. Farrington. (Tr. 16-22, 51).

[8]According to [redacted], he did not contact L&L again because he had received some threatening phone calls; he did not know specifically who had made the calls. (Tr. 31).

demanded that [redacted] be compensated as required and stated that if no compensation was forthcoming counsel would recommend [redacted] take further legal action.[9] (Tr. 27, 51; R-4).

Discussion

Respondent L&L does not dispute that [redacted] had an elevated BLL and that he was medically removed from his position. It contends, rather, that [redacted] is not entitled to MRPB under the cited standard because of the facts of this case and section 1926.62(k)(2)(iii) of the standard. That section, as indicated above, states that:

> During the period of time that an employee is medically removed from his or her job or otherwise medically limited, the employer may condition the provision of medical removal protection benefits upon the employee=s participation in follow-up medical surveillance made available pursuant to this section.

In support of its contention, L&L notes the testimony of Scott Earl, the project manager at the subject site. Mr. Earl testified that he prepared a letter dated June 4, 2004, to [redacted] and that he then sent the letter to [redacted] by Federal Express. Mr. Earl identified R-1 as the Federal Express slip he completed, R-2 as the tracking number and delivery information, and R-3 as the letter and an L&L transmittal sheet. (Tr. 46-49). The letter, R-3, states as follows:

> On Tuesday, June 1, 2004 you were scheduled to receive a follow-up Blood Lead/Zinc Protoporphyrin exam due to the recent high blood lead level result you received. Since you were not present for this examination we hereby advise you to obtain a follow up test immediately.
>
> Please contact L&L Painting Co., Inc. at (516) 349-1900 if you require assistance in locating a medical facility that will perform a Blood Lead/Zinc Protoporphyrin exam. As always all costs associated with this examination will be incurred by L&L.
>
> If you have any questions concerning the above, please contact the undersigned.

Exhibits R-1 through R-3, along with Mr. Earl=s testimony, show the letter was delivered on June 8, 2004, to the address that L&L had for [redacted] and that M. Nefus signed for the letter. (Tr. 49-50). [redacted] testified he never received the letter, noting he had moved from that address, which was that of his ex-girlfriend, about a week before. He also testified his ex-girlfriend had not

[9]In Docket No. 05-0055, [redacted] testified that he was currently involved a suit against the Port Authority of New York and New Jersey. *See* Tr. 262 in No. 05-0055.

given him the letter. [redacted] conceded that the address to which the letter was sent was the one he had provided to L&L and that he had not given L&L his new address. (Tr. 57-58).

L&L points out that [redacted] did not contact it about the letter or the follow-up testing; it also points out that [redacted] did not receive the letter because he had not given L&L his new address. L&L asserts that because [redacted] did not comply with the letter it did not pay him MRPB and that, pursuant to section 1926.62(k)(2)(iii), it was well within its rights in not doing so. I disagree with Respondent=s assertion, for the following reasons.

First, R-3, the letter sent to [redacted], did not state that L&L was conditioning the receipt of MRPB upon his participation in follow-up medical surveillance; in fact, the letter did not mention MRPB at all. Thus, even if [redacted] had received the letter, he would not have had notice that the provision of MRPB was subject to his participating in follow-up medical surveillance.

Second, [redacted] had two follow-up tests after the May 7, 2004 test that revealed his BLL to be 76 µg/dl.[10] The follow-up tests were conducted on May 24 and May 27, 2004; the May 24 test showed his BLL to be over 100 µg/dl, and the May 27 test showed his BLL to be 91 µg/dl. *See* C-5. The physicians who had ordered the tests provided [redacted] with letters; those letters, C-1 and C-2, were dated May 27 and June 3, 2004, respectively. As set out *supra*, C-1 stated that [redacted] was totally disabled due to lead toxicity and that he could not return to work until a complete work-up and therapy was completed. C-2 stated [redacted] had an unusually high BLL and was symptomatic; C-2 also stated [redacted] had been advised to take a medical leave of absence, until his BLL returned to baseline, and to begin chelation therapy with biological monitoring. [redacted] showed these letters to Mr. Farrington, his supervisor at L&L, on or about the dates set out on the letters.

As the Secretary points out, C-1 and C-2 constituted a final medical determination with respect to [redacted] medical condition, pursuant to 29 C.F.R. 1926.62(k)(1)(ii)(B), and L&L was required to act consistently with the recommendations in those letters. *See* 29 C.F.R. 1926.62(k)(1)(ii)(C). Instead, L&L offered [redacted] a position in the office, even though both letters stated he should not work. Further, while [redacted] should have contacted L&L officials after

[10]In fact, [redacted] had follow-up tests essentially every two weeks until July 20, 2004, when his BLL was down to 36 µg/dl; he had period tests after that date, with the last one shown in the record taking place on June 24, 2005. *See* C-5.

June 3, 2004, and specifically told them his doctor did not want him to work at all, his testimony makes it clear he was very ill at the time.[11] (Tr. 29-32). Regardless, I find that C-1 and C-2 put L&L on notice that [redacted] could not work and that it was required to begin providing him MRPB.

Third, even assuming *arguendo* that C-1 and C-2 were insufficient to put L&L on notice that it was required to begin paying MRPB, R-1, the letter [redacted] counsel wrote to L&L on June 9, 2004, provided unequivocal notice to the company of its obligation to pay MRPB to [redacted]. Ross Levine, L&L=s vice-president, testified that he received the letter and that he referred it to the various legal counsel of the company who would have needed to be aware of the letter. He further testified that any company response would have been from L&L=s counsel, but he had no knowledge of anyone at L&L or any of its counsel responding to the letter. (Tr. 53-54).

On the basis of the record, I find that L&L was in violation of the cited standard. I further find that the violation was serious within the meaning of the Act; in this regard, I note the testimony of [redacted] physician, set out *infra*. This citation item is affirmed as a serious violation.

Penalty

The Secretary has proposed a penalty of $1,625.00 for this citation item. In arriving at an appropriate penalty, the Commission is required to give due consideration to the gravity of the violation, to the size of the employer=s business, and to the employer=s history and good faith. I find the gravity of the violation to be high, in that L&L failed to provide MRPB as required to an employee who was overexposed to lead on the job and who sustained serious injury and was unable to work. I also find that no credit is due for size, as the employer has over 250 employees; likewise, no credit is due for history or good faith, based on prior OSHA inspections and other serious citation items issued to this employer.[12] I conclude that the proposed penalty is appropriate.

Medical Removal Protection Benefits

The Secretary contends [redacted] is entitled to MRPB for the 18-month period set out in the cited standard, dating from May 25, 2004, the day after his last day of work, to November 25, 2005.

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[11] [redacted] might also have felt intimidated and did not want to contact L&L for that reason. *See* footnote 8, *supra*.

[12] The record in No. 05-0055, noted *supra*, shows the employer has about 400 employees and that L&L has been inspected numerous times in the past three years. *See* Tr. 35, 121-22, in No. 05-0055. Furthermore, my decision in 05-0055 has affirmed all 15 of the citation items in that case, most of which alleged serious violations of the lead in construction standard.

The Secretary also contends [redacted] is entitled to the restoration of his seniority and the restoration of other employment rights and benefits for that period. Finally, the Secretary contends [redacted] is entitled to be paid for any medical bills he incurred after his insurance was terminated.

As a preliminary matter, I note that while the citation and complaint allege a violation of the cited standard, they do not include a specific abatement statement that L&L was required to pay to [redacted] the benefits he was entitled to under the standard, in this case, MRPB and his medical expenses for the relevant period. Such an abatement measure is arguably subsumed by the language of the standard, based on the definition of MRPB. However, even if it is not, I find that this issue was tried by the parties. At the hearing, the OSHA industrial hygienist (IH) who conducted the inspection testified about the standard=s purpose and its specific requirements; L&L=s representative also cross-examined the IH about the standard. (Tr. 5-15). In addition, the Secretary presented C-4, the IH=s calculation of the average weekly gross pay [redacted] had received during the last full eight weeks he had worked at L&L; L&L did not object to C-4, and it was received in evidence. (Tr. 9-10). Finally, in a post-hearing submission of L&L in response to my order of March 14, 2006, L&L stated no objection to the Secretary=s position that it was required to pay MRPB to [redacted] plus his medical expenses, although it noted its position that [redacted] was not entitled to MRPB as he had not participated in follow-up medical surveillance.[13] In view of the record, and pursuant to Federal Rule of Evidence 15b, the citation and complaint are amended to conform to the evidence; specifically, they are amended to include an abatement statement that L&L was required to pay MRPB to [redacted] for the relevant period, to restore his seniority and other employment rights and benefits for that period, and to pay the medical expenses he incurred during that period.

As to the period for which [redacted] is entitled to MRPB, L&L asserts that he is entitled to only 54 days of MRPB, based on the definition of MRPB in the standard and the work that [redacted] had been performing at the New Jersey site. The standard defines MRPB as follows:

> For the purposes of this section, the requirement that an employer provide medical removal protection benefits means that, as long as the job the employee was removed from continues, the employer shall maintain the total normal earnings, seniority and other employment rights and benefits of an employee, including the

[13]In that order, the Secretary was directed to provide copies of [redacted]=s unpaid medical bills for the relevant period, and L&L was directed to provide the total wages it would have paid [redacted] during that same period.

> employee=s right to his or her former job status as though the employee had not been medically removed from the employee=s job or otherwise medically limited.

See 29 C.F.R. 1926.62(k)(2)(ii). L&L interprets the phrase as long as the job the employee was removed from continues to refer to the specific job the employee held at the time of the removal. It notes that [redacted] had been working in the saddle rooms on the New Jersey site for a few weeks when he was removed, that that work ceased on May 12, 2004, and that it was recommenced on June 9, 2005 and was completed on August 12, 2005, for a total of 54 working days. L&L indicates it would not have had any continuous work for [redacted], due to his skills, seniority and compensation, through the relevant period. I disagree with L&L=s interpretation, as it circumvents the very purpose of the standard; further, L&L=s argument is belied by the facts of this case. [redacted]s employment with L&L began in August 2002. He worked in the saddle rooms on the New Jersey site, removing paint, and L&L removed him to the New York site on May 14, 2004, due to his elevated BLL; at the New York site, [redacted]=s job was putting up containments.[14] [redacted] had two additional tests, on May 24 and May 27, 2004, which showed that his BLL had increased after his removal to the New York site, and on or about June 3, 2004, L&L offered him a job working in its office at the New York site. (Tr. 16-17, 22).[15] In view of the language and purpose of the standard and the facts of this case, L&L=s assertion is rejected.

L&L further asserts that it does not work during the winter months and cuts back to a skeletal crew of only key personnel and that because [redacted] would not have been included as part of the skeletal crew he is not entitled to any MRPB for the winter shutdown period from September 2004 through March 2005. There is no evidence in the record to support this assertion, and it is therefore rejected. L&L additionally asserts that any MRPB to which [redacted] might be entitled must be reduced by any worker compensation benefits he has received. There is no evidence that [redacted] has received any worker compensation benefits, and the fact that he has a

[14]There is nothing in the record to indicate how long [redacted] had worked in the saddle rooms and what other work he might have performed at the New Jersey site.

[15]*See also* Tr. 258-62, No. 05-0055.

lawsuit pending against the Port Authority of New York and New Jersey indicates he has received no such benefits.[16] This assertion is also rejected.

L&L=s final assertion is that even if [redacted] was entitled to MRPB when his BLL was elevated, he was no longer entitled to MRPB once he had two consecutive tests showing a BLL of 40 µg/dl or less, pursuant to 29 C.F.R. 1926.62(k)(1)(iii)(1); L&L notes that C-5, [redacted] tests, show his BLL was 35 and 36 µg/dl on July 8 and July 20, 2004, respectively, and that MRPB thus would have ended on July 20, 2004. While it is true under the section L&L cites that an employee shall be returned to his former job status once he has had two consecutive tests showing a BLL of 40 µg/dl or less, L&L overlooks 29 C.F.R. 1926.62(k)(1)(iii)(2), which provides, as to when an employee shall be returned to his former job status, as follows:

> For an employee removed due to a final medical determination, when a subsequent final medical determination results in a medical finding, determination, or opinion that the employee no longer has a detected medical condition which places the employee at increased risk of material impairment to health from exposure to lead.

As found above, C-1 and C-2 constituted a final medical determination that [redacted] could not work because of his elevated BLL. Moreover, Debra Milek, a board-certified physician in occupational medicine who works at the Occupational and Environmental Medicine Center at Mt. Sinai, appeared and testified at the hearing. She testified that [redacted] had been her patient from May 2004 to present and that when she first saw him he had a BLL of over 100 and was extremely symptomatic; he had severe abdominal pain, constipation, diarrhea, headaches, irritability, bone and muscle pain, depression, and sexual dysfunction. She further testified that the diagnostic tests she had ordered had indicated neurological damage and that while she had wanted to have more tests run and to chelate him, his medical insurance had ended and he had not had money for additional testing and treatment.[17] Dr. Milek said she had not cleared [redacted] to go back to work with L&L because of the lead still remaining in his body; she noted that one=s BLL reflects only a small amount of the total lead in the body, that 90 percent of the lead one is exposed to is stored in the bones for 25 to 30 years, and that [redacted] would bear the results of his exposure for many years. Dr. Milek also said that she had tried to allow [redacted] to do some work but that he was still

[16]*See* Tr. 262, No. 05-0055.

[17]Dr. Milek indicated that some chelation was done before the insurance ended. (Tr. 42).

symptomatic and had had dizzy spells and episodes of falling that she believed were dangerous; in her opinion, [redacted] needed further evaluation and treatment. (Tr. 40-45).

[redacted] testified about the symptoms he had had resulting from his exposure to lead and about his inability to work, and his testimony was consistent with that of Dr. Milek.[18] (Tr. 24-32). [redacted] further testified that he had had no health benefits after he had stopped working and that he had a stack of bills from blood tests that remained unpaid. (Tr. 27-28). Based on the testimony of Dr. Milek and [redacted], and on the record as a whole, I find [redacted] is entitled to MRPB for a period of 18 months from May 25, 2004 to November 25, 2005. I further find that [redacted] is also entitled to the restoration of his seniority and other employment rights and benefits for that same period. Finally, I find that [redacted] is entitled to be paid for the medical expenses he incurred for the relevant period due to his health insurance coverage ending.

The Secretary has submitted copies of the subject medical expenses, which total $16,010.32. With respect to the MRPB that is due [redacted], Respondent has submitted an exhibit showing the number of regular and overtime hours [redacted] worked during his last eight weeks with L&L, along with his average gross pay per week for that period. *See* Exhibit A to L&L=s March 31, 2006 filing. Exhibit A is similar to C-4, the IH=s calculation of [redacted] average weekly gross pay, with one significant difference. Exhibit A shows that [redacted] worked only one day, with eight regular hours and 1 overtime hour, during his last week with L&L, and using that week in calculating his average weekly gross pay had the effect of reducing the average number of hours he worked during his last eight weeks. The average weekly gross pay set out in C-4, on the other hand, was determined by using the last full eight weeks that [redacted] worked at L&L. *See* C-4. I find, therefore, that C-4 is the more accurate calculation of [redacted] average weekly gross pay for the last eight weeks he worked at L&L. That amount, $1,397.80, multiplied by 78 (52 weeks plus 26 weeks, for the 18-month period set out in the standard, equals 78 weeks) totals $109,028.40.

Based on the above, [redacted] is due $16,010.32 for medical expenses and $109,028.40 in medical removal protection benefits. He is accordingly due a total amount of $125,038.72.

[18] [redacted] testified that Dr. Milek told him he could go back to work in March of 2005; however, she also told him that he could not work at heights at all or in any capacity that would involve any further exposure to lead. (Tr. 25-27).

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Respondent, L & L Painting Company, Inc., was in serious violation of 29 C.F.R. 1926.62(k)(2)(i), as alleged in Item 1 of Citation 1. Item 1 of Citation 1 is AFFIRMED as a serious violation, and a penalty of $1,625.00 is assessed for this item.

2. Pursuant to 29 C.F.R. 1926.62(k)(2)(i), Respondent, L & L Painting Company, Inc., shall pay its employee, [redacted], a total of $109,028.40 in medical removal protection benefits.

3. Pursuant to 29 C.F.R. 1926.62(k)(2)(i), Respondent, L & L Painting Company, Inc., shall restore to its employee, [redacted], his seniority and other employment rights and benefits for the 18-month period from May 25, 2004 to November 25, 2005.

4. Pursuant to 29 C.F.R. 1926.62(k)(2)(i), Respondent, L & L Painting Company, Inc., shall pay its employee, [redacted], a total of $16,010.32 for medical expenses.

/s/
Irving Sommer
Chief Judge

Dated: May, 4 2006
Washington, D.C.